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Arbitration Watch

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1. Slovakia ordered to pay $800 million+ claim by ICSID tribunal; next move unclear,
By Luke Eric Peterson

The Slovak Republic is still mulling its options after finding itself on the losing end of a major contract arbitration at the International Centre for Settlement of Investment Disputes (ICSID).

An award was handed down in the case of CSOB v. Slovakia on December 29, 2004. Although that award has yet to enter the public domain, it has generated extensive coverage in the business and financial press, primarily because the Czech bank was awarded a reported $868 million dollars (US).

The dispute arises out a 1993 three-way agreement between CSOB, the Slovak Republic and the Czech Republic. Pursuant to that agreement, significant loans were made to both the Czech and Slovak Republics by the bank, however disagreement soon arose over alleged non-repayment of those loans on the part of the Slovak Republic. Following discussions in 1996, the Czech bank turned to arbitration at the ICSID facility in 1997 in an effort to seek compensation.

In an interesting jurisdictional twist, the bank argued that it could bring the dispute to ICSID because the contract made reference to the Czech-Slovak bilateral investment treaty, which, in turn, provided for ICSID arbitration of disputes. Thus, while a contract-based dispute, the jurisdictional grounds for ICSID arbitration were to be found in the international treaty concluded between the Czech and Slovak Republics.

In a series of public comments on the recent arbitral award, Slovak officials have indicated that they are still reviewing their options with respect to challenging the award, and/or the amount of compensation ordered by the tribunal.

What is known is that the tribunal's award gave the Slovak Republic a 30 day grace period in which to pay the award, after which further interest would be applied to the amount awarded. Under ICSID rules, either party could seek to have the award rectified (for e.g. relating to the amount of compensation awarded) or annulled in whole, or in part. The former process would need to be commenced within 45 days of the handing down of the award, while a request for annulment would need be taken within 120 days from that date.

In public comments reported this week, Slovak Finance Minister Ivan Miklos said that decisions will be taken next month. Mr. Miklos also downplayed concerns that the large award will complicate Slovakia's efforts to reduce its public sector deficit so as to join the single European currency by 2009. It has been widely reported that, if Slovakia were to pay the amount owing, this would increase its 2004 public sector deficit from 3.9% of GDP, to 5.8% of Gross Domestic Product. In order to meet European Union rules governing the single currency, member-states need to run deficits of no greater than 3% of GDP.

Notably, press reports in the Czech Republic suggest that the Czech Republic has some residual financial obligations related to the CSOB dispute, and that due to the fact that the ICSID award did not reward CSOB the full amount which it sought from the Slovak Republic, the Czech Republic may be liable for the shortfall. A report in the Prague Post dated January 6, 2005 noted that this shortfall amounts to some $215 million dollars (US). Nevertheless, a spokesperson for the Czech Finance

Ministry told the Post that the ICSID award was a "good" decision for the Czech government, as it relieved Czech taxpayers of being on the hook for even more of the amount sought by CSOB. Further details about the nature of the Czech Republic's financial liability could not be clarified at press time, but are expected to be revealed upon public release of the ICSID award.

No decision has been taken as yet on public release of that award, however one source close to the case confided that it seems likely that the two parties will clear the award for publication. Two earlier decisions on jurisdiction in the CSOB case are available on the website of ICSID at http://www.worldbank.org/icsid/cases/awards.htm

Sources:

INVEST-SD Interviews

"Slovakia deciding Feb whether to appeal CSOB order", Reuters News Service, January 19, 2005

"Big bill slams Slovakia", The Slovak Spectator, By Beata Balagova, January 10, 2005

"Slovak government may appeal ruling on bank's claim", Dow Jones Newswire, Dec.31, 2004

"Slovakia must pay CSOB 24.7 Bln Koruna in Arbitration", Bloomberg News, Dec. 30, 2004

2. Zimbabwe facing treaty claims arising out of land reform programme, By Luke Eric Peterson

An investigation by INVEST-SD News Bulletin has found that a number of investment treaty based claims have been threatened, and in some cases filed, against the Government of Zimbabwe in relation to that country's compulsory acquisition of foreign-owned properties in recent years.

Various press reports seen by INVEST-SD suggest that there have been extensive diplomatic representations made by European governments, including those of Germany, Holland and Italy, over a long period of time, in response to developments in Zimbabwe.

In 2001, the PanAfrican News Agency wire reported that the Zimbabwean

government backed away from plans to acquire a number of foreign-owned farms, as part of its controversial land reform programme, following representations from Switzerland, Austria, Germany, Belgium, the Netherlands and Italy - often invoking the provisions of bilateral investment protection treaties concluded between those governments and Zimbabwe.

And, in 2002, the High Court of Zimbabwe ordered the Zimbabwean government to refrain from the compulsory acquisition of a German-owned estate, "unless such acquisition is done strictly in accordance" with the 1995 Germany-Zimbabwe bilateral investment treaty.

However, in more recent times, the Zimbabwean government has accelerated its land reform efforts, and moved ahead with compulsory acquisitions of properties held by foreign nationals of states, including nationals who might enjoy protection under a bilateral investment treaty.

In October of 2003, South Africa's Business Day publication reported that Zimbabwe was again moving ahead with plans to seize German-owned timber, sugar and citrus estates. Business Day reported that this policy "ignored a report by Special Affairs Minister for Lands, Land Reform and Resettlement John Nkomo urging the state to avoid seizing land protected by international accords."

Meanwhile, in November of 2003, an official with the Netherlands Embassy in Harare, told the Zimbabwe Independent newspaper that most Dutch farmers in the country have had their properties seized by the government as part of the land reform programme launched in 2000.

Lily Talapessy, a first secretary with the Embassy, told the Independent: "We have about 1000 Dutch nationals in Zimbabwe, 70 of them farmers all growing flowers and falling under a ratified Bippa, which came into force in 1996. The majority of our farmers have lost their properties and some are still under threat."

INVEST-SD can confirm that a small number of Dutch nationals are now fighting the compulsory acquisition of their properties through the launch of investor-state arbitration under the terms of investment protection treaties.

A lawyer with the UK-based firm, Bishop and Sewell, confirms that his firm has partnered with a US-based firm, Wylie Rein and Fielding, in order to bring a series of claims to the International Centre for Settlement of Investment Disputes (ICSID) on behalf of more than a dozen Dutch nationals, as well as single Italian national, all of whom have sustained loss of agricultural holdings and properties in Zimbabwe.

The claims invoke provisions of the Dutch and Italian bilateral investment treaties with Zimbabwe. The Dutch-Zimbabwean treaty has been ratified by both parties; however the Italian treaty has been signed, but not ratified by both parties.

Matthew J. Coleman a London-based partner with Bishop and Sewell tells INVEST-SD that his firm also acts for a large number of other individuals and groups who have sustained losses in Zimbabwe, but who lack recourse to investor-state arbitration under an investment protection treaty.

At present, ICSID has yet to take a decision on the registration of the aforementioned claims brought by Dutch and Italian nationals. INVEST-SD will continue to monitor developments in this area.

Sources:

INVEST-SD interviews

"Diplomats Petition Govt On Property Seizures", Africa News, Nov. 26, 2004

"Chaotic Land Reform Strains Diplomatic Ties", Zimbabwe Independent, Nov.19, 2004

"Mugabe targets German timber plantations; State ignores minister's report on land grabs", Business Day (South Africa), October 27, 2004

"Certain farms de-listed after diplomatic pressure", PanAfrican news Agency (PANA), June 27, 2001

3. Tribunal rules in Jordan dispute; rejects extension of MFN to cover procedural issues,
By Luke Eric Peterson

A tribunal convened by the International Centre for Settlement of Investment Disputes (ICSID) has handed down a decision on jurisdiction in a bilateral investment treaty dispute between Jordan and two Italian construction firms, Salini Costruttori S.pA. and Italstrade S.pA.

The ICSID arbitration arose out of disagreements over the amounts owing for work on the construction of the Karameh dam in Jordan.

Following a meeting between the Italian and Jordanian Prime Ministers, along with other high-ranking officials, the two sides differed as to whether Jordan had expressed a willingness at that meeting to see the dispute submitted to arbitration pursuant to the construction contract. (The contract provided for dispute settlement in local courts, unless the two parties both agreed to submit disputes to arbitration.)

The investors also pleaded a number of other jurisdictional arguments before the ICSID tribunal. For its part, Jordan maintained that the dispute was purely a contract dispute, and that there was no consent on its part to deal with the dispute anywhere other than in the domestic courts (as specified in the contract).

Among the investors' jurisdictional arguments was one premised upon what the claimants characterized as a so-called "umbrella clause" (a treaty clause which allegedly "transforms contractual undertakings into international law obligations").

Indeed, counsel for the two investors in this dispute, Prof. Antonio Crivellaro, had served as arbitrator in an earlier ICSID case which dealt with the question of the "umbrella clause", SGS v. Philippines. In the Philippines case, the tribunal took the view that a (differently-worded) provision found in the Swiss-Philippines BIT had the effect of making it "a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it had assumed with regard to specific investments."

In the Salini-Jordan case, however, the tribunal held that the wording of the relevant provision of the Italy-Jordan BIT was "appreciably different" from that in other recent disputes, including the SGS v. Philippines case, and that the Italy-Jordan treaty did not contain an "umbrella clause". Accordingly, the tribunal rejected the view that the Italy-Jordan BIT could be interpreted so as to elevate contractual undertakings to the plane of international law.

The tribunal added, however, that while it might not have jurisdiction to entertain arguments related to breach of contract, it might still be seized with jurisdiction if contractual breaches rose to a level where they breached other protections clearly provided in the relevant bilateral investment treaty. Thus for example, if it could be established that an expropriation had occurred, or that national treatment had not been provided, then the tribunal might have jurisdiction. While the tribunal chided the claimants for putting forward scant evidence to establish such treaty breaches, it did, in the end, hold that it had jurisdiction to examine the merits of the

investors' argument that Jordan was guilty of breaches of the treaty's provisions on national treatment and "just and fair treatment". Thus, the arbitration will proceed to a hearing on the merits of these treaty-based claims.

Notable in the tribunal's decision on jurisdiction however, was its dismissal of an additional argument put forward by the claimants, to the effect that the tribunal should have jurisdiction over contractual claims thanks to the operation of the Most Favored Nation clause found in the Italy-Jordan BIT.

The claimants argued that the treaty's provisions on MFN should entitle Italian investors to "the same right" enjoyed by US and UK investors under the terms of their respective BITs with Jordan. And in the view of the claimants, the US and UK treaties contained a dispute settlement clause "which is more favourable than that contained in Article 9 of the Jordan-Italy BIT", by virtue of its supposed inclusion of contractual breaches. Thanks to the operation of the MFN clause found in the Jordan-Italy BIT, the Italian investors argued that they should be entitled to the more favourable procedural treatment available in other Jordanian BITs.

In ruling on this question, the tribunal laid considerable emphasis upon the fact that some BITs will expressly indicate that their MFN clauses extend to matters of dispute settlement. In the Salini case, the relevant BIT was silent on the question of the application of MFN to the dispute settlement process; accordingly, the tribunal rejected the claimants' contention that the MFN clause should be interpreted so as to apply to procedural matters.

Notably, the tribunal professed concern that a well-known decision adopted in an earlier BIT arbitration, Maffezini v. Spain, did not do enough to curb the "risk of 'treaty-shopping'" through the use of the MFN clause. However, the Salini tribunal does appear to have erred in one detail of its description of the infamous Maffezini case.

At paragraph 113 of the decision in Salini v. Jordan, the tribunal characterized the Maffezini case as one where a claimant invoked an MFN clause so as to "avoid having first to exhaust domestic remedies".

However, the Maffezini case did not deal with a requirement to exhaust domestic remedies. Rather, the case dealt with a circumstance where the relevant treaty, the Spain-Argentina BIT, prescribed a lengthy (but finite) time period during which claimants would need to pursue domestic remedies, before turning to international arbitration.

Although Mr. Maffezini successfully argued that his right to MFN treatment meant that he was entitled to a shorter time-period found in many other Spanish BITs, the Maffezini tribunal expressly observed that it would not permit an MFN clause to circumvent a clear requirement for exhaustion of domestic legal remedies.

Copies of the decisions in the Salini v. Jordan dispute, and in the Maffezini v. Spain dispute are available on-line at:
http://www.worldbank.org/icsid/cases/awards.htm

4. Second Canadian court declines to overturn NAFTA Feldman v. Mexico decision,
By Luke Eric Peterson

A decision rendered last week by the Ontario Court of Appeal has dismissed a bid by the Mexican Government to set aside a tribunal award in the NAFTA Chapter 11 dispute between Mexico and US citizen, Marvin Roy Feldman Karpa.

The judgment is the second rendered by a Canadian court, following on the heels of an earlier decision by the Ontario Superior Court of Justice, which also refused to set aside the Feldman v. Mexico award.

Both courts have cited the high degree of deference due to arbitral tribunals under Canadian arbitration laws, in deciding not to interfere with the verdict of the NAFTA tribunal which held Mexico in violation of its NAFTA obligation to provide Mr. Feldman with national treatment.

Mr. Feldman operated a grey-market cigarette re-export business in Mexico. He launched a NAFTA Chapter 11 arbitration in 1999 claiming to have been the victim of discriminatory treatment due to the fact that similarly-situated domestic firms were allegedly receiving tax rebates, while Mr. Feldman was denied such rebates.

Following a divided ruling in 2002 which upheld Mr. Feldman's claim, Mexico sought a rectification of the award, on the grounds that it was obliged under Article 2105 of the NAFTA to withhold certain forms of information in order to protect the "personal privacy or the financial affairs and accounts of individual customers of financial institutions."

Accordingly, Mexico was of the view that the tribunal made an "impermissible inference" when it based its finding of discrimination, in part, on the failure of the Mexican authorities to adduce

(confidential) evidence about the taxation of other parties, which might have served to rebut the allegations of discrimination leveled by Mr. Feldman.

However, the tribunal dismissed Mexico's bid for rectification of the award, and Mexico then turned to the Canadian court system in an effort to challenge the arbitral award. (Canadian courts being the relevant venue because the arbitration had been legally sited in Canada).
In the most recent decision, handed down on January 11, 2005, the Ontario Court of Appeal held that "the applicable standard of review in this case is at the high end of the spectrum of judicial deference."
The Court then proceeded to reject each of Mexico's three arguments for set-aside of the award: that it had been unable to present its case before the tribunal because the majority of the tribunal had drawn the aforementioned "impermissible inferences"; that the tribunal failed to follow the agreed procedural rules for the arbitration by its failure to take into account NAFTA's Article 2105 (which was said to constitute part of the mandatory rules for the NAFTA arbitration); and, last, that the tribunal's order to pay tax rebates to Mr. Feldman - which had no legal basis under Mexican law - was in
contradiction of public policy.

A copy of the Court's judgment is available on-line at the following address:
http://www.ontariocourts.on.ca/decisions/2005/january/C41169.pdf

5. Canadian Centre for Policy Alternatives publishes list of NAFTA cases

A Canadian-based research group have published a complete list of all known NAFTA investor-state arbitrations, current to mid-January 2005. The list offers basic details and a summary of legal developments in each case. For further information visit the website of the Canadian Centre for Policy Alternatives at:

http://www.policyalternatives.ca

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