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Arbitration Watch:
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1. Spanish financial investors initiate arbitration against Russia over Yukos,
By Luke Eric Peterson

A group of seven as-yet-unnamed Spanish financial investors have made good on an earlier threat to take the Russian Federation to international arbitration.

The claimants allege that Russia violated the terms of the Spain-Russia bilateral investment treaty by effectively expropriating their minority-shareholdings in the Yukos oil company.

ITN can report that the claim has been submitted to the Stockholm Arbitration Institute, but a decision on registration had not been made by the Stockholm authorities at press time.

Once Russia's largest privately-owned oil company, Yukos' fortunes changed

dramatically in 2003 when Russian authorities began investigating the firm for alleged tax evasion.

Ultimately, the company was ordered to pay Billions in fines and penalties, and Yukos' largest production asset, Yuganskneftegas, was seized by Russian authorities and auctioned in 2004.

Whatever the merits of the tax investigation, the move against Yukos was widely viewed as a political power-play by Russian President Vladimir Putin in order to rein in so-called business Oligarchs in Russia.

CAN INVESTORS RECOUP YUKOS LOSSES VIA INVESTMENT TREATIES?

To date, shareholders in the Yukos Corporation have been unsuccessful in securing any compensation for the precipitous drop in Yukos's share prices – and for the ultimate bankruptcy of the firm following the actions of Russian tax authorities.

In 2005, the majority shareholder Group Menatep filed a series of three closely-related arbitrations* against the Russian Federation under the Energy Charter Treaty. Cumulatively, the Menatep claim is the largest known investment treaty arbitration – with upwards of $30 Billion (US) being sought by the investors.

However, the Menatep claim encounters at least one formidable jurisdictional obstacle.

While Russia has signed the Energy Charter Treaty, the country's parliament, The Duma, has never ratified the agreement. Yet, as has been earlier reported in ITN, the ECT contains an unusual provision, Article 45(1), which stipulates that "Each signatory agrees to apply this treaty provisionally". What that provision means in practice has never been formally adjudicated or interpreted by an arbitral tribunal. As such, the question as to what legal obligations Russia owes to foreign investors under the ECT regime is now in the hands of a three-member arbitration tribunal consisting of L. Yves Fortier, Stephen Schwebel and Daniel Price.

The Menatep claim is being arbitrated according to the UNCITRAL procedural rules, with administrative and secretarial support provided by the Permanent Court of Arbitration at The Hague. The arbitral proceedings are not open to the public or the media; nor are documents and hearing transcripts a matter of public record.

While the three Group Menatep arbitrations continue to move forward, Russia is also seeing other arbitration claims filed under bilateral investment treaties in force between Russia and third-countries.

A lawyer acting for the seven Spanish investors which are now pursuing arbitration tells ITN that the claim should not encounter the same sort of jurisdictional challenges faced by the Menatep shareholders.

Because the Spanish-Russia bilateral investment treaty has been signed and ratified by the Russian Duma, Tom Johnston, of the law firm Covington & Burling, predicts that, no matter what happens in the Menatep arbitration, “We are going to have (in the Spanish case) an arbitration panel decide whether Russia violated international law”

Indeed, because Russia has concluded a number of bilateral investment treaties, the country remains open to other potential arbitration claims from disgruntled Yukos shareholders.

UK-based financial investors are understood to be quietly pursuing their own international arbitration against Russia, alleging violations of the UK-Russia bilateral investment treaty. Little public information is known about this arbitration, however a jurisdictional hearing in that case could take place as soon as this summer.

With multiple international arbitrations pending against Russia, before differently-composed international arbitration tribunals, it remains to be seen whether those different tribunals – should they render decisions on the merits of the disputes - will reach identical findings when it comes to Russia’s liability for breach of international investment treaties.

Another potential question, looming further in the distance, is whether Russia – which has declined to pay at least one investment treaty award earlier rendered against it – would voluntarily comply with any financial ruling made by international arbitrators in any of these Yukos-related cases.

* Yukos Universal Ltd. v. Russian Federation, Hulley Enterprises Ltd. v. Russian Federation, and Veteran Petroleum Trust v. Russian Federation

2. Czech Rep and Hungary opposed to Canada’s investor-state transparency demands, By Damon Vis-Dunbar

Investment Treaty News has learned that negotiations over revisions to bilateral investment treaties between Canada and some Central and Eastern European governments have stalled as a result of two European governments resisting changes that would enhance transparency in investor-state arbitrations.

The European Union’s Executive branch, the European Commission (EC), is leading the drive to renegotiate the investment treaties of certain recent EU members where those BITs allegedly clash with the EU’s acquis communitaire (the body of laws of the EU).

Both the United States and Canada have been pushed by the EC to alter their investment treaties with certain European countries, and in 2003, the EC endorsed a plan that saw amendments to the American investment treaties. However, negotiations with Canada have dragged on for several years longer- in part because of lingering disagreement as to

whether more transparency should be brought to bear upon any international arbitrations arising under these treaties.

Canada has so-called foreign investment protection and promotion agreements (FIPAs) with the governments of Poland, Hungary, the Czech Republic, Slovakia, Latvia and Romania. A Canadian official said that Canada sought to update these treaties according to its 2003 model FIPA.

Like the US model investment treaty, the Canadian template mandates that arbitral documents be publicly disclosed, and that hearings be registered and open to the interested public. These provisions were introduced into the Canadian and US model investment agreements following wide-spread criticisms that arbitrations launched under the investment chapter of the North American Free Trade Agreement (NAFTA) were shielded from public view despite holding important public policy implications.

Notably, however, when the US Government agreed changes to its BITs with certain EU member-states, no transparency provisions were added to the dispute settlement provisions of those treaties. As such, arbitrations might continue to proceed without public disclosure or open hearings.

For its part, Canada has pushed for the inclusion of transparency obligations in the dispute settlement provisions of its treaties with EU member-states.

Yet, according to multiple sources, the governments of the Czech Republic and Hungary have resisted these changes proposed by Canada. The Hungarian official in charge of the negotiations could not be reached prior to publication. An official with the Czech Republic would not comment on the matter.

Indeed, as ITN reported last month*, other unnamed non-European governments that are negotiating FIPAs with Canada have voiced similar reservations over Canadian desires for investor-state arbitrations to be more transparent. (Canada is currently negotiating investment treaties with China, India and Singapore, based on its model agreement, according to Canada's International Trade Department.)

Sources:

ITN interviews

*"Canada encountering static from negotiating partners over transparency demands", By Luke Eric Peterson, Investment Treaty News, March 16, 2007

"European Governments defend BITs in lawsuit brought by EU Executive Branch", By Damon Vis-Dunbar, Investment Treaty News, March 16, 2007

"EU-Canada discuss revisions to investment treaties, and new talks on broader pact", By Luke Eric Peterson, INVEST-SD, March 25, 2004

3. New BIT arbitration launched against Czech Republic over bank failure,
By Luke Eric Peterson

ITN can reveal that a Dutch-incorporated company, Invesmart, has lodged a request for arbitration with the Czech Republic. The case is the latest in a string of claims by foreign investors under the terms of the Netherlands-Czech Republic bilateral investment treaty.

The move to arbitration comes more than three years after Invesmart, and its Italian majority owner Mr. Paolo Catalfamo, first filed formal "notices of dispute" with the Czech Republic – a process that set in motion a period of consultations and discussions between the parties.

At the root of Invesmart's claim is an allegation that Czech authorities caused a run on a Czech bank owned by Invesmart, leading to the shuttering of the bank and the destruction of Invesmart's shareholdings.

In 2002, Invesmart bought a controlling interest in Union Banka, the fourth largest Czech bank measured by its retail banking network. Invesmart alleges that the Czech authorities announced without warning in February 2003 that they were to withdraw previous commitments to provide state support to the bank. According to Invesmart, this public announcement led to a frenzy of customer withdrawals and ultimately contributed to the closing and liquidation of the foreign-owned bank.

A 2003 Czech press article announcing the earlier filing of "notices of dispute" by Invesmart and Mr. Catalfamo reported that the Czech Finance Ministry and Czech National Bank disavowed responsibility for Union Banka's fate.

The same article also reported that a "parliamentary commission set up to investigate the matter has also said that former Union Banka managers were to blame." For its part, Invesmart is understood to take the view that the parliamentary report acknowledged the state's commitment to provide support to Union Banka – a commitment alleged by Invesmart to have been broken.

Invesmart's arbitration request was filed February 14, 2007, and sets in motion an arbitration proceeding under the UNCITRAL rules. The Czech Finance Ministry acknowledged the filing of the Invesmart request following an inquiry by ITN earlier this year. Invesmart is represented in its arbitration claim by the law firm of King & Spalding.

Sources:

ITN Interviews

"Invesmart has launched arbitration over Union Banka", CTK Business News Wire, August 5, 2003

4. Jurisdictional decision expected this year in ICJ dispute between Guinea and DRC, By Fernando Cabrera Diaz

Hearings were held in December of 2006 at the Hague in the International Court of Justice (ICJ) diplomatic protection case of Ahmadou Sadio Diallo; a jurisdictional decision is expected some time this year.

The case pits the Republic of Guinea on behalf of Mr. Diallo against the Democratic Republic of Congo (DRC), and is one of the rare foreign investment disputes handled by the Hague-based ICJ.

Among the issues debated between the parties was the extent to which violations of shareholders' rights can form the basis of a "diplomatic protection" case – a question with significant financial implications in the Diallo dispute, and wider repercussions for other potential claims.

(As reported previously* by Investment Treaty News, "diplomatic protection" is the method by which a State takes action (including initiating judicial or arbitral proceedings) against another State on behalf of its national whose rights and interests have been injured by the other State.)

In this case, Mr. Diallo, a national of Guinea, moved to the DRC in 1964 and established himself as a businessman in that country. Over the next 30 years Mr. Diallo went on to run two companies, Africom-Zaire and Africom Containers. Both companies provided services to the DRC government (previously Zaire) and state affiliated oil companies, for which they were owed large amounts of money.

The dispute arose when Mr. Diallo was expelled form the DRC in 1996, a move which he alleges was carried out to prevent him and his companies from collecting millions of dollars owed to them by the DRC - and more important - by oil companies with friendly ties to the (then) DRC government.

According to Guinea, both sides are in agreement that it can "exercise diplomatic protection in respect of the alleged wrongful detention and arbitrary expulsion of Mr. Diallo…" But what is in dispute at this preliminary stage, is to what extent Mr. Diallo's rights as sole shareholder in his two companies can form the basis for Guinea to invoke diplomatic protection and seek damages allegedly caused by the DRC's interference with these rights.

A source close to the proceedings tells Investment Treaty News that the importance of shareholders rights in this case is due to the type of damages that can be sought. If the DRC objections to shareholder rights are upheld, Guinea could only move forward to the

merits phase with its case against the detention and expulsion of Mr. Diallo. According to the source, damages for wrongful detention and arbitrary expulsion would be small in comparison to the tens of millions of dollars being sought for the alleged losses incurred by Mr. Diallo as sole shareholder in the two DRC companies.

During the oral hearings Guinea argued that under Congolese law shareholders enjoyed, among other things, the right to supervise the company, to receive dividends, and to receive the proceeds of the liquidation of the company. According to Guinea these rights were violated when Mr. Diallo was arbitrarily expelled.

In particular, Guinea asserts that without Mr. Diallo's engagement in the business activities of the DRC-based companies, the companies were unable to pursue their projects and to recover the alleged debts owed to them by the DRC and the oil companies.

For its part, the DRC argued at the hearings that Mr. Diallo's shareholder rights were not violated. According to the DRC the right of a shareholder to supervise the company in Congolese law is in fact a right to supervise the management of the company, which could not apply in this case because Mr. Diallo was also the manager of his two companies.

Furthermore, the DRC continued, with modern communications, the rights to supervise, as well as the rights to receive dividends and the proceeds from liquidation can be exercised from anywhere in the world, and were therefore not violated when Mr. Diallo was expelled from the DRC.

Notably, Guinea argued for a broader notion of "diplomatic protection". This would allow Guinea to pursue diplomatic protection for damages caused directly to the company and not just as a result of the violation of Mr. Diallo's shareholder's rights. This distinction is significant as any damages owing as a result of Mr. Diallo's not being able to exercise his shareholder's right to supervise his companies could be notably lower than damages owing for the harm caused to the companies themselves.

In arguing for so-called "diplomatic protection by substitution", Guinea laid emphasis upon the particular ownership structure of the companies, in which Mr. Diallo was sole shareholder and also manager.

Ultimately, Guinea's arguments could have wider repercussions in cases where there is a similar ownership structure, and where no Bilateral Investment Treaty (BIT) is in place between the investor's home state and the host state.

The tribunal is now deliberating on the DRC's objections with a decision expected to be handed down later this year.

Sources

* See previous ITN reporting.

Briefly Noted:
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5. Second group of Italian bondholders sue Argentina at ICSID

A second group of Italian bondholders have registered a claim* with the International Centre for Settlement of Investment Disputes (ICSID) seeking compensation for their losses associated with Argentina's 2001 default on its public debt. The group is seeking 14.3 million Euros and a further 1.2 million Dollars.

As reported previously in ITN, a larger group of approximately 170,000 bondholders have had a claim registered as ICSID for an estimated $3.5 billion against Argentina.**

The ICSID claims have been brought by bondholders unhappy with the terms of a 2005 settlement extended to holders of defaulted Argentine debt.

In February of 2005 Argentina had reached a settlement with about three quarters of the holders of its defaulted bonds in which it offered bondholders 34 cents on the dollar to settle its debts to them.

Although most bondholders accepted the offer, thousands refused to do so holding out for the chance to re-coup a larger part of their investments. Despite pressure from the Italian Government, Argentina has held firm, saying that its offer was final and that it sees the issue as settled.

The newly registered ICSID claim involves a much smaller group of several hundred bondholders. Like the earlier claim, this one has been brought under the Argentina-Italy Bilateral Investment Treaty (BIT). The bondholders are alleging several violations of BIT protections, including the "just and equitable standard of treatment" and the prohibition against expropriation without compensation.

Sources:

ITN Interviews

* Gionvanni Alemanni and others v. Argentine Republic, ICSID Case No. ARB/07/8

** Giovana A. Beccara and others v. Argentine Republic, ICSID Case No. ARB/07/5

6. Back-to-back events on investment treaty arbitration slated for May 17-18 in DC

A pair of one-day events on investment treaty arbitration are scheduled for May 17th and May 18th in Washington DC. On May 17th, Juris Conferences is hosting an event entitled “Investment Treaty Arbitration: A debate and discussion”. The event will feature presentation of papers by ten “up-and-comers” in the field of investment treaty arbitration, focusing on five controversial and important issues. These papers will then be discussed by panels of more experienced arbitration experts. For more information see here.

Meanwhile on May 18th, the ICSID facility will play host to a conference on “Investment Protection and the Energy Charter Treaty”. The event is co-sponsored by the Energy Charter Secretariat and the Arbitration Institute of the Stockholm Chamber of Commerce. The event will focus on key substantive and procedural issues arising under Energy Charter Treaty (ECT) arbitrations. The ECT contains investment protections similar to those found in bilateral investment treaties, and has been invoked in an increasing number of disputes between energy companies and sovereign governments. For more information see here.

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