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Arbitration Watch:
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1. Existence of 'umbrella' clause denied by tribunal in US-Argentina BIT dispute,
By Luke Eric Peterson

On the heels of an April arbitral ruling which cast doubt on a claim that a provision of the US-Argentina BIT can be interpreted as a so-called 'umbrella clause', another arbitral tribunal - composed of 2 of the same 3 arbitrators - has reached a similar conclusion in a separate parallel dispute related to the same investment treaty.

As was reported in an earlier edition of ITN, an ICSID tribunal presiding in the case of El Paso v. Argentina rejected a reading advanced by a US based energy firm which would have permitted contractual breaches to be considered as breaches of the US-Argentina treaty thanks to the operation of a contested treaty provision which declares that "Each Party shall observe any obligation it may have entered into with regard to investments."

In the latest developments, a second tribunal presiding over a dispute brought by BP America and several subsidiaries of the energy firm Pan American, has followed the approach laid down in the earlier El Paso arbitration.

In a July 27th decision, a separate ICSID tribunal affirmed its jurisdiction to hear a claim that Argentina has harmed energy investments of the aforementioned investors, in a manner contrary to the US-Argentina bilateral investment treaty.

At the same time, the tribunal consisting of Prof. Lucius Caflisch, Prof. Brigitte Stern, and Prof. Albert Jan van den Berg, held that the contested provision in the US-Argentina BIT could not be considered to be an "umbrella clause" which would transform contract claims into breaches of international law.

The tribunal declared that a contrary interpretation would be "quite destructive of the distinction between the national legal orders and the international legal order", and would open the door for the slightest breaches of contract, not to mention of domestic laws, to be arbitrated before an international tribunal.

The tribunal observed: "It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law 'with regard to investments'"

As was earlier noted, the reasoning of the tribunal in the BP-Pan American case hews closely to that of the ICSID tribunal presiding over the El Paso-Argentina arbitration. In the El Paso case, a tribunal consisting of Prof. Lucius Caflisch, Prof. Brigitte Stern, and Prof. Piero Bernardini, offered a largely similar analysis leading to the same conclusion: Article II (2) (c) of the US-Argentina BIT should not be read so as to permit mere contractual breaches to be arbitrated under the terms of the BIT's international arbitration mechanism.

(ITN reporting and analysis of the El Paso ruling is available here: http://www.iisd.org/pdf/2006/itn_june15_2006.pdf)

The BP-Pan American and El Paso rulings are only the latest in a growing body of arbitration rulings which stake out starkly different interpretations of a cluster of treaty provisions which, while differently worded, generally fail to state clearly the particular "obligations", "commitments" or "undertakings" which governments have pledged to uphold. Accordingly, tribunals have openly clashed over the meaning to be ascribed to such treaty clauses, and the extent to which they may permit foreign investors to dispense with the dispute settlement provisions spelled out in contracts in favour of pursuing international arbitration under a treaty.

At times, the question has even split individual tribunals, as happened recently in a Billion Dollar dispute between the Dutch insurance company Eureko and the Government of Poland.

A majority of the three member arbitral tribunal in the Eureko arbitration held that a provision of the Netherlands-Poland BIT - stipulating that a host state must "observe any obligations it may have entered into with regard to investments of investors of the other Contracting Party" – could be construed as an "umbrella clause" whose functions included the elevation of contractual breaches to the plane of international law.

Meanwhile, the third member of the arbitral tribunal, Prof. Jerzy Rajski, protested that the majority's jurisdictional reasoning – including its analysis of the so-called umbrella clause – might "lead to a privileged class of foreign parties to commercial contract who may easily transform their contractual disputes with State-owned companies into BIT disputes."

The Eureko majority, consisting of Mr. L. Yves Fortier and Judge Stephen Schwebel, are far from alone in their view of the proper construction to be given to so-called "umbrella clauses". A number of tribunals - including in the ICSID cases of Noble Ventures v. Romania, MTD Equity v. Chile and CMS v. Argentina - have construed such clauses so as to permit arbitration of BIT claims premised on the alleged breach of contractual undertakings.

Perhaps most remarkable, the CMS v. Argentina case was arbitrated under the very same treaty, the US-Argentina agreement, as in the El Paso and BP-Pan American arbitrations.

At the same time as tribunals disagree as to the reading to be given to such treaty clauses, another theme which cuts across many of these cases – and which has had some influence on the interpretations adopted by different arbitrators and tribunals – is a vigorous debate as to the overall "object and purpose" of bilateral investment treaties.

In the view of some arbitrators, these treaties are instruments for the maximization of investor protection; accordingly, as the tribunal opined in the SGS v. Philippines arbitration, uncertainties as to how to resolve ambiguous treaty provisions (such as the contentious "umbrella clause") should be resolved in favour of foreign investors.

By contrast, other arbitral tribunals, including those presiding over the El Paso and BP-Pan American arbitrations, have dismissed such an approach, calling instead for a more "balanced interpretation" which considers both the necessity to protect foreign investment and the state's sovereign responsibility to provide for "an adapted and evolutionary framework for the development of economic activities".

Doubts as to the specific intentions of those governments which have concluded bilateral investment treaties has contributed to uncertainty and disagreement amongst arbitrators as to how those treaties are to be applied to concrete disputes between foreign investors and their host states.

Judith Gill, a London-based partner with the firm Allen & Overy, represented the Republic of the Philippines in an early ICSID arbitration which hinged on interpretation of a so-called "umbrella clause".

Gill says that "part of the problem is that treaty clauses are sometimes adopted without much thought given to their meaning." Gill adds that textual variations from treaty to treaty may explain, in part, different interpretations given to such provisions, but she also says that arbitrators appear to take different philosophical positions as to the proper scope of application of such clauses. Depending on the constitution of a given tribunal, she says you can get different results.

(Gill adds that her own firm is currently acting for an investor in one arbitration and for a state in another, where interpretation of the so-called umbrella clause is expected to be an issue.)

While tribunals continue to diverge in their approaches to the interpretation of so-called umbrella clauses, the tribunal presiding over the BP-American dispute found in its Decision of July 27, 2006, that it did have jurisdiction to examine other of the claimants' claims, for example alleged breach of the expropriation and fair & equitable treatment provisions of the treaty. That case – minus the "umbrella clause" elements – will proceed to a hearing on the merits.

Sources:

Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic, ICSID Case No. ARB/03/13 and BP America Production Company, Pan American SUR SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic, ICSID Case No. ARB/04/08, Decision on Preliminary Objections, July 27, 2006, available on-line here

2. Foreign investors allege expropriation in multiple new arbitrations with Azerbaijan, By Damon Vis-Dunbar

The government of Azerbaijan may find itself on the defensive as three foreign investors file for international arbitration for alleged expropriation of their businesses.

All three disputes involve privatization agreements granted by a former economic development minister who was jailed last year after Azerbaijan's president accused him of attempting a coup.

Farhad Aliyev, the former minister, is said to have built up significant political and economic capital during his stint at the Ministry of Economic Development, eventually becoming a threat to President Ilham Aliyev, according to a recent report by the Economist Intelligence Unit. Soon after his arrest several foreign investors who had purchased newly privatized companies while Aliyev was minister saw their contracts severed and senior management arrested.

Among the companies that have filed for arbitration is the Turkish firm Barmek, which had a 25-year contract to distribute electricity in Azerbaijan. The company alleges that after the arrest of Farhad Aliyev, it came under fire from government officials who accused the company of failing to invest sufficiently in the electricity distribution network in Baku. In March 2006, power supplies were brought back under state ownership.

The General Prosecutors Office in Azerbaijan has launched a criminal case against Barmek, alleging "serious financial scams including overcharging equipment, materials and assembly jobs, deliberate overstating of consumption by the largest power-consuming industries and collecting extra payments from consumers …", according to a statement from the prosecutor's office.

Barmek denies those charges, and maintains that it has fallen victim to a political battle between the former minister for economic development and the current president of Azerbaijan. "This is a no good will campaign (sic) against Barmek in order to make it leave Azerbaijan," says the company.

In July, Barmek announced that it had filed an arbitration request with the International Centre for the Settlement of Investment Disputes (ICSID). It says that Azerbaijan's actions towards the company are in breach of the Turkey-Azerbaijan bilateral investment treaty, and the Energy Charter Treaty (ECT), a multilateral agreement that governs investments in the energy sector.

Meanwhile, the Dutch oil company Azpetrol has also filed a claim with ICSID for alleged breach of the ECT, against a similar backdrop of murky politics and business deals.

As in the Barmek dispute, the government says that an investigation turned up violations in connection with the privatization agreement.

The company strongly denies those charges, including the allegations that it had mutually advantageous business deals with Farhad Aliyev. “The former Minister of Economic Development Farhad Aliyev does not have and never did have any commercial interest in the Azpetrol Group of Companies,” says the company.

In a third dispute, the Dutch firm Fondel, one of the largest foreign investors in Azerbaijan, is planning to file a request for arbitration this month with ICSID, according to counsel for the company, Michael Swangard, of the law firm Clyde & Co.

Fondel saw its contract to run an aluminum company severed in March of this year. Azerbaijan says that Fondel’s contract was terminated because it failed to invest enough money into the company it managed.

“Monitoring showed that Fondel Metal had been unable to fully rejuvenate Azerbaijan Aluminum and had not honored any of the conditions to increase aluminum production,” said the chairperson of the State Property Commission, Karian Hasanov, as reported by the Russian news agency Interfax.

As in the other cases, Fondel claims the government’s actions are politically motivated.

None of the above claims has yet to be registered by the Washington-based ICSID facility – a screening process which can take a number of months.

Sources:

“Dutch Energy Firm Charges Azerbaijani Government with Illegal Expropriation of Property”, By Andrew Birch, Global Insight Daily Analysis, July 24, 2006

“Azerbaijan: Driving out investors”, Economist Intelligence Unit, July 10, 2006

“Azerbaijan cuts aluminum deal, Fondel to file ICSID case”, Platts Commodity News, March 22, 2006

3. Canadian miner may sue Bulgaria in dispute over environmental impact assessment, By Luke Eric Peterson

A Canadian mining company, Dundee Precious Metals, says that it may take the Republic of Bulgaria to international arbitration over the country’s failure to complete an environmental impact assessment of the company’s proposed Ada Tepe mining development.

Although Canada does not have an investment protection treaty with Bulgaria, in a recent interview, company executives indicated that their investments in Bulgaria were made via the Netherlands, which could open the way to an arbitration claim under the Netherlands-

Bulgaria investment protection treaty. The firm has engaged legal counsel and is girding for a potential arbitration battle.

The company currently operates a combined gold/copper mine at Celopech, 65 kms from the Bulgarian capital of Sofia – an existing facility which the firm acquired in 2003. Additionally, Dundee is seeking permission to develop a gold/silver mine in the southern area of the country at the Ada Tepe site near the town of Krumovgrad.

Dundee says that they are victims of a "silent refusal" by the Environment Ministry to allow the Ada Tepe project to proceed. The firm filed a complete Environmental Impact Assessment report in April of 2005, and insist that they have met all requirements of Bulgaria's Environmental Protection Act and relevant legislation.

According to company officials, Bulgaria's Environment Minister, Dzhevdet Chakarov, was supposed to have submitted the Environmental Impact Assessment to an Expert Council by mid-November of 2005, however Dundee says that the Minister has failed to do so, leaving the company's project in limbo.

Although Dundee turned to local courts in an effort to force the issue, company officials say that a lower court ruled that there was no mechanism by which it could force the Minister to take a decision.

The proposed mining development has attracted opposition from locals in the town of Krumovgrad (pop. 11,000), with the municipal council passing a resolution opposing the proposed project and object to plans for resettlement of affected locals. Environmental groups have also raised concerns about the potential use of cyanide leaching, a mining technique which they say could expose the local community and watershed to environmental damage.

For its part, Dundee has criticized the red tape and "corruption" encountered in the Eastern European country, and has raised doubts as to whether Bulgaria's political and legal institutions qualify the country to join the European Union as scheduled in January of 2007.

Company officials have responded warily to recent musings by the Bulgarian Environment Minister which have suggested that the country should revise its minerals and energy legislation so that the government could take an equity stake in certain projects. In particular, the Minister mentioned Dundee's 30 year concession to operate the Celopech facility as an agreement which might warrant revision.

Sources:

ITN Interviews

"Bulgaria Should Consider Stakes in Oil, Drilling Concessions – Minister", SEE News, August 3rd

"DPM to Appeal Ruling by Bulgarian Court on Absence of Decision by Minister of Environment and Waters on Krumovgrad Environmental Impact Assessment", Canadian Corporate Newswire, July 12, 2006

"Gold plans under threat", The Sofia Echo, August 1, 2005, available on-line here

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In-Depth:
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4. Despite time-bar ruling in NAFTA arbitration, Grand River claim will proceed in part, By Fiona Marshall*

In a ruling handed down last month, an arbitral tribunal convened under NAFTA Chapter 11 has held that a claim against the United States by several aboriginal First Nations Canadian cigarette manufacturers is partially time-barred, but may proceed in part.

The terms of the ruling may serve to allay fears that foreign investors might invoke the provisions of NAFTA in a wider effort to challenge the terms of a wide-ranging settlement agreement reached in 1998 between U.S. states and major tobacco manufacturers.

The NAFTA claim was announced in September of 2003, when Grand River Enterprises Six Nations Limited, a Canadian corporation, and three individuals, all First Nations Canadians, signalled their intention to pursue arbitration against the U.S. Government.

The claimants have manufactured and distributed cigarettes on U.S. Indian reservations and Canadian First Nation reserves since the early 1990s. A large part of their output is sold to consumers on reservation land, although some is sold at retail off reservation in the U.S.

The claim's background is rooted in 1990s litigation by forty-plus U.S. states against four major tobacco producers seeking compensation for medical costs of tobacco-related illnesses.

The litigation was settled in 1998 under an agreement known as the Master Settlement Agreement. Under the settlement agreement, each participating manufacturer was required to make cash payments to a central account in perpetuity in respect of each cigarette it sold. Each participating state received a share of the sum paid annually by the participating manufacturers, proportional to that state's share of covered cigarette sales. In addition, participating manufacturers agreed to extensive restrictions on advertising and other marketing and to fund smoking prevention and cessation programs.

The claimants in the present NAFTA arbitration were not involved in the litigation by US states against leading tobacco companies, nor were they parties to the eventual settlement agreement.

However, because compliance with the settlement agreement increased the cost of participating manufacturers' cigarettes, that agreement included various measures to encourage other, mostly smaller, manufacturers (like the claimants) to adhere to the agreement or to otherwise limit their ability to gain market share (at the expense of larger companies which were forced to add a sizable levy to the price of their own products). The most significant of these measures was a requirement that all participating states adopt legislation requiring all manufacturers not party to the settlement agreement to place annually in escrow a sum roughly equivalent to the amount it would have paid in each state if the manufacturer had been party to the Master Settlement Agreement.

These escrow funds are to remain locked up for 25 years to pay any future judgment against the manufacturer stemming from any potential litigation by a US state over the health consequences of that manufacturer's product.

The escrow laws, together with other provisions of the settlement agreement directed towards manufacturers not party to the agreement, and subsequent related legislation enacted by participating states, form the core of the claimants' claim filed against the US Government under NAFTA Chapter 11.

The U.S. raised a number of objections to jurisdiction, including that the NAFTA claim was time-barred.

The tribunal agreed to examine the time-limitation issue as a preliminary issue and to postpone other jurisdictional objections until the merits phase of the arbitration. The preliminary hearing took place in March 2006 in New York.

The arbitral tribunal was composed of Fali S. Nariman as President, Senior Advocate, Supreme Court of India and President of the Bar Association of India; Professor James Anaya, Professor of Human Rights Law and Policy at the University of Arizona; and John R. Crook, Commissioner in the Eritrea-Ethiopia Claims Commission and Adjunct Professor at George Washington University Law School.

The sole issue before the tribunal was whether more than three years had elapsed from the date on which the claimants "first acquired" or "should have first acquired" knowledge of the alleged NAFTA breaches and whether more than three years had elapsed from the date of knowledge that they had incurred "loss or damage". If so, the claim would be barred under NAFTA Articles 1116(2) and 1117(2).

In respect of whether the claimants acquired "actual knowledge" of the alleged NAFTA breaches more than three years before filing the claim, the tribunal found that it was unable to determine this point. Accordingly, the tribunal turned to consider whether the claimants had so-called "constructive knowledge" of the alleged breaches, i.e. whether

they “should have” acquired knowledge of the alleged NAFTA breaches more than three years before their claim was filed.

Here, the tribunal had more certainty. The tribunal noted that the claimants were experienced and substantial participants in the tobacco industry; that the settlement agreement and its implementing measures were developments of fundamental significance in the trade and had been widely publicised; and that a reasonable, prudent investor intending to invest substantial funds ought to make reasonable enquiries about significant legal requirements potentially impacting on their activities, particularly in a field they know to be highly regulated and taxed.

While determining that the claimants had “constructive knowledge” of the alleged NAFTA breaches, the tribunal limited this finding to the part of the claim relating to cigarettes ultimately sold to consumers off-reservation.

The tribunal did not find “constructive knowledge” in respect of cigarettes sold at retail on reservation lands because it understood that, under U.S. federal law, sales of tobacco products on Native American reservation lands are generally exempt from regulation by the U.S. states.

With regard to when the claimants first acquired or should have first acquired knowledge that they had incurred loss or damage, the tribunal found that, in respect of any loss or damage incurred on cigarettes sold in the U.S. off reservation, with appropriate diligence the claimants should have discovered this fact more than three years before the date of their claim.

The tribunal disagreed with the claimants’ contention that loss or damage could only be “incurred” once judicial enforcement action had been initiated. Instead, the tribunal ruled that the ordinary meaning of the term “incur” includes an obligation to pay - even if an outlay of funds is not immediately required.

In sum, the tribunal concluded that the investors’ claim in respect of the Master Settlement Agreement and any implementing measures adopted more than three years before the filing of the claim and related to sales of cigarettes sold off-reservation is time-barred.

Meanwhile, the portion of the claim relating to cigarettes sold on-reservation can proceed to a hearing on the merits. The part of the claim relating to measures taken less than three years before the filing of the claim is also not time-barred, even if those measures are related to the settlement agreement or to associated legislation enacted within the time-barred period. For example, the tribunal found that amendments of the escrow laws adopted in 2003-2004 are not time-barred.

During final rebuttal at the hearing, the claimants sought leave to amend their claim to explicitly add the 2003-2004 escrow law amendments to their list of alleged breaches. In

doing so, the claimants had anticipated the tribunal's finding that the escrow amendments were not adequately specified in their pleadings.

The tribunal, after considering the claimants' delay, possible prejudice to the respondent, and other circumstances as required by Article 20 of the UNCITRAL Rules, noted that the claimants could in any event file a second arbitration if the motion was denied, and granted leave to amend the claim. The tribunal is to inform the parties of a revised schedule of further pleadings.

* Fiona Marshall is a Geneva-based free-lance contributor to Investment Treaty News. She is a consultant, and a Member of the Bar of the High Court of New Zealand.

Sources :

ITN Interviews

Grand River Enterprises Six Nations Ltd. et. al. v. United States of America, Decision on Objections to Jurisdiction, 20 July 2006, available on-line here

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Negotiation Watch:
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5. UNCTAD reports on investment provisions in economic integration agreements,
By Damon Vis-Dunbar

The rapid growth of so-called economic integration agreements (EIAs) has spurred the trade and development arm of the United Nations to take a close look at how these agreements apply to foreign investment.

EIAs refer to a wide range of bilateral, regional and multilateral trade and investment agreements, including free trade agreements, customs unions, common markets and sectoral trade agreements – although the term excludes bilateral investment treaties (BITs), the most common instruments for regulating foreign direct investment between countries.

The Geneva-based United Nations Conference on Trade and Development (UNCTAD) reports that some 218 EIAs with investment provisions had been inked as of June 2005. UNCTAD notes that these agreements have flourished particularly since the 1990's, expanding beyond their origins as regional agreements between countries at a similar level of economic development, to the now commonplace deals between a rich and poor country.

While the number of EIAs with investment provisions pales beside the over 2400 bilateral investment treaties that have been signed between countries, EIAs are

proliferating rapidly. That expansion combined with the varied investment provisions in EIAs creates a complex web of rules that dictate both the liberalization and protection of foreign investments. UNCTAD calls it “a universe in constant expansion and change, formed by variable constellations that are linked by overlapping membership and complex interactions.”

The investment provisions in EIAs often serve a different purpose than BITs. Bilateral investment treaties tend to focus on the treatment and protection of foreign investments, while EIAs are more often concerned with liberalizing and promoting investment flows between countries. These often include extensive commitments that allow investors to enter and establish themselves in a host country, either immediately or within the near future. Such commitments are rarer in BITs.

However, there are notable exceptions. Canada and the United States are two countries that have bucked this trend, promoting BITs that lock-in liberalization commitments, as well as entering into free trade agreements with comprehensive investment chapters which offer strong levels of investor protection.

Indeed, the investment chapter of the North American Free Trade Agreement (NAFTA), signed in 1992 between Canada, the US and Mexico, was a state-of-the-art EIA at the time it came into force. The NAFTA included provisions that stipulate how foreign investors should be treated in the host country, and offered investor-state arbitration as a means to settle disputes. It has since spawned agreements with Latin American countries built upon a similar model, such as the Central American Free Trade Agreement (CAFTA).

The investment provisions in EIAs are often marked by regional differences, says UNCTAD. The European Community (EC) has pursued EIAs that focus on the liberalization of investment flows, while the treatment and protection of foreign investment is placed in the hands of individual member states.

As such, a country negotiating with the European Community “will likely find investment liberalization, competition policy and intellectual property protection high on the agenda,” notes UNCTAD. By contrast, a deal with the US will likely include the types of investment protections offered in BITs, as well as liberalization commitments.

Meanwhile, Asian and African countries are increasingly entering into agreements that cover both the liberalization and protection of foreign investment. The Association of Southeast Asian Nations (ASEAN), and its various stand-alone components, forms a package with extensive rules that liberalize foreign investment and provides strong treatment and protection standards.

Dispute settlement mechanisms also vary widely. Many EIAs, particularly those focused on liberalization, do not offer a binding investor-state dispute settlement mechanism; rather, disputes under European Community agreements with third parties will leave investment disputes to state-to-state processes. Where investor-state arbitration is offered,

it may include various regional institutions such as the Regional Center for Arbitration in Kuala Lumpur.

UNCTAD stresses that the investment provisions in EIAs are far more varied than in BITs. This can make them more development friendly, as they may allow for more flexible and experimental approaches, such as transition phase-in periods, special & differential treatment, or different forms of general or specific exceptions. At the same time, EIAs add a level of complexity that may pose difficulties for governments, for example in relation to wide-ranging transparency requirements or the need to identify those sectors where liberalization obligations will and will not apply.

The complexity of these agreements is enhanced by the way they interact with other EIAs and internally with the various chapters in these agreements. The latter is demonstrated in the free trade agreement between the United States and Singapore, which contains chapters on investment, services and financial services, all three of which may overlap in the case of a given investment. This problem is normally overcome by giving one chapter supremacy over another by stating that the investment chapter does not apply to financial services, for example, except in narrow specified instances.

Less easy to resolve are the interactions between EIAs and other investment agreements. UNCTAD points to three ways in which these interactions can be handled: one is a provision stating that the EIA will not modify the obligations made under other agreements; the second option would make clear that provisions in one EIA will prevail over the provisions of another; a third is a mechanism for resolving inconsistencies.

Nonetheless, UNCTAD warns that the growing number of EIAs "is creating increasing difficulties for the interpretation of the rules." This is often termed the spaghetti bowl effect, in which a complex web of rules interact with each other in ways that are not always clear.

Sources:

"Investment Provisions in Economic Integration Agreements", UNCTAD, 2006, is available on-line here

Briefly noted

6. London workshop to examine procedural aspects of investment treaty arbitration

The Investment Treaty Forum of the British Institute for International and Comparative Law (BIICL) is to host a one-day event on procedural aspects of investment treaty arbitration. The event is slated for Friday, September 8th, at Goodenough College, at London House, Mecklenburgh Square. The Investment Treaty Forum was established in

2004 to encourage research and policy discussion related to international investment treaties.

For more information visit:
http://www.biicl.org/events/view/-/id/23/

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