

Investment Treaty News (ITN), January 17, 2008

Published by the International Institute for Sustainable Development
<http://www.investmenttreatynews.com>

Contents at a Glance:

Editor's Note on recent IISD publications

1. ICSID annulment committee will not require Argentina to post bond in Azurix case
2. Czech Republic quietly pursues challenge to jurisdictional ruling in Prague court
3. BIT claim against Thailand clears initial jurisdictional hurdles
4. Austrian cement company's BIT arbitration with Bosnia is settled
5. Campaigners deliver letter to ICSID over Euro Telecom vs. Bolivia arbitration
6. Turkish telecoms company initiates BIT claim against Iran

Analysis

7. Interpreting narrowly-worded arbitration clauses in Soviet-era and Chinese BITs

Negotiation Watch

8. Canadian Minister hopes China BIT is months away, with Mongolia pact to follow

Briefly Noted

9. Cases where MFN arguments have led to more favourable arbitration options

Editor's Note:

In our last issue ITN highlighted several recent publications and activities of the International Institute for Sustainable Development. However, in our haste to publish, we neglected to note that the briefing paper on the proposed revisions to the UNCITRAL arbitration rules was written by IISD in conjunction with the Centre for International Environmental Law. Additionally, the IISD Developing Countries Investment Negotiators Forum was organized in partnership with the Centre on Asia

and Globalization at the National University of Singapore.

For more information on these and other IISD publications visit:
<http://www.iisd.org/investment>

Arbitration Watch:

1. ICSID annulment committee will not require Argentina to post bond in Azurix case,

By Luke Eric Peterson

In the second such order to be issued in recent months, an ICSID ad-hoc annulment committee has rejected a bid by a US investor to have a stay of enforcement lifted while the committee reviews Argentina's request for annulment of a \$165 Million (US) arbitration award.

US-based Azurix Corporation, a former subsidiary of the now-defunct Enron Corporation, was awarded compensation in July of 2006, following a determination by ICSID arbitrators that Argentina had violated its treaty obligations by mistreating Azurix's investments in an ill-fated privatized water utility in the province of Buenos Aires.*

When Argentina moved to have the award annulled, it requested that ICSID maintain a temporary stay of enforcement until the annulment process had concluded. For its part, Azurix countered by asking the tribunal to remove the stay of enforcement, or to have Argentina post a bond if the stay were to remain in place.

In a decision issued on December 28, 2007, the three-person annulment committee, consisting of Dr. Gavan Griffith Q.C., Judge Bola Ajibola and Mr. Michael Hwang S.C., held that a bond need be posted only in exceptional cases where there was a risk that a Government would not pay the final award. Indeed, the committee took a more forceful line on one key point than another annulment committee which recently upheld a similar request by Argentina in its dispute with US energy company CMS:

“On the issue of onus, and perhaps in contrast to the contrary suggestion by the ad hoc committee in *CMS v. Argentina*, the Committee does not see that the applicant for annulment bears any burden of persuasion as to why security should not be ordered. To the contrary: it is for the claimant to make out its case for security consequent upon a stay being ordered.”

Although the committee had not required a so-called comfort letter from Argentina, the Argentine Government did offer a letter undertaking to pay the arbitral award should the Government's annulment bid fail.

Azurix had protested, in vain, to the committee that such letters offered scant reassurance in light of contemporaneous comments from Argentine Government officials to the effect that they would not acknowledge the final and binding nature of

the Decision on Annulment rendered in late-September in the parallel CMS v. Argentina case. (As was reported in the previous edition of ITN, US-based CMS reports that it has been unsuccessful to date in obtaining payment from Argentina in relation to a 2005 award, despite a final ruling by an ICSID annulment committee which upheld the operative parts of that award.**)

Notably, in the recently-issued decision by the Azurix ad-hoc annulment committee, the committee took the view that there was an “absence of history of non-payment by Argentina of final ICSID awards (there are as yet none)”. What’s more, the committee added that Argentina (in contrast with recent moves by other South American Governments) “has not denounced the ICSID Convention, and continues to be bound by its obligations under Article 54 to recognize and enforce ICSID awards as final judgments of domestic courts.”

The recent rulings on stays of enforcement by the CMS and Azurix annulment committees are the first in what could be a long string of such decisions, as Argentina has made it a pattern thus far to seek annulment of the growing number of unfavourable arbitration awards which have been rendered against the Government.

In addition to the CMS and Azurix cases, Argentina has also sought annulment of arbitration awards rendered in favour of Siemens and Vivendi. Another case, Enron v. Argentina, is currently. Meanwhile, the 120-day window in which a party may seek annulment of an ICSID award remains open in the case of a September 28, 2007 award rendered in favour of US-based Sempra Energy, as well as in the Enron v. Argentina case where the tribunal concluded its work on October 25, 2007.

* For background on the Azurix-Argentina arbitration see “[Azurix wins claim against Argentina, recoups only part of sunk costs](#)”, By Luke Eric Peterson, Investment Treaty News, July 26, 2006
http://www.iisd.org/pdf/2006/itn_july26_2006.pdf

** See “[CMS Energy urges Argentina to pay ICSID Award](#)”, By Luke Eric Peterson, Investment Treaty News, January 11, 2008

2. Czech Republic quietly pursues challenge to jurisdictional ruling in Prague court,
By Damon Vis-Dunbar

The Czech Republic tells ITN that it is challenging a decision on jurisdiction in a BIT dispute involving a German investor.

The investor, Rupert Binder, ran a transport company in the Czech Republic. His complaint relates to alleged fraud by Czech customs authorities which drove his company into bankruptcy in 2003. Ad-hoc arbitration proceedings, seated in the Czech Republic, commenced in 2006 under the UNCITRAL rules of procedure.

The Czech Ministry of Finance would not elaborate on why they were seeking to annul the jurisdictional decision, nor has the 2006 decision on jurisdiction been made public.

In the original arbitration proceedings, the Czech Republic had challenged the tribunal's jurisdiction on two grounds. The first was that the investor was not a "resident" of Germany, which was a requirement under the German-Czech Republic BIT. The second is a more complex argument, which the Czech Republic used in a previous BIT arbitration with the Dutch-based Eastern Sugar, and relates to the Czech Republic's obligations under EU law.*

In both the R.J. Binder and Eastern Sugar arbitrations, the Czech Republic argued that its bilateral investment treaties with other European Union Member States had been implicitly terminated as a result of Czech accession to the EU. The tribunal in the R.J. Binder arbitration, like the Eastern Sugar tribunal, is understood to have rejected this argument.

As earlier reported in ITN, the Czech Republic also attempted to overturn a recent jurisdictional ruling rendered by a tribunal in another BIT arbitration with the Luxembourg-based broadcasting company, European Media Ventures (EMV). In a ruling issued last month, a UK court rejected that bid. (See: "[UK Court declines to overturn jurisdiction in Czech TV broadcasting dispute](#)", Investment Treaty News, December 14, 2007)

The Czech Republic declined a request from ITN for further information about the EMV or R.J. Binder cases, citing confidentiality agreements in those UNCITRAL-based arbitrations.

Proceedings in both arbitrations are understood to be ongoing.

* For information on the Eastern Sugar arbitration see: "[Czech Republic loses BIT arbitration to sugar firm challenging quota allocation](#)", By Luke Eric Peterson and Damon Vis-Dunbar, Investment Treaty News, April 13, 2007

Other Sources:

"[Czech Gov't seeks to annul jurisdiction ruling in UNCITRAL broadcasting dispute](#)", By Luke Eric Peterson, Investment Treaty News, October 30, 2007

"[Czech Republic loses BIT arbitration to sugar firm challenging quota allocation](#)", By Luke Eric Peterson and Damon Vis-Dunbar, Investment Treaty News, April 13, 2007

3. BIT claim against Thailand clears initial jurisdictional hurdles,
By Luke Eric Peterson

A minimally-publicized UNCITRAL arbitration brought by the German construction company Walter Bau AG against the Republic of Thailand has cleared certain initial jurisdictional hurdles.

In an unpublished ruling issued last year, a three-person tribunal dispensed with certain jurisdictional objections raised by Thailand. Other jurisdictional objections

will be heard as part of the merits phase of the proceeding. A hearing in the case is slated for October of 2008.

Walter Bau is a minority investor in the Don Muang Tollway Co., a local Thai company which holds a 25 year concession to construct and operate a well-known toll highway in the Thai capital.

The German firm has fallen out with Thai officials over the concessionaire's authority to increase tolls charged to drivers, as well as allegations of unpaid construction bills.

Walter Bau accuses Thailand of breaching protections contained in the Germany-Thailand bilateral investment treaty. The case is the only known arbitration to be proceeding against Thailand pursuant to a BIT, although other arbitrations claims could be proceeding without publicity.

The Walter Bau case is being heard by a tribunal consisting of Sir Ian Barker, Mr. Marc Lalonde (the investor's nominee), and Mr. Jayavadh Bunnag (who was appointed by the Government, after an earlier nominee, Dr. Suvarn Valaisathien, resigned from the tribunal)

4. Austrian cement company's BIT arbitration with Bosnia is settled,
By Luke Eric Peterson

A BIT arbitration between the Austrian cement company ALAS and the Republic of Bosnia and Herzegovina has come to a conclusion following a settlement agreed by the parties.

ALAS International Baustoffproductions AG had turned to ICSID in November of 2006, alleging that Bosnia had violated protections contained in the Austria-Bosnia-Herzegovina bilateral investment treaty, by virtue of its failure to protect ALAS's investments in a privatized cement manufacturing plant.

In particular, ALAS contended that Bosnia had violated the BIT's umbrella clause as a result of its failure to prevent a local state-owned company from breaching a long-term supply agreement with ALAS's local subsidiary.

The Austrian company invested in the Bosnian firm in the autumn of 2001, taking a 51% stake in the newly-privatized plant. Later, ALAS would increase this stake to 95%.

An arbitration tribunal consisting of Judge Stephen Schwebel (ALAS's nominee), Mirko Vasiljevic (Bosnia's nominee), and Prof. Prosper Weil was constituted in September of 2007.

However, before the tribunal could hear jurisdictional objections or arguments on the merits of the case, the two sides reached a deal whereby the Bosnian-state entity agreed to honour the long-term supply agreement which had been repudiated. This agreement was later embodied in an award issued on December 27, 2007.

That award had not entered the public domain at the time of this writing.

The arbitration is the first known treaty-based investment arbitration to have been initiated against Bosnia-Herzegovina, although other cases (for e.g. under the less-transparent UNCITRAL rules) might have been initiated without public disclosure.

5. Campaigners deliver letter to ICSID over Euro Telecom vs. Bolivia arbitration, By Damon Vis-Dunbar

Some 800 citizens groups have signed a letter calling on the President of the World Bank to withdraw a claim registered with its affiliated arbitration forum, the International Centre for the Settlement of Investment Disputes (ICSID).

As ITN reported in its last issue, a campaign led by the non-profit Institute for Policy Studies accuses the Bank of “refusing to respect the Bolivian government’s actions and allowing a case brought by a European telecommunications firm to proceed.”

Last year, Bolivia became the first country to formally withdraw from the ICSID Convention; however, the legal impact of that withdrawal remains a matter of debate. As such, the ICSID Secretariat agreed to register Eurotelecom’s claim, and allow a tribunal to decide whether it has jurisdiction over the dispute.

Robert Sills, counsel for Euro Telecom, tells ITN that ICSID is the appropriate forum to settle the dispute given that Bolivia’s consent is still active:

“Euro Telecom is appropriately seeking to enforce its rights against Bolivia before ICSID, the forum that Bolivia agreed to when it sought foreign investment in its infrastructure.”

Sills added: “While Bolivia has elected to withdraw from the ICSID Convention, that treaty makes it clear that this dispute, which arises out of Bolivia’s consent to ICSID jurisdiction given prior to Bolivia’s denunciation of the Convention, is one that should be decided by an ICSID tribunal. Bolivia can, and no doubt will, present its jurisdictional arguments to the arbitral tribunal once that tribunal is constituted, but Euro Telecom is confident that the tribunal will determine that it in fact has jurisdiction and proceed to decide the case.”

Sources:

“Activists lobby in support of Bolivia’s withdrawal from ICSID”, By Damon Vis-Dunbar, Investment Treaty News, January 11, 2008

A copy of the IPS petition presented to ICSID is available here:
<http://www.ips-dc.org/reports/080115-boliviapetition-en.pdf>

6. Turkish telecoms company initiates BIT claim against Iran, By Luke Eric Peterson

In a tersely-worded filing with the Istanbul Stock Exchange, the largest cellular telecommunications company in Turkey, Turkcell, announced that it has initiated arbitration against the Islamic Republic of Iran.

Turkcell accuses Iran of violating the terms of a bilateral investment treaty between Turkey and Iran:

“This arbitration process relates to a dispute which arises by reason of acts by Islamic Republic of Iran, directly and indirectly, through entities owned and controlled by the Islamic Republic, further to the award of a license to operate a nationwide GSM network in the Islamic Republic on 18 February 2004 to a consortium that was led by our Company, as a result of which our Company has been materially deprived of its investment in that country and incurred significant losses.”

Under the terms of the Turkey-Iran bilateral investment treaty, investor-state arbitration is provided for under the auspices of the ad-hoc UNCITRAL rules of arbitration – rules which do not require any mandatory registration or disclosure of information.

Analysis:

7. Interpreting narrowly-worded arbitration clauses in Soviet-era and Chinese BITs,
By Luke Eric Peterson

A recently-published ruling in the *Berschader v. Russia* arbitration reported in the previous edition of ITN* will be of interest not merely to those concerned with the foreign investment climate or contract enforcement in Russia, but to legal observers eager for clues as to how similarly-worded arbitration provisions contained in other international investment treaties may be construed in future disputes.

Owing to a long-standing suspicion of international arbitration on the part of some (then) Communist governments, a number of investment treaties concluded by former members of the Soviet Union, as well as many by China, contain restrictive-looking investor-state arbitration clauses.

For example, arbitration might be available only for disputes related to transfer of funds or alleged expropriation (rather than the full gamut of alleged treaty breaches). At other times, treaties might limit arbitration even further: to disputes over the amount or mode of compensation owed in the event of expropriation.

However, the precise import of such clauses can only be determined in actual disputes, where arbitrators will be obliged to interpret a given treaty provision. Indeed, in several ongoing arbitrations against the Russian Federation, brought by aggrieved shareholders in the now-bankrupt Yukos Corporation, tribunals are confronted with treaty arbitration clauses which appear to place strict limits on the types of alleged treaty breaches which can be reviewed by international arbitrators.

Although few details have emerged about these arbitration claims, at least two cases are understood to be pending pursuant to bilateral investment treaties signed by Russia with the United Kingdom and Spain respectively. These BIT claims by minority shareholders are in addition to a major multi-Billion dollar claim mounted by majority shareholders, Group Menatep, pursuant to the Energy Charter Treaty. (In all three cases, the claimants essentially accuse Russia of destroying their investments by using demands for back-taxes as a means of driving Yukos into bankruptcy.)

In both of the pending BIT claims against Russia, the claimants may need to convince the respective tribunals that the UK and Spanish treaties with Russia provide for jurisdiction to review whether Russia has committed an expropriation (as well, perhaps, as breaches of other treaty protections). Yet, neither treaty follows the typical pattern whereby “all investment disputes”, or any alleged breach of the investment agreement may be subject to arbitration.

Instead, for example, the UK-Russia treaty limits investor-state arbitration to disputes concerning “the amount or payment of compensation under Articles 4 or 5 of this Agreement [Compensation for Losses and Expropriation], or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement [Repatriation of Investments and Returns]”.

To date, only a handful of arbitration tribunals have been faced with narrowly-tailored arbitration clauses, providing little in the way of definitive guidance for observers or interested parties. What’s more such clauses may differ slightly or sharply from treaty to treaty, thus leading lawyers to argue that earlier “precedents” may or may not be relevant in other contexts.

COMPARING EMV V. CZECH REPUBLIC AND BERSCHADER V. RUSSIA

Two recent arbitrations which have seen tribunals interpret restrictive-looking arbitration clauses are the aforementioned Berschader v. Russia case and that between a Luxembourg media firm, European Media Ventures, and the Czech Republic.

Indeed, attentive readers of ITN may detect a potential contrast between the outcome in the Berschader v. Russia arbitration – where jurisdiction was declined - and the ruling in the EMV v. Czech Republic case – where jurisdiction was upheld.**

In the Berschader case, a majority of the presiding tribunal held that it lacked jurisdiction to hear a claim for breach of the expropriation clause, given the narrow wording of the Belgium-Russia treaty’s provisions on investor-state arbitration.

Meanwhile, in the EMV-Czech Republic matter, the tribunal in that case found jurisdiction to hear a claim for breach of the expropriation provision of the Belgium & Luxembourg-Czech Republic BIT.

However, the arbitration clauses at play in the two disputes – while both narrowly-cast – were differently-worded, a factor which some observers have credited for the

divergent outcomes of those two disputes.

The Belgium-Russia treaty, at issue in the *Berschader v. Russia* case, provides for arbitration only in case of disputes “concerning the amount or mode of compensation to be paid under Article 5 (expropriation) of the present Treaty”. Meanwhile, the treaty at issue in the *EMV-Czech Republic* case was arguably worded in a less restrictive fashion: with no express language limiting arbitration to disputes over the “amount or mode” of compensation. Rather, that treaty provided for arbitration “concerning compensation due by virtue of Article 3 Paragraphs (1) and (3) (Expropriation)”.

Thus, the tribunal in the *EMV-Czech Republic* case went on to construe the latter wording so as to provide a wider jurisdiction for the tribunal, one which included a determination by the international tribunal whether an expropriation had, in fact, occurred.

OTHER CASES WHERE RESTRICTIVE DISPUTE CLAUSES WERE AT ISSUE

Of course, the *EMV-Czech Republic* and *Berschader v. Russia* cases are not the only BIT arbitrations where arbitrators have been confronted with narrowly-cast arbitration clauses.

In another arbitration involving the Russian Federation, and a German investor, Mr. Franz Sedelmayer, the majority of a tribunal held that it had jurisdiction over Mr. Sedelmayer’s claim for expropriation. This ruling was made notwithstanding the fact that the Germany-Russia BIT provides for investor-state arbitration only in case of disputes “relating to the amount of compensation or the method of its payment, in accordance with Article 4 of this Agreement, or to freedom of transfer, in accordance with article 5 of this agreement”.

Despite the seemingly narrow jurisdictional window presented to German investors – disputes “relating to the amount of compensation” - it does not appear from the final award in the *Sedelmayer* case that Russia raised jurisdictional objections similar to those raised in the more recent *Berschader* case.

As such, the *Sedelmayer* award does not discuss whether jurisdiction ought to have been limited to disputes over the quantum or amount of compensation – with the determination of whether there had been an expropriation left to a domestic court or tribunal.

Rather, the arbitrators in the *Sedelmayer* case simply determined that they had jurisdiction over both questions and then proceeded to hold that Russia had committed an act of expropriation, after which the tribunal determined the amount of compensation owed.

Given the lack of reasoning supporting this conclusion, it remains unclear how persuasive this holding may be in other cases – even where the Germany-Russia treaty itself were at issue.

Meanwhile, in yet another investment arbitration, *Plama Consortium Ltd. v. Bulgaria*,

the claimant, a Cypriot company, seemingly conceded that the Cyprus-Bulgaria BIT provided for very limited arbitration options – arbitration of disputes over the “amount of compensation” – and sought to invoke through use of the MFN clause the more favourable arbitration clause contained in the Finland-Bulgaria BIT.

This MFN gambit in the Plama case was ultimately unsuccessful; however, the tribunal made no analysis of the Cyprus-Bulgaria BIT’s own (seemingly narrowly-cast) arbitration clause, because the claimants themselves declined to invoke that particular arbitration clause in their case. As such, the Plama ruling offers no interpretation of that particular clause, and little insight into how similarly worded provisions ought to be interpreted.

Thus, the earlier rulings in Plama and Sedelmayer seemingly cast little light on the debate which has been spawned by the more recent EMV and Berschader rulings – a debate which is far from resolved, given the varying types of arbitration clauses found in certain treaties, and the ambiguity to which they give rise.

* For more on the Berschader v. Russia case see: “Award in Berschader v. Russia arbitration is finally made public”, By Luke Eric Peterson, Investment Treaty News, January 11, 2008, available on-line at:
http://www.iisd.org/pdf/2008/itn_jan11_2008.pdf

** For more on the EMV v. Czech Republic case see: “UK court declines to overturn jurisdiction in Czech TV broadcasting arbitration”, By Luke Eric Peterson, Investment Treaty News, December 14, 2007, available on-line at:
http://www.iisd.org/pdf/2007/itn_dec14_2007.pdf

Negotiation Watch:

8. Canadian Minister hopes China BIT is months away, with Mongolia pact to follow,
By Luke Eric Peterson

Canada’s Minister of International Trade, David Emerson, speaking on a conference call to reporters last week said that negotiations on a bilateral investment treaty with China could be wrapped up in a matter of months. Emerson, who was in China as part of a trade mission to Asia, indicated that some progress was made in resolving thorny issues in those negotiations.

Absent from Minister Emerson’s comments, however, was any assurance that a forthcoming Canada-China BIT will contain robust transparency requirements similar to those contained in the recent Peru-Canada BIT.

As previously reported in ITN, the Government of Canada has, in recent years, advocated for mandatory disclosure of investor-state arbitrations initiated pursuant to investment treaties. Canada’s new model Foreign Investment Protection and

Promotion Agreement (FIPA) contains provisions which dictate that investor-state arbitrations will be disclosed to the public and arbitrated in an open and transparent fashion.

However, these transparency demands have been unpopular with certain negotiating partners, leading to friction and delays in concluding investment pacts with several Asian partners.

In June of 2007, Minister Emerson announced that an agreement had been concluded between Canada and India. However, the text of that agreement has yet to be released to the public. As such, it remains unclear what understanding was reached between the parties on the contentious question of arbitral transparency.

In his recent conference call with reporters, when asked if Canada made it a “red-line negotiating position” to have mandatory transparency in the Canada-China BIT’s dispute settlement provisions, Mr. Emerson replied that Canada “want(s) to achieve transparency” in that regard.

In his public comments, Mr. Emerson also noted that Canada will pursue an investment protection pact with Mongolia, where Canadian investors, including Ivanhoe Mines, are playing a major role in the natural resources sector of that country. According to figures compiled by Natural Resources Canada, Canadian investors in Mongolia hold some \$400 Million (CAD) in assets.

Briefly Noted:

9. Cases where MFN arguments have led to more favourable arbitration options,
By Luke Eric Peterson

In last week’s edition of ITN we published an article which examined how several recent arbitration tribunals have taken the view that the MFN clause in a given bilateral investment treaty does not open up access to more-favourable arbitration provisions found in other treaties – unless expressly indicated by the parties.

Although we emphasized that “a string” of tribunals have taken a contrary approach, thereby permitting investors to reach into the arbitration provisions of other treaties, one long-time ITN reader suggested that we name some of those cases where this has occurred. As a further guide for readers, we do so below.

In addition to the *Maffezini v. Spain* case, where the argument first succeeded, other cases where this MFN argument has been upheld include: *Siemens v. Argentina*; *National Grid v. Argentina*; *Gas Natural v. Argentina*; *Suez, Aguas de Barcelona and Interaguas v. Argentina*; *Suez, Aguas de Barcelona and Vivendi v. Argentina*; and *Anglian Water Limited v. Argentina*. In these cases, investors were typically using an MFN argument in order to detour around more onerous waiting periods prescribed in the relevant BIT.

Meanwhile, as reported last week, in several recent cases (*Salini v. Jordan*, *Plama v. Bulgaria* and *Berschader v. Russia*), arbitrators have frowned upon attempts by investors to use an MFN clause to obtain more favourable arbitration options, particularly where investors were seeking to access different modes or varieties of arbitration provided in other treaties.

To subscribe to ITN, email the editor: lpeterson@iisd.ca

Past editions dating to October 2002 are available on-line at:
<http://www.investmenttreatynews.com>

The views expressed in Investment Treaty News are factual and analytical in nature; they do not necessarily reflect the views of the International Institute for Sustainable Development, its partners, or its funders. Nor does the service purport to offer legal advice of any kind.