Investment Treaty News (ITN), August 23, 2006

Published by the International Institute for Sustainable Development
(http://www.iisd.org/investment/itn)

Contents at a glance:

Arbitration Watch:
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1. Russia prevails in Stockholm arbitration with Belgian construction firm owners,
By Luke Eric Peterson

An arbitral tribunal at the Stockholm Arbitration Institute has declined jurisdiction to hear a claim by two Belgian businessmen brought pursuant to the Russia-Belgium bilateral investment treaty.

The Stockholm arbitration was initiated by two Belgian nationals Vladimir Berschader and Michael Berschader in the autumn of 2001. The Bershaders brought their claim following a dispute over payments under a construction contract for the rehabilitation of the Russian Supreme Court building.

In April of this year, the presiding tribunal issued a decision on jurisdiction in the dispute. The tribunal noted that the relevant Soviet-era investment treaty contained a narrow dispute settlement clause which permitted investor-state arbitration only in case of disputes over the amount of compensation owing in the event of an expropriation or nationalization. As such, Belgian investors could not seek arbitration over alleged breaches of the other protections found in the treaty (e.g. fair & equitable treatment, expropriation, etc.)

The three member tribunal split on the further question as to whether the Belgian investors could invoke the Most-Favoured Nation (MFN) clause in the Belgium-Russia BIT in an effort to “borrow” more favourable dispute settlement rules found in more recent bilateral investment treaties signed by Russia (and which do offer much wider scope for investor-state arbitration of alleged treaty breaches).

By a majority of two-to-one the tribunal rejected this MFN argument, although the reasons, along with the fuller arbitral award, have not been published. The names of the presiding arbitrators have not been released; however the website of one well-known Canadian attorney, Todd Grierson Weiler, who acts on behalf of various foreign investors in such disputes, discloses that he was a member of the three person arbitral tribunal.

The ruling marks the second-known instance where an arbitral tribunal has declined a request to “widen” a Soviet-era arbitration clause, in the manner sought by the Belgian claimants.

In an earlier arbitration at the World Bank’s International Centre for Settlement of Investment Disputes (ICSID), a tribunal declined a similar request by a Cypriot investor to “widen” the dispute settlement clause of a bilateral investment treaty between Cyprus and Bulgaria. In the case of Plama Consortium Ltd. v. Republic of Bulgaria, the tribunal refused to permit the investor to borrow the arbitration clause found in another investment treaty, which would have paved the way for arbitration under a different set of rules and over a much broader range of claims.

A 3 month window during which the claimants could have challenged the Stockholm arbitration award has closed without such a move by the Berschaders. It is unknown whether, the claimants might be able to mount a second arbitration, following the move by the Stockholm tribunal to decline jurisdiction over their claim.

The outcome in the Berschader case will be of particular interest to foreign shareholders of the now-bankrupt Yukos Corporation, who are exploring lawsuits against Russia under the terms of various bilateral investment treaties. Some of these Russian BITs contain similarly-circumscribed consent-to-arbitration clauses as that of the Soviet-era Belgium-Russia BIT.

2. Tribunal affirms jurisdiction and treaty-shopping in Buenos Aires water dispute,
By Luke Eric Peterson

In a ruling released on August 3rd, an ICSID tribunal has affirmed its jurisdiction over arbitration claims brought by a grouping of foreign investors against Argentina.

The foreign investors, Suez, Vivendi Universal S.A., Anglian Water Group Ltd. (AWG), and Sociedad General de Aguas de Barcelona S.A. (AGBAR), are shareholders in an Argentine company which held a 30 year concession to provide water services to the city of Buenos Aires and surrounding municipalities.

The shareholders claim that more than $1.7 Billion (US) was sunk into the water project over the course of a decade, before, they allege, it was derailed by Argentina's financial crisis and a series of measures taken by the Argentine government.

In finding jurisdiction to examine the dispute on its merits, the presiding tribunal offered an interpretation of the Most-Favoured Nation (MFN) treatment clause contained in the Spain-Argentina and UK-Argentina bilateral investment treaties.

The tribunal's reading of the MFN clause ultimately permitted both the Spanish firm AGBAR and the UK firm AWG to "shop" for better treatment available under other investment treaties signed by Argentina.

The Spanish and the UK firms had confronted treaty requirements which bade them to pursue their claims for 18 months in domestic courts prior to pursuing international arbitration.

However, the tribunal permitted the two investors to invoke their entitlement to MFN treatment, so that they could shop for more favourable treatment in Argentina's vast catalogue of investment treaties. Specifically, the Spanish and UK investors sought to be treated on the same footing as their French counterparts, Suez and Vivendi, who were entitled under the France-Argentina BIT to pursue international arbitration after a mere 6 month waiting period.

In the case of the Spanish treaty, the tribunal was faced with an MFN clause which expressly applied to "all matters" covered by the treaty. The tribunal held that dispute settlement was clearly a "matter" covered by the Spain-Argentina BIT, and it had only to inquire whether the promised most favourable "treatment" applied to the right to dispute settlement. Finding that it did, the tribunal would conclude that the Spanish company AGBAR deserved the more favourable treatment found in France's treaty with Argentina.

In the case of the UK-Argentina treaty, the tribunal confronted an MFN clause which was silent as to whether it applied to "all matters". However, the tribunal interpreted most favourable "treatment" as it had in its analysis of the Spain-Argentina BIT. Therefore, AWG too was entitled to more favourable arbitration rules found in France's treaty with Argentina.

In both cases, the tribunal placed weight on the fact that the UK-Argentina and Spain-Argentina BITs had excluded certain things from the reach of the MFN clause – and dispute settlement was not one of them. Accordingly, the tribunal drew the inference that dispute settlement was not meant to be excluded from the reach of the clause.

The presiding tribunal professed to find strong support for its reasoning in other earlier investment treaty arbitration rulings, including those in Maffezini v. Spain, Siemens v. Argentina, and MTD Equity v. Chile.

Most notable, the tribunal also sought to differentiate its reasoning from that in an earlier ICSID arbitration between Plama Consortium v. Bulgaria, where the presiding tribunal had declined, in a 2005 ruling, to permit a foreign investor to use an MFN clause so as to enjoy access to an entirely different mode of arbitration than that which was written into the Cyprus-Bulgaria BIT.

For its part, the Suez/AWG tribunal adduced several reasons as to why it could permit foreign investors to use an MFN clause so as to avoid certain procedural requirements (i.e. waiving a requirement to spend 18 months in domestic courts), without offering an opinion as to whether the Plama tribunal had been correct to deny a foreign investor a much more “radical” use of the MFN clause i.e. the ability to shop for a different form (and scope) of arbitration than that which was provided in the basic treaty.

Sources:

Suez, Sociedad General de Aguas de Barcelona, S.A. (AGBAR) and Vivendi Universal, S.A. v. Argentine Republic (ICSID Case No. ARB/03/19), and AWG Group Ltd. v The Argentine Republic, (UNCITRAL), Decision on Jurisdiction, August 3, 2006, available on-line here

3. Tribunal affirms jurisdiction and treaty shopping in Argentine electricity case, By Luke Eric Peterson

In a ruling issued on June 20th, an arbitral tribunal operating under the UNCITRAL rules of procedure has ruled that the MFN clause in the UK-Argentina BIT can be invoked so as to allow the UK energy firm National Grid PLC to borrow more favourable arbitration provisions contained in another international treaty, the US-Argentina BIT.

National Grid initiated its arbitration in April of 2003, alleging harm to its investments in Argentina’s privatized electricity sector, following that country’s financial crisis.

As with the above-reported dispute involving AWG/Suez, at issue in the National Grid case was whether the UK company could avoid a duty spelled out in the UK-Argentina BIT to pursue its claim at the domestic level for a period of 18 months, prior to launching an international arbitration against Argentina.

The presiding tribunal endorsed the approach taken by several earlier ICSID arbitral tribunals – most notably in the cases of Maffezini v. Spain, Siemens v. Argentina, Gas Natural v. Argentina – where investors were permitted to detour around treaty requirements to pursue their claims in domestic courts for a period of 18 months.

In analyzing the particular MFN clause found in the UK-Argentina treaty, the tribunal observed that the clause failed to clarify if it applied to dispute resolution (or to all matters covered by the treaty). For this reason, the tribunal was left to determine whether it was implicit in the MFN clause that dispute resolution was covered.

The tribunal first examined the subsequent treaty practice of Argentina and the UK, to ascertain whether the two countries had given signals as to their respective reading of clauses like those found in the UK-Argentina treaty. This exercise proved inconclusive.

On the one hand, UK investment treaties negotiated shortly after the 1990 conclusion of the UK-Argentina treaty often included a clause which indicated that “for the avoidance of doubt” MFN treatment extended to the dispute settlement provisions of the treaty. However, the tribunal found that Argentina’s subsequent treaty practice included efforts to negotiate diplomatic notes with treaty-partners so as to affirm that ambiguous MFN clauses were not meant to cover dispute resolution.

Finding a divergence of views, the tribunal turned to examine whether the ambiguous phrase “treatment less favourable” could be interpreted so as to cover the “administration of justice” i.e. arbitration procedures.

Here, the tribunal endorsed the reasoning of the earlier tribunal in the Maffezini case, which had construed a similarly ambiguous clause so as to apply to “administration of justice” - which was viewed as an inextricable part of the overall substantive package of rights provided to foreign investors.

At the same time, the tribunal presiding over the National Grid arbitration took pains to emphasize that the application of the MFN clause in the UK-Argentina BIT could not be open-ended.

Echoing the earlier Maffezini tribunal, the arbitrators in the National Grid dispute called for a “balanced” approach, which would not extend an MFN clause beyond appropriate limits.

For example, the National Grid tribunal held that an MFN clause could not be used to avoid a treaty requirement to resolve disputes under a particular set of arbitral rules (e.g. the UNCITRAL rules), by seeking to borrow an option for a wholly-different type of arbitration (for e.g. ICSID arbitration) found in another treaty.

While imposing some limits, however, the National Grid tribunal was clearly of the view that the purpose of an MFN clause was “to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.”

Sources:

National Grid PLC v. Argentine Republic, Decision on Jurisdiction, June 20, 2006, available on-line here

4. French investor criticizes governments' handling of Cambodian dispute,
By Damon Vis-Dunbar

A Frenchman is making a concerted effort to bring diplomatic pressure to bear on the Government of Cambodia after regulatory action closed his insurance company in 2004.

Philippe Lenain, the former director of the French insurance firm Indochine, was forced to liquidate the company after the Cambodian government ruled that it did not meet mandatory levels of capital investment and reserves. However, Lenain says that Indochine was on the eve of signing a deal with French insurance giant Macif and the French Development Agency, which would have injected fresh capital into the company.

Lenain maintains that Cambodia's "arbitrary" actions are in breach of the Cambodia-France bilateral investment treaty. He is considering filing a request for arbitration with the International Centre for the Settlement of Investment Disputes (ICSID), but says the cost of pursuing arbitration has held him back.

One arbitration lawyer contacted by ITN, and speaking anonymously, acknowledged that the costs of such arbitration can be imposing for small claimants. Even where lawyers agree to represent a claimant on a pro bono basis, this source notes that claimants would need to pay a non-refundable fee of $25,000 US to register their case, a further $10,000 per year to keep the case on the ICSID docket, as well as a share of arbitrator fees ($3,000 per arbitrator per day) and expenses (hotel, per diems, and business class air travel) and other administrative fees imposed by ICSID.

For his part, Philippe Lenain says that he has lost $4 Million US, representing his investment in Indochine when the company's accounts were frozen and its assets liquidated.

While plans for arbitration are in limbo, Lenain has launched a vigorous public relations campaign in support of his case, drumming up media coverage in the Cambodian press where he's taken shots at officials in the Cambodian Ministry of Finance.

Recently, however, he's also fired criticisms at the French Embassy in Cambodia.

"I'm quite disappointed by the lack of enthusiasm demonstrated so far by French diplomats... It seems to me they are interested in defending the Cambodian side, not me," said Lenain in an email to ITN.

The French Embassy in Cambodia declined to comment on this matter when contacted by ITN.

A senior official with the Cambodian Finance Ministry explained that Indochine had not complied with an insurance law that requires companies to make a minimum of $7 Million US in capital investments and keep $700 000 US deposited in the National Bank of Cambodia.

This person said that it was now a matter for Cambodian courts to deal with. “The government has tried to facilitate a solution by asking the Ministry of Finance to work with the court system,” said this official. “The government cannot intervene with the courts. The courts are independent,” he said.

In September 2005 the Cambodian Prime Minister Hun Sen paid a visit to French President Jacques Chirac, and the Indochine affair was reportedly discussed. Lenain says that Chirac pressed Hun Sen to settle this dispute. Cambodian officials tell ITN that Hun Sen explained that he could not interfere with a matter that was before the courts.

Both Mr. Lenain and the Government of Cambodia have leveled accusations of fraud at the other – none of which have been proven in any court or proceeding.

Sources:

ITN Interviews

“French insurance firm alleges Cambodia violated investment treaty”, By Luke Eric Peterson, Invest-SD, May 5, 2005

“Ministry: Gov’t was victim of Indochine scam”, By Erik Wasson and Kay Kimsong, The Cambodian Daily, May 19, 2006

5. South African opposition complains about delay in signing SA-Zimbabwe BIT, By Luke Eric Peterson

According to a report in the newspaper Business Day, a South African opposition politician has criticized the ruling African National Congress for failing to push Zimbabwe for binding legal assurances that it will not nationalize South African assets without compensation.

The criticism comes amidst fears that Zimbabwean plans to take a majority interest in foreign-owned mining investments could impact heavily upon South African mining firms.

South Africa and Zimbabwe have negotiated a bilateral investment treaty, however the agreement has gone unsigned for almost two years.

In a response to a parliamentary question posed by a member of the opposition Democratic Alliance party, South Africa’s Foreign Minister Nkosazana Dlamini-Zuma said that efforts were still under way to get Zimbabwe to sign the bilateral investment treaty.

Bilateral investment treaties have played a role in other disputes involving Zimbabwe. A group of Dutch nationals have filed an arbitration at the International Centre for Settlement of Investment Disputes in an effort to challenge the Zimbabwean Government's seizure of farms and other properties held by Dutch nationals.

A tribunal has yet to be selected to hear that case. Both parties have nominated their respective arbitrators, but failing to agree on a president for the tribunal, have turned to the ICSID Secretary-General to nominate a third arbitrator.

Sources:

ITN interviews

"Mugabe delays signing investor law", Business Day, August 22, 2006

6. OECD addresses multinationals investing in countries with weak governments,
By Damon Vis-Dunbar

The Organization for Economic Cooperation and Development (OECD) is posing a series of questions to multinationals, in the hope that it will help them navigate "the risks and ethical dilemmas" encountered in countries with weak governments.

The so-called Risk Awareness Tool asks multinational companies to consider how prepared they are to deal with corruption, human rights abuses and political interference, problems that are exacerbated when governments are fragile.

According to the OECD, a Paris-based intergovernmental think tank comprised of 30 developed economies, some 15 percent of the world's population lives in "weak governance zones," with the problem particularly acute in sub-Saharan Africa.

As with its other work in this area, the OECD is not presenting companies with legally binding obligations. Rather, the stated aim is to build internationally recognized benchmarks that corporations may adopt voluntarily.

The OECD stresses that companies do not inherit new legal obligations when operating under weak governments: international and domestic laws bind them wherever they operate. But "government failures" pose additional challenges in living up to those obligations, says the OECD.

The OECD's package of questions are categorized under six themes: obeying the law and observing international instruments; heightened managerial care; political activities;

knowing clients and business partners; speaking out against wrong-doing; and finally the self interest businesses have in promoting responsible governments.

As powerful actors in poor countries, multinationals can play a positive role in improving governance, and the OECD stresses that it is in the self-interest of businesses to do so. But that influence can also be used as a corrupting force. The OECD notes, for instance, that companies sometimes find it necessary to build relationships with government officials in order to ward off threats of expropriation, which may lead to "improper" involvement in local politics.

The OECD asks that multinationals consider what steps can be taken "to identify conflicts of interest associated with public officials with whom it has political or business relations?"

Other questions are broadly framed. Focusing on the use of private security forces, the OECD asks, "Is the company well informed about the relevant principles covering business and human rights?"

This method of developing a checklist of questions is a common approach for the Paris-based organization, particularly when addressing issues where various stakeholders are at odds.

In this case, businesses, governments and civil society have long debated how best to ensure that multinational corporations act responsibly when operating in countries with weak governments.

The OECD has developed voluntary codes of conduct, most notably the Guidelines for Multinational Enterprises, a comprehensive set of standards aimed at large companies operating overseas.

Yet some critics have pushed for binding obligations, questioning the effectiveness of "toothless" standards or check-lists.

"Without incentives or sanctions neither progressive nor backwards companies will take any notice," notes Friends of the Earth, an environmental NGO, commenting on the Guidelines for Multinational Enterprises. "More progressive companies are already ahead of the standards in the draft revised guidelines, and without any form of meaningful incentive or sanction, the vast majority of companies will continue to ignore them."

Sources:

"Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones", OECD, 2006, is available on-line here