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Arbitration Watch:
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1. Russian investor pursues multiple treaty arbitrations against Moldova in Stockholm,
By Damon Vis-Dunbar and Luke Eric Peterson

An investigation by ITN finds that a Russian investor, Mr. Iurii Bogdanov, has launched four separate arbitrations against the Republic of Moldova for alleged breaches of the Russia-Moldova bilateral investment treaty. The claims, all of which have been brought to the Arbitration Institute of the Stockholm Chamber of Commerce, were filed in the 12 month window between July 2004 and July 2005.

Following an award issued on January 31, 2006, all four claims have now concluded. Two of the claims saw awards rendered by the relevant tribunals, while the remaining two claims were terminated due to the failure of the parties to tender advance payments to the Stockholm Arbitration Institute.

All four of the arbitration claims against Moldova relate to Mr. Bogdanov's investments

in the paint-manufacturing company, Agurdino, purchased in 1999 pursuant to a privatization agreement.

Of the two arbitration claims which have yielded final awards, Mr. Bogdanov prevailed in one of the two claims, and is now seeking enforcement of that award in Moldovan court. In an award dated September 22, 2005, Mr. Bogdanov was awarded damages by an arbitral tribunal for Moldova's failure to accord him with fair and equitable treatment under the terms of the Russia-Moldova bilateral investment treaty.

According to the award, a copy of which has been seen by Investment Treaty News, Moldova did not participate in the defence of this particular claim. The Moldovan Department of Privatization, which was the state agency whose actions were at issue in the case, also failed to pay its share of the advance costs for the arbitration, and did not respond to repeated inquiries from the tribunal.

The case against the Department of Privatization centred on a worker's hostel which had been transferred to the Government by Mr. Bogdanov in exchange for shares in State-owned companies.

Mr. Bogdanov later alleged that Moldova engaged in a retroactive change of the laws by which compensation-shares are issued, and by doing so breached its own domestic laws regulating foreign investment. In particular, he alleged that Moldova was putting on offer shares whose actual market value was much less than their book value.

While Mr. Bogdanov based his claim on the supposed non-retroactivity of Moldovan law, the tribunal also called upon the two parties to the arbitration to offer further clarification as to whether there had been any violation of Moldova's international treaty obligations under the BIT.

Indeed, the sole arbitrator in the case, Prof. Giuditta Cordero Moss, ultimately decided that Moldova had not breached any principle of non-retroactivity found in Moldovan law. However, she did find that Moldova had breached the "fair and equitable treatment" standard found in the Russia-Moldova treaty. In her award, Prof. Moss observed that the purpose of the BIT is to promote and protect foreign investment, and that relevant provision "must be interpreted to cover also any conduct that, even if it is in compliance with the national law of the host country and it is not discriminatory, has unjust or unreasonable results."

By offering shares which failed to compensate the investor for his transfer of assets, Moldova was held to have negatively affected the investor's "legitimate expectations of obtaining compensation", contrary to the "fair and equitable treatment" guarantee.

An award of 694896 Lei, which converts to some 190,000 Euros, was rendered in favour of Mr. Bogdanov. In determining who should pay for the costs of the arbitration proceeding, Prof. Moss took into account Moldova's failure to respond to the arbitration claim. Ultimately she would order the Government to cover all costs of the arbitration,

amounting to some 25, 000 Euros, because "of the inconvenience caused by the Respondent's uncooperative attitude."

Mr. Bogdanov is now attempting to have this award enforced through the Moldovan Supreme Court. A decision is expected as soon as this month, according to his lawyer, Isai Chibac.

In relation to the other arbitration claims faced by Moldova at the Stockholm Institute, the Republic did take part in the defence of a separate arbitration alleging wrongdoing on the part of Moldova's Customs Department.

This case was heard first in domestic courts in Moldova in 2003, after the Customs Department restricted Agurdino's operations in a so-called free economic zone. When the Moldovan Supreme Court dismissed the claim, Bogdanov filed for arbitration in Stockholm.

Two sources familiar with this case tell ITN that the relevant 3 member tribunal issued a ruling on jurisdiction and the merits on January 31 of this year. According to these sources, the tribunal rejected certain elements of the claim on jurisdictional grounds, and the remainder on their merits. ITN continues to investigate this particular arbitration.

Meanwhile, in a third related suit brought against Moldova, alleging wrong-doing on the part of the Ministry of Finance in relation to value-added tax (VAT), Mr. Bogdanov and his companies had claimed that they were taxed illegally. The claimants argued that as residents of a so-called "free-economic zone", goods produced in that zone should be exempt from VAT. The claimants sought a refund of the taxes paid to date, according to a copy of the Arbitration Request seen by ITN.

However, a source familiar with this claim tells ITN that the arbitration proceeding was recently terminated due to a failure on the part of the parties to furnish the Stockholm Institute with advance payments.

Finally, a fourth suit brought against Moldova in June of last year, alleging wrongdoing on the part of the Centre for Combating Economic Crimes, has also been terminated due to lack of payment, according to a senior Moldovan official with the Centre.

The arbitrations by Mr. Bogdanov are not the first investment treaty claims to be faced by Moldova. In 1999, a US claimant, Link Trading Joint Stock Company, brought a claim alleging that actions by the Moldovan Department of Customs Control violated the terms of the US-Moldova bilateral investment treaty. The arbitration was mounted under the UNCITRAL rules of arbitration, meaning that there was no duty on the parties to disclose the existence of this arbitration to the public. While unreported at the time, the arbitral decisions in the Link Trading case did surface several years after having been rendered.

The claim had been brought by a US investor whose local joint venture was engaged in the import of products into a "free-economic zone" in the Moldovan capital of Chisinau,

and the resale of those products to retail consumers in Moldova. After a series of changes to Moldovan law, which had the effect of reducing the amount of duty-free purchases which Moldovan citizens could make from such a "free-economic zone", the US investor alleged that Moldova had breached protections contained in the US-Moldovan investment treaty.

While finding jurisdiction to examine Link Trading's claims, the tribunal went on to reject the company's claims on their merits.

It is unknown whether Moldova faces – or has faced further investment treaty arbitrations – as there is no central repository of information on such claims in Moldova or at the international level.

(With additional reporting by Miruna Onofrei in Geneva)

2. Dutch investor sues the Czech Republic over contract lost to alleged corruption,
By Damon Vis-Dunbar

In the midst of an EU subsidies scandal involving a former deputy minister of the Czech Republic, a Dutch investor has turned to international arbitration to recoup losses incurred by his venture capital management company.

The story grabbing headlines in the Czech Republic involves 10 people, mainly former-employees of the Ministry of Local Development, accused of siphoning millions of dollars in EU subsidies, which were intended to foster new small and medium size businesses in the country. In a related case, a Dutch-investor, Gijs Boot, who saw his contract with the ministry terminated in 2003, says his company was a victim in this complex scheme of alleged corruption.

Mr. Boot's company, Dutch-based K+ Venture Partners, (K+ VP) is now seeking some 4.7 Million Euros in damages, for breach of the Czech Republic-Netherlands bilateral investment treaty.

The Dutch firm's Czech subsidiary, Czech Venture Partners (CVP) began working with the Ministry for Local Development in 1993, when they set up a foundation that invested in local business, using EU subsidies for funding. The relationship turned sour in 2003, after the Deputy Minister for Local Development, Petr Forman, accused the company of underperforming, and terminated its contract.

Late last year, however, Czech authorities charged Mr. Forman and a number of his colleagues with misappropriating nearly $10 Million US of these European subsidies, from the Ministry of Local Development. That case is currently winding its way through Czech courts.
Meanwhile, the arbitral claim by K+ VP alleges that the Czech Republic's treatment of

CVP breaches that country's bilateral investment treaty with the Netherlands. "The claim concerns both the acts and the omissions of the Czech Republic", says Anthony Sinclair of the International Arbitration Practice of Allen & Overy LLP, which represents K+ VP in the case.
In particular, K + VP allege that CVP's contract with the Czech ministry fell victim to the alleged misuse of European funds by certain Czech officials.

Talks over a possible settlement between K+ VP and the Czech Republic had been ongoing for two years, and Mr. Boot says that a possible settlement was agreed last year. But in October, Boot says the Czech Republic backed out, leading the Dutch company to file for arbitration proceedings in November. Proceedings will take place in London under UNCITRAL rules.

A request for comment to a spokesperson for the Czech Republic had not been returned at press time.

However, in a press conference held last month in Prague, a spokesperson for the ministry said K+ VP had submitted an unsigned draft version of a settlement before launching the arbitration suit, but that no settlement had been agreed to, according to reports in the Czech press. This spokesperson also indicated that there were avenues for settling this dispute, outside of arbitration.

While not closing the door on the possibility of a settlement, Boot said that such a course of action looks unlikely. He added that the Czech Republic is "only communicating through the media."

The arbitral proceedings are to be held under the UNCITRAL rules of procedure. Klaus Reichert has been appointed as arbitrator by the claimant, and Prof. Thomas Walde has been appointed by the Czech Republic.

Mr. Reichart is a London-based arbitrator and counsel with the Littleton Chambers. Prof. Walde is a Scotland-based former Head of the Centre for Energy Petroleum and Mineral Law and Policy at Dundee University. Recently, he authored a dissenting opinion, published last month, in a NAFTA arbitration between the Thunderbird Gaming Corporation and Mexico.

A chairperson for the K+ VP v. Czech Republic arbitration has yet to be selected.

Sources:

ITN interviews

K+ VP starts arbitration with CR over acknowledged claim, January 31, 2006, Czech News Agency (CTK)

3. ICSID tribunal rejects Italian construction firm's BIT claim against Jordan,
By Luke Eric Peterson

An arbitral tribunal at the International Centre for Settlement of Investment Disputes (ICSID), in a final award rendered on January 31, 2006, has rejected claims by the Italian construction companies Salini Costruttori and Italstrade that Jordan violated the terms of the Italy-Jordan bilateral investment treaty (BIT) in its treatment of the two Italian firms.

The arbitration arose as a result of a claim by the investors that Jordan had reneged upon an oral agreement to permit international arbitration of a dispute over payments related to the construction of the Karameh dam in Jordan. The two parties differed as to whether a meeting between high-level Jordanian and Italian politicians had ended with an oral agreement to allow the dispute to be taken to international arbitration, rather than to the Jordanian courts.

While the claimants insisted that the Jordanian Prime Minister had committed to permit arbitration, Jordan denied that such a commitment was tendered. Accordingly, Jordan argued that there had been no breach of the Jordan-Italy bilateral investment treaty, as the investor's claim "fails on the facts".

An ICSID arbitral tribunal convened to hear the dispute held that the claimants had the burden of proof in establishing that an oral agreement had been made between the Jordanian and Italian Ministers - and that the alleged breach of such an agreement would violate the terms of the bilateral investment treaty between the two countries.

In the event, the claimants would fail on the first count. After reviewing conflicting testimony and evidence, the tribunal ruled that the investors had not proven that an oral agreement had been made to allow the construction dispute to go to international arbitration.

Accordingly, it would be unnecessary for the tribunal to grapple with the more vexing legal questions which would have arisen had there been proof of such an oral agreement. In particular, the ICSID tribunal would have had to determine whether a country was in breach of its bilateral investment treaty obligations, by having agreed to submit a particular commercial dispute to arbitration and then failing to follow through.

On the question of costs, the tribunal apportioned the costs of the arbitration equally between the parties. This decision occasioned a separate declaration by one of the three tribunal members, Sir Ian Sinclair, who expressed the view that a more equitable sharing of costs would have accorded "some limited weight to "the loser pays" principle". In other words, Sir Ian would have preferred if the investors were to shoulder a greater proportion of the costs for the merits proceeding, in view of the particular circumstances of the case. Ultimately, however Sir Ian, signaled his support for the tribunal's award on costs, notwithstanding the concerns voiced in his separate declaration.

The final award in the Salini v. Jordan arbitration may be of less interest from a policy

perspective, than the earlier decision on jurisdiction in that case. As was reported in an earlier edition of ITN, that jurisdictional decision saw the tribunal offer readings of several key BIT provisions, including the Most-Favored Nation (MFN) clause, as well as an ambiguous clause which the claimants alleged to have been a so-called umbrella clause, which would have imported various other commitments into the treaty. (See: "Tribunal rules in Jordan dispute; rejects extension of MFN to cover procedural issues", By Luke Eric Peterson, January 21, 2005, available on-line by clicking here: http://www.iisd.org/pdf/2005/investment_investsd_jan21_2005.pdf)

Sources:

Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Award of January 31, 2006, now available in the ITN Documents Centre by clicking here.

4. Argentina in settlement talks over several BIT arbitrations,
By Luke Eric Peterson

The Spanish multinational Telefonica has reached an executive agreement with the government of Argentina, which could see the suspension of the arbitration between the two parties at the International Centre for Settlement of Investment Disputes (ICSID).

Under the terms of the proposed deal, suspension of the arbitration proceeding would take place 30 days after a public hearing has been held to discuss a proposal for renegotiation of Telefonica's license.

The Spanish firm has a multi-billion dollar stake in the major local telephone company in Argentina, the country's largest utility. It brought a claim to ICSID, alleging breaches of the Spain-Argentina bilateral investment treaty, following Argentina's 2002 financial crisis.

A member of the legal team working for Telefonica in the ICSID arbitration tells ITN that the proposed suspension of the arbitration would see the case placed in abeyance for 210 days, during which time the parties would seek to hammer out the terms of final settlement. Any final settlement would likely address, Telefonica's long-standing desire for a renegotiation of the rates which may be charged by the company to local telephone customers. Those rates – in common with those charged by other utility companies – were frozen in response to Argentina's financial crisis. The Government also ended the practice of use of foreign inflation indices to index tariffs – as had been promised in many utility contracts signed by Argentina.

In recent months, Argentina has had some signs of success in turning back the tide of arbitration claims which have been brought by aggrieved foreign investors in recent

years.

In January of this year, an ICSID arbitration brought by the US power company, AES, was suspended so that the parties could work on a settlement of the claim.

Meanwhile, a lawyer with the Argentine state agency charged with defending such claims tells ITN that at least one of the three claims brought by the French water firm Suez is likely to see a suspension of proceedings, while the parties explore a settlement. That claim relates to an investment in the water utility of Argentina's Cordobesas province.

Likewise, an UNCITRAL arbitration pursued by Canada's Scotiabank is also in abeyance, as the parties pursue a settlement of the claim. The same Argentine Government source says that the parties appointed their respective arbitrators in the case (Judge Charles N. Brower of the United States for the claimant, and Prof. Alain Pellet of France for Argentina) but, had yet to appoint a Chairman in the case.

Negotiation Watch:
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5. China pursue new-style BIT commitments with Germany, replaces 1980s BIT
By Luke Eric Peterson

The People's Republic of China has agreed a new bilateral investment treaty with Germany which will replace an earlier treaty concluded between the two countries in 1983.

The new BIT, which entered into force in November of last year, will offer much wider scope for aggrieved investors to pursue international arbitration in case of disputes with their host state.

While China has concluded more than 100 BITs with a wide-variety of partners, most of these earlier investment treaties limited investor-state arbitration to very narrow circumstances, for e.g. disputes over the amount of compensation owing in confirmed cases of expropriation.

By contrast, the new China-Germany BIT extends a right to investor-state arbitration over "any dispute concerning investments between a contracting Party and an investor of the other Contracting Party". Indeed, it is notable that this right to arbitration is not limited to those claims which allege that one or more of the investment treaty's substantive protections have been breached – for e.g. breach of "fair and equitable treatment" or "full protection and security" - but rather encompasses "any dispute concerning investments".

In cases where investors turn to arbitration, they may take their claims to the International Centre for Settlement of Investment Disputes (ICSID), or, with the consent of the Defendant state could elect for ad-hoc arbitration. The latter process would impose no mandatory rules of disclosure or publicity relating to any such dispute. Accordingly, disputes arbitrated on an ad-hoc basis may or may not come to public light.

In terms of the new BIT's substantive protections, the agreement incorporates many standard clauses, including those providing "fair and equitable treatment", "full protection and security", compensation in the event of direct or indirect expropriation, as well as a right to repatriate investments and returns.

The agreement's preamble, which will be of relevance in interpreting the agreement's substantive provisions, highlights a narrow set of reasons for creating favourable conditions for foreign investments. These include: increasing prosperity, stimulating business initiative, and intensifying economic cooperation. The preamble does not reference further goals and objectives such as poverty-reduction, or sustainable development. In this regard, the agreement is similar to most BITs which adopt a narrow set of preambular goals.

Notably, the new BIT does accord national treatment to investments, as well as to "activities associated with such investments". A protocol to the BIT explains that the latter phrase may include the purchase of raw or auxiliary materials, energy, fuel or "other means of production or operation of any kind". The import of this provision appears to place foreign investors on an equal footing with locals with respect to a right of access to resource inputs.

The guarantee of national treatment does not prejudice the ability of China to maintain any existing non-conforming measures. So, for example, any regulation or legislation which provides more favourable treatment to local investors would not be in breach of the new BIT. However, China does promise to "take all appropriate steps in order to progressively remove the non-conforming measures".

Also of note, the BIT affirms the right of either Party to discriminate against foreign investments "for reasons of public security and order, public health or morality". This exception is found in some small number of investment treaties, but most BITs do not contain such a broad derogation from the national treatment obligation.

Finally, the new BIT does not follow the trend of recent Canadian, US and certain other BITs in seeking to ensure that government measures in pursuit of legitimate public welfare will rarely run afoul of treaty rules against expropriation. Such steps were taken in Canada and the United States following rising concern that certain public interest policies or regulations might be deemed tantamount to expropriation by arbitral tribunals. To date, most countries have not followed the North American practice of introducing such safeguard language into their investment treaties.

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