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Arbitration Watch:

1. Dutch Court finds arbitrator in conflict due to role of counsel to another investor,
By Luke Eric Peterson

An arbitrator in an investment treaty arbitration between Telekom Malaysia and Ghana has resigned as counsel to an investor in a separate treaty-based dispute following a ruling by a Dutch court which effectively required Professor Emmanuel Gaillard to choose between his arbitral work in the Telekom Malaysia case and his work as counsel in a separate ICSID proceeding involving an Italian construction consortium, Consortium RFCC v. Morocco.

Prof. Gaillard, head of law firm Shearman Sterling's international arbitration practice, confirmed in an email to INVEST-SD, that he is no longer counsel to Consortium RFCC.

Gaillard had been instructing the Italian firm as it sought to annul an earlier ICSID award which rejected all of the Italian firm's claims against Morocco under the Italy-Morocco bilateral investment treaty. (See "Investment Treaty Dispute with Morocco Heading to Annulment Phase", INVEST-SD News Bulletin, May 11, 2004, at: http://www.iisd.org/pdf/2004/investment_investsd_may11_2004.pdf)

In addition to his role as counsel in a number of arbitral claims, Gaillard also works as an arbitrator - including in the ongoing NAFTA Chapter 11 dispute between the Canfor Corporation and the United States, in two pending claims at the International Centre for Settlement of Investment Disputes (ICSID), and in the Telekom Malaysia v. Ghana arbitration.

It was these twin roles of counsel and arbitrator - so often undertaken by a growing number of international lawyers - which the Dutch Court objected to in this particular instance.

In a decision of the District Court of The Hague dated October 18, 2004, an unofficial English translation of which was obtained by INVEST-SD, the Court reasoned that Prof. Gaillard, in his role as counsel to Consortium RFCC, would need to put forward all possible arguments against the award in the annulment proceeding taking place at ICSID. The Court held that such a duty was incompatible with Prof. Gaillard's duty as arbitrator in the Telekom Malaysia arbitration, to be unbiased and open towards the validity of the award which had been rendered in the earlier RFCC case (and upon which lawyers for the Government of Ghana relied in part in their defence of Telekom Malaysia's claim).

Thus, the Court held it would be impossible to avoid the appearance of these roles coming into conflict, and accordingly there would be "justified doubts" as to Professor Gaillard's impartiality were he to occupy these two roles.

The Court gave Prof. Gaillard ten days in which to decide whether he would resign as attorney in the RCCC/Morocco case, in order to retain his position as arbitrator in the Telekom Malaysia arbitration. As already noted, Prof. Gaillard subsequently resigned as counsel in the RFCC/Morocco matter.

Notably, the Telekom Malaysia tribunal (consisting of Mr. Albert Jan van den Berg, Mr. Robert Layton, and Prof. Gaillard) had earlier rejected Ghana's efforts to challenge to Prof. Gaillard. Likewise, the Secretariat of the Permanent Court of Arbitration, which is supervising the administration of the arbitration, also rejected a subsequent challenge by Ghana. Only upon turning to the Dutch Courts was Ghana successful in challenging Prof. Gaillard's appointment by Telekom Malaysia.

Nevertheless, Ghana was not pleased with the "conditional" nature of the Court's ruling, which had the effect of permitting Prof. Gaillard to continue as an arbitrator so long as he resigned as counsel to Consortium RFCC. Accordingly, Ghana lodged a second challenge motion in Dutch Courts. However, this second motion was rejected.

In its decision dated Nov.5 2004, the Court dismissed any suggestion that Prof. Gaillard's (now past) role as counsel in a different case should disqualify him to serve as an arbitrator. In an unofficial English translation of the decision obtained by INVEST-SD, the Court argued:

"After all, it is generally known that in (international) arbitrations, lawyers frequently act as arbitrators. Therefore, it could easily happen in arbitrations that an arbitrator has to decide on a question pertaining to which he has previously, in another case, defended a point of view. Save in exceptional circumstances, there is no reason to assume however that such an arbitrator would decide such a question less open-minded than if he had not defended such a point of view before. Therefore, in such a situation, there is, in our opinion, no automatic appearance of partiality vis-à-vis the party that argues the opposite in the arbitration."

As far as can be determined, the Telekom Malaysia v. Ghana arbitration - which relates to an alleged dispossession of TM's investment stake in Ghana's national telecommunications company - now proceeds again, behind closed doors.

While the challenge to one of the arbitrators took place in Dutch courts (The Netherlands being the legal place of arbitration), the proceeding itself is being resolved in-camera under the UNCITRAL rules of arbitration. INVEST-SD will endeavour, as ever, to monitor the case to the extent possible.

Whether the Dutch Court ruling in the Telekom Malaysia case will serve as a precedent in other challenges to arbitral appointees is not yet clear. It is commonplace, however, for international lawyers to serve as advocates in one or more investment treaty claims, at the same time as they may be sitting as arbitrators in other such cases - with the potential for facing the same types of legal issues in both contexts.

Sources:

District Court of The Hague, civil law section, provisional measures judge, Challenge number 13/2004, petition number HA/RK 2004, 667, Decision of Oct. 18, 2004

District Court of The Hague, civil law section, provisional measures judge, Challenge number 17/2004, petition number HA/RK 2004, 778, Decision of Nov. 5, 2004

2. IISD submits proposals on ICSID reform

The International Institute for Sustainable Development (IISD) (publisher of the INVEST-SD News Bulletin) has responded to a public call by ICSID for comments on a discussion paper released last month.

The ICSID paper sets forth various proposed changes to its handling of international investor-state arbitrations. In its comments on the ICSID proposals, IISD complimented the ICSID Secretariat for initiating the public discussion process, but urged more radical reform including fuller transparency of proceedings and devolution of ICSID from the World Bank Group.

ICSID's discussion paper was profiled in an earlier edition of INVEST-SD (See "ICSID Secretariat floats proposals for reforms to investor-state arbitration", Oct.27, 2004, at: http://www.iisd.org/pdf/2004/investment_investsd_oct27_2004.pdf). ICSID's full discussion paper is available here: <http://www.worldbank.org/icsid/improve-arb.htm>

IISD's response to ICSID's discussion paper is available on the IISD website: <http://www.iisd.org/publications/publication.asp?pno=667>

3. European Banks move to BIT arbitration against India in Dabhol dispute, By Luke Eric Peterson

A group of seven foreign banks have signaled that they will proceed with international investment treaty arbitrations against the Government of India, in relation to alleged losses arising out of their financing of the failed Dabhol power plant project.

The seven banks - Credit Suisse First Boston, Standard Chartered Bank, Erste Bank Der Oesterreichischen Sparkassen AG, Credit Lyonnais SA, (now Calyon SA), BNP Paribas, ANZEF Ltd. V. India, and ABN Amro N.V. - hail from five different European nations. Although notices of intent to arbitrate were filed in November of 2003, the banks had refrained from filing formal requests for arbitration while negotiations were pursued.

The firms allege that the Government of India has failed to protect their loans in the Dabhol project, and is liable for damages under investment treaties concluded by India with the UK, Switzerland, Austria, France and the Netherlands.

As reported in INVEST-SD last month, the US Government and the Overseas Private Investment Corporation have also mounted an arbitration under the terms of a 1997 US-India Investment Incentive Agreement, in an effort to recoup certain losses by several US-based investors in the Dabhol project. This state-to-state arbitration parallels a pair of ongoing investor-to-state arbitrations launched by General Electric and Bechtel (the majority shareholders in the Dabhol project), as well as an unclear number of commercial arbitrations proceeding under the terms of the Dabhol project contracts.

The seven arbitrations initiated by the European banks are to be arbitrated under the UNCITRAL rules of arbitration. INVEST-SD understands that no decision has been taken as yet as to consolidation of the claims under the purview of a single arbitration tribunal, so as to minimize the scope for conflicting or divergent findings by multiple tribunals.

The seven claims by these European banks bring to a total of 35, the number of international investment treaty disputes known to have been launched by investors against governments in 2004. (Due to the confidentiality of some forms of arbitration, the actual number of treaty-based arbitrations is almost certainly higher).

Sources:

INVEST-SD Interviews

"Seven banks start arbitration vs India over Dabhol", Reuters News, Dec.10, 2004

"US Government mounts arbitration against India over failed power plant project", INVEST-SD News Bulletin, Nov.29, 2004

Negotiation Watch:

4. US releases final draft of model investment treaty,
By Luke Eric Peterson

The US State Department has released a final version of its 2004 draft bilateral investment treaty. The finalized text will serve as the template for any forthcoming US investment negotiations.

Among the treaty's features are a commitment to full transparency in arbitral proceedings - including open hearings and publication of related legal documents - as well as revisions to the wording of various substantive treaty obligations in response to concerns emerging in arbitrations under earlier investment treaties.

In common with the investment provisions of recent US Free Trade Agreements, particular effort has been made to circumscribe provisions on minimum standards of treatment and those governing indirect forms of expropriation. The former provision clarifies that the treaty provides for the minimum standard under customary international law, rather than a right to other international legal standards (for e.g. those contained in other treaties).

Meanwhile, the provisions on indirect expropriation are subject to an important qualification which provides shelter for most non-discriminatory legitimate public welfare regulations (e.g. in the areas of health, safety or environment).

As earlier reported in INVEST-SD, some civil society groups had criticized this qualification for not doing enough to shelter sensitive public interest regulations, while

some business groups criticized the new language for doing too much to shelter such regulations. In the end, it appears that the US Government was not swayed by criticism from either side, and has left the clarification language intact.

In contrast to many existing bilateral investment treaties, the US model treaty features a preamble which places some emphasis upon non-economic objectives such as "health, safety, environment, and the promotion of internationally recognized labor rights". Language contained in other treaty preambles has played an important role in shaping a given tribunal's interpretation of the treaty's substantive provisions; in several recent arbitrations, tribunals have taken narrowly economic preambles as a cue to interpret treaty provisions in a manner most favorable to investors.

The model treaty also responds to another issue raised in a recent treaty arbitration, where a tribunal was asked to wrestle with the applicability of the international law test of effective or dominant nationality to an investment treaty arbitration, in a case where a holder of Canadian and Italian passports sought to invoke the protections of an Italian investment treaty. Although the tribunal in the case of Hussein Nauman Soufraki did not have occasion to address whether a test of effective or dominant nationality should be applied in that case, the dispute did highlight the failure of most investment treaties to provide explicit guidance to tribunals in such circumstances.

Notably, the new US model BIT specifies that dual nationals must be "deemed to be exclusively a national of the State of his or her dominant and effective nationality" in order to qualify as a covered investor under the treaty.

The model BIT also exhibits several noticeable changes from an earlier draft version of the model BIT circulated earlier this year by US authorities. In particular, authorities appear to have resolved a long-running inter-departmental debate over those investment agreements (for e.g. natural resources contracts) which may be arbitrable using the international disputes mechanism contained in the treaty. Whereas an earlier draft of the model treaty had covered only agreements that came into effect on or after the date of entry into force of the treaty, the November 2004 version of the US model BIT no longer imposes such a bar on the inclusion of pre-existing investment contracts.

Another notable difference is that the final draft model BIT relaxes some of the transparency obligations placed upon states in the draft circulated earlier this year. An earlier draft had introduced an obligation for states (to the maximum extent necessary) "to notify the other Party of any proposed or actual measure that the Party considers might materially affect the operation of this treaty." However, this potentially onerous obligation has been struck from the final version of the US model BIT.

Finally, Article 20 on Financial Services has been revised so as to introduce a new provision which clarifies that nothing in the treaty "applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies." At the same time, the provision makes clear that it does not derogate from a Party's duty to permit the free transfer of

investment-related funds.

The text of the model BIT is available online at:

<http://www.state.gov/e/eb/rls/othr/38602.htm>

5. Trade Ambassador Zoellick goes to South Africa to revive US-SACU talks

The US Trade Representative Robert Zoellick met last Friday in Namibia with officials from the Southern African Customs Union (SACU) in an effort to revive faltering free trade talks.

Negotiations between the US and SACU (comprising South Africa, Botswana, Namibia, Swaziland and Lesotho) were postponed earlier this year following publicized differences over the proposed scope of a free trade agreement.

US negotiators are seeking a comprehensive trade pact which would encompass issues such as services, intellectual property, investment, government procurement, environment and labour. However, SACU officials reportedly prefer to negotiate on a narrower slate of issues, while leaving others for a later date. One recent press report suggests that negotiators lack a clear mandate to negotiate on issues where the SACU countries do not have uniform internal policies in place.

Following Friday's meeting of trade ministers in Namibia, an Associated Press report characterized Ambassador Zoellick as upbeat about the prospects for putting the negotiations back on track; however, Zoellick's South African counterpart, Trade and Industry Minister Mandisi Mpahlwa, averred that the discussions had been "difficult", telling the Associated Press that further work would be needed to move the talks forward.

Both services and investment have been thorny issues in the negotiations. One persistent point of contention has been South Africa's Black Economic Empowerment (BEE) programme - which seeks to remedy past injustices by mandating greater economic roles for blacks and other minorities. Some US business groups have criticized the BEE scheme for imposing performance requirements which would be illegal under standard US investment treaty rules.

Sources:

"Administration, Business Pressure SACU for Comprehensive FTA", Inside US Trade, Dec.10, 2004

"U.S. envoy discusses free trade agreement with Southern Africa", By Max Hamata, Associated Press, Dec.10, 2004

"SACU, US moot talks to salvage free-trade deal", By Carli Lourens, Business Day (South Africa), Nov.15, 2004

6. University of Toronto study finds declining US investment in Canada, post-NAFTA

According to a new University of Toronto study, Canada has seen a decline in its share of US-origin Foreign Direct Investment since the inception of the North American Free Trade Agreement (NAFTA). The study's authors note that US-based multinationals no longer need to locate in Canada in order to avoid tariff barriers, and this has resulted in reduced investment - but greater cross-border trade - between the two countries.

Further information about the study is available here:

<http://www.news.utoronto.ca/bin6/041208-760.asp>

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