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Arbitration Watch:
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1. NGOs submit legal brief in Biwater v. Tanzania arbitration

A group of non-governmental organizations* granted leave to submit a legal brief in the ICSID arbitration, Biwater v. Tanzania, have filed their brief with the tribunal this week and made that brief available on-line for public access.

As was earlier reported in ITN, the groups had petitioned the tribunal for leave to present written arguments in the ongoing arbitration which pits a UK-based water services company against the Government of Tanzania.

2. Ad-Hoc Committee declines to annul “extreme” reasoning in award against Chile,
By Luke Eric Peterson

In a ruling dated March 21, 2007, a three-member ad-hoc committee at the International Centre for Settlement of Investment Disputes (ICSID) has dismissed a bid by the Republic of Chile seeking annulment of an earlier arbitral award rendered in favour of a Malaysian company, MTD Equity Sdn Bhd.

As earlier reported in ITN, an ICSID arbitration tribunal had held Chile liable for breaching the terms of the Chile-Malaysia bilateral investment treaty, after Chile’s Foreign Investment Committee signed off on a Malaysian investment which stood no chance of being licensed for subsequent go-ahead by land and environmental planning authorities.

In a 2004 ruling, the tribunal noted that Chile’s actions violated the guarantee of fair and equitable treatment owed to Malaysian investors. The tribunal held that the approval granted to MTD was unreasonable – and hence unfair and inequitable – given that the investment was bound to be frustrated due to Chile’s Urban Development policies. (Ultimately, Chilean authorities had refused to countenance the re-zoning of 600 hectares of agricultural land in order to accommodate a mixed-use township to be developed by the Malaysian claimants their local Chilean partner.)

At the same time, the tribunal had chastised the Malaysian firm for failing to undertake adequate “due diligence” of its own, in order to investigate whether its proposed investment would be able to obtain the various licenses and approvals needed for it to proceed.

Interestingly, the tribunal would hold that each party bore some responsibility for the $17 Million (US) in losses suffered by the Malaysian firm; in its Award the tribunal had ordered Chile to pay half of these costs to MTD, whereas the Malaysian firm was ordered to bear the remainder of its losses.

Following the rendering of the ICSID arbitration award, Chile moved to have the award annulled - a process which took several years, culminating in the ruling issued this month by a special three person ICSID committee* convened to hear that annulment request.

Under the ICSID system, a so-called ad-hoc committee may annul an award on a handful of narrow grounds. This annulment process is not equivalent to a full-fledged appeal
process. Indeed, the three-member committee convened to hear the MTD v. Chile case stressed in their recently-released ruling that

“… the role of an ad hoc committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal.”

These words served to foreshadow the outcome of the annulment proceeding, as the committee ultimately rejected the various grounds for annulment raised by Chile in its effort to overturn the arbitral award.

Of particular note is the disposition by the committee of Chile’s bid to annul the tribunal’s ruling on fair and equitable treatment.

Counsel for Chile had argued that the original arbitral tribunal had adopted an “extreme” interpretation of the treaty provision which had the effect of imposing extensive obligations on Chile to provide for “good governance” vis a vis foreign investors.

In Chile’s view, the tribunal’s reading of the “fair and equitable treatment” obligation had failed to apply international law, or applied it in such a cursory and indefensible way that this amounted to a non-application of international law. Rather, Chile contended that the arbitral tribunal had based its interpretation of “fair and equitable treatment” on “dictum” from another investment treaty award, in the case of Tecmed v. Mexico.

The Tecmed passage, quoted at length by the tribunal in the MTD v. Chile, appears to take a particularly investor-friendly interpretation of the “fair and equitable treatment” standard, providing as it does for,

“the host State to act in a consistent manner, free from ambiguity, and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”

In legal terms, Chile argued that the tribunal hearing the MTD v. Chile claim had manifestly exceeded its powers – one of several grounds according to which ICSID awards may be annulled – by virtue of relying on the Tecmed standard which was not viewed by Chile as reflecting international law.

In the final analysis, however, the ad-hoc committee rejected Chile’s argument. The committee took the view that the original tribunal had not relied on the Tecmed definition of fair and equitable treatment, but rather had cited that Tecmed standard in support of its own formulation which could be found elsewhere in the arbitral award at paragraph 113.

As for that latter formulation, the committee held that it was a “defensible” formulation for the tribunal to adopt, and that the tribunal had not committed any excess of powers in interpreting the fair and equitable treatment standard in these terms:
“treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – ‘to promote’, ‘to create’, ‘to stimulate’ – rather than prescriptions for a passive behaviour of the State or avoidance of prejudicial conduct to the investors.”

Notably, Chile would also fail to convince the committee that it ought to annul the MTD v. Chile award on another ground: namely that the tribunal had failed to state the reasons for several findings in its arbitral award.

The committee noted that its mandate was to ascertain whether there was a genuine absence of reasons lying behind certain of the original tribunal’s findings, rather than a lesser inadequacy or brevity of those reasons.

As such, the committee ultimately asked “whether an informed reader of the Award would understand the reasons given by the Tribunal and would discern no material contradiction in them.” Finding that the tribunal’s reasoning on the various impugned points was indeed sufficiently clear and non-contradictory, the committee went on to reject Chile’s demand for annulment on the grounds of a failure to state reasons.

After dismissing the various grounds for annulment, the committee hastened to add that the case involved “a complex and novel question of public importance”. Given that both parties bore some fault in relation to the dispute, the committee went on to rule that the costs of the annulment proceeding ought to be split between the two parties, while leaving each to bear their own legal costs and expenses.

For its part, Chile must now pay the original award (of some 7 Million USD) plus interest.

Meanwhile, the MTD v. Chile award remains intact – thus serving as a reminder to Governments that they may encounter liability under investment treaties in some circumstances where the activities of investment promotion and authorization authorities are not sufficiently coordinated with those of other government agencies having oversight over foreign investment activities.

* Ad-hoc committee in the MTD v. Chile annulment phase: Judge Gilbert Guillaume, Prof. James Crawford, Dr. Sara Ordonez Noriega

Sources:


“Malaysian firm wins BIT case against Chile; wide scope of MFN clause looms large”, Invest-SD News Bulletin, Aug, 23, 2004, available on-line at:
3. ICSID Jurisdiction affirmed as Italian firm accuses Bangladesh of frustrating ICC case, by Luke Eric Peterson

An ICSID tribunal has affirmed jurisdiction over a claim brought by the Italian company Saipem against the Republic of Bangladesh.

Saipem claims that Bangladesh has violated the terms of the Italy-Bangladesh bilateral investment treaty thanks to a series of Bangladeshi court rulings alleged to have frustrated an earlier contract arbitration initiated by Saipem against the Bangladeshi state energy firm Petrobangla.

In 1990, Saipem entered into a contract with Petrobangla for construction of a natural gas and condensate pipeline. Following disputes over performance under the contract, Saipem initiated arbitration under the rules of the International Chamber of Commerce (ICC).

In particular, the parties quarreled over additional costs alleged by Saipem to be owing as a result of significant delays which were said to have arisen when the local population “rebelled” against the pipeline project.

The ICC arbitration proceeding was challenged by Petrobangla in various ways, including through multiple challenges before the Bangladesh courts in an effort to suspend the arbitration. The ICC tribunal (consisting of Dr. Werner Melis, Prof. Riccardo Luzzatto, and Prof. Ian Brownlie) proceeded with the arbitration notwithstanding rulings by Bangladeshi courts which ordered the tribunal to halt its proceedings.

In 2003, the ICC tribunal issued a final award, awarding compensation to Saipem. At this point, Petrobangla turned again to the local courts, this time in an effort to have the ICC award annulled.

In April of 2004, the High Court Division of the Supreme Court of Bangladesh held that there was no award capable of being annulled, as the ICC proceeding had proceeded illegally, and without jurisdiction, following earlier rulings of the Bangladeshi courts which had ordered the arbitration halted.

Following this ruling, and in the face of Petrobangla’s unwillingness to pay the ICC Award, Saipem turned to ICSID, arguing that its contractual rights had suffered expropriation by Bangladesh contrary to the Italy-Bangladesh bilateral investment treaty.

Bangladesh objected to the tribunal’s jurisdiction over the dispute, raising various arguments including that there was no “investment” as per the requirements of Article 25 of the ICSID Convention.
For its part, the tribunal applied a 4-part test sometimes used by ICSID tribunals in order to determine whether there was an “investment” for purposes of the ICSID Convention.

Under the so-called Salini test (a name derived from the test’s development in the earlier case of Salini v. Morocco) the tribunal would ascertain whether the following elements were present: 1) a contribution of money or other assets of economic value, 2) a certain duration, 3) an element of risk, 4) a contribution to the host State’s development.

After reviewing the pipeline project in light of these criteria, the tribunal determined that Saipem’s Contract clearly constituted an “investment” for purposes of the ICSID Convention, thus clearing one potential jurisdictional hurdle to Saipem’s claim.

Notably, the tribunal rejected an objection by Bangladesh to the effect that the foreign investor had not brought capital from outside of the country to put into the pipeline project. The tribunal held that under the ICSID system, “investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant.”

Subsequently, the tribunal went on to find that Saipem’s contract rights also constituted an “investment” for purposes of the Italy-Bangladesh investment treaty. However, the tribunal declined to state an opinion as to whether the ICC arbitration award itself would be considered to be a covered investment under that investment treaty.

Bangladesh raised an additional jurisdictional argument: that the expropriation clause of the Italy-Bangladesh investment treaty expressly prohibits arbitration of expropriation claims in respect of “judgments or orders issued by Courts or Tribunals having jurisdiction”.

In Bangladesh’s view, the judgments of its Courts ought not form the basis for an expropriation claim by Saipem.

However, the tribunal rejected this reading of Article 5(1) of the relevant investment treaty, holding that it could not be read as “creating immunity in favour of the judiciary power.”

Ultimately, after rejecting the various jurisdictional objections of Bangladesh, the tribunal would hold that Saipem’s claims (if subsequently proven) set forth at least a prima facie case for breach of the investment treaty’s expropriation clause. As such, the tribunal held that it had jurisdiction to hear the claim on its merits.

Among the matters which may be determined at the merits phase are whether the Bangladesh courts breached the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the so-called New York Convention), as well as whether certain actions of Petrobangla are attributable to the Government of
Bangladesh as a matter of international law.

The ICSID tribunal also noted that it would consider at the merits phase an argument by Bangladesh that Saipem are basically asserting that they have suffered a denial of justice in Bangladesh – a claim which ordinarily requires that the claimant first exhaust its domestic legal remedies in order to bring such a claim before an international arbitration tribunal, such as the ICSID tribunal in this case.

Sources:


4. BIT claim against Vietnam settled on confidential terms,
By Luke Eric Peterson

A Dutch-Vietnamese businessman, Mr. Trinh Vinh Binh has settled his claim against the Vietnamese Government on confidential terms, bringing to an end an UNCITRAL arbitration which had been proceeding with little publicity under the Netherlands-Vietnam bilateral investment treaty.

Mr. Trinh had filed his claim in 2003 alleging that he and his extensive Vietnamese business interests had been subjected to a range of abuses at the hands of Vietnamese authorities.

Mr. Trinh held various real-property investments in Vietnam, including a food-processing operation, a garment factory and various tourism assets, in the early 1990s. His claim purportedly alleged that he suffered illegal detention, torture and abuse at the hands of state officials, as well as confiscation of assets amounting to more than $100 Million (US). Mr. Trinh had been convicted by Vietnamese courts of several criminal charges and had his assets seized – convictions which Mr. Trinh alleged to have resulted after a “show-trial” and state conduct which breached the terms of the Dutch-Vietnamese investment treaty.

Following an award rendered on March 14, 2007, the UNCITRAL proceeding, which was being administered by the Stockholm Arbitration Institute, was terminated at the request of the parties.

The case was heard by a tribunal consisting of C. Mark Baker, Brigitte Stern, and Kaj Hober. The law firm of King & Spalding handled the claim for Mr. Trinh, while the law firm Gide Loyrette Nouel represented Vietnam.
As is typically the case with UNCITRAL arbitrations, the documents and pleadings related to this arbitration claim are not a matter of public record. Brief snippets about the case have been reported on rare occasion in the media.

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**Briefly Noted:**
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5. Briefing paper analyzes intellectual property provisions in investment treaties,

A new briefing paper produced by the Geneva-based South Centre (a think-tank with some 48 developing country members) examines the impact of investment agreements on the rights, obligations and regulatory discretions of countries under the Agreement on Trade-Related Aspect of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO).

Source:


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