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Arbitration Watch:

1. British investor sues Malaysia over sunken treasure, pleadings posted by ICSID,
By Damon Vis-Dunbar

When lawyers filed their memorials on jurisdiction last month in the case of Malaysian Historical Salvors v. Malaysia – the first pleadings to ever be made publicly available by the International Centre for the Settlement of Investment Disputes (ICSID) - it was the latest chapter in a larger story that stretches back almost two centuries.

The dispute pits the British adventurer Dorian Ball against the Government of Malaysia, over the proceeds from nearly 24,000 pieces of ancient Chinese porcelain – treasure which sat at the bottom of the Strait of Malacca for 176 years, until it was salvaged by Mr. Ball in 1993.

Notably, both parties have consented to ICSID publishing their pleadings on jurisdiction: a precedent for the Centre.

Mr. Ball’s company, Malaysian Historical Salvors (MHS), claims that Malaysia failed to uphold the terms of their contract, in which it promised MHS 70 percent of the proceeds from the sale of the salvaged cargo. By allegedly breaking that contract, it is being argued that Malaysia also breached its obligations under the UK-Malaysia bilateral investment treaty.

The 18 tonnes of well-preserved blue and white plates, bowls and teacups, which sank with the wooden cargo ship *Diana* in 1817 as its four-person crew journeyed from China to India, was a valuable discovery.

Much of the porcelain was sold at auction in 1995 for \$3.4 Million US. MHS has received about 40 per cent of that, according to its memorial, while Malaysia has held onto some remaining items without offering any compensation.

MHS complains that its pleas to government officials have fallen on deaf ears, and numerous attempts to settle the dispute in domestic court and at a Malaysian arbitral tribunal were handled incompetently or dismissed out of hand.

For its part, Malaysia has argued that MHS was not an “approved project” as intended under the investment treaty, and therefore not eligible for its protection. The BIT covers “approved projects” by the “appropriate Ministry of Malaysia.” Although it is not made explicit in the treaty, Malaysia explains that the appropriate ministry is, in all cases, the Ministry of Trade and Industry. Investments seeking the BIT’s protection must therefore apply to this ministry before being deemed an “approved project.”

Malaysia has also challenged ICSID’s jurisdiction over the dispute on the grounds that MHS has failed to exhaust its options in the domestic courts – a condition allegedly imposed by the treaty before it allows for disputes to be submitted to international arbitration. While MHS takes pains in its pleadings to ICSID to describe its efforts to pursue local remedies, Malaysia holds that the company still had the ability to appeal the latest decision rendered by the local courts.

Additionally, Malaysia has questioned MHS’s status as a British company. At the time the contract with Malaysia was signed, three partners – Mr. Ball and two Americans, owned it in equal parts. Mr. Ball became a majority shareholder some nine months later.

Both parties raise the familiar, and thorny question of whether a tribunal constituted

under an investment treaty has jurisdiction over disputes which are rooted in alleged breaches of a contract. For its part, Malaysia denies that ICSID should have jurisdiction over the dispute – insisting that the dispute is contractual in nature, and that the relevant contract stipulates that all disputes should be dealt with according to Malaysian arbitration laws in Kuala Lumpur.

However, the investor has insisted that the UK-Malaysia BIT contains a so-called “umbrella clause”, elevating contractual obligations to the plane of international law, and rendering their breach, a breach of the treaty itself.

Each party having made arguments on jurisdiction, it ultimately turns to the tribunal’s sole arbitrator, Michael Hwang, a Singaporean-based barrister and arbitrator, to issue an award on jurisdiction.

Sources:

The texts of the pleadings on jurisdiction in *Malaysian Historical Salvors, SDN, BHD v. Malaysia* are available online by clicking [here](#).

“Salvaging: Sunken Treasure”, By Murray Hiebert, *Far Easter Economic Review*, August 12, 1999

2. UK farm group settles BIT claim over Venezuelan land seizures and invasions, By Luke Eric Peterson

A privately-held UK agricultural company has signed a settlement agreement with the Government of Venezuela which will see some of the firm’s Venezuelan landholdings ceded to the state, while others, which had been seized as part of Venezuela’s land reform efforts, will be returned to the investor.

The firm, Vestey Group Ltd., had lodged a claim against Venezuela under the UK-Venezuela bilateral investment treaty alleging expropriation and failure by the Venezuelan authorities to provide “full protection and security” to Vestey’s Venezuelan farms. The BIT claim was formally registered by the International Centre for Settlement of Investment Disputes (ICSID) on March 17th of this year.

The Vestey Group’s presence in Venezuela dates back almost a century, and the Group’s total landholdings amount to some 350,000 hectares. Following the introduction of a new land law in 2001, a so-called Land Institute was created to examine titles to landholdings and to assess whether lands were being used in a productive manner.

A number of Vestey farms were subsequently declared by the Land Institute to lack valid title, and were declared to be “unproductive” by state authorities – a declaration which was contested by the owners. In an effort to challenge these findings, and to stave off squatting by landless Venezuelans, Vestey’s local subsidiary Agroflora turned to local

courts. At the same time, the Parent firm lodged its international arbitration claim with the Washington-based ICSID facility.

However, it now appears unlikely that that arbitration claim will proceed should the two sides implement the terms of their settlement agreement. Under the terms of that agreement Venezuela will pay compensation to the Vestey Group for one 13,000 acre farm, while the UK company will donate another 42,000 acre farm to the Venezuelan government.

Local press reports indicate that the two farms will be turned into state-financed cooperatives as part of the Government's drive to encourage broader ownership and exploitation of agricultural lands. At the same time, the Venezuelan Government has reportedly undertaken to reexamine earlier administrative proceedings and decisions, which had declared certain of Vestey's landholdings to be invalid and unproductive – decisions which the British firm says were unfounded.

3. Venezuela signs contentious new contracts with foreign oil companies, By Damon Vis-Dunbar

Venezuela has convinced all but four foreign oil companies to sign new joint-venture contracts, giving the state-owned energy company PDVSA a majority stake in the country's oil fields and stipulating that all disputes that arise in the future must be settled in domestic courts.

Among the four companies that balked, the government has reclaimed two oil fields run by the French Total SA and the Italian ENI SpA. Earlier this year, Exxon Mobile Corp and Norway's Statoil ASA also rejected the contracts, and have since sold their stakes in Venezuela.

Prior to accepting new contracts, a number of foreign oil companies raised the possibility of taking Venezuela to international arbitration for breaches of their contracts or international investment agreements.

So far, however, it appears that outcome has been avoided. Energy Minister Rafael Ramirez said that Venezuela would now begin negotiating with Eni and Total over compensation for their investments. It appears both companies are waiting to see what comes out of these talks.

In a statement, Eni said: "this action is a violation of contract rights. It is Eni's intention to offer PDVSA a period of time in which full reparation of Eni's contract rights can be agreed. In the event that an agreement cannot be reached, Eni will pursue legal action to claim its rights."

Total has been more tempered in its response, saying only that it is considering its options.

The new deals, approved by Venezuela's national assembly earlier this month, are being celebrated by the Hugo Chavez administration, which has long held that the original contracts were unconstitutional.

Indeed, the conditions under which foreign oil companies operate in Venezuela have been altered significantly. Under the agreements signed in the 1990's by an administration eager to attract foreign investment, oil companies were granted attractive fee-based contracts. Those have now been changed to equity agreements in which the government holds a majority stake.

Oil companies will find their profits diminished, but with prices high, Venezuelan oil remains lucrative enough for the majority of foreign investors in the country.

While the original operating agreements allowed for international arbitration in their dispute resolution clauses, the new agreements stipulate that all disputes between the foreign oil companies and the government be settled in domestic court, according to the PDVSA. This is a provision that oil companies had resisted.

However, as reported earlier in Investment Treaty News, it remains in question whether the dispute resolution clauses in these new contracts would also preclude arbitration under international investment treaties, of which Venezuela has signed at least 25.

Sources:

"Venezuela dodges arbitration with oil companies; pursues new contracts to preclude arbitration of future disputes", by Damon Vis-Dunbar, Investment Treaty News, January 12, 2006

"PDVSA takes back oil fields run by ENI, Total", By Brian Ellsworth, Reuters, April 3, 2006

"Politics and Economics: Oil keeps Chavez fighting", By David Luhnow and Jose De Cordoba, The Wall Street Journal, April 6, 2006

4. Tribunal chosen in German firm's UNCITRAL arbitration with Thailand,
By Luke Eric Peterson

An arbitral tribunal has been appointed in a bilateral investment treaty arbitration between the German construction firm Walter Bau and the government of Thailand.

The arbitration, which is governed by the UNCITRAL rules of arbitration, will be arbitrated by a tribunal consisting of Dr Suvarn Valaisathien, Sir Ian Barker (Chair), a retired Judge of the New Zealand High Court, and Marc Lalonde.

Mr. Lalonde, a former Canadian Cabinet Minister, is a particularly well-known arbitrator of investment treaty disputes, having presided over a number of prominent cases, including CMS v. Argentine Republic (the first case to see a ruling on the merits of a BIT claim arising out of the Argentine financial crisis), as well as other BIT arbitrations involving Argentina, Chile, the Democratic Republic of Congo, Lithuania and Kazakhstan.

The German firm Walter Bau is a 10% shareholder in the Don Muang Tollway Co., a company which holds a 25 year concession to construct and operate a toll highway in Bangkok.

For several years, the firm has been embroiled in disputes with the Thai Government over the tolls to be charged on the tollway, as well as arguments over the two party's performance of contractual obligations.

Business Week magazine has reported that the company's arbitration against Thailand is for some \$100 Million US in unpaid construction bills.

Details of the arbitration claim have not been released publicly.

5. Tribunal chosen in TV broadcaster's UNCITRAL arbitration with Czech Rep, By Luke Eric Peterson

An arbitration tribunal has been selected to resolve a dispute between a Luxembourg-based company and the Czech Republic.

European Media Ventures (EMV) alleges that the Czech Republic has breached its obligations under the Czech-Belgium & Luxembourg bilateral investment treaty, by virtue of the failure of the Government's broadcasting regulator to permit a transfer of a television license from a Czech businessman to EMV's Czech subsidiary.

EMV reportedly sought to obtain control of the TV broadcasting license before it would commit to further investments in the Czech TV market. However, following the refusal by the Czech Radio and Television Broadcasting Council, the Luxembourg firm is seeking to recoup compensation for its initial investments in the Czech television sector.

The dispute has been billed in the Czech press as a repeat of an earlier dispute involving the US businessman Ronald Lauder, his Dutch-based firm Central Media Enterprise (CME) and the Czech Government.

The Lauder/CME dispute, saw the Czech Government lose one of two arbitrations over the matter, leading to a damages award of some \$350 Million (US).

The stakes in the EMV dispute are reportedly smaller, with media reports suggesting that

the investor seeks at least \$45 Million (US) for its sunk costs.

ITN can reveal that the arbitrators chosen to resolve the dispute are:
Prof. Christopher Greenwood QC, Mr. Julian Lew QC, and Lord Mustill.

Lord Mustill chairs the tribunal, and has served as arbitrator in an earlier closely-watched arbitration under the North American Free Trade Agreement, *Loewen v. United States*.

Prof. Greenwood is Professor of International Law at the London School of Economics, and also serves as arbitrator in the NAFTA arbitration, *Corn Products International v. Mexico*. Recently, he acted for the Occidental Exploration and Petroleum Company in the English High Court, in an action by the Republic of Ecuador to overturn an arbitral award rendered in favor of Occidental.

Mr. Lew is currently serving as arbitrator in an ICSID arbitration under the Norway-Lithuania BIT, *Parkerings-Compagniet AS v. Republic of Lithuania*, a dispute over a parking concession privatization.

Negotiation Watch:

6. Japan-Malaysia ink investment rules – arbitrations may go to Kuala Lumpur Centre,
By Luke Eric Peterson

The Governments of Japan and Malaysia finalized an Economic Partnership Agreement in December of 2005. The Agreement is expected to enter into force later this spring, and boasts extensive investment liberalization and protection standards.

Among the investment liberalizing features of the agreement are obligations to provide foreign investors with National Treatment at the so-called establishment or acquisition stage - effectively putting foreign investors on the same footing as investors hailing from inside the host country, when it comes to the right to acquire or creating new investments within that country.

The rights to National Treatment with respect to matters of establishment and acquisition are not open-ended however, and are subject to a series of exceptions which are spelled out in a detailed annex to the agreement.

The Japan-Malaysia EPA is also notable for offering highly-detailed definitions for “investments” covered under the treaty, as well as what constitutes “ownership”, “control” and “portfolio investments” under the agreement. Such questions have proven controversial in certain investment treaty arbitrations, which may explain the move to provide arbitrators with greater guidance in this regard.

With respect “portfolio investments” – which include shares, stocks or other trade securities which account for less than 10% of the total capital of a given enterprise – the new agreement explicitly excludes such portfolio investments from protection of the National Treatment obligation.

In terms of limiting the ability of host states to impose certain performance requirements on foreign investors, the agreement incorporates the provisions of the World Trade Organization Trade Related Investment Measures (TRIMs) agreement, and commits the countries to further discussions about prohibiting other performance requirements. In this respect, the agreement does not go as far as other recent Japanese EPAs - including a 2002 agreement with Singapore which banned the use of a long list of performance requirements – no doubt reflecting the desire of Malaysia to retain greater latitude to impose certain requirements on foreign investors.

The agreement provides foreign investors with access to international arbitration in case of disputes under the investment chapter, however claims for alleged breach of the agreement’s provisions on National Treatment or performance requirements are forbidden – thus foreclosing, in particular, investor-state claims alleging breach of the WTO TRIMS agreement standards which have been incorporated into the Japan-Malaysia agreement.

In a notable twist, the agreement’s investor-state dispute settlement mechanism offers arbitration not only under the commonly-used ICSID and UNCITRAL rules, but also under the rules of the Kuala Lumpur Regional Centre for Arbitration – thus opening up another commercial arbitration venue to handle certain investment treaty-based arbitrations. A number of earlier Malaysian investment treaties, including ones with regional parties such as Indonesia, Korea, Vietnam and Cambodia, do not refer arbitrations to the Kuala Lumpur Centre.

Sources:

Agreement Between the Government of Japan and the Government of Malaysia for an Economic Partnership, December 2005, available online by clicking [here](#).

Briefly Noted:

7. Investment Treaty News seeks intern to work as reporter-researcher in Geneva office

The International Institute for Sustainable Development (IISD) is seeking an intern to work out of IISD’s Geneva, Switzerland office for a 6 month period commencing August 2006.

The successful candidate will serve as a reporter-researcher for Investment Treaty News (ITN). ITN tracks the negotiation of international treaties governing foreign direct investment, as well as lawsuits between businesses and governments arising under such treaties.

The position is a paid internship, and the prospects for post-internship work and consulting opportunities are significant. Applicants must be Canadian citizens or permanent residents and under 30 years of age at the time of taking up the internship. Candidates should have strong language skills, encompassing not only English, but additional languages as well. A background in journalism, law, or international affairs, while not essential, is strongly desired.

Further information about the internship, along with application information, will be posted on-line shortly at: http://www.iisd.org/interns/apply_positions.asp . Specific queries about the position can also be directed to Luke Eric Peterson at lpeterson@iisd.ca

8. DC event on Regulatory Powers and Property Rights: Tension in Latin America
The District of Columbia Bar Association is holding a public lunchtime discussion on April 19th regarding the imposition of new conditions upon foreign investors by Latin American Governments, including licensing requirements, environmental restrictions, and taxes. According to the promotional materials: “This lively talk program addresses the most common such obstacles being encountered by oil and gas, and real estate investors in Latin America these days, and the types of insurance and other protections and remedies that are available.”

For more information search the website of the DC Bar Association:
http://www.dcbar.org/for_lawyers/events/index.cfm

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