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Arbitration Watch:

1. Argentina liable for \$100+ Million after expropriating Vivendi water concession, By Luke Eric Peterson

An arbitral tribunal at the International Centre for Settlement of Investment Disputes (ICSID), in a ruling dated August 20, has found Argentina liable for expropriating a water and sewage concession majority-owned by the French firm Vivendi Universal S.A.

Argentina has been ordered to pay \$105 Million USD (plus interest) in compensation to the French firm and its consortium partner Compania de Aguas Del Aconquija S.A. (CAA), after being found in breach of the France-Argentina bilateral investment treaty.

BACKGROUND TO THE ICSID ARBITRATION

The dispute has been one of the longest-running investor-state arbitrations at ICSID, with the claimants first filing for arbitration in late 1996.

As has been extensively chronicled* in ITN, Argentina prevailed on the merits in a first round of arbitration over the dispute; however, this ruling was subsequently overturned by an ICSID annulment committee which held that the original tribunal “exceeded its powers” by declining to rule on alleged treaty breaches which were closely intertwined with alleged contract breaches.

The original tribunal had reasoned that contractual breaches were – by the terms of the contract – reserved to the exclusive jurisdiction of the Argentine courts, and that alleged breaches of the France-Argentina BIT could not be disentangled from those alleged contract breaches. The first port of call for the claimants, in view of the original tribunal, ought to have been the contractually-prescribed forum: the Administrative courts of Argentina’s Tucuman province.

However, an ICSID annulment committee subsequently annulled this ruling by the arbitral tribunal; the annulment committee held that the tribunal should have grappled with the concession contract in question, at least insofar as was necessary to determine whether Argentina had committed breaches of the relevant international treaty.

Thus, following annulment of original arbitration ruling , Vivendi filed a new arbitration claim at ICSID in 2003.

Some four years later, the tribunal hearing that resubmitted claim has issued its final award, holding Argentina liable for several breaches of the France-Argentina BIT.

BACKGROUND TO THE INVESTMENT DISPUTE

In the mid-1990s, during a period of aggressive liberalization and privatization in Argentina, the province of Tucuman moved to privatize its water and sewage services.

A consortium led by Vivendi acquired a 30 year concession which contemplated sharp tariff increases (i.e. the prices charged to households for water and sewage services), as well as ambitious targets for collection of water payments from customers (which under state ownership had been lackluster).

As with a number of other investor-state disputes which have arisen in recent years, there was strong criticism of the privatization from members of the political opposition. Indeed, the privatization would become – in the tribunal’s words – “something of a political flashpoint” in a 1995 provincial election which swept to power critics of the deal.

At the crux of its treaty claim, Vivendi contended that the investment environment became progressively more hostile following the concessionaire's implementation of contractually-mandated increases in water-prices. Various politicians and officials denounced the concession operators, as water bills for many customers (save for low-income households) doubled in the face of price-increases and new taxes.

What was largely undisputed between the parties was that Vivendi found itself in a public relations nightmare as the increase in customer water charges were accompanied by several incidents of turbidity and discoloration in the water supply, leading to public alarm over the cost and safety of the water provided.

However, Vivendi alleged that regulators abused their powers by unilaterally lowering tariffs – contrary to the Concession Agreement - and by imposing other illegal fines upon the local concessionaire.

By contrast, Argentina insisted that provincial officials had responded in legitimate fashion in the face of skyrocketing charges for an essential service such as water. Argentina also maintained that the investor was liable for serious deficiencies in the quality of water delivered to Tucuman households. Argentina couched its arguments before the ICSID tribunal in terms of the province's "right and responsibility to take the requisite steps to ensure the availability of safe drinking water for its population on an affordable and accessible basis".

Throughout 1995 and into 1996, relations between the concessionaire and authorities worsened, and the parties ultimately entered into several protracted efforts to renegotiate the concession – with Vivendi claiming to have done so under duress – in the hopes of easing political pressure on Vivendi and reducing the cost of water services for customers.

These efforts all proved unsuccessful, at the same time as the concessionaire faced ever-dwindling success in collecting on water payments from Tucuman households. In the third quarter of 1997, the concessionaire moved to formally rescind the concession, a move which was rebuffed by the Tucuman Government, who, in turn, moved to terminate the concession themselves on the grounds that the concessionaire had repeatedly violated its obligations under that agreement.

Ultimately, it was left to the ICSID tribunal to determine whether Argentine authorities had acted – as they suggested – in a "reasonable and proportionate" manner in the face of the concessionaires failure to provide potable water and to live up to its contractual obligations. For its part, Vivendi insisted that it had fallen prey to a politically-motivated "parody of regulation"

"ILLEGITIMATE" ACTIONS OF PROVINCE ARE UNFAIR AND INEQUITABLE

Ultimately, the dispute was to be resolved by a three-member ICSID tribunal consisting of Mexican Professor Carlos Bernal Vereza, nominated by Argentina, Swiss Prof. Gabrielle Kauffmann-Kohler, nominated by Vivendi, and tribunal President J. William Rowley, an arbitrator and Chairman of the Canadian law firm McMillan Binch Mendelsohn.

In their final award, the tribunal determined that Argentina was liable for breaching its treaty obligation to provide “fair and equitable treatment” to Vivendi and its consortium partner CAA.

Notably, the tribunal found that the incoming government of Antonio Domingo Bussi, “improperly and without justification, mounted an illegitimate ‘campaign’ against the concession, the Concession Agreement, and the ‘foreign’ concessionaire from the moment it took office, aimed either at reversing the privatization or forcing the concessionaire to renegotiate (and lower) CAA’s tariffs.”

A newly-elected government could have sought renegotiation of the concession in a “transparent non-coercive manner”, the tribunal opined, without resorting to threats and illegal regulatory incursions upon the concession. The tribunal added that the fair and equitable treatment standard imposed upon the government “an obligation not to disparage and undercut a concession (a ‘do no harm’ standard) that has properly been granted, albeit by a predecessor government, based on falsities and motivated by a desire to rescind or force renegotiation.”

Various instances where provincial officials denied fair and equitable treatment were identified by the tribunal, including with respect to actions taken in response to instances of water turbidity and discoloration. Indeed, the tribunal criticized the provincial Minister of Health for acting irresponsibly and in an inflammatory manner, so as to fan the flames in relation to (non-existent) public health threats.

In addition to breaches of the treaty’s fair and equitable treatment standard, the tribunal also held Argentina in breach of the “protection and full security” standard. In legal terms, the tribunal took an expansive view of this provision, holding that it imposed not merely a duty for host states to provide for physical (for e.g. reasonable police protection) of foreign investments, but that it also provides protection against harassment which would impair the normal functioning of an investor’s business.

In reaching this conclusion, the tribunal noted several earlier arbitral rulings which had taken a similarly expansive interpretation of this treaty obligation; among these was the 2006 *Azurix v. Argentina* award and the 2001 *CME v. Czech Republic* award, which had been co-authored by Judge Stephen Schwebel (counsel for Vivendi in the present arbitration).

ARGENTINA ALSO LIABLE FOR EXPROPRIATION OF CONTRACT RIGHTS

After determining that contractual rights were protected investments under the France-Argentina BIT, the tribunal would go on to hold that Argentina was liable for expropriating those rights. In so doing, the tribunal rejected Argentina’s plea that an act of state must be presumed to be regulatory, absent proof of bad faith. On the contrary, the tribunal held that there was no need to show that the state intended to interfere with the property rights in question, in order for a finding of expropriation to be upheld. What’s more, in this case, the tribunal was of the view that the authorities intended to end the water services concession and to force a renegotiation.

In sum, the tribunal held that Argentina was liable for illegitimate actions by the province which had “struck at the economic heart of, and crippled, claimants’ investment”. In the tribunal’s

view, the claimants suffered no mere incidental interference with their contractual rights; rather, they were “radically deprived of the economic use and enjoyment” of those rights.

Thus, it was left to determine what compensation would be owing to the claimants. In its pleadings, Vivendi sought more than \$300 Million, the preponderance of which represented future lost profits related to the 30 year concession.

In order to award future lost profits, the tribunal held that they must be “sufficiently established”, either through evidence of a going concern, or through the presentation of sufficient evidence of the claimant’s expertise and proven record of profitability of concessions it (or indeed others) had operated in similar circumstances.

Ultimately, the claimants could not meet this test. The tribunal noted that the claimants faced significant business challenges in the Tucuman province, even if one set to one side the behaviour of the host government. Under the circumstances, the tribunal concluded that the claimant had not proven the future profitability of the concession.

Thus, the tribunal opted for an alternative approach to valuation: by examining the actual investments made by the claimants. Ultimately, it was established that the claimants had sunk some \$105 Million (US) into the venture, for which they ought to be compensated.

Finally, the tribunal in ruling on the costs of the proceedings, held Argentina liable for the legal costs of the claimants during the jurisdictional phase – a phase during which the tribunal held Argentina to have raised various inappropriate jurisdictional objections. However, the tribunal instructed both parties to bear their own legal costs – and the costs of the tribunal – for the merits phase.

Under the ICSID arbitration rules, Argentina has 120 days in which it might seek annulment of the award. Thus far, Argentina has pursued the annulment of several other ICSID awards rendered against it, including in relation to another water services dispute with the US-based Azurix Corporation. (Earlier ITN reporting on the Azurix case is available on-line here: http://www.iisd.org/pdf/2006/itn_july26_2006.pdf)

Recently, ICSID constituted a three-person annulment committee – consisting of Gavan Griffith, Bola Ajibola, and Michael Hwang – to review Argentina’s request for annulment of the Azurix award.

Sources:

A copy of the final award in the Vivendi v. Argentina award is available on-line at: <http://ita.law.uvic.ca/documents/VivendiAwardEnglish.pdf>

Previous ITN reporting on the Vivendi v. Argentina case:

(*“Vivendi will resubmit Argentine water claim, following recent ICSID decision”, By Luke Eric Peterson, August 1, 2003, available on-line at:
http://www.iisd.org/pdf/2003/investment_investsd_aug1_2003.pdf)

2. Divided ICSID panel declines jurisdiction over Philippines airport terminal case, By Luke Eric Peterson

A majority of a three-member panel of ICSID arbitrators has declined jurisdiction over an arbitration brought against the Philippines by the German airport operator Fraport.

In a ruling dated August 16, 2007, the majority held that Fraport had violated Philippine law through the use of a secret scheme to exert managerial control over a Philippines corporation, PIATCO.

As a consequence, the tribunal went on to hold that Fraport had not made an investment in accordance with the laws of the Philippines – a prerequisite to protection under the Germany-Philippines BIT.

The arbitral ruling is the latest development in a series of litigation and arbitration which is taking place in a variety of forums.

Fraport entered the Philippines in 1999, when it initiated what would become a series of direct and indirect investments in PIATCO, a Philippines company which held a recently-negotiated concession to construct and operate an international terminal at the Manila airport. Over time, the “Terminal 3 concession” became the subject of domestic discontent - with local businesses and unions decrying its implications - as well as a legal hot potato, as questions swirled as to the legality of the concession and related agreements.

Initially, the administration of President Gloria Macapagal-Arroyo sought renegotiation of the contracts, which had been negotiated by a predecessor administration. However, by late 2002, the Government had announced that the contracts were considered null and void; President Arroyo added that the PIATCO concession was a “test-case” of her administration’s “commitment to fight corruption”.

Subsequently, the Philippines Supreme court would also determine the contracts to be null and void, citing deficiencies in the process by which they had been awarded. Meanwhile, the Government had moved to initiate formal expropriation of the (by now) largely completed Terminal 3. An expropriation process is still playing itself out in the Philippines and the Government has maintained that it will pay compensation for losses suffered by investors.

In the mean time, both Fraport and PIATCO have turned to international arbitration against the Philippine state; with Fraport launching an ICSID claim and PIATCO opting for contractual arbitration under the rules of the International Chamber of Commerce (ICC).

Fraport's ICSID claim was registered by the Centre in 2003, and the parties devoted significant time to the jurisdictional phase of the proceedings.

In its defence, the Philippines Government contended that the ICSID tribunal convened to hear the dispute lacked jurisdiction over the claim. In particular, the Government pointed to several express provisions of the Germany-Philippines BIT which were said to limit the treaty's coverage to those investments which had been made in accordance with the laws of the host state. Indeed, the Government insisted that the BIT imposed an "ongoing duty" upon foreign investors to comply with the host state's law while carrying out investments.

Ultimately, a majority of the tribunal, consisting of the Philippines' appointee, Yale University Professor Michael W. Reisman, and tribunal President, L. Yves Fortier, chairman of the Canadian law firm Ogilvy Renault, would concur with the Government that the BIT should be read as imposing certain domestic legal requirements in order for economic transactions to be considered as "investments" under the treaty.

In an aside, however, the majority noted that it would not go so far as to conclude that this requirement was an ongoing one. The requirement (that investments be made in accordance with the laws of the host state) pertained to the entry of investments into the host country, and in this respect was a prerequisite to jurisdiction under the treaty. The separate question as to whether investments later failed to comply with the laws of the host state was, in the majority's view, a matter to be addressed at the merits phase of an arbitration. (For example, a Government might seek to defend itself against substantive claims of treaty-breach, by raising the fact of a foreign investor's non-compliance with domestic laws).

Having concluded that a German investor would need to have made its investments in accordance with the laws of the Philippines, the majority then examined whether Fraport had done so in the instant case.

Here, the majority would determine that Fraport, while barred by provisions of Philippines law from taking managerial control of the investment, had embarked upon an effort to ensure managerial control over the Terminal 3 Concession. Heretofore secret documents tabled in the ICSID arbitration revealed to the satisfaction of two of the three arbitrators that the German company "was consciously, intentionally and covertly structuring its investment in a way which it knew to be in violation of" the so-called Anti-Dummy Law – which was designed to prohibit foreign management or control of certain Philippines companies.

Accordingly, the majority would go on to determine that it lacked jurisdiction over Fraport's ICSID claim. In a coda to its jurisdictional ruling, the majority added a comment on policy considerations:

"... BITs oblige governments to conduct their relations with foreign investors in a transparent fashion. Some reciprocal if not identical obligations lie on the foreign investor. One of those is the obligation to make the investment in accordance with the host state's law. It is arguable that even an investment which is not made in accordance with the host state law may import economic value to the host state. But that is not the only goal of this sector of international law.

Respect for the integrity of the law of the host state is also a critical part of development and a concern of international investment law.”

DISSENTER SEES NO ILLEGALITY WHICH WOULD IMPEDE JURISDICTION

In a vigorous dissent, Bernardo M. Cremades, the arbitral appointee of Fraport, expressed the view that the tribunal should have upheld jurisdiction over the dispute.

Dr. Cremades, managing partner of a Madrid law firm, maintains that Fraport had made investments that warranted protection under the treaty, namely shareholdings in PIATCO and other Philippine corporations.

“The fact that Claimant’s asset may have engaged in illegal conduct in the Philippines (allegedly, a breach of the Anti-Dummy Law) does not change the fact that its shareholdings are an asset accepted in accordance with Philippine law.”

Dr. Cremades hastened to add, however, that: “Illegal conduct by the investor might well excuse or limit any liability of the State Party in an arbitration pursuant to the BIT, depending on the circumstances.” Nonetheless, in his view, such considerations are best left to the merits phase of an arbitration. Accordingly, Dr. Cremades criticizes the majority ruling – contending that it “does violence to the object and purpose of promoting and protecting investment in the Philippines.” Indeed, he would later go so far as to add that the majority’s decision has the effect of leaving the host state “secure and immune in a gross violation of a Bilateral Investment Treaty”.

As for the alleged violation of the Anti-Dummy Law, based on Dr. Cremades’ own interpretation of that law, Fraport had not committed a violation. The mere execution of the so-called secret shareholders agreements was not enough in his view; Dr. Cremades adds that Fraport never followed through and exercised illegal managerial control over PIATCO.

What’s more, Dr. Cremades also notes that the terms of the Anti Dummy Law – which Fraport was alleged to have violated – expressly require that the alleged dummy corporation must hold a public utility franchise (which is the ultimate subject of illegal control by a foreign entity). However, given that the PIATCO concession had been determined by the Philippines to be null and void, Dr. Cremades questions whether there was, in fact, a public utility franchise – something which ought to have been necessary in order to make out a case that the Anti Dummy Law (ADL) had been breached.

In a striking comment, Dr. Cremades goes so far as to hint that a tribunal manifestly exceeds its powers – grounds for annulment under the ICSID system – if it ignores its obligation to apply Philippine law to the interpretation of the ADL. On his view, Philippines law was clear as to the nullity of the PIATCO concession, which ought to have undermined any subsequent allegations of ADL violations in this context.

Currently, it remains unknown whether Fraport will seek annulment of the majority ruling in this case; the claimant has 120 days under ICSID rules in which to file a request for annulment.

Meanwhile, a parallel commercial arbitration brought by PIATCO against the Philippines remains pending under the rules of the International Chamber of Commerce (ICC). Hearings in that case are slated for later this autumn.

As a rule, ICC arbitrations tend to be less transparent than ICSID arbitrations, so it remains unknown to what extent information about that case will come to public light.

3. Majority declines jurisdiction over Spanish investor's fishing claim against Chile, By Fernando Cabrera Diaz

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has held by a two-to-one margin that it does not have jurisdiction to hear a dispute over fishing rights brought by Spanish group Sociedad Anonima Ediardo Vieira (Vieira) against the Republic of Chile.

The majority determined that the disputes cited by the claimant pre-dated the coming into force of the Chile-Spain Bilateral Investment Treaty (BIT).

The claimant bought a 49% share in a Chilean fishing company, CONCAR, in December of 1990. Prior to that purchase, CONCAR had obtained authorization - pursuant to so-called Resolution 291 - to operate two fishing boats in "internal" waters south of the 47° parallel. However, CONCAR was unsuccessful in obtaining further approval to fish in "external" waters, further off the Chilean coast; a demand which Chile's Department of Fisheries formally rejected in September of 1990.

In the months following that ruling, Vieira took a 49% stake in CONCAR.

Over the subsequent decade, CONCAR repeatedly sought to modify the terms of Resolution 291 - which had denied the firm rights to fish in external waters. CONCAR maintained that the denial had been erroneous and illegal. However, Chile sought to justify the move on economic and ecological grounds, including the need to control over-fishing of the Patagonian toothfish (or Chilean sea bass as the fish is marketed in some countries).

In January 2001, CONCOR succeeded in convincing the General Controller of Chile that Resolution 291 had been enacted illegally. Consequently, the Department of Fisheries enacted Resolution 371, which granted CONCOR authority to fish in Chile's external waters.

However, fishing quotas were at this stage to be determined by reference to catches in those waters during the previous 2 years. As a result, CONCAR was awarded a "0" fishing quota for 2001.

Moreover, later that year, Resolution 371 was declared invalid by Chilean courts, thus withdrawing CONCAR's authorization to fish in external waters.

While CONCAR was ultimately awarded an authorization and quota to fish in external waters in 2002, thanks to the terms of a legislative change, by this point, the Spanish claimant felt that its investments in CONCAR had been sufficiently harmed by Chile's actions that it should turn to ICSID arbitration.

The claimant alleged that the Chilean Government had violated several guarantees owed to it under the Chile-Spain BIT, including promises of just and equitable treatment, national treatment, and most-favoured nation treatment. Vieira also alleged that it had suffered an indirect expropriation of its investment and future profits.

Chile, for its part, countered that the ICSID tribunal lacked jurisdiction to hear the dispute on the grounds that the "real cause" of the dispute had been Resolution 291 which was passed several years before the Chile-Spain BIT came into force in 1994.

Chile argued that the differences arose – at their latest - in September of 1990 when Chile's Department of Fisheries first rejected CONCAR's petition to have its fishing authorization extended to external waters.

Meanwhile, the claimant argued that the events that took place before the BIT's entry into force were merely requests for the extension of its existing (interior) fishing authorization and didn't imply the existence of a dispute as defined under the Spain-Chile treaty.

Rather, for the claimant, the "real causes" of its disputes with Chile were the 1997 refusal by the Ministry of the Economy to alter Resolution 291; the fishing quota of zero which was received in 2001; and the conduct of the Chilean authorities in 2001 in relation to the Chilean courts' invalidation of Resolution 371 (which had, at least for a time, granted external waters fishing authorization).

Ultimately, a majority of the tribunal would endorse the approach taken in a previous ICSID arbitration, *Lucchetti v. Peru*, - which also hinged on jurisdictional arguments related to the timing of the disputes in question. The majority held that a dispute had already arisen between the Vieira and Chile, with respect to Chile's refusal to grant the claimant authority to fish external waters, prior to the Spain-Chile BIT's entry into force in 1994.

Notably, the majority, consisting of Prof. Michael W. Reisman, Chile's arbitral appointee, and tribunal President Dr. Clause von Wobeser, emphasized that both parties to the ICSID arbitration had, prior to 1994, expressed to each other their conflicting opinions on a clearly-defined legal disagreement as to whether CONCAR had the right to fish in Chile's external waters.

Ultimately, the tribunal ruled that three grievances cited by the claimant were, in fact, part of the same long-running dispute.

The remaining arbitrator, Susana B. Czar de Zalduendo, who had been appointed to the tribunal by the claimants, issued a dissenting opinion, wherein she held that the tribunal had jurisdiction over several of Vieira's claims. In her view, the quota of zero which had been assigned to the claimants in 2001, as well the behavior of Chilean authorities in relation to the Chilean Courts'

invalidation of Resolution 371, created new and separate disputes which fell within the tribunal's jurisdiction.

For Ms. Czar de Zalduendo the fact that Resolution 291 had been withdrawn when the quota of zero was issued by Chilean authorities served as evidence that the disagreement over the quota constituted a new dispute between the claimant and respondent. "With the disappearance of the denial to fish in certain zones, it is difficult to sustain that that denial continued being central in respect to the quota..." she reasoned.

Similarly, Ms. Czar de Zalduendo reasoned that the behavior of Chilean officials with respect to the invalidation of Resolution 371 – which occurred after Resolution 291 had been withdrawn – also constituted a new dispute arising between the parties in the period after which the Spain-Chile treaty had come into force.

A Spanish-language version of the jurisdictional decision is available on-line:

<http://www.investmentclaims.com/decisions/SAEV-Chile-Award.pdf>

4. Greek construction company takes Albania to ICSID over Pyramids' crisis, By Fernando Cabrera Diaz

Greek construction company Pantechniki S.A. has filed an arbitration claim against the Republic of Albania for failing to protect its property during the so called Pyramids' crisis. During this period of crisis, mobs of Albanians looted and destroyed property throughout the Balkan country in response to heavy financial losses they incurred following the collapse of pyramid schemes in which many Albanians had invested.

The claim, filed at the World Bank's International Centre for Settlement of Investment Disputes (ICSID), seeks at least \$1.8 million US as compensation for Albania's alleged failure to protect the claimant's property during the Pyramids' crisis and its subsequent failure to live up to alleged commitments to pay compensation. According to the claimant these failures amount to violations of Albania's obligations to provide it with full protection and security, fair and equitable treatment, and most favoured nation treatment owed under the Albania-Greece Bilateral Investment Treaty (BIT).

The Pyramid scheme crisis befell Albania when a dozen large pyramid schemes collapsed in early 1997. These pyramid schemes had sprung up with the fall of communism in the early 1990s when Albania enjoyed a rapid growth in economic activity and domestic savings. A new and inexperienced group of moneyed individuals became an easy target for swindlers.

The result was the growth of a series of pyramid schemes which offered investors 20 to 30 percent interest monthly, amounts impossible to earn under normal circumstances. Pyramid managers paid these large sums using the investments made by new entrants into the schemes. (Pyramid schemes take their name from the fact that the bottom layer of deposits (from new investors) must be bigger than previous layers in order to support the scheme's high interest payments paid to earlier investors).

Eventually, as with most pyramid schemes the bottom layers of investors was not able to grow fast enough to keep up with payments and 12 out of the 16 major operations in Albania collapsed in early 1997. By then, Albanians had invested an estimated \$1.2 billion US, or almost half of the country's GDP. The result of the pyramid scheme collapse was an economic crisis that sent people rioting in the streets, brought down the government and plunged the country into a state of anarchy.

Pantehniki's relationship to these events stems from its 2002 merger with fellow Greek construction company C. I. Sarantopoulos S.A. That company had won an international tender in 1994 to build 10 bridges in Albania with financing provided by the World Bank.

According to the claimant, the construction of the bridges was proceeding normally until the Pyramids' crisis and subsequent riots in March of 1997 forced it to evacuate its personnel from its work site in Bushtriza. The evacuation left the site unguarded and armed bands stole everything from construction materials, to equipment and machinery.

After the crisis, the claimant alleges that a World Bank appointed Supervisor Engineer* recognized its right to terminate the project and to receive compensation, which the supervisor evaluated at \$3,123,199 US. That sum was later lowered to \$1,821,796 US by a commission created by the same Supervisor Engineer, and the General Road Directorate of the Albanian Ministry of Public Works and Transport.

According to the claimant, it reluctantly accepted the lower amount in order to resolve the dispute in an amicable manner, and so as to preserve other commercial relationships including another pending project in Albania. Moreover, the claimant contends that it was promised quick payment by Albanian officials. The claimant alleges that despite these Government assurances, no compensation has been forthcoming.

At press time, the Albanian Embassy in Washington, DC, had not returned a request for comment.

(*It was common practice during this time for international construction contracts, particularly for projects funded by the World Bank, to include a controlling entity which disbursed money and supervised the construction. Sometimes this entity, in this case the Supervisor Engineer, is asked to settle disputes between the parties before they resort to arbitration.)

Sources:

ITN Reporting

Albania under the Shadow of the Pyramids, by Carlos Elbirt, Transition Newsletter, World Bank, available online at: <http://www.worldbank.org/html/prddr/trans/so97/albania2.htm>

5. Failed hotel deal in the Ukraine leads to ICSID arbitration, By Damon Vis-Dunbar

The Ukraine has been hit with suit by an Austrian company that invested in a state-owned hotel in Kiev in the mid-nineties.

Alpha Projekt Holding, the Austrian company, claims that it entered into a contract with the Ukrainian government to modernize a hotel, pouring over 3.5 million US into the project, and was later stripped of its investment when the government turned the hotel in a public corporation in 2003.

“In the course of corporatization, by way of acts and decisions of authorities of the Ukraine, assets co-owned by Alpha were ruled to constitute state property,” said counsel for the company, Andreas Weikhart of the law firm Specht Rechtsanwalt GmbH.

A spokesperson at the Ukrainian Embassy directed inquiries about the dispute to Ukraine’s Ministry of Justice. A representative of the Department was unavailable for comment at press time.

The International Centre for the Settlement of Investment Disputes (ICSID) registered the claim in July 2007. The claimant is alleging breaches of the Austria-Ukraine bilateral investment treaty.

The Ukraine is party to several known cases of international arbitration under its international investment agreements. This summer an ICSID tribunal, in a 2-to-1 decision, found in favour of the Ukrainian government in a claim brought by the Lithuanian owner of a Ukrainian publishing company (Tokios Tokelès v. Ukraine). This marked the second claim at ICSID where Ukraine prevailed on the merits; in 2003, an ICSID tribunal rejected a claim brought by the US firm Generation Ukraine.

At present, the Ukraine is involved in arbitration proceedings with a Latvian company, AmtO, which has alleged breaches of the Energy Charter Treaty in relation to an investment in a Ukrainian nuclear power plant. This claim is proceeding at the Stockholm Chamber of Commerce.

Meanwhile, an American citizen, Joseph C. Lemire, who invested in the Ukrainian radio industry is currently suing the Ukraine at ICSID for alleged failures and omissions of the state broadcasting regulators.

More information about all these cases can be found in the ITN archives:

<http://www.iisd.org/investment/itn/archive.asp>

Negotiation Watch:

6. Canada-India investment agreement under wraps due to outstanding issues, By Damon Vis-Dunbar

A Foreign Investment and Protection Agreement (FIPA) between Canada and India will not be made public until at least the fall of 2007, according to sources in the Canadian government.

The negotiations, which began in 2004, were concluded in June, according to a statement by the Canadian government. But a spokesperson for the Canadian government tells ITN that the text still needs a “legal scrub” before it is released to the public. Another Canadian official said it is difficult to say when the text will be posted, but that it would likely not happen before the fall of 2007.

“Canadian practice is to release the text of an agreement of this kind at the time of the formal signing,” a Canadian spokesperson told ITN. “However, given that the release of an international agreement before its entry into force normally is done with the agreement or understanding of the other Party or Parties to the agreement, timing of the release may vary.”

A knowledgeable official with the Indian government said that they were “in the final stages” of the negotiation but that there were still some “outstanding issues.” This person would not elaborate on what issues still need to be resolved.

Both parties are remaining tight-lipped over the details of the agreement, including whether the deal deviates from Canada’s avowed preference for extensive transparency provisions in the deal.

As ITN has reported, some of Canada’s negotiating partners have resisted provisions designed to ensure that investor-state disputes are arbitrated with a high-degree of transparency. These provisions mandate that arbitrations remain open to the public and decisions and awards be published. They were introduced in Canada’s 2003 model FIPA agreement following criticism that investor-state arbitrations were being conducted in secrecy.

Sources:

ITN interviews

“Canada encountering static from negotiating partners over transparency demands”, By Luke Eric Peterson, Investment Treaty News, March 16, 2007

Briefly Noted:

7. Tribunal constituted in UNCITRAL arbitration over Czech banking dispute, By Luke Eric Peterson

An arbitral tribunal has been convened to hear a claim brought by a Dutch-incorporated financial services company against the Czech Republic.

As earlier revealed in ITN, Invesmart, filed a claim under the Netherlands-Czech Republic bilateral investment treaty, alleging that Czech officials caused a run on an Invesmart-owned Czech bank, leading to the financial failure of that institution. (See: “New BIT arbitration launched against Czech Republic over bank failure”, By Luke Eric Peterson, Investment Treaty News, April 27, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_april27_2007.pdf)

ITN can report that a tribunal chaired by Australian lawyer and arbitrator Michael Pryles has been convened to hear the dispute. The Czech Republic appointed Canadian lawyer and arbitrator J. Christopher Thomas Q.C. to the tribunal, while the claimants nominated Prof. Piero Bernardini of the University of Rome.

In 2002, Invesmart secured a controlling stake in the Czech-based Union Banka. The Dutch firm accuses Czech officials of withdrawing commitments to provide state support for the bank, thus triggering customer panic and the eventual closure and liquidation of the bank. According to Invesmart, the Czech actions and omissions served to violate guarantees in the Netherlands-Czech Republic BIT.

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