

INVESTMENT ARBITRATION DECISIONS

Noah Rubins

EDITOR

JURIS

Questions About This Publication

For assistance with shipments, billing or other customer service matters, please call our Customer Services Department at:

1-631-350-0200

To obtain a copy of this book, call our Sales Department:

1-631-351-5430
Fax: 1-631-351-5712

Toll Free Order Line:

1-800-887-4064 (United States & Canada)

See our web page about this book:
www.jurispub.com

COPYRIGHT © 2012
by JurisNet, LLC and
The Arbitration Institute of the Stockholm Chamber of Commerce

No part of this publication may be reproduced in any form or by any electronic or mechanical means including information storage and retrieval systems without permission in writing from the publisher.

All Rights Reserved.
Printed in the United States of America.

ISBN: 978-1-933833-72-9

JurisNet, LLC
71 New Street
Huntington, New York 11743
USA
www.jurispub.com

Investment Arbitration Decisions

FOREWORD

By Noah Rubins

xi

I. Mr. Franz Sedelmayer v. The Russian Federation	1
--	----------

(1) Final Arbitral Award Rendered in 1998 in An <i>Ad Hoc</i> Arbitration in Stockholm, Sweden	
---	--

<i>Observations by Walid Ben Hamida</i>	47
---	----

<i>Observations by Stefan Kröll and Jörn Griebel</i>	67
--	----

(2) Judgment by The Stockholm District Court Rendered on 18 December 2002	
--	--

(3) Decision by The Svea Court of Appeal Rendered on 15 June 2005	
--	--

<i>Observations by Domenico Di Pietro</i>	118
---	-----

SUBJECT-MATTERS:

- 1) Definition of “investor”
- 2) Scope of the definition of “investment”
- 3) The scope of expropriation provisions
- 4) Application of the principle of *lis pendens*
- 5) Propriety of State as respondent
- 6) Compliance with pre-arbitration procedures
- 7) Identification and valuation of investments subject to expropriation

(4) Two Decisions by Germany’s Supreme Court Rendered on 4 October 2005, VII ZB 08/05 and VII ZB 09/05	
---	--

SUBJECT-MATTERS:

- 1) Can the Russian State’s claims against the German State or a German company be attached to secure payment of a German private individual’s award against Russia?

INVESTMENT ARBITRATION DECISIONS

- 2) Does an arbitration clause in a bilateral investment treaty constitute a waiver by the State of its immunity from enforcement of the award?

Observations by Hilmar Raeschke-Kessler 162

(5) Developments from January 2008 to June 2010

- a. German Federal Court of Justice IX 64/08
- b. German Federal Court of Justice, VII 37/08
- c. Cologne Higher Regional Court, 22 U 98/07
- d. Berlin Higher Regional Court, 1 W 276/09

SUBJECT- MATTER:

Execution of an arbitral award against the Russian Federation based on the 1989 Bilateral Investment Protection Treaty between the Federal Republic of Germany and the Union of Socialist Soviet Republics. Execution Immunity and States operating through State-owned corporations.

Observations by Friederike Stumpe 169

II. Nykomb Synergetics Technology Holding AB, Stockholm v. The Republic of Latvia, Riga 185

- (1) SCC Case 118/2001
Final Award Rendered on 16 December 2003

SUBJECT- MATTER:

Whether the Republic of Latvia was in breach of its obligations under the Energy Charter Treaty (ECT) towards the claimant due to the fact that the republic's state-owned company allegedly did not pay the claimant's subsidiary in accordance with the contract between company and subsidiary.

Observations by Richard Happ 257

TABLE OF CONTENTS

III. CCL Oil v. Republic of Kazakhstan	269
---	------------

**(1) SCC Case 122/2001
Jurisdictional Award Rendered in 2003**

SUBJECT- MATTERS:

- 1) Applicable law to jurisdictional issues under the arbitration clause.
- 2) *Res judicata* and collateral estoppel.
- 3) Principle of Separability, Competence-Competence Doctrine.
- 4) Act of State Doctrine.
- 5) Comity among states.
- 6) Sovereign state, Issue of sovereign immunity.
- 7) Definition of “foreign investor” under the Foreign Investment Law of Kazakhstan.
- 8) Applicable law to jurisdictional issues under the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment (19 May 1992) (“BIT”).
- 9) Definition of “National of another Contracting State” under the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment.
- 10) Burden of proof to establish “National of another Contracting State” under the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment.

**(2) SCC Case 122/2001
Final Award Rendered in 2004**

SUBJECT- MATTERS:

- 1) Jurisdiction – Validity of the Agreement – Apparent authority, Ratification by acceptance.
- 2) Jurisdiction – Admission to jurisdiction of the Kazakh courts.
- 3) Party to the arbitration agreement – Sovereign state and state organ – whether the department designated in the Agreement or the State is the contractual party.

INVESTMENT ARBITRATION DECISIONS

- 4) Effects of prior court decision on termination of the Agreement.
- 5) Whether act of the Prosecutor General, and the national courts, either in its capacity of contractual party to the Agreement or under norms of Kazakh law and customary international law should be considered as acts attributable to Sovereign State.
- 6) Loss of future profit based on contractual right of first refusal – the owner's decision to sell and without specification on the purchase price to be paid, may give rise to a claim for damages.
- 7) Concept of expropriation, “creeping” or “covert” expropriation.

(3) SCC Case 122/2001

Supplemental Award and Interpretation Rendered in 2004

SUBJECT- MATTERS:

- 1) Enforcement of the Tribunal's decision on costs – whether the Tribunal can issue award or order to enforce its decision on costs.
- 2) Correction of the award based on miscalculation.

Observations by Hans Smit

337

IV. The Attorney General of Canada v. S.D.Myers, Inc.

347

Docket T-225-01, T-81-03
Order of Canada's Federal Court on 13 January 2004

Observations by Rajeev Sharma

390

V. Mr. William Nagel v. The Czech Republic

405

Decision by The Svea Court of Appeal
Rendered on 26 August 2005

SUBJECT- MATTERS:

- 1) Did the Arbitral Tribunal rule on all of the issues that were submitted to it?

TABLE OF CONTENTS

2) Was the decision taken by the Arbitral Tribunal a jurisdictional decision, or a decision on the substance of the parties' dispute?	
<i>Observations by Michael Polkinghorne and Matthew Secomb</i>	414
<hr/>	
VI. Mr. Iuri Bogdanov v. The Republic of Moldova	425
SCC Case 93/2004	
Arbitral Award Rendered on 22 September 2005	
<u>SUBJECT- MATTERS:</u>	
1) Jurisdiction under a Bilateral Investment Treaty.	
2) Application of the principle of <i>iura novit curia</i> and failure of Respondent to appear (procedural default).	
3) Application of the fair and equitable treatment standard.	
4) Reimbursement of moral damages.	
<i>Observations by Jeremy Wilson</i>	454
<hr/>	
VII. Petrobart Limited v. The Kyrgyz Republic	469
(1) SCC Case 126/2003	
Final Arbitral Award Rendered on 29 March 2005	
<u>SUBJECT- MATTERS:</u>	
1) Is the Energy Charter Treaty (ECT) applicable to a company registered in Gibraltar?	
2) Are the conditions for application of Article 17 (1) of the ECT present?	
3) The potential <i>res judicata</i> effect after the domestic litigation and the UNCITRAL Arbitration.	
4) Doctrine of collateral estoppel.	
5) Whether Petrobart qualifies as an investor under the ECT?	
6) Did Petrobart make an investment in the Kyrgyz Republic?	
7) Whether the Kyrgyz Republic violated its obligations under Articles 10(1), 10(12), 13(1) and 22(1) of the ECT.	
<i>Observations by Georgios Petrochilos and Noah Rubins</i>	534

INVESTMENT ARBITRATION DECISIONS

(2) Case No. T 3739-03

**Decision of the Svea Court of Appeal, Judgment Rendered
on 13 April 2006**

SUBJECT- MATTER:

Action for amendment of an arbitral award

(3) Case No. T 5208-05

**Decision of the Svea Court of Appeal
Judgment Rendered 19 January 2007**

SUBJECT- MATTER:

Challenge to an arbitral award

(4) Case No. T 2113-06

**Decision of the Swedish Supreme Court
Judgment Rendered 28 March 2008**

SUBJECT- MATTERS:

- 1) Challenge of an arbitral award terminating the arbitration for lack of jurisdiction.
- 2) The scope of application of the so-called “doctrine of assertion” in arbitration.

(5) The Petrobart Saga

By Erik Karlsson

**(6) Comments on the Swedish Supreme Court’s Recent
Judgment on the So-Called “Doctrine Of Assertion” and the
Arbitrators’ Jurisdiction in Investment Disputes**

By Paulo Fohlin

**(7) Comments on the Petrobart Limited v. The Kyrgyz Republic
Case**

Anonymous

TABLE OF CONTENTS

VIII. Mr. Vladimir Berschader and Mr. Moise Berschader v. The Russian Federation	665
SCC Arbitration V (080/2004) Arbitral Award Rendered in Stockholm on 21 April 2006	
<u>SUBJECT- MATTERS:</u>	
1) Do the Claimants (two Belgian physical individuals) who own shares in a company incorporated in Belgium, BI, which owns assets in the territory of the Russian Federation qualify as investors within the meaning of the Luxembourg/Belgium-Russia BIT (the Treaty)?	
2) Have the Claimants carried out an investment within the meaning of the Treaty?	
3) To what extent can the Claimants rely on the most favoured nation (MFN) clause contained in the basic Treaty to import a more favourable dispute settlement mechanism contained in a third party treaty concluded by the Russian Federation to establish the jurisdiction of the Arbitral Tribunal?	
<i>Observations by Domenico Di Pietro</i>	746
<hr/>	
IX. Telenor Mobile Communications A.S. v. The Republic of Hungary	763
ICSID Case No. Arb/04/15 Arbitral Award Rendered on 13 September 2006	
<u>SUBJECT- MATTERS:</u>	
1) Challenge of the Tribunal's jurisdiction grounded on the fact that the relevant BIT limited recourse to international arbitration for claims of expropriation only.	
2) Indirect expropriation.	
3) The scope of application of Most Favoured Nation clauses.	
4) Allocation of costs.	
<i>Observations by Domenico Di Pietro</i>	798
<hr/>	

INVESTMENT ARBITRATION DECISIONS

X. Mr. Patrick Mitchell v. The Democratic Republic of Congo	815
--	-----

ICSID Case No. Arb/99/7
Decision of the *Ad Hoc* Committee on the Application for Annulment of the Award Rendered on 1 November 2006

SUBJECT-MATTER:

- 1) Annulment under Article 52 of the ICSID Convention.
- 2) Jurisdiction and definition of investment under a Bilateral Investment Treaty.
- 3) Jurisdiction and definition of investment under the ICSID Convention.

<i>Observations by Reza Mohtashami</i>	855
--	-----

XI. Canadian Cattlemen for Fair Trade, et al. v. United States of America	867
--	-----

UNCITRAL Arbitral Award on Jurisdiction
Rendered in Washington, D.C., U.S. on 28 January 2008

SUBJECT-MATTER:

Jurisdiction of Tribunal to hear a claim brought under Chapter Eleven of the NAFTA (North American Free Trade Agreement). Territorial location requirement for protected investments and investors.

<i>Observations by Jean-François Hébert</i>	888
---	-----

XII. Renta 4 S.V.S.A., et al v. The Russian Federation	905
---	-----

(1) SCC Case V (024/2007) Award on Preliminary Objections Rendered on 20 March 2009	
--	--

SUBJECT-MATTER:

Whether the arbitral tribunal has subject-matter jurisdiction under Articles 10 and 5 of the Spain/Russia BIT, whether it has

TABLE OF CONTENTS

personal jurisdiction over the seven claimants, whether the claimants had made investments and, if so, whether their claims are admissible.

(2) Yukos and Some of Its Progeny

By Lucia Raimanova

ARTICLES

The Guarantee of “Full Protection and Security” in Investment Treaties Regarding Harm Caused by Private Actors	959
<i>By Helge Elisabeth Zeitler</i>	
US Investors and Expropriation Under the AUSFTA – Is the Protection Afforded to Investors Illusory?	999
<i>By Annie L. Phillips</i>	
Missing Bits – To Be Substituted by BITs	1025
<i>By Max Gubrod and Steffen Hindelang</i>	
Investment Treaty Arbitration: Mapping the Non-ICSID Universe	1047
<i>By Luke Eric Peterson</i>	
Chinese Investment Treaties and the Dispute Resolution Opportunities Offered by Most Favoured Nation Provisions	1059
<i>By John Savage and Elodie Dulac</i>	
Bilateral Investment Treaties and EU Law	1107
<i>By Thomas Eilmansberger</i>	
INDEX	1137
