INVEST-SD: Investment Law and Policy News Bulletin, March.10, 2005

Published by the International Institute for Sustainable Development
(http://www.iisd.org/investment)

Contents at a Glance:

Arbitration Watch:
---

1. French multinational wins treaty arbitration against Lebanon,
By Luke Eric Peterson

An arbitration tribunal, operating under the UNCITRAL rules of procedure has handed down an award in a dispute between France Telecom and the

Republic of Lebanon.

The award was rendered on February 22 by a tribunal composed of Paris-based Professor Bernard Audit, Lebanese lawyer Antoine Akl, and Canadian lawyer Marc Lalonde.

In a press release issued last week, France Telecom noted that it had prevailed on the major claims asserted under the France-Lebanon bilateral investment protection treaty. It is understood that these grounds included violation of the treaty's provisions on "fair and equitable treatment".

France Telecom has declined to release the confidential award for the time being, citing the political sensitivities surrounding the matter.

UNCITRAL arbitrations are typically subject to limited challenge in the domestic courts where the arbitration had been legally seated. In this case, that challenge would take place in the courts of Switzerland.

According to an informed source, the Lebanese government has 30 days in which to make an application to Swiss courts to set aside the arbitral award.

Recently, the Lebanese Telecommunications Minister had signaled that his government would challenge the award, and would ignore the tribunal's order to refrain from its efforts to impose a $300 million dollar penalty on France Telecom's local subsidiary, Cellis.

However, in the period since these comments were made, Lebanon's government has fallen thanks to widespread public agitation (unrelated to this arbitration).

Thus, it remains unclear what powers the caretaker government may have with respect to taking a decision to challenge the arbitral award

Contrary to some recent press reports, the UNCITRAL tribunal did not issue any ruling related to a second Lebanese cellular network operator, LibanCell. According to two informed sources that entity is currently pursuing a separate commercial arbitration against the Lebanese government under the terms of its own Build, Operate and Transfer (BOT). The facts of the two arbitrations are similar, however, with both operators objecting to the same treatment at the hands of Lebanese authorities.

Sources:

INVEST-SD Interviews

"Award of the arbitration tribunal in the dispute with the Republic of Lebanon", France Telecom press release, February 22, 2005, available at: http://www.francetelecom.com/en/financials/journalists/press_releases/CP_old/cp050222.html

2. Tribunal finds jurisdiction under Energy Charter, but reins in MFN shopping,
Luke Eric Peterson

A tribunal convened by the International Centre for Settlement of Investment Disputes (ICSID) has upheld jurisdiction in a dispute between a Cypriot company and the Government of Bulgaria under the Energy Charter Treaty.

However, in a notable development, the tribunal rejected a parallel attempt by the investor to invoke jurisdiction under a separate bilateral investment treaty between Cyprus and Bulgaria.

The Cyprus-Bulgaria BIT contains a very narrow investor-state arbitration clause - permitting arbitration only in case of disputes over the amount of compensation owed to foreign investors - but the Plama Consortium Limited had attempted to argue that they were entitled to more favorable arbitration privileges thanks to the BIT's Most Favored Nation (MFN) clause. Specifically, the investors sought to "import" in more favorable arbitration procedures found in other international investment treaties concluded by Bulgaria, such as the Finland-Bulgaria BIT.

However, the tribunal dismissed the investor's argument, and also criticized a well-known decision by an earlier tribunal, in the ICSID case of Maffezini v. Spain, which had dealt with questions of MFN interpretation as it applies to procedural matters.

In the recent Plama decision, the tribunal did note that some investment treaties expressly reject the extension of MFN treatment to dispute settlement matters; however the tribunal was not convinced that a failure to expressly reject such an extension could be taken as a sign that "dispute resolution provisions must be deemed to be incorporated."

Rather, it took the view that "the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed."

The upshot of the decision was that Plama Consortium Limited was unable

to discard the Cyprus-Bulgaria's narrowly-cast dispute provisions, and shop for a better choice in Bulgaria's entire treaty catalogue.

In the event, the tribunal's decision was not fatal to the investor's case at ICSID, as the tribunal did uphold jurisdiction under the Energy Charter Treaty, a multilateral trade and investment treaty governing the energy sector.

Bulgaria had objected to the investor's alleged use of a "mailbox company" in Cyprus in order to qualify as a Cypriot investor under the Energy Charter Treaty, and the tribunal heard extensive arguments about the corporate structure of Plama Consortium Limited.

While the tribunal was convinced that the company was duly incorporated in Cyprus, it did raise an eyebrow over the company's "obtuse" structure of ownership, and whether the company was owned or controlled by a national of an Energy Charter Treaty signatory. The tribunal noted that this matter might be addressed more squarely during the merits stage of the proceedings.

Of particular note, was the tribunal's interpretation of Article 17(1) of the treaty which permits governments to deny the benefits of Part III of the treaty (the part which sets out many of the substantive investor rights) in cases where a legal entity is owned or controlled by citizens or nationals of a third state and that entity has no "substantial business activities in the Area of the Contracting Party in which it is organized".

Bulgaria failed to convince the tribunal that this denial of benefits provision also extended to the procedural remedy of investor-state arbitration itself.

Thus, the tribunal held that it did have jurisdiction to hear Plama's claim, and that Article 17(1) had no bearing upon the dispute settlement provisions found in Article 26 of the treaty.

Pronouncing Article 26 to offer the "unconditional assent" of states to entertain investor-state arbitration claims, the tribunal added that this provision and the broader Energy Charter Treaty marked another step in the transition of investors "from objects to subjects of international law".

The tribunal consisting of V.V. Veeder, Albert van den Berg, and Carl F. Salans will now proceed to a hearing of the merits.

As earlier reported in INVEST-SD, Plama's dispute relates to an oil

refinery in northern Bulgaria which has been beset by controversy since its privatization in the late 1990s.

The parties have quarreled over various issues including responsibility for the outstanding debts of the company, as well as Bulgaria's new Environmental Protection Act passed by the Bulgarian Parliament in July of 2002. As was reported in INVEST-SD, the act would have absolved the Bulgarian government of any liability for environmental pollution related to companies which had been privatized prior to 1999, and placed the liability on the new owners, including the Plama Consortium

Sources:

Plama Consortium Limited v. Republic of Bulgaria, Decision on Jurisdiction, Feb. 8, 2005, available at: http://www.worldbank.org/icsid/cases/plama-decision.pdf

"New ICSID cases registered against Argentina and Bulgaria", INVEST-SD News Bulletin, Sept.5, 2003, available at: http://www.iisd.org/pdf/2003/investment_investsd_sep5_2003.pdf

3. South Centre quarrels with ICSID Secretariat's reform proposals, By Luke Eric Peterson

The South Centre, a Geneva-based organization consisting of some 48 developing countries, has prepared a strong critique of a draft discussion paper produced by the Secretariat of the International Centre for Settlement of Investment Disputes (ICSID).

As reported in an earlier edition of INVEST-SD, the ICSID Secretariat published a discussion paper last autumn which set out a variety of proposed reforms of the Centre's investor-state arbitration processes. Among the proposals were suggestions for an appellate mechanism, greater transparency, new guidelines for the qualification of arbitrators and provision for expanded training of developing country officials in relation to investment treaty arbitration.

In February of this year, the South Centre released a lengthy "analytical note" criticizing many of these proposed reforms, and taking issue with the Secretariat's decision to put forward such proposals. In its note, the South Centre accused the Secretariat of taking a "political" initiative which was incompatible with its role.

An ICSID official contacted for this article disputed such a

characterization.

That official told INVEST-SD that "It is one of the functions of the Secretariat to keep the rules and regulations under review and to propose to the members of the Administrative Council changes from time to time, in order to keep (the rules and regulations) responsive to current needs."

The South Centre also took aim at the ICSID Secretariat discussion paper for proposing means by which reforms might be undertaken without having to submit them to the more onerous amendment procedures set out in the ICSID Convention. And the group expressed the view that ICSID's Secretariat had failed to consult developing countries adequately, and that various of its proposals "reflect the concerns of investors and developed countries."

In particular, the South Centre objects to proposals which would confer upon ICSID tribunals the authority to accept and consider submissions from non-party interveners (amicus curiae), as well as suggestions that would take away the ability of one party to veto the opening of arbitral proceedings to the public. Citing the "private nature" of such disputes, the potential added costs of open hearings, and a concern that greater openness of dispute settlement might "affect the promotion of investment", the South Centre raised doubts about any proposal which would remove from the two parties the ability to keep proceedings closed to the public.

The Centre also raised concerns about the cost, duration and propriety of an appellate mechanism designed to remedy potential inconsistencies in investment treaty awards, appearing to construe such proposals as a United States inspired initiative - and one which would sit uncomfortably with the ICSID Convention, which provides that tribunals will not be bound by the decisions of other ICSID tribunals.

Sources:

Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing countries
http://www.southcentre.org/

"ICSID Secretariat floats proposals for reform to investor-state arbitration",
http://www.iisd.org/pdf/2004/investment_investsd_oct27_2004.pdf

4. Poland faces new BIT claim by French firm Vivendi,
By Luke Eric Peterson

French multinational Vivendi has announced plans to sue Poland under the terms of the France-Poland bilateral investment treaty, citing failures of the Polish justice system to protect its investments in the Polish telecommunications sector.

Vivendi is embroiled in a conflict with German firm Deutsche Telekom and the Polish company Elektrim over control of the Polish mobile phone operator, Polska Telefonia Cyfrowa (PTC).

Vivendi partnered with Elektrim in the late 1990s and invested well over $2 Billion US in a joint venture enterprise, Elektrim Telekomunikacja, which gave Vivendi a controlling stake of the Polish mobile firm.

However, Deutsche Telekom, which owns the remaining 49% of the mobile operator, moved - with Elektrim's assistance - to assert control over PTC following an arbitral ruling last November by a Vienna arbitration tribunal.

In a press release issued on March 1, 2005, Vivendi objects to what it characterizes as the "unlawful" appointment by Elektrim and Deutsche Telekom of a new Supervisory Board and Board of Directors and amendments to PTC's shareholders registry, which have allegedly stripped Vivendi of its controlling stake in the Polish mobile operator.

Vivendi says that the Warsaw public prosecutor has filed an "appeal against the partial enforcement of the Vienna arbitration award" which has been sought by Deutsche Telekom and Elektrim. And, while this appeal is pending, the French firm insists that it is illegal for Deutsche Telekom and Elektrim to assert ownership of the PTC firm.

A report in the Polish press suggests that Vivendi will pursue amicable settlement with Poland for a period of 6 months as prescribed under the France-Poland investment treaty, after which it may request arbitration under the UNCITRAL rules of its claims that Poland has failed to protect its investments.

According to INVEST-SD files, the dispute is only the latest investment treaty suit to be threatened against Poland. Notably, Poland faced two claims in 1996 from US-based Ameritech and France Telecom in relation to their investments in the mobile telecommunications sector. Those claims were settled on unknown terms the following year.

Currently, the Polish government is defending a claim brought by US-based agricultural giant Cargill at the International Centre for Settlement of Investment Disputes (ICSID). As well, a decision is expected in the coming months in a pending ad-hoc arbitration brought by Dutch insurer Eureko against Poland in relation to an earlier commitment to permit the Dutch firm to acquire a majority stake in the Polish insurer PZU.

While the latter case had seen settlement discussions take place in recent months, Eureko ultimately withdrew its settlement offer, when the Polish Parliament failed to ratify the offer in a timely manner. Meanwhile, the Polish Parliament has launched an inquiry into the circumstances surrounding the 1999 privatization agreement agreed between the then-government and the Dutch firm. Final statements have been submitted to the ad-hoc tribunal composed of Stephen Schwebel, Yves Fortier and Prof. Jerzy Rajski, and the tribunal is understood to be weighing the merits of Eureko's case, with a decision expected in the near future.

Sources:

INVEST-SD interviews

"Faced with Repeated breaches of law and attempts to deprive it of its interests in Poland, Vivendi Universal is commencing proceedings", Vivendi Universal press release, March 1, 2005

"Vivendi Ready to Take PTC Case to UN Arbitration Tribunal", Polish News Bulletin, March 2, 2005

"Vivendi to sue D Telekom over PTC Telecommunications", Financial Times, March 8, 2005

Briefly Noted:
---

5. FT: "Enforcement of anti-corruption laws falling short, says watchdog"

According to a recent Financial Times report the watchdog group Transparency International has highlighted "significant international variation in governments' efforts to prosecute claims of overseas bribery".

A recent study by Transparency International on the implementation of the OECD Anti-Bribery Convention finds that some governments are failing to investigate and prosecute instances of bribery by their multinational corporations operating abroad. While the group hails efforts made by the United States, it criticized the inadequate efforts of several other states, including the UK, Germany, Japan and the Czech Republic.

Transparency International has tabled its report with the OECD's anti-bribery working group and is calling for the devotion of greater resources to national-level implantation of the OECD Convention.

Sources:

"Enforcement of anti-corruption laws falling short, says watchdog", By Jean Eaglesham, Financial Times, March 7, 2005

"Crack-down on foreign bribery underway in major exporting countries", Transparency International press release, March 7, 2005, available at: http://www.transparency.org/pressreleases_archive/2005/2005.03.07.oecd_countries.html

6. Robert Volterra moves to new firm

A leading London-based investment treaty practitioner has moved from the law firm Herbert Smith to Latham & Watkins. Volterra tells INVEST-SD that he joined Latham & Watkins in mid-February and will head up the firm's public international law practice.

Volterra has served as counsel in a number of investment treaty claims, including and Lucchetti S.A. and Lucchetti Peru S.A. v. Peru and Aguas Del Tunari v. Bolivia, a well-known dispute over a water concession in Cochabamba. He also serves as an arbitrator in investment treaty disputes, including a pending claim at ICSID against the Argentina Republic. In addition to heading Latham & Watkin's public international practice, Volterra will continue part-time teaching duties at the University of London.

Sources:

INVEST-SD Interviews

"Leading Arbitration Lawyer Joins Latham & Watkins", press release,

Feb.4, 2005, available at:
http://www.lw.com/resource/Publications/PressRelease/pressRelease.asp?pid=1176

7. Czech Republic hires firm to defend claim by Croatian company

In a sign that an arbitration may be imminent, the Czech Republic has announced that law firm Weinhold Legal has won the tender to defend the Republic in an investment treaty claim mounted by Croatian firm Zipimex.

As was reported in INVEST-SD last autumn, the Croatian firm insists that it has seen its investment in a non-residential building expropriated without compensation. The firm received an eviction notice from the Czech Education ministry last year, following a decision that certain existing leasing agreements were "disadvantageous" for the government.

Sources:

"Croatian firm invokes investment treaty to challenge Czech eviction notice", INVEST-SD News Bulletin, October 1, 2004, available at:
http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf

CTK Business News in Brief, Prague, Feb.28, 2005

8. Motorola's SEC filings confirm ICSID dispute relates to Telsim matter

A filing made by Motorola Credit Corporation with the US Securities and Exchange Commission reveals that an earlier-reported investment treaty arbitration filed by the firm at ICSID does relate to Motorola's $2 billion loan to Turkish telecommunications firm Telsim. The ICSID arbitration was reported in an earlier edition of INVEST-SD (See link below), but confirmation of the case's subject matter could not be confirmed at that time.

However, the firm's March 4, 2005 filing with the SEC describes Motorola Credit Corporation's (MCC's) investment treaty case:

"On October 13, 2004, Motorola filed an arbitration claim in Washington, D.C., under a United States-Turkey bilateral investment treaty involving the Turkish government, which currently controls Telsim and claims priority over Motorola's interest in Telsim. Motorola claims that the Turkish government has 'expropriated' Motorola's investment in Telsim by taking over Telsim, obtaining injunctions purportedly prohibiting Telsim

from paying MCC's debt, and passing legislation requiring that Telsim be sold and that the proceeds of the sale be distributed first to the Turkish government, in priority over MCC's claims. Motorola seeks, among other things, a judgment in the amount of $2 billion. On December 28, 2004, the International Centre for the Settlement of Investment Disputes registered Motorola's Request for Arbitration, thus finding that, at a minimum, there is a possibility of jurisdiction for Motorola's claims."

Sources:

Motorola Inc., SEC Form 10-K, filing date March 4, 2005

"ICSID registers two new investment treaty arbitrations", INVEST-SD News Bulletin, February 7, 2005, available at: http://www.iisd.org/pdf/2005/investment_investsd_feb7_2005.pdf

---

To subscribe to INVEST-SD Bulletin, email the editor at: lpeterson@iisd.ca

Past issues of INVEST-SD News Bulletin available on-line at: www.iisd.org/investment/invest-sd/archive.asp

Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to lpeterson@iisd.ca