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Arbitration Watch:
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1. Malaysian firm wins BIT case against Chile; "wide scope" of MFN clause looms large, By Luke Eric Peterson

A Malaysian investor has prevailed in its arbitration with Chile at the International Center for Settlement of Investment Disputes (ICSID). The case arose out of MTD Equity's investment in a sprawling parcel of undeveloped land in metropolitan Santiago which the firm hoped to develop into a mixed-use "planned community".

After having secured a contract with Chile's Foreign Investment Commission, and sunk some more than $17 million US into a joint-venture, the Malaysian firm learned that it could not re-zone the property - which had been earmarked for agricultural use - on the grounds that a change would be contrary to Chile's urban development and environmental

policies.

Frustrated in its investment, the firm turned to international arbitration in June of 2001, under the Malaysia-Chile bilateral investment treaty (BIT), in an effort to obtain compensation. The firm alleged that it was subject to an indirect form of expropriation and a denial of fair and equitable treatment.

In an important wrinkle, MTD contended that the latter guarantee extended not only to the provisions of the Malaysia-Chile treaty, but - thanks to its right to most-favored nation treatment - also to two other BITs concluded by Chile with Denmark and Croatia, and which contained more detailed treaty language on fair and equitable treatment, including obligations to award permits subsequent to the approval of an investment and to fulfil contractual obligations, respectively.

In determining whether MTD could invoke such protection, the tribunal began by indicating that its interpretive task would be guided by the polar star of investor rights: "the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments."

Accordingly, the tribunal had little difficulty in incorporating the provisions of the Croatian and Danish treaties into the Malaysian treaty by virtue of the "wide scope" of the latter treaty's MFN clause - and deeming this importation to be "in consonance with" the purpose of the Malaysia-Chile investment treaty.

The tribunal then turned to the question of how fair and equitable treatment - as it is set forth in the various BITs - applied to the present case. It stressed, again, the lens through which it would view the treaty standard: "... treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."

In particular, the tribunal turned to the detailed definition of "fair and equitable treatment" expounded by an earlier ICSID tribunal, in an arbitration between the Spanish-based Tecmed firm and Mexico. Among other things, the Tecmed tribunal had interpreted fair and equitable treatment so as to require states "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."

However, ascertaining the "expectations" of the Malaysian firm in its dealings with the Chilean authorities was no easy task.

The MTD tribunal acknowledged that the parties differed substantially as to the facts of the dispute - including the extent to which certain officials had cautioned MTD about the possibility that its application for re-zoning of the investment property might be viewed unfavourably by the land-planning authorities.

The parties to the dispute also disagreed as to the proper role of Chile's Foreign

Investment Commission - with Chile insisting that the body's remit was limited to approval of inflows of capital, rather than as a "one-stop window" which approved the viability of the project as a whole and guaranteed future safe-passage to the foreign investor.

Ultimately, however, the tribunal would pronounce itself satisfied that it was unreasonable - and, hence, unfair and inequitable - for Chile to have approved an investment which was clearly against its own urban development policy, and as such likely to be frustrated.

Nevertheless, the tribunal held that, while the provisions of the Chile-Croatia BIT (which obliged a state to award permits after approval of an investment) could be invoked by MTD, the firm was wrong to believe that these provisions entitled it to anything more than the ability to apply for permits and for those applications to be considered in accordance with the law.

The tribunal noted that the obligation "... does not entitle an investor to a change of the normative framework of the country where it invests. All that an investor may expect is that the law be applied." And, given that MTD's investment would have required "a change in the norms that regulate the urban sector in Chile," the investor could not assert that it was entitled to such a change in Chile's policy.

Thus, MTD was found to have been the victim of an "unreasonable" approval by Chile of a project which was ill-fated thanks to the fact that it was clearly counter to the country's urban development policies, but the investor could not claim that it deserved to see those policies changed to suit its needs. Nor, for that matter, did the tribunal believe that MTD's treatment could be characterized as an indirect form of expropriation.

In the end, the tribunal elected to award only a portion of the compensation claimed by the Malaysian firm, noting that the firm was not blameless for its losses and "had made decisions that increased their risks in the transaction and for which they bear responsibility". Accordingly, damages of 5.8 million US dollars were awarded by the tribunal.

The tribunal consisted of Mr. Marc Lalonde, Dr. Andres Rigo Sureda, and Rodrigo Oreamuno Blanco.

2. Tribunal upholds jurisdiction in Siemens v. Argentina; MFN plays procedural role, By Luke Eric Peterson

An arbitration tribunal at the International Center for Settlement of Investment Disputes (ICSID) has upheld jurisdiction in a claim brought by the German company Siemens under the Argentina-Germany bilateral investment treaty (BIT).

The claim relates to alleged breach of contract - and attendant breach of the BIT - by Argentina of an agreement with a local Siemens subsidiary, Siemens IT Services S.A.

That subsidiary won the bidding process for a contract to establish "a system of migration control and personal identification", and entered into the contract in October of 1998.

However, when a new government came to power in December of 1999, it suspended the contract - ostensibly for technical reasons - in February of 2000. The following year, pursuant to an Emergency Law passed during the Argentine financial crisis, the contact was terminated.

Although Siemens' local affiliate sought to challenge its treatment through the initiation of several local administrative appeals, the German parent firm turned to international arbitration before those domestic processes had been resolved. In May of 2002, the firm filed a request for arbitration with the Washington-based ICSID facility, and in July of that year the claim was formally registered and a tribunal was struck shortly thereafter.

In its decision on jurisdiction dated August 3, 2004, a tribunal consisting of Judge Charles N. Brower, Professor Domingo Bello Janeiro, Dr. Andres Rigo Sureda (who was a member of the earlier-discussed MTD v. Chile tribunal which also grappled with the reach of the most-favored nation clause) handed down a decision finding jurisdiction to examine Siemens' claim on its merits.

In so doing, the tribunal dismissed a series of 8 arguments put forward by Argentina in an effort to quash jurisdiction in the case.

Notably, the tribunal devoted a substantial amount of attention to Siemens' efforts to invoke the more-favorable terms of a bilateral investment treaty between Argentina and Chile - by virtue of the Most-Favored Nation clause contained in the Germany-Argentina BIT.

The Argentine Republic had objected to what it characterized as Siemens attempts to pick and choose elements of various investment treaties in order "to create a super investment treaty that includes the main benefits of each different treaty."

In particular, Argentina objected to Siemens' failure to exhaust an 18 month time period set out in the Germany-Argentina BIT for recourse to local courts, prior to turning to international arbitration.

Moreover, the Republic rejected Siemens' argument that the MFN provision of the BIT applied to the treaty's provisions on dispute settlement, and therefore permitted investors to access more favorable dispute settlement rules found in other investment treaties concluded by Argentina (notably the Chile-Argentina BIT which imposed no 18 month requirement on investors).

Argentina contended that the tribunal should interpret "limitations to a State's sovereignty

... restrictively", and asked the tribunal to deny Siemens' efforts to detour around provisions in the Germany-Argentina BIT which were alleged to be more favorable to the Argentine Republic (at least insofar as they imposed an 18 month period for recourse to local courts).

For its part, Siemens argued that the onus should be on a state to lodge an express exception to a treaty's MFN clause, and that Argentina had failed to do so in its treaty with Germany.

In resolving this, and other key interpretive questions relating to the BIT, the tribunal began by ascertaining what it took to be the object and purpose of the Germany-Argentina BIT. And having determined that this purpose was to "create favorable conditions for investments and to stimulate private initiative", the tribunal went on to resolve a number of ambiguities in treaty language with an eye on this objective.

After dispensing with Argentina's various objections, the tribunal affirmed that the case will proceed to a hearing on the merits.

3. Tribunal dismisses BIT suit against United Arab Emirates on grounds of nationality, By Luke Eric Peterson

An ICSID tribunal has dismissed a large arbitration claim against the United Arab Emirates under the Italy-U.A.E. bilateral investment treaty.

The claim - which according to a knowledgeable source was worth several hundred million US dollars - was related to a port concession in Dubai. In an award handed down on July 7 of this year, Mr. Hussein Nuaman Soufraki, although a holder of Italian and Canadian passports, was found not to have qualified as an Italian national under Italian law. In view of the lapse of his claim to Italian nationality, the tribunal held that he was not entitled to bring a claim under the Italy-U.A.E. BIT as an Italian national.

The award is understood not to have addressed a potentially more interesting legal question: whether Mr. Soufraki, had he qualified as an Italian national, would still need to meet a further test of "effective" or "dominant" nationality under international law. Such a test might have required that, as a dual passport-holder, he demonstrate that he had closer or more "effective" ties with the "home" state under whose BIT he sought to bring a claim (i.e. Italy).

Mr. Soufraki's failure to clear the initial hurdle - proof of Italian nationality - obviated the need for the tribunal to resolve whether effective nationality need be demonstrated.

Had the tribunal grappled with the question, the case might have formed a neat book-end to another recent ICSID case which grappled with the question of how to define the

nationality of corporate claimants. In the recent Tokios Tokelés arbitration, a majority of an ICSID tribunal held that a Lithuanian incorporated firm - while owned by Ukrainians - still qualified as a Lithuanian investor for purposes of the Lithuania-Ukraine BIT. Following that decision, the President of the tribunal resigned in disagreement with the majority's argument.

When it comes to determining the nationality of an individual investor, few investment treaties are known to impose more restrictive requirements - such as an express requirement that the investor have been resident for some period of time in the putative home state - in order to qualify as a covered investor under the treaty. Indeed, on occasion, treaties will move in the opposite direction and extend their protections beyond nationals, to include permanent residents - as is the case in some Canadian bilateral investment treaties.

Had the Soufraki arbitration grappled with the question of "effective" nationality, it might have resolved whether a rule drawn from another area of international law (the "effective" nationality test) is applicable to an investment treaty arbitration at ICSID.

The tribunal in the Soufraki v. U.A.E. arbitration was composed of Dr. Aktham El Kholy, Judge Stephen Schwebel and Mr. L. Yves Fortier.

4. British Institute's Investment Treaty Forum to host conference Sept.10

The Investment Treaty Forum of the British Institute for International and Comparative Law (BIICL) is hosting its third conference, which will explore the relationship between local courts and investment treaty arbitration.

The event is scheduled for September 10, 2004 and will take place at Senate House, at the University of London.

Discussion topics will include the so-called fork-in-the-road clause, denial of justice in local courts, and the relationship between contractual and treaty claims.

For full information see:

http://www.biicl.org/admin/files/investment%20treaty%20elec.doc

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Negotiation Watch:
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5. Briefing paper analyzes Intellectual Property Rights rules in investment treaties,
By Luke Eric Peterson

A new publication of GRAIN, an international non-governmental organization, sets forth an analysis of the intellectual property right (IPR) provisions of international investment agreements. The paper, by Prof. Carlos M. Correa of the University of Buenos Aires, examines whether and how investment treaties "increase the scope and availability of IPR protection beyond current standards, reduce flexibilities to developing countries under international treaties and can be used to expand the application in their territories of IPRs over biodiversity."

Noting that new gains in IPR protection are increasingly found at the bilateral, rather than the multilateral level, the paper explores how standard investment treaty rules may narrow policy options for governments in relation to regulation, revocation or compulsory licensing of investments which are protected by intellectual property rights.

In particular, Correa raises the spectre of domestic legislation facing investor-challenge under international arbitration, even where the legislation is compliant with the World Trade Organization's Trade-Related Intellectual Property (TRIPs) agreement.

A free copy of Correa's paper is available for download at:
http://www.grain.org/rights/tripsplus.cfm?id=59

6. OECD to Host Global Forum on Investment in India from Nov.19-21

The Organisation for Economic Cooperation and Development (OECD) is holding a global forum in India from November 19-21. The event will explore how governments can enhance their business environments and maximize the benefits of investment. In particular, sessions will focus upon three areas:

"(i) The OECD initiative on a Policy Framework for Investment as an operational tool to promote investment for development; (ii) Promoting corporate responsibility - defining the roles of government and business; and (ii) Maximising official development assistance - synergies for development."
Further information is available at:

http://www.oecd.org/document/56/0,2340,en_2649_33763_32233656_1_1_1_1,00.html

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