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ARBITRATION UPDATE: ICSID TRIBUNALS RULE ON JURISDICTION AND PROVISIONAL MEASURES

Lao Holdings NV v The Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6)
Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2013-12 (Number 2)

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Background

By way of a Request for Arbitration dated 14 August 2012, Lao Holdings NV (the Claimant) sought to commence arbitration against The Lao People's Democratic Republic (the Respondent), on the basis of the Agreement on Encouragement and Reciprocal Protection of Investments between the Lao People's Democratic Republic and the Netherlands.

The Claimant alleged that the Respondent, through confiscatory taxation and other measures contrary to its treaty obligations effectively expropriated the Claimant's investment in gambling and related businesses located in Laos. The Respondent, in addition to denying any expropriation or other unfair or improper conduct, also asserts that the Claimant's investment is tainted by bribery, embezzlement and money-laundering.

By way of a Decision on Jurisdiction dated 21 February 2014, the ICSID Tribunal found that it did have jurisdiction over the dispute. The hearing on the merits of the arbitration was scheduled to commence in Singapore on 17 June 2014.

The present application arose out of a Provisional Measures Order dated 17 September 2013 which prohibited the Respondent from taking "taking any steps that would alter the status quo ante or aggravate the dispute." At a hearing on 12 May 2014, the Respondent sought to amend the Provisional Measures Order in a way that would permit the Respondent "to further its criminal investigation into alleged illegal conduct by employees of the Claimant, as well as the alleged corruption of officials of the Respondent Government connected with the investments that are the subject matter of the arbitration."

Decision

In its Ruling on the Motion to Amend the Provisional Measures Order dated 30 May 2014, the Tribunal (comprising of The Honourable Ian Binnie CC, QC as President, along with Professor Bernard Hanotiau and Professor Brigitte Stern) rejected the Respondent's request to amend.

The Tribunal found that the Respondent had not satisfied the conditions precedent to justify a modification of the non-aggravation clause to which the Respondent consented at the hearing of 2 September 2013. Such a modification had to be based on changed circumstances, which make it urgent and necessary to adopt a new decision on provisional measures, which can suspend, terminate or modify the scope of the provisional measures initially granted (and this was particularly so given that the Respondent had agreed to the original provisional measures order).

The Tribunal agreed in principle with the Respondent's assertion of its sovereign right to pursue a criminal investigation both within Laos as well as invoking the assistance of other states, but drew attention to the unusual facts present in this case. In the circumstances, the Tribunal was satisfied on the evidence that the timing and direct relationship between the criminal proceedings and the arbitration, the amendment should not be permitted. In particular, the integrity of the arbitral process would be compromised by permitting the Respondent to run a criminal investigation concurrently with the arbitration directed to the same people and the same facts at the same time, and would aggravate the dispute. The Respondent had been aware (or could have been aware) of the alleged unlawful activity, and the Respondent's position was not based so much on a "change of circumstances" as a change of tactics as the arbitration hearing date approached. In the circumstances, therefore, the amendment would not be permitted.

Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2013-12 (Number 2)

Background

On 6 February 2013, Achmea (a shareholder of the UNION health insurance company) submitted to the Slovak Republic a Notice of Arbitration pursuant to Article 3 of the United Nations Commission on International Trade Law Arbitration Rules of 1976 (the "UNCITRAL Rules"}, and to Article 8 of the Bilateral Investment Treaty between the Netherlands and the Slovakian Republic.

The arbitration related to the plans of the Slovakian government to merge the three existing health insurers and introduce a unitary state system of health insurance. In the present case, Achmea stated that it was seeking to prevent the potential expropriation of its investment by Slovakia which was seeking to reform the national healthcare system, and establish a single health insurance company. Achmea also alleged that its investment was damaged by the conduct of 17 state-owned hospitals during the negotiations of contracts on healthcare provision, as well as by the purported general instability of the regulatory environment in health insurance.

Achmea requested that the Tribunal order the Slovak Republic to refrain from expropriating Achmea's private health insurance company, subject to a financial penalty.

The arbitration followed a previous arbitration between Achmea and the Slovakian Republic, which was instigated after Slovakia took away a number of ownership rights from Achmea. In that case, an arbitral tribunal found in favour of Achmea although the Slovakia later appealed against the decision.

Decision

In a decision dated 20 May 2014, the Tribunal (comprising of Dr. Laurent Levy as President, Mr. John Beechey and Prof. Pierre-Marie Dupuy) held that it did not have jurisdiction over Achmea's claims. The Tribunal awarded Slovakia EUR 1.01 million in costs, and ordered Achmea to bear the arbitration costs, which amounted to over EUR 340,000.

In connection with the claim for expropriation, the Tribunal noted that as the proposed reform of the healthcare service were still in "infancy stages", the Tribunal was therefore, in the present instance, being invited to engage in a speculative exercise, looking into the future to examine a State conduct that has not yet materialized and whose features may not be determined with certainty at this stage. The Tribunal concluded that such an exercise was impermissible under the Bilateral Investment Treaty, and therefore fell outside the ambit of the Tribunal's jurisdiction.

In particular, the Tribunal noted that, in its view, it was not empowered to intervene in the democratic process of a sovereign State, and could not do so absent very specific language to that effect. The design and implementation of its public healthcare policy is for the State alone to assess and the State must balance the different and sometimes competing interests, such as its duty to ensure appropriate healthcare to its population and its duty to honor its international investment protection commitments. In the circumstances, the Tribunal had no jurisdiction.

1st July 2014