<Reference>
RECENT INVESTMENT TREATY ARBITRATION CASES

Although not binding as a precedent, arbitral awards under investment treaties have a significant influence on subsequent arbitral awards. Arbitration cases in which arbitration awards were granted in 2013 and on which information is available will be briefly summarized below. In general, claims over jurisdiction are raised quite often before arbitral tribunals. Where it is determined that the arbitral tribunal has jurisdiction, a decision on the merits of the case is made thereafter. The decisions on jurisdiction and the substance of the case are given either separately or together as one decision. Regarding decisions on the merits of the case, decisions on breach of obligation and on compensation are given either separately or together. As shown by the fact that many cases reach an amiable settlement after the jurisdiction of the arbitral tribunal is held in the affirmative, the determination of jurisdiction has a great influence on the negotiation between investor and state.

1. Cases involving Disputes over Jurisdiction

(1) Investments "in" the Host Country

1) Apotex Inc. v. The United States of America, UNCITRAL, NAFTA, Award on Jurisdiction and Admissibility, June 14, 2013.

The claimant (Canadian company), which develops/manufactures generic drugs, claimed that the US government's delay in issuing a distribution license, etc. had disrupted exports of its products to the US market and violated the national treatment clause, the fair and equitable treatment clause, and the expropriation clause. The arbitral tribunal stated that all the expenses involved in developing, manufacturing, and preparing to apply to the US authority for a distribution license by the claimant were funded in Canada and thus the claimant had not made any investments in the US. The claimant also claimed that the expense involved in distributing the generic drugs in the US market constituted a concrete investment. However, the arbitration tribunal determined that the expenses of concern were for exporting the products from Canada and did not constitute an actual investment under NAFTA because NAFTA Article 1139(i) excludes claims to money arising from commercial contracts from the definition of an investment under NAFTA. Jurisdiction was therefore denied.

2) Ambiente Ufficio v. Argentina, ICSID Case No. ARB/08/9, Argentina-Italy BIT, Decision on Jurisdiction and Admissibility, February 8, 2013.

In response to a claim by Italian creditors that suspension of an interest payment from government bonds by Argentina violated the Argentina-Italy BIT, the Argentinian government argued that the investment which had not been made "in" the contracting party was not subject to the investment protection provisions of the BIT because the bonds of concern were issued outside Argentina, Argentinian laws were not applicable, and jurisdiction was designated to a country other than Argentina, etc. The arbitration tribunal, however, determined that Argentina would benefit from having issued the bonds and the capital thereby

gained would be used for the economic growth of Argentina. The arbitration tribunal concluded that the issuance of bonds did fall under being an investment made "in" the contracting party under the BIT, and therefore affirmed the jurisdiction. This determination was very similar as that of another case, Abaclat v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011, which arose from the same situation.

(2) Existence of Economic Contribution

• KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, Netherlands-Kazakhstan BIT, Award, October 17, 2013.

A Kazakhstani person ("A") purchased Kazakhstan BTA Bank. "A" had established an anti-establishment political party and his relationship with the ruling party worsened and hence he made detour investments via foreign companies because of the fear that his property would be expropriated. The claimant company KT Asia (a Netherlands company) owned by "A" also held a small number of shares in BTA Bank. However, the claimant did not pay anything to acquire the shares. The ruling Kazakhstan authority subsequently initiated nationalization of the BTA Bank, upon which the claimant filed a request for arbitration based on the Netherlands-Kazakhstan BIT.

The respondent country claimed that no economic contribution was made by the claimant, and that therefore no actual investment was made. The arbitration tribunal said that although properties transferred within an entity that would be generally regarded as being a "business group" from the point of view of tax laws and financial reporting standards but without any new economic contribution might be deemed an investment, in this particular case "A" practically controlled a large number of companies via a number of persons basically under his control and therefore the aforementioned companies could not be regarded as being a "business group" in the overall context of the situation. The arbitration tribunal determined that no economic contribution had been made by the claimant and therefore no investment under the BIT or the ICSID Convention, and thus denied the jurisdiction.

(3) Financing agreement with investors

• Burimi SRL and Eagle Games SH.A v. Republic of Albania, ICSID Case No. ARB/11/18, Albania-Italy BIT, Award, May 29, 2013.

Eagle Games (an Albanian company) was granted a 10-year gambling business license by the Ministry of Finance of Albania and its minor shareholder "A" had concluded an agreement with Burimi (an Italian company) wherein Burimi would finance "A"'s investment in Eagle Games. Several years later and within the licensing period a law providing for all existing gambling business licenses to be cancelled was adopted/enforced. The Albanian government proposed compensation that conformed to the law, but Burimi objected and subsequently filed a request for arbitration based on the Albania-Italy BIT.

The arbitration tribunal determined that Burimi did not partially own Eagle Games via financing to "A" and therefore had made no investment under the BIT or the ICSID Convention, and thus denied the jurisdiction.

(4) Nationality of investor

• Burimi SRL and Eagle Games SH.A v. Republic of Albania, ICSID Case No. ARB/11/18, Albania-Italy BIT, Award, May 29, 2013.

About the forecited case, "B" (who held dual nationality in Albania and Italy), owned a majority stake in East Games and was also a board member. Eagle Games did not agree to the compensation that had been proposed by the Albanian government and hence filed a request for arbitration based on the Albania-Italy BIT. East Games claimed that although it was an Albanian company it fell under "any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign controll, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention" (Article 25(2)(b) of the ICSID Convention) and invoked Article 8(2)(c) of the BIT, which provided that a company with the nationality of a Contracting Party to the dispute (for example, Albania), but with the majority of the capital being owned by investors of the other Contracting Party (for example, Italy), would be considered as having the nationality of the latter (Italy).

While the arbitration tribunal acknowledged that Article 25(2)(b) of the ICSID Convention did not provide any definition for "foreign" control, it pointed out that "B" could not be a claimant in this case because of the provision for dual nationality (Article25(2)(a)). The arbitration tribunal therefore determined that a company controlled by "B" could not be qualified as a foreign company based on Article 25(2)(b), and thus denied jurisdiction.

(5) Prior negotiation requirement (cooling-off period)

• Tulip Real Estate v. Turkey, ICSID Case No. ARB/11/28, Netherlands-Turkey BIT, Decision on Bifurcated Jurisdiction Issue, March 5, 2013.

The claimant (a Netherlands company) concluded a contract concerning city planning in Istanbul with a Turkish company, the majority of which was owned by the Turkish government, and acquired some land. The Turkish company, however, subsequently terminated the contract due to breach of the contract by the claimant. The claimant then filed a request for arbitration alleging that the termination of the contract violated the BIT. In determining jurisdiction only an objection concerning the prior negotiation requirement provided for in Article 8(2) of the BIT was addressed. The Article provided that in the event of any dispute over an investment the parties to that dispute shall initially seek to resolve the dispute by consultations and negotiations in all good faith, but could choose to submit the dispute to the ICSID for settlement by arbitration at any time after one year from the date upon which the dispute arose.

The claimant claimed that one year had passed from the date upon which the dispute had arisen when the request for arbitration was filed or, if it had not, during the procedure involved in the case, and thus that requirement had been met. The arbitration tribunal stated that one year needed to have passed from the date upon which the dispute arose when the request for arbitration was filed, and if one year had then passed after that filing the jurisdiction would be denied. In this particular case the request for arbitration was determined to have been filed after that one year had passed, and thus the respondent's objection regarding jurisdiction was rejected.

(6) Prior domestic lawsuit requirement

1) Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Switzerland-Uruguay BIT, Decision on Jurisdiction, July 2, 2013.

Uruguay provided in a Presidential Decree and by the ordinances of the Ministry of Public Health that all cigarette packages would have to include graphics depicting the effects of smoking on human health, health warnings on cigarettes would have to cover 80% of the surface of the front and back of the packaging, and only one type of packaging could be used per brand (for example, the same packaging must be used for both "Marlboro Red" and "Marlboro Gold"). The claimant (a Swiss company) filed a request for arbitration alleging that those measures violated the BIT. Article 10.2 of the BIT provides for the parties to the dispute setting a six-month negotiation period, filing a domestic lawsuit if the dispute could not be resolved within that period, and then filing a request for arbitration if a court decision was not passed within 18 months. In this case six months of negotiations had taken place and a subsequent domestic lawsuit was filed, but 18 months had not elapsed when the request for arbitration was filed, whereas 18 months had elapsed after the request for arbitration was made but before the jurisdiction determination. The respondent claimed that the request for arbitration should be rejected on the grounds that 18 months had not elapsed when the request was made.

The arbitration tribunal invoked the decision of the International Court of Justice that where the jurisdiction requirements had not been met at the time of initiating proceedings, any jurisdiction once denied could be accepted upon the plaintiff initiating new proceedings and therefore in any such case jurisdiction would then be accepted on grounds of good judicial practice (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), ICJ Reports 2008, pp. 441-442, para. 87), also referring to a similar precedent, Teinver v. Argentina (ICSID Case No. 09/1, Decision on Jurisdiction, December 21, 2012), and affirmed the jurisdiction.

2) Ömer Dede and Serdar Elhüseyni v. Romania, ICSID Case No. ARB/10/22, Romania-Turkey BIT, Award, September 5, 2013.

The claimants (Turks) owned a majority stake in a Romanian agricultural equipment company (SC), but the Romanian governmental authority seized the money deposited in a depository by the claimants for reasons related to unsuitableness of the share-acquiring process, and requested the depository to register the shares owned by the claimants in the name of the government authority instead. The depository did as requested. The claimants filed a request for arbitration in November 2010 claiming that the act of the government authority constituted illegal expropriation. Romania claimed that jurisdiction should be denied on the grounds that the claimants had not met the requirement of referring a dispute to a court of the respondent country, with any request for arbitration only being allowed after domestic dispute resolution had failed or after one year has elapsed from the date when the dispute was first submitted to the court. The claimants claimed that a dispute on illegal expropriation that violated the BIT could not be filed with Romanian courts, thus making the obligation to refer to a domestic court inapplicable.

The arbitration tribunal stated that while both parties acknowledged that Article 4 (provisions on expropriation) of the BIT could not be invoked in Romanian courts, the BIT did not require an investment dispute brought before domestic courts in the sense of claims based on breaches of particular BIT terms. Rather, claims before domestic courts must allow for the resolution of the dispute to the same extent as if the claim had been brought to arbitration under the BIT. The arbitration tribunal then determined that since the claimants had not brought the dispute to a Romanian court, they had not fulfilled the jurisdictional prerequisite, and therefore it denied jurisdiction.

(7) Denial of benefits clause

• Stati v. Kazakhstan, SCC Arbitration V (116/2010), Energy Charter Treaty, Award, December 19, 2013.

Upon the claimants claiming that Kazakhstan had expropriated LPG plant, etc., the respondent invoked Article 17 (denial of benefits) of the Energy Charter Treaty and claimed that jurisdiction of the arbitral tribunal should be denied for Ascom, the other claimant. The arbitration tribunal determined that in order for Article 17 to be applicable the host country (respondent) needed to have invoked the aforementioned Article before the dispute arose, whereas in this particular case it had been invoked after the dispute had already arisen, thus making Article 17 inapplicable.

With regard to Article 17 of the Energy Charter Treaty, similar determinations had been made in the cases of Plama v. Bulgaria (ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005) and Veteran Petroleum v. Russia (Interim Award on Jurisdiction and Admissibility, November 30, 2009). On the other hand, the tribunals found that the denial of benefits clause could be invoked after a dispute arose in the cases of Pac Rim Cayman v. El Salvador (ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections , June 1, 2012) with respect to the denial of benefits clause of the Central America-United States-Dominican Republic Free Trade Agreement and Guaracachi & Rurelec v. Bolivia (PCA Case No. 2011-17, Award, January 31, 2014) with respect to the denial of benefits clause of the US-Bolivia BIT.

(8) Application of most-favored-nation treatment clause to procedural rules

• Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Turkey-Turkmenistan BIT, Award, July 2, 2013.

The claimant (Turkish company) had been involved in construction projects that were based on contracts with the heads of local governments, etc. in various cities in Turkmenistan. However, a difference of opinion over the status of fulfillment of the contract arose and the claimant filed a request for ICSID arbitration.

The Turkey-Turkmenistan BIT imposed a claim for relief to a court in the host country as a requirement for international arbitration, but the claimant had not made any such claim. The applicability of the dispute settlement clause of other treaties arising from the use of the most-favored-nation treatment clause was then challenged. The arbitration tribunal compared the most-favored-nation treatment clauses of the treaties, application of which in procedural rules was accepted in precedents, with the most-favored-nation treatment clause of the BIT, and pointed out that the latter did not provide for most-favored-nation treatment in "all matters", thus making the coverage of the most-favored-nation treatment of the latter smaller in focus. The arbitration tribunal rejected the use of the dispute settlement clause of the other treaties because "treatment" in the most-favored-nation treatment of the BIT only refers to substantive rights and does not include a dispute settlement clause, and therefore determined that jurisdiction should be denied.

(9) Application of most-favored-nation treatment clause to the definition of "investment"

• Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Israel-Uzbekistan BIT, Award, October 4, 2013.

Two molybdenum-related state-owned enterprises of Uzbekistan aimed to improve their business environment and established a joint venture company, Uzmetal, with the claimant (Israeli company) after having obtained cabinet approval. A few years later Uzbekistan prosecutors initiated an investigation of misconduct by the executives of the company, and the cabinet adopted a resolution to invalidate the rights of Uzmetal to purchase resources. A petition was then filed by an Uzbekistan state-owned enterprise, which was a participant in the joint venture company, and an Uzbekistan court declared Uzmetal to be bankrupt. The claimant claimed the expropriation clause, the fair and equitable treatment clause, and the prohibition of discriminatory treatment clause had all been violated, and filed a request for BIT-based arbitration.

The respondent noted that Article 1.1 of the BIT defined "investments" to be assets implemented in accordance with all domestic laws and regulations, and claimed that the investment in this case had been implemented via an act of bribery and was therefore not subject to protection under the BIT. The claimant claimed that the definition of other treaties that did not limit investments to assets that were implemented in accordance with domestic laws and regulations should be applicable via the most-favored-nation treatment clause of the BIT. The arbitration tribunal rejected the claim on the grounds that protection by an investment treaty, including the most-favored-nation treatment clause, should be granted within the scope of that treaty set forth in the definitions of "investments" and "investors". Based on the act of bribery committed by the claimant, the arbitral tribunal denied jurisdiction.

2. Decision on Merits

(1) Termination of contract and expropriation

• Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/04/6, Canada-Venezuela BIT, Award, January 16, 2013.

A Venezuelan government institution, CVG, which supervises regional development, called for bids to develop a gold mine, and concluded an agreement with a Canadian company, Placer Dome Inc. (PDI), to jointly establish two companies that would engage in that development. After initiation of the development a difference of opinion over the development approach arose between CVG and PDI due to a drop in the price of gold, and PDI announced that the project was to be terminated and all investments to be liquidated. PDI then concluded, without obtaining the approval of CVG, a share transfer agreement with the claimant (Canadian company) to sell all the shares and a credit obligation of 68 million US dollars held by PDI to the claimant for 50 US dollars. CVG, on the other hand, declared the contract to be void, and then took possession of the business location and assets. The claimant filed a lawsuit in a Venezuelan court concerning maintaining its status and also requested the Venezuelan National Assembly and the Prosecutor's Office to investigate the situation, but it did not improve. The claimant then filed a request for arbitration, claiming the expropriation clause and fair and equitable treatment clause had both been violated.

The arbitration tribunal rejected the claim on the grounds that the claimant and PDI had violated the contract by transferring the shares without first obtaining the approval of CVG, and that the measures used by the Venezuelan government had been the responses that were based on the violation of the contract by the claimant and thus did not constitute any expropriation nor violate the fair and equitable treatment obligation or the full protection and security obligation.

(2) Negotiation for compensation for expropriation

• ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venezuela, ICSID Case No. ARB/07/30, Netherlands-Venezuela BIT, Decision on Jurisdiction and Merits, September 3, 2013.

The claimants (Netherlands companies) invested in various oil-related projects in Venezuela. After the inauguration of President Chávez the Venezuelan government raised the royalty and income tax rates on some of the projects, and declared all oil-related projects to be nationalized via Presidential Decree. Negotiations for compensation for the shares of the claimants with the Venezuelan government subsequently broke down. The claimants then filed a request for ICSID arbitration.

The arbitration tribunal first determined that it did not have jurisdiction under the Venezuelan domestic law and said that an arbitral award could only be rendered on the dispute over violations of the BIT. The arbitration tribunal then acknowledged that the taxation measures were explicitly excluded from the scope of the fair and equitable treatment clause of the BIT and determined that raising the royalty and income tax rates in this particular case was not discriminatory and thus did not violate the national treatment clause and the most-favored-nation treatment clause. With regard to the expropriation clause, the arbitration tribunal found no discrimination had taken place and determined that only the obligation to faithfully conduct negotiations for compensation had been violated.

(3) Conflicting acts within a government

1) Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, France-Moldova BIT, Award, August 4, 2013.

The claimant (a French natural person) won a bid for the creation of a network of duty-free stores at the border and the airport in Moldova, but could not smoothly proceed with the business due to the court decisions that declared the successful bid by the claimant to be invalid and the obstructive acts by the authorities. The claimant then filed a request for ICSID arbitration, claiming the fair and equitable treatment clause and expropriation clause had both been violated.

The arbitration tribunal determined that even though the court found that the business approved by an administrative organization had been violated domestic laws, yet if the administrative organization subsequently took no remedial action for the investor, there was a violation to the fair and equitable treatment obligation.

2) Teco v. Guatemala, ICSID Case No. ARB/10/17, Free Trade Agreement between the Dominican Republic, the United States of America, and Central America (CAFTA-DR), Award, December 19, 2013.

The claimant (US company) indirectly held a small number of shares in a privatized Guatemalan electricity distribution and sales company, EEGSA. Guatemalan domestic laws provided that the fees collected by EEGSA should be determined every five years by a Guatemalan national institution, the National Commission of Electric Energy (CNEE), after taking the opinions of the Expert Commission into account. In 2008, however, CNEE's revision of the fees was not in line with the opinions of the Expert Commission. The claimant objected to this and filed a request for ICSID arbitration.

The arbitration tribunal stated that the domestic laws attached significant value to the opinions of the Expert Commission and that Article 10.5 of the CAFTA-DR (minimum standards of treatment including fair and equitable treatment) provided for due process in

administrative processes, and therefore, even if the opinions of the Expert Commission were not legally binding, CNEE had the obligation to consider their opinions and present their reasons for reaching a different conclusion. The arbitration tribunal determined that in this particular case CNEE had not taken the opinions of the Expert Commission into account nor presented their reasons for not doing so, and therefore the respondent had violated Article 10.5 of the CAFTA-DR.

(4) Obligation to minimize damage to investors

• The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Netherlands-Romania BIT, Award, May 6, 2013.

The claimant (Netherlands company) acquired a controlling interest in a privatized Romanian petroleum refinery/petrochemical complex company, Rompetrol Rafinare. The claimant at the time was fully owned by a Romanian citizen “P”. Immediately after the claimant had acquired an interest in Rompetrol Rafinare, the National Anti-Corruption Office and the General Prosecutor’s Office initiated an investigation of the privatizing process, and “P” and his former business partner “S” were detained for a short period of time. The claimant filed a request for arbitration, claiming that the investigation was initiated based on an official report of the Presidential Administration alleging that the company had committed irregularities in the course of the privatizing process and that the investigations were overly oppressive and violated the Netherlands-Romania BIT.

With regard to the formulation of the report of the Presidential Administration, the arbitration tribunal identified that the President investigating general concerns such as irregularity was a matter of course and there was no proof that any improper pressure had been used during the report formulation process, and therefore determined it to have been non-problematic. The arbitration tribunal then rejected the claim that the Prosecutor’s Office initiating compulsory investigations based on the report violated the obligations of the treaty on the grounds that whatever made the investigation authority suspect illegal acts had taken place did not affect the validity of the investigation, and thus not a violation of the BIT. With regard to the implementation methods of the compulsory investigations, the arbitration tribunal discussed the individual measures that the claimant claimed the violation of the BIT as well as their cumulative effects, and determined no violation from the both point of views had taken place. However, the arbitration tribunal did determine that although the Prosecutor’s Office was aware that its investigation possibly violated the obligation to protect a foreign investor (claimant), they did not take any measures to avoid, minimize, or mitigate that possibility of harm; therefore, only to such extent were their acts a violation of the fair and equitable treatment obligation. The claimant’s claim for damages, however, was rejected because the claimant failed to prove the amount claimed.

(5) Alteration of investor preferential legislation and obligations under BIT

• Micula v. Romania, ICSID Case No. ARB/05/20, Romania-Sweden BIT, Final Award, December 11, 2013.

The claimants, the Micula brothers (Swedes), directly and indirectly owned several food companies in Romania. Romania issued a government decree that granted the right of a preferential taxation measure for ten years under certain conditions, and the claimants obtained entitlement to receive the measure. However, in the course of preparing for accession to the EU, Romania found inconsistencies between this measure and EU laws, and eventually abolished the measure. The claimants then filed a request for arbitration, claiming

that it was a violation of the umbrella clause and the fair and equitable treatment clause of the BIT.

The arbitration tribunal stated that the content of the "obligation" of the observance of undertakings clause (umbrella clause) should be determined depending on the law governing that obligation, and that the claimants did not establish Romania's obligation to continue to grant the same taxation preferential measures for ten years under Romanian laws. However, the arbitration tribunal did determine that, through the legislations, the entitlement to a preferential measure, and other subsequent actions, the Romanian government had created the claimants' legitimate expectation that basically the same preferential measure would continue to be granted for ten years, and that there was no clear indication that any such measure conflicted with EU laws; thus, the investors' expectation was reasonable. The arbitration tribunal then concluded that Romania's act of not fulfilling that expectation constituted a violation of their fair and equitable treatment obligation.