APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
15-19 June 2009

Produced for:
Asia Pacific Economic Cooperation Secretariat
35 Heng Mui Keng Terrace
Singapore 119616
Tel: (65) 68919 600 Fax: (65) 68919 690
Email: info@apec.org
Website: www.apec.org

APEC#209-CT-01.5

APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region

Malaysia's Experience with ICSID

Osman Affendi Mohd. Shalleh
Senior Federal Counsel
Attorney General's Chambers, Malaysia

Focus of this presentation:

- To share Malaysia's experience of its involvement in an investor-State dispute settlement under ICSID
  - *Malaysian Historical Salvors Sdn Bhd v Government of Malaysia* (ICSID Case ARB/05/10)

Introduction

- Number of IGAs (BITs) Malaysia has entered into - 73
- Number of new IGAs being negotiated - 5
- Number of IGAs under review – 4
- Number of FTAs – 2 (Japan and Pakistan)
- Number of new FTAs being negotiated - 4

- ICSID as the sole/one of ISDS fora

Malaysia & ICSID

- Signed by Malaysia – 22 October 1965
- Entry into force – 14 October 1966
- Domestic law - Convention on the Settlement of Investment Disputes Act 1966 [Act 392]
  - c.i.o – 15 March 1966

- 2 cases brought against Malaysia:
  - *Philippe Gruslin v Malaysia* (ARB/94/1)
  - *Malaysian Historical Salvors Sdn Bhd v Malaysia* (ARB/05/10)

Malaysian Historical Salvors (MHS) v Government of Malaysia

- 1988 – MHS offer to salvage a wreck of DIANA – sank in 1817 – off coast of Melaka
- 1991 - Salvage Contract – "*to survey, identify, classify, research, restore, preserve, appraise, market, sell/auction, and carry out a scientific and salvage of the wreck and content of Diana*".
- No-finds no-pay basis
- Contract period – 18 months

- 28 March 1994 – MHS reported DIANA found on 23 December 1994 (after 3 extensions of time)
- Discovery – 24,000 intact individual pieces of porcelain (plus broken items)
- 6 March 1995 – "Designated finds" auctioned by Christie's in Amsterdam
- 12 July 1995 - Dispute arose - share of proceeds (auction and appraised value)

Domestic arbitration

- July 1995 – MHS referred the dispute to Kuala Lumpur Regional Centre for Arbitration – sole arbitrator
- July 1998 – claims dismissed
- August 1998 – applied to KL High Court (award to be remitted/set aside)
- 4 February 1999 - Application dismissed – no appeal made

International forum

- December 2000 - MHS filed a complaint to Chartered Institute of Arbitrators, London (internal review of award & misconduct)
- January 2001 – complaint dismissed entirely

ICSID Arbitration

- 30 September 2004 – MHS submit request to ICSID
- IGA between Malaysia & UK (1981) – c.i.o 21 October 1988
  - Article 7 – ISDS – ICSID only
- 1 November 04 – ICSID requested further information
- 30 November '04 – MHS responded & claimed the Salvage Contract is an "investment"
- 18 February '05 – ICSID enquired further – "approved project" [Art. 1(1)(b)(ii) of IGA]

Article 1(1)(b)(ii)

"Investment" means:

- in respect of investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an "approved project".

ICSID Arbitration

- 14 June 2005 – ICSID registered MHS' request
- 4 October 2005 – Mr. Michael Hwang SC appointed as sole arbitrator by ICSID SG (with parties' agreements)
- 23 December 2005 - GOM filed Notice of Objection to Jurisdiction (Rule 41 Arbitration Rules) – 2 grounds
- 29 December 2005 – First Session (the Hague)
- Memorials filed by deadlines

Rule 41

- (1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible.

- 1. The claim does not fall within the scope of Article 25 of ICSID Convention and Article 7 of IGA
- 2. The Claimant's claim is not an "investment" under Article 1 of IGA

ICSID Arbitration

- 25 May 2006 - Oral hearing (Frankfurt)
- Post-hearing – further written submissions
- 17 May 2007 – Award handed down:
  - The Centre has no jurisdiction over the dispute submitted to it in this arbitration and the Tribunal lacks competence to consider the claims made by the Claimant

ICSID Arbitration

- Conclusion
  - The Contract is not an "investment" within the meaning of Article 25(1) of the ICSID Convention. The Claimant's claim therefore fails *in limine* and must be dismissed for want of jurisdiction
- Important finding:
  - The Contract did not make any significant contributions to the economic development of Malaysia (one of the hallmarks in *Salini*)

Article 25

- The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an **investment**, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

Annulment – Article 52

- **No appeal allowed** – annulment only on 5 limited grounds
- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

Annulment application

- 12 September 2007 - MHS applied for annulment
  - "(b) that the Tribunal has manifestly exceeded its powers"
- 30 October 2007 - Establishment of *ad-hoc* Committee [Article 52(3)]
  - Judge Schwebel (US)
  - Judge Shahabuddeen (Guyana)
  - Judge Tomka (Slovakia)

Ad-hoc Committee

- 31 March 2008 - First Session (the Hague)
- Timelines set – filing of Memorials
- Oral hearing – 3 & 4 December 2008 (the Hague)

What is annulment?

- A request for annulment is not an appeal, which means that **there should not be a full review of the tribunal's award**. One general purpose of Article 52, including its sub-paragraph (1)(b), must be that an annulment should not occur easily – *Indalsa Peru* (ICSID Case No. ARB/03/4)

What is annulment?

- Annulment is not a remedy against an incorrect decision. Accordingly, an ad hoc Committee may not in fact reverse an award on the merits under the guise of applying Article 52 - *MINE* (4 ICSID Rep 79)
- An allegation of a mere error of fact or of law will be of no avail – *Soufraki* (ICSID Case No. ARB/02/7)
- Annulment provides limited emergency relief for situations in which the basic legitimacy of the arbitration process is called into question – *CDC* (ICSID Case No. ARB/02/14)

Manifest excess of power

- The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest – *Wena Hotel* (ICSID Case No. ARB/98/4)
- Any excess apparent in a Tribunal's conduct, if susceptible of argument "one way or the other, is not manifest". ... If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive – *CDC* (ICSID Case No. ARB/02/14)

Decision (16 April 2009)

- 1. The Committee recognizes that the Sole Arbitrator acted in the train of several prior ICSID arbitral awards which lend a considerable measure of support to his approach
- 2. This Committee's majority has every respect for the authors of the *Salini v. Morocco* Award and those that have followed it, such as the Award in *Joy Mining v. Egypt*, and for commentators who have adopted a like stance

However ...

- It (Committee's majority) gives precedence to awards and analyses that are consistent with its approach, which it finds consonant with the intentions of the Parties to the ICSID Convention
- The Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it "manifestly" did so

And ...

- The Award is **annulled**
- GOM to bear the full costs of the annulment proceedings

- www.worldbank.org/icsid
  - Pleadings
  - Award
  - Decision

Should the Award be annulled?

- NO!
  - If the law on annulment is referred to
- The Tribunal didn't formulate something new – based findings on principles in earlier cases
- Battle between two different views on what constitutes "investment"
- Majority has the right to its own view – but no right to annul the Award
- Why is GOM punished?

Reasons

- MHS is just a Claimant advancing claims of minor financial dimension

- The Award stands annulled despite the Respondent's vigorous and comprehensive defence and adoption of it

Dissent by Judge Shahabudeen

- Economic development of the host State is a condition of an ICSID investment
- An investment must contribute to the economic development of the host State
- The Tribunal was correct in finding that the contribution to the economic development of the host State had to be substantial or significant

- The Tribunal was also correct in finding that the Applicant's outlay did not promote the economic development of Malaysia in a substantial or significant manner

- If the Tribunal erred in holding to these effects, it nevertheless did not manifestly exceed its powers

- It is difficult to see how a purely commercial entity, intended only for the enrichment of its owners and not connected with the economic development of the host State, is entitled to bring before ICSID a dispute concerning an investment in the host State
- Host States which let in purely commercial enterprises would have something to worry about. Correspondingly, ICSID would seem to have lost its way: it is time to call back the organization to its original mission.

- Economic development of the host State is a condition of an ICSID investment. If it is not, there is nothing to separate an ICSID investment from any other kind of investment; in the result, an ICSID arbitration would be indistinguishable from any other kind of arbitration (and there are several) concerning an investment dispute.

- This is an arbitral process; a high threshold is required to show that the Tribunal manifestly exceeded its powers.
- I do not think that that threshold can be passed in this case without converting the limited grounds of annulment into the ampler grounds of an appeal.

Lessons learnt

- Don't be too naive
- Only go to ISDS forum as a last resort
- Appointment of arbitrator (number)
- Financial implications
- Procedural clarity – proper mechanism in place
- Investor vs. States – whose rights?
- What is "investment"?