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NEWS: ICSID TRIBUNAL DISMISSES RSM PRODUCTION CORPORATION'S CLAIM AGAINST GRENADA

By Damon Vis-Dunbar

An American businessman has failed in his claim against Grenada under a 1996 oil and gas agreement, in a contract dispute conducted before an ICSID tribunal.

Initiated in 2005, the ICSID claim was one of a host of legal avenues pursued by Jack J. Grynberg, the president and CEO of RSM Production Corporation, in an effort gain an exploration license for oil and gas reserves that may lie off the coast of Grenada.

RSM's claim was pursuant to an ICSID arbitration clause in an agreement between RSM and Grenada, which prescribes the laws of Grenada as the applicable law for settling disputes. In its claim, RSM sought an order declaring that the 1996 agreement was still in force and that Grenada must grant RSM a license, or alternatively financial damages which RSM estimated would exceed US$500 million.

The 1996 agreement between RSM and Grenada established a long-term arrangement for the exploration, and potential extraction, of oil and gas reserves. As a first step, RSM was granted an opportunity to apply for an exploration license within 90 days of signing the agreement, which Grenada was obligated to award.

However, a broadly worded *force majeure* clause, which made implicit reference to Grenada's long-standing negotiations with Venezuela and Trinidad & Tobago over maritime boundaries, allowed RSM to delay its application for the exploration license. Notably, the clause also called on RSM to "take all reasonable steps to remove the cause" of the *force majeure*.

Fourteen days after the agreement was inked, RSM notified Grenada that it was invoking *force majeure*, thereby stopping the clock on the 90-day period for applying for an exploration license. RSM would maintain *force majeure* status for the next 8 years, a period in which Mr. Grynberg played a dubious role in Grenada's negotiations with Venezuela and Trinidad & Tobago over maritime boundaries.

At a contested point in early 2004, RSM notified Grenada that it was revoking *force majeure* status, effectively resuming the 90-day countdown that RSM had available to apply for an exploration license.

Indeed, the critical point of dispute is when RSM ended its declaration of *force majeure*, and in turn, at what point the 90-day countdown resumed. Confusing matters, two letters from RSM revoking *force majeure* were sent on different dates to different government bodies; moreover, while the second letter was dated 27 February 2004, it wasn't received until mid-April.

Ultimately, the Tribunal's 13 March 2009 ruling held RSM to a strict 90-day period, including the 14 days that lapsed in 1996 between signing the agreement and RSM's notice of *force majeure*, and resuming in January 2004 with RSM's first letter revoking *force majeure*. As a result, the Tribunal determined that the 1996 agreement either lapsed as of end-of March 2004, when the 90-day period ran out, or was lawfully terminated by Grenada in 2005.

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While the Tribunal supported its decision using precedents set under English law (Grenadian law was the applicable law, but the parties agreed that, with respect to the issues in dispute, English common law was the same as Grenadian law) it tested its conclusion against the principles of international law. Applying the commonly agreed methods for interpreting treaties under international law, the Tribunal concluded that it would have come to the same decision.

Grenada charges investor with illegal misrepresentation

In a counterclaim, Grenada charged RSM with illegal misrepresentation under Grenadian law, including the allegation that the company exaggerated the financial resources at its disposal, falsely indicated that it would begin work on certain aspects of the agreement immediately, and hid the fact that it intended to 'farm-out' the activities under the agreement to larger oil and gas companies.

Grenada also accused Mr. Grynberg of misrepresenting himself as an expert in maritime boundary negotiations.

These counterclaims accompanied sharp criticism of Mr. Grynberg's business strategy, which Grenada's counsel claimed took on a distinct modus operandi:

> *The Tribunal concurred that Mr. Grynberg was not an expert in maritime boundary negotiations, describing his approach as "secretive, unilateral, unauthorised, crude ... backed up with wild threats and vexatious litigation if unsuccessful ..."*

"The first step in this *modus operandi* is to 'lock-up' large, and often disputed, territories for long periods of time with agreements that require little of nothing from Mr. Grynberg (frequently because of force majeure notices). He appears to target governments that lack experience in the oil and gas business, using a combination of slick salesmanship, glowing promises and economic threats to procure such agreements. Then, when the time and market conditions are right, he either 'farms out' his contracts to serious players; and/or sues everyone in sight."

The Tribunal, however, rejected the counterclaim, finding that in some instances RSM had not made the alleged misrepresentations and in others Mr. Grynberg had genuinely believed what he was saying was true, even though it was not.

The Tribunal concurred that Mr. Grynberg was not an expert in maritime boundary negotiations, describing his approach as "secretive, unilateral, unauthorised, crude ... backed up with wild threats and vexatious litigation if unsuccessful ..."

However, despite the damning assessment of Mr. Grynberg's involvement in the maritime boundary negotiations, these actions did not constitute fraudulent misrepresentations, due to the fact that Mr. Grynberg subjectively believed them to be true.

The Tribunal would also go on to reject the other counterclaims related to misrepresentation. Although RSM often offered vague or contradictory statements with respect to its financial resources, these fell short of the level required to constitute illegal misrepresentation under Grenadian law.

Having dismissed RSM's substantive claims and Grenada's counterclaims, the Tribunal would order the parties to bear their own legal costs, and split the costs of the arbitration.

NEWS: CIT GROUP SETTLES WITH ARGENTINA

By Damon Vis-Dunbar

The American finance company CIT Group has reached a settlement with Argentina, bringing to close ICSID arbitration proceedings which began in 2003.

CIT Group had been seeking some US$124 million for alleged violations of the US-Argentina bilateral investment treaty, in one of the many disputes that arose with foreign investors in the wake of Argentina's 2001-2002 economic crisis.

In a 20 March 2009 letter to the tribunal, counsel for CIT Group announced that it had reached an agreement with Argentina, and requested discontinuance of the arbitration proceedings. Argentina concurred with the request, and accepted to split the cost of the arbitration with CIT Group.

Requests by ITN to CIT Group for further information about the settlement were not returned.

Of the cases at ICSID launched by foreign investors against Argentina, eight have so far been discontinued after a settlement was reached. A number of others have been suspended on the request of the disputing parties.

INTERVIEW: REFLECTIONS ON PAKISTAN'S INVESTMENT-TREATY PROGRAM AFTER 50 YEARS: AN INTERVIEW WITH THE FORMER ATTORNEY GENERAL OF PAKISTAN, MAKHDOOM ALI KHAN

By Lauge Skovgaard Poulsen and Damon Vis-Dunbar

Pakistan inked the first ever bilateral investment treaty (BIT) with the government of West Germany 50 years ago, before going on to accumulate one of the largest portfolios of BITs held by a developing country: some 47 in total, 35 of which were signed in a flurry of activity between 1988 and 1999.

However, in recent years, the expansion of Pakistan's investment-treaty network has slowed down substantially. The timing is no accident; the brakes were applied at the same time that Pakistan faced its first lawsuit under a BIT in 2001 by the Swiss multinational Société Générale de Surveillance (SGS) under the Switzerland-Pakistan BIT. While the SGS dispute ended in a settlement favourable to Pakistan, its effect on the Pakistani administration at the time was considerable.

Pakistan's Attorney General during the SGS dispute, and others that followed, was Mr. Makhdoom Ali Khan. To learn more about the impact of these disputes on Pakistan's investment-treaty program during his tenure as Attorney General, ITN spoke to Mr. Khan in Karachi.

ITN: How did you get involved with Pakistan's BIT-program?

The Secretary of Law called me up in 2001 and asked what I knew about the International Centre for Settlement of Investment Disputes (ICSID) and this thing called a bilateral investment treaty (BIT). He informed me that Pakistan was being sued by SGS at ICSID and asked how SGS could do that. To be perfectly honest, I did not have a clue, so I had to look it up on Google. I typed in 'ICSID' and 'BIT', and that's how I learned about these instruments for the first time.

I asked the Ministry of Industries, who were responsible for BITs at the time, how these treaties were signed. I was told that when the President, or Prime Minister, went abroad, our foreign missions would tell the Ministry that BITs are '*one of the doables*'. Since Pakistan had signed BITs without any consequences for a long time, everyone simply considered the treaties a piece of paper, something for the press, a good photo opportunity—and that was the end of it.

> *Notwithstanding a few very learned officials within the bureaucracy, there is not a shared understanding in Pakistan that negotiating BITs requires a lot of effort and - perhaps most importantly - legal expertise.*

Now, one option was of course not to participate in the SGS proceedings and instead try to rely on our local courts to avoid enforcement of a possible award. But I advised against this option, as it would give Pakistan's courts a bad reputation internationally. The government at the time agreed, but we knew it was going to be expensive. Recall that in 1999 and early 2000, most aid had been cut off to Pakistan due to our nuclear tests, so the case had the potential to wipe-out our entire stock of foreign reserves had it gone in the investor's favor. Luckily for Pakistan, it didn't.

ITN: What subsequent impact did the SGS case have?

The secretariat of the Chief Executive [former President Pervez Musharraf] issued a directive which provided that no more BITs were to be signed by Pakistan until the Attorney General's office was consulted and all other government stakeholders were onboard. This was a first for Pakistan. Previously, I don't think any ministry—except that in charge—even knew that the BITs had been signed, and I couldn't find files on record demonstrating that meaningful negotiations had actually taken place. The maximum level of input to the negotiations from Pakistan appears to have been proof-reading, and at times, albeit rarely, some not very significant suggestions on the text.

Secondly, the Board of Investment BOI [the agency now in charge of BITs] and I brought in experts from abroad to speak with the government stakeholders. If someone of any note in the world of public or private international law was visiting the region, we would invite them to come and speak. This was an education process of sorts, allowing us to understand what could, and could not, be the consequences of signing BITs. This, combined with a couple of excellent officials within the BOI, meant that Pakistan's negotiating capacity was upgraded significantly at the time.

ITN: Has this 'education process' succeeded?

I don't think that is the case. While the Pakistani team involved in the long and difficult BIT-negotiations with the United States [which remain ongoing] has been relatively well-prepared and rigorous in their approach, these negotiations were special because of the political relationship between our two countries and the scope of the U.S. proposal. So despite these efforts, I'm afraid the worst is yet to come. When I

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resigned as Attorney General in 2007, the approach to negotiating BITs was still haphazard and piecemeal. Notwithstanding a few very learned officials within the bureaucracy, there is not a shared understanding in Pakistan that negotiating BITs requires a lot of effort and—perhaps most importantly—legal expertise. Pakistan has therefore continued to sign BITs without seriously considering the implications. This is particularly troubling as Pakistan is not able to fulfill many of the legal obligations enshrined in BITs, which makes us an easy target for expensive investor claims.

ITN: With this in mind, do you think Pakistan should stop signing BITs?

I am not against BITs as such; I'm simply against the approach Pakistan has taken in the past, which is to passively sign these treaties, with no real negotiations, or sense of the risks involved. If Pakistan is going to seriously negotiate BITs, it needs to set aside an appropriate budget, so that the bureaucracy is well staffed and informed on these matters. Unfortunately, the Government of Pakistan has never considered BITs an important enough issue for this. But look at the legal costs in the three cases against us so far; I'm sure they exceed US$10 million as a very conservative estimate. For less than a fraction of that amount you can set up a department, hire lawyers—perhaps even get some assistance from outside Pakistan—and start looking at this process properly. But I don't think the will is there because the need is not felt. But come a day where we are faced with a similar situation as Argentina is now, this may change.

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NEWS: EUROPEAN MINERS AND SOUTH AFRICA SUSPEND PROCEEDINGS

By Damon Vis-Dunbar

A group of European's with a stake in South Africa's granite-quarrying sector and the Government of South Africa have agreed to suspend arbitration proceedings* for two months.

The claimants—several Italians and a Luxembourg corporation—allege that their interests in granite-quarrying companies were indirectly expropriated with the introduction in 2004 of the Mineral and Petroleum Resources Development Act (MPRDA).

The MPRDA forms part of South Africa's efforts to increase participation by historically disadvantaged South Africans in the mining industry.

The claimants argue that their mineral rights have been "extinguished" under the MPRDA, only to be replaced with rights of lesser value when changed to mining licenses under the new regime.

Notably, the quarrying companies indirectly owned by the claimants have lodged their so-called old-order mineral rights for 'conversion' to new-order rights. The MPRDA requires lodgement by 1 May 2009. (The actual 'conversion', however, may take longer. Until the new order rights are issued, the rights holder continues to mine under the terms of the old-order rights.)

In an interview with ITN, co-counsel for the claimants, Peter Leon of the law firm Webber Wentzel, stressed that the process of 'converting' their mineral rights under the MPRDA was unrelated to their decision to request a stay in the proceedings. Rather, Leon said high-level negotiations between South African officials and the claimants have been in process for several months, and the parties felt that a stay in the proceedings would be advantageous in reaching a settlement.

However, in a statement, the Government of South Africa said it has "consistently maintained that the MPRDA conversion mechanism amply protects security of tenure of mining/prospecting rights and complies with South Africa's commitments under international law."

Counsel for South Africa said that South Africa firmly believes that the Claimants' case has no merits.

"Whatever new order rights the Claimants' South African companies may obtain, and the terms and conditions of such rights, will be determined in accordance with the MPRDA and the Mining Charter. The companies will receive the same substantive treatment as any old order rights holder in a similar position," said Jonathan Gass, a senior associate with the law firm Freshfields Bruckhaus Deringer.

NEWS: ARGENTINA ORDERED TO PLACE US$75 MILLION IN ESCROW PENDING ANNULMENT DECISION ON SEMPRA AWARD

By Fernando Cabrera Diaz

An ad-hoc committee formed under the rules of the International Centre for Settlement of Investment Disputes (ICSID) has ordered Argentina to put up US$75 million in escrow as a condition of a continued stay in the enforcement of an award.

Under ICSID rules a party seeking the annulment of an ICSID award can request a stay in the enforcement of the award pending the decision on the annulment. Once the request for a stay is made, a provisional stay is automatically granted and valid until the Annulment Committee decides on the issue.

In this case San Diego, California-based Sempra Energy International requested that the Annulment Committee suspend the provisional stay of enforcement of a US$128 million award, alleging that Argentina's actions demonstrated it was not willing the pay the award should the committee reject the annulment request.

Sempra pointed to Argentina's repeated assertions that award creditors must submit awards for enforcement to Argentina's domestic judicial system as proof of the country's unwillingness to comply.

While Argentina does not dispute the binding nature of ICSID awards, it maintains that award creditors must formally seek compliance of awards though domestic courts. In support of this view, Argentina sites Article 54 of the ICSID Convention, which states that contracting parties must "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Argentina interprets this article as requiring it to treat ICSID awards as it would treat domestic awards, which must be enforced by domestic courts.

Argentina also contends that placing millions in escrow would cause it economic hardship. "In the face of the current international financial uncertainty, a requirement to freeze such amount of money would be particularly detrimental to any State and, especially, to an emerging country such as Argentina," wrote the Argentine government to the Committee.

While Argentina does not dispute the binding nature of ICSID awards, it maintains that award creditors must formally seek compliance of awards though domestic courts.

In a 5 March decision, the Committee rejected Argentina's arguments and held that, under the ICSID Convention, ICSID awards are unconditionally enforceable.
In reaching this decision, the Committee relied on Article 53(1) of the ICSID Convention which states that awards "shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."

Argentina's affirmation that creditors must submit awards to domestic courts, demonstrates its unwillingness to comply with its obligations under Article 53, continued the Committee.

As a result, the Committee concluded that in order to continue the stay of enforcement, "Argentina must be required to give some tangible demonstration of its preparedness to comply, unconditionally and in good faith, with its obligations under Article 53 of the Convention." It therefore ordered the country to place US$75 million in escrow within 120 days of the 5 March 2008 ruling.

The decision demonstrates mounting pressure on Argentina to comply, unconditionally, with ICSID awards. In recent months, two annulment committees* have demanded so-called comfort letters from Argentina: written assurances that it will comply with ICSID awards in the case that annulment is rejected, without requiring a judicial review by domestic courts. In both cases, Argentina has missed its deadlines for supplying these letters to the committees.

In taking a stronger position, the Annulment Committee in the Sempra case has concluded that "comfort letters" are inadequate for two reasons: Argentina has failed to provide these letters in other cases; and the letters are unnecessary, given that they would simply "confirm and restate Argentina's obligations under the ICSID Convention."

NEWS: DEUTSCHE BANK TARGETS SRI LANKA WITH A BIT CLAIM CONNECTED TO A HEDGING CONTRACT

By Damon Vis-Dunbar

A dispute related to oil derivatives entered into by Sri Lanka's state-run petroleum utility has led at least one foreign bank to file arbitration proceedings against the Government of Sri Lanka.

The state-run Ceylon Petroleum Corporation (CPC) entered into hedging contracts with a number of foreign and local banks in 2007 to protect against a surge in oil prices. While the contracts were originally profitable for CPC, they led to heavy losses when oil prices fell steeply in the fall of 2008. The heads of CPC and the banks involved have come under criticism by politicians, citizens and the news media in Sri Lanka.

According to reports in the Sri Lankan press, several citizens have submitted petitions to the Supreme Court alleging corruption played a part in the contracts, leading the court to order CPC to temporarily suspend payments under the contracts.

While the Supreme Court order was lifted in January 2009, The Sri Lankan Central Bank has also stepped in, ordering CPC to suspend the hedging transactions, on the grounds that they were "materially affected and substantially tainted."

Media reports also quote government officials as saying that the Government of Sri Lanka and the banks have been engaged in talks on re-negotiating the hedging contracts.

Deutsche Bank has filed an arbitration claim against the government of Sri Lanka in relation to the hedging contracts, registered with the International Centre for Settlement of Investment Disputes (ICSID) on 24 March 2009.

In its claim, Deutsche Bank argues that the government of Sri Lanka has violated the German-Sri Lanka bilateral investment treaty. Deutsche Bank has declined to comment on the case.

Citibank is also rumored to have turned to arbitration in order to enforce the hedging contracts. An official with the bank said he could not comment, because a case related to the contracts is pending in the Sri Lankan Supreme Court.

NEWS: SOUTH AFRICAN COURT JUDGMENT BOLSTERS EXPROPRIATION CHARGE OVER BLACK ECONOMIC EMPOWERMENT LEGISLATION IN THE MINING SECTOR

By Damon Vis-Dunbar

A South African judicial ruling has opened the door for two plaintiffs to seek compensation for alleged expropriation of their mineral rights, in a case that echoes the complaints made by European investors in a pending international arbitration against South Africa under bilateral investment treaties.

The judgment* comes in response to claims lodged with the Pretoria High Court, in which the plaintiffs (Agri S.A. and AM van Rooyen) argue that their rights to coal and clay were expropriated without compensation in 2004 under the Minerals and Petroleum Resources Development Act (MPRD).

The MPRD Act is intended to boost the black population's participation in the mining sector, and forms part of a wider effort by the South African government to address the country's racial inequalities rooted in a legacy of apartheid.

Under the Act, private ownership of mineral rights was replaced with a system of licenses offered by the government. Companies who held mineral rights under the old regime were given an opportunity to apply for licenses under new regime; however, mining companies complain that so-called new order rights are not equivalent in value to the rights they enjoyed previously.

The Ministry of Minerals and Energy sought to dismiss the lawsuits by Agri S.A. and AM van Rooyen on the ground that they fail to provide sufficient facts to support their claims.

In 6 March 2009 ruling, however, the High Court has rejected the Ministry's charge that the plaintiffs' claims are "vague", allowing the claims to proceed to the merits stage.

In coming to a decision, the High Court compared mineral rights held by the plaintiffs prior to 2004 with the rights offered under the new regime. The Court concludes that mineral rights were "extinguished" under the Act, and that the transitional arrangements did "no more than afford an opportunity to the holders of affected rights to mitigate their damages."

"In short it is my interpretation of the Act that it admits that holders will be deprived of their rights and that such deprivation coupled with the State's assumption of custody and administration of those rights constitute expropriation thereof," writes Judge Willie Hartzenberg.

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The judge also dismissed the Ministry's argument that the plaintiffs failed to exhaust administrative remedies prior launching their complaint with the High Court.

In a written response, a spokesperson for the Ministry of Minerals and Energy said the judgment was a "setback", but stressed that the case was "at a preliminary stage."

The ruling is an interim application judgment; a subsequent judgment on the merits is set to follow separately. Should the High Court side with the plaintiffs in its judgment on the merits, the Ministry of Minerals and Energy says it can appeal to South Africa's Constitutional Court.

Agri S.A., an organization representing agribusiness in South Africa, is seeking R750 000 (approx. US$77 800) in damages from the South African Government. The second plaintiff, AM van Rooyen, is seeking R600 000 (approx. US$62 350).

The dispute playing itself out in Pretoria's High Court has parallels with arbitral proceedings pending at the International Centre for Settlement of Investment Disputes (ICSID). (For an update on this dispute, see the "European miners and South Africa suspend proceedings", featured in this issue).

In this case, a group of European investors in South Africa's mining sector are suing South Africa for alleged breaches of the Italy-South Africa and Benelux-South Africa bilateral investment treaties, on the grounds that their investment in mineral rights was expropriated under the MPRD Act (Piero Foresti, Laura De Carli and others v. the Republic of South Africa).

Matthew Coleman, a Partner at Steptoe & Johnson, who has written about the Piero Foresti claim against South Africa, said the decision "will no doubt, in South African Government circles, give pause for thought as it is a decision of a South African Court that is consistent with the arguments that have been made by investors both domestically and internationally as to the expropriatory effect of the MPRDA.

"Of course, the position of the effect of the MPRDA when it comes to claims under public international law is not straightforward—part of the MPRDA's object is to redress wrongs that occurred under the apartheid system. Whether or not such matters can be a valid defence under public international law is of great interest and one may assume will be touched upon by the tribunal in the case before the ICSID Additional Facility."

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The suspension of the proceedings at the International Centre for Settlement of Investment Disputes (ICSID) came into effect on 28 March 2009 and runs until 28 May 2009.

On 27 March 2009, South Africa submitted a counter-memorial and objections to jurisdiction to the tribunal. The claimants submitted their memorial in July 2008. Hearings are currently scheduled for April 2010.

The dispute has drawn attention for its human rights implications, and civil society groups in South Africa have considered making amicus curiae (friend of the court) applications. As ITN reported in October, the ICSID Secretariat has prepared a two-page brief outlining the steps and criteria required of potential amici.

So far, however, there have not been any requests to make *amicus curiae* applications.

*Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1)

RECENTLY PUBLISHED: THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS

The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows (Oxford University Press, 2009), edited by Karl P. Sauvant and Lisa E. Sachs.

In recent years, the treaties and strategies promoting foreign direct investment (FDI) have changed dramatically. In particular, countries have liberalized their FDI laws and have entered into bilateral investment treaties (BITs) and double taxation treaties (DTTs) to attract such investment. The basic purpose of these treaties is to signal to investors that investments will be legally protected under international law in case of political turmoil and to mitigate the possibility of double taxation of foreign entities. But the actual effect of BITs and DTTs on the flows of foreign direct investment has been debated. The Effect of Treaties on Foreign Direct Investment is a comprehensive assessment of the performance of these treaties in this respect, and presents the most recent literature on BITs and DTTs and their impact on foreign investment flows.

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