Kluwer Arbitration Blog

International Investment Law and Policy: Highlights from 2012

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, January 2nd, 2013

In the final days of 2012, I spent some time flipping back through the stories we've covered at *Investment Arbitration Reporter*, looking to identify the year's most notable developments. I've settled on ten that I think are particularly noteworthy. Half of them are legal in nature, and are highlighted below. The other five are in the policy sphere, and will be featured in a separate post in the coming days.

In settling on my choices, I've deliberately overlooked stories that reflect broader trends – many of which have been with us for multiple years: things like non-payment of awards; challenges to tobacco regulation in Uruguay, Australia and elsewhere; or the growth of treaty claims against Western European countries.

So, here are my five legal highlights of 2012. Feel free to offer dissenting opinions in the comments section.

1. BG v. Argentina award vacated

The biggest bombshell of 2012 landed early.

On January 17, a U.S. Federal Appeals Court set aside a 2007 arbitral award in favour of UK energy company BG in a dispute with the Republic of Argentina. While BG had prevailed in arbitration – making out breaches by Argentina of the UK-Argentina bilateral investment treaty and netting more than $185 million– the U.S. Court of Appeals for the District of Columbia held that the tribunal had wrongly arrogated to itself the authority to determine that BG's failure to comply with a pre-arbitration procedural requirement was not a bar to its dragging Argentina to international arbitration.

While a number of arbitration lawyers and institutions have since petitioned the U.S. Supreme Court to hear BG's last-ditch appeal, the procedural requirement at the center of the dispute – a minimum of 18 months litigation in local courts – continues to generate controversy in investment treaty circles. Indeed, in December of 2012 alone, two ICSID tribunals have weighed in with their own perspectives on the need for foreign investors to comply with this pre-arbitration requirement.

2. White Industries v. India

News of the award in White Industries Ltd v. Government of India only came to light on February 7, 2012 – several months after having been rendered.

The Australian claimant turned to arbitration under the Australia-India BIT in July of 2010, after a protracted struggle to collect on an earlier ICC arbitral award rendered against an Indian state-owned company. In their final award, the tribunal in the BIT proceeding ruled that a slow-moving bid by White's former business partner to set aside the 2002 ICC award had dragged on for too long without resolution. Because India had failed to provide White Industries with an "effective" system of laws and institutions for resolving such matters, arbitrators ruled that the Government of India should compensate the Australian firm for the sum in dispute in the earlier ICC arbitration.

The outcome of the BIT case –coupled with India's honoring of the final award – appears to have emboldened other foreign investors to try their hand at BIT arbitration with India. More broadly, the tribunal's focus on the "effective means" of justice obligation has put other governments on alert that a long-overlooked clause found in some BITs – and importable into others by means of an MFN clause – could create liability when local courts and institutions leave foreign investors mired in gridlock.

3. Ecuador v USA

When Ecuador initiated a state-to-state arbitration against the United States in 2011, it sought something truly unusual: a definitive ruling on the meaning of a controversial clause contained in the U.S.-Ecuador bilateral investment treaty.

Ecuador hoped that an arbitral tribunal would offer a less investor-friendly reading of the same type of "effective means" clause that was at the core of the White Industries v. India case (discussed above). Like the Government of India, Ecuador had been tripped up in an earlier investor-state arbitration centered on the slow movement of its own domestic courts.

Even if Ecuador could not undo that prior loss, it hoped that an interpretive ruling from a specially-convened state-to-state tribunal might bring final clarity to the meaning of the contested treaty provision. The U.S., for its part, denied that there was a dispute with Ecuador – or that a state-to-state tribunal was empowered to offer authoritative readings of particular investment treaty provisions

In an as-yet-unpublished award rendered on September 29, 2012, the state-to-state proceeding was dismissed for lack of jurisdiction. While the tribunal's award has not been released to date, a report on its holdings has clarified that the arbitrators split on the question of their own jurisdiction. Given the divided outcome of the proceeding, and the unusual facts of this particular test-case (particularly the stony U.S. Government silence as to the meaning of the "effective means" obligation), it remains possible that other governments will take a page from Ecuador's strategy-book.

4. Occidental v Ecuador

Little more than a month after the aforementioned setback, officials in Quito got more bad news: an October 5, 2012 award in the Occidental v. Ecuador arbitration had held Ecuador liable to pay the largest sum ever awarded in an ICSID proceeding: $1.76 billion (US).

While the size of the award is enough to make it a notable development of 2012, I'm also struck by the tribunal's embrace of the principle of "proportionality" as the measuring stick against which the actions of governments can be measured. Yes, previous tribunals have dipped into the international & comparative law toolbox, and come up with a proportionality test.

But, until the Oxy case, we hadn't seen an investment treaty decision that was quite so blunt in its use of proportionality. At the end of the day, billions of dollars hinged on the three arbitrators' perception as to whether Ecuador acted disproportionately in the face of Oxy's documented misbehavior.

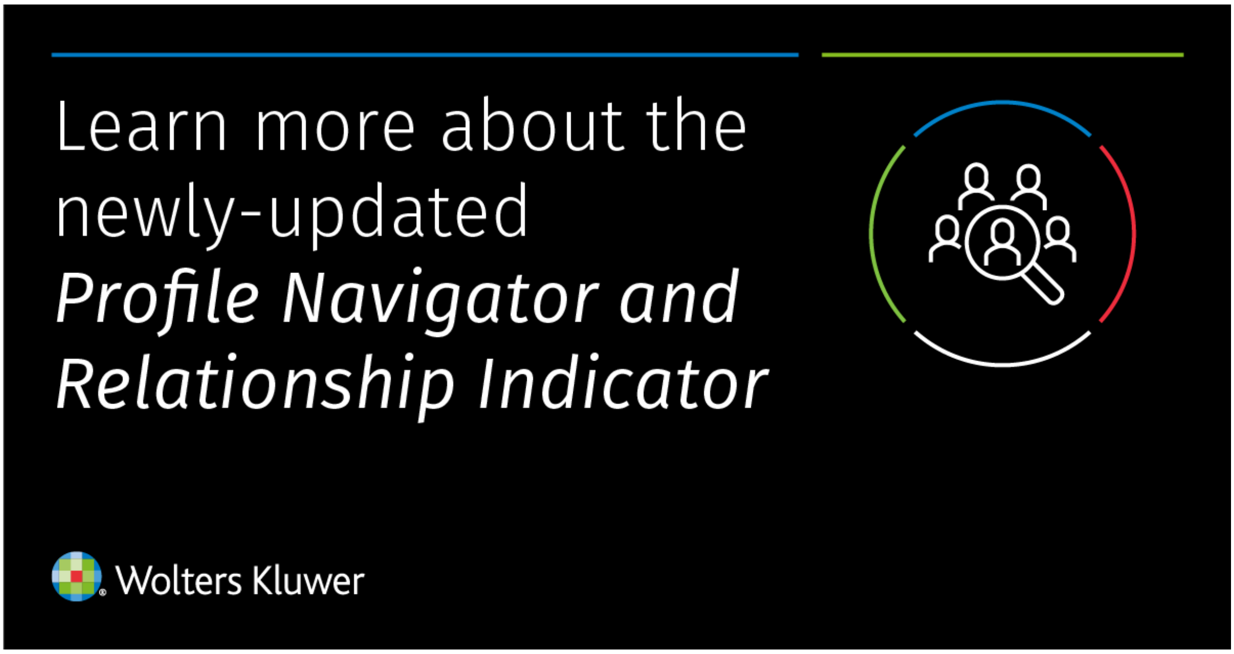
5. Hesham Al Warraq v Indonesia

The investment agreement of the Organisation of Islamic Cooperation (OIC) has been in existence for nearly three decades. Yet, it wasn't until August of 2012 that that agreement was confirmed to have a pulse.

A foreign investor, locked in a bitter feud with Indonesia over the near-collapse of a bank, announced in an August 2012 press release that an UNCITRAL arbitral tribunal had upheld jurisdiction over claims brought under the OIC agreement. Subsequent digging revealed that Indonesia had protested that the treaty's awkwardly-worded dispute settlement provisions merely acknowledges the possibility of investor-state arbitration – provided that both parties to a dispute give their explicit consent in a separate instrument. However, in a still-unpublished June, 2012 jurisdictional ruling, arbitrators went further and held that a "contemporary" reading of the admittedly ambiguous dispute settlement clause – particularly in light of the treaty's object and purpose – pointed to its offering the consent of ratifying states to binding arbitration.

Because upwards of 25 governments in Africa, Asia and the Middle East have ratified the OIC Investment Agreement, the tribunal's trailblazing jurisdictional ruling appears likely to inspire other investors to follow suit – particularly when they lack any other springboard to arbitration with a host state. Moreover, now that the OIC investment agreement has been disinterred, I wouldn't be surprised if OIC member-states conduct a fuller autopsy of the pact – perhaps at the urging of Indonesia – at their next global get-together.

Luke Eric Peterson is the Editor of InvestmentArbitrationReporter.com an online news and analysis service focused on investor-state arbitration and policy. He has been a contributor to Kluwer's Arbitration Blog since its launch.



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