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Parsing the PCA's Latest Case Numbers

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, August 1st, 2012

In a recent blog post, Gary Born highlighted the current role of the Permanent Court of Arbitration in administering state-to-state arbitrations.

Given that the PCA has recently released its Annual Report for 2011, I thought I'd complement Gary's post with some further information about the PCA's role in administering investor-to-state arbitrations.

It's useful to set the stage by flipping the calendar back five years, and noting that the PCA had a *total* of 24 cases on its docket in 2007.

It took years for the PCA to build up that number of cases, and subsequent annual reports of the PCA chart a much sharper rise in the center's caseload:

• In 2008, a further 12 cases were registered by the PCA. Almost all of these cases – 10 of 12 – were pursuant to investment treaties;

• In 2009, the PCA's caseload leaped again thanks to 22 new cases – with 9 pursuant to investment treaties, 11 pursuant to contract, and 1 arising under a national investment law;

• In 2010, the PCA saw 24 new cases, with 13 of those arising under an investment treaty and 10 arising under a contract;

• Finally, in 2011, an additional 19 cases were brought to the PCA – 10 under treaty and 9 under contract or some other agreement.

Thus, in the last four years, the PCA has registered 77 cases, the majority of which are treaty-based investment arbitrations. Most of the remaining cases are contractual disputes, which may or may not relate to investment transactions.

Peering in the windows

While the PCA requires the consent of both parties before it can disclose details of its cases, many of them have come to light at the behest of a single party or the efforts of media outlets.

Thus, we know that the PCA has hosted investment treaty claims against the likes of Lithuania, Mongolia, Canada, Russia, the Dominican Republic, Bolivia, Ecuador, Argentina, the Slovak Republic, Belize, and Turkey.

Indeed, some of the highest-stakes contemporary investment treaty cases are being arbitrated under the PCA roof, including three related claims against Russia by the majority shareholders of the Yukos Corporation and a much-discussed arbitration between Chevron and Ecuador.

The inevitable comparison with ICSID

While the PCA's caseload has grown by leaps and bounds in recent years, its 19 new cases in 2011 remains only half of the 38 cases registered by the Washington-based International Centre for Settlement of Investment Disputes (ICSID) in the same year. (Indeed, ICSID's impressive 2011 caseload far exceeded its own average recorded over the preceding several years.)

While the PCA and ICSID are inevitably compared with one another, an obvious point bears stressing: a given party's choice of forum will be constrained by options written into contracts or treaties some years – or even decades – earlier. Even where parties have more than option, a multitude of factors may influence their choice of one forum over the other.

For all of the reasons why a given party may choose a particular forum, it's actually striking to note that a single factor might help explain the divergence in recent case numbers at the two facilities.

Chalk it up to Venezuela

The unusual number of claims (10) filed against the Bolivarian Republic of Venezuela in 2011 at ICSID may explain the caseload divergence between ICSID and the PCA. Had those 10 Venezuela cases been brought to the Hague, rather than to Washington, ICSID and the PCA would have finished 2011 in a statistical dead-heat.

So, why were so many Venezuelan cases landing at ICSID?

For starters, some of the most-often invoked Venezuelan treaties – including the Dutch BIT – offer only ICSID arbitration.

Moreover, several other Venezuelan treaties – including those with Canada, Luxembourg and Barbados – are worded so as to steer claimants to ICSID arbitration, unless it is unavailable. Indeed, when a Canadian company, Nova Scotia Power Incorporated (NSPI), opted for PCA arbitration in 2008, a unanimous tribunal declined jurisdiction over the investor's claims due to the treaty's prioritizing of ICSID and the seeming availability of that latter forum.

Duly chastened by its effort to drag Venezuela to the Hague, the claimant re-filed its case in Washington, where it was registered by ICSID in early 2011.

The time and money spent by NSPI on its effort to avoid ICSID have been duly chronicled, and surely provided a cautionary lesson for other similarly-situated foreign investors contemplating where to sue Venezuela in recent years.

Will PCA see a future surge now that Venezuela has left ICSID?

However, now that Venezuela's withdrawal from ICSID has taken formal effect, investor-claimants may have a stronger argument that the Washington-based Center is no longer "available" to resolve disputes with Venezuela. Of course, there is a school of thought which holds that the

consent found in the relevant BITs lives on notwithstanding any ICSID withdrawal. But, if Venezuela continues it torrid nationalization spree, I suspect we will see some of the affected parties opting for UNCITRAL/PCA arbitration, ostensibly so as to spare Venezuela from being dragged to a forum which it has renounced.

Indeed, after the Republic of Ecuador completed its withdrawal from ICSID, new claims at ICSID appeared to dry up. Recent claims against Ecuador by Murphy Oil, Merck and Copper Mesa, have all been brought to the PCA. Don't be surprised if future arbitrations against Venezuela also begin to drift across the Atlantic.

All else being equal, the caseload trajectories of the PCA and ICSID could look less divergent in the near future.

Luke Eric Peterson is the Editor of InvestmentArbitrationReporter.com an online news and analysis service focused on investor-state arbitration and policy. He writes occasional blog posts for Kluwer's Arbitration Blog.

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