Kluwer Arbitration Blog

ISDS Through the Looking Glass: The Case of Israel

Shai Sharvit (Gornitzky & Co) · Thursday, April 14th, 2016

The Hearing, the Secret Opinion and the Decision to Strike Down the Gas Deal in Israel

On 27 March, in a highly controversial decision, the Supreme Court of Israel struck down the gas deal the government of Israel promoted with the oil & gas companies for the extraction and sale of gas from the Leviatan and Tamar gas fields (HCJ 4374/15 *The Movement for Quality Government for Israel et al. v. Prime Minister of Israel et al.* (Decision from 27.3.2016)). Although the Supreme Court denied most of the petitioners' claims, it did eventually find one of the components of the deal (namely, the "Stability Clause") unconstitutional, and struck down the entire deal.

Although the decision of the Supreme Court, in and by itself, deserves careful attention, the proceedings leading up to the decision, and especially the ex-parte hearing held by the Court with the counsels of the State of Israel, and the ex-parte filing of a certain "secret" legal opinion the government of Israel commissioned from a US law firm, in replying to the petitions filed to the Supreme Court, are especially noteworthy.

Although the opinion is still confidential, Israeli newspapers reported that its conclusion (as pleaded by the government) is that should the Supreme Court strike down the gas deal, then the foreign investor oil & gas company, namely, Nobel Energy Mediterranean Limited, may initiate arbitration proceedings against the government of Israel and, eventually, prevail, costing the State of Israel billions of dollars.

Since the secret opinion is not specifically referenced in the decision of the Supreme Court, it is unclear what effect, if any, did the secret opinion have on the decision. However, this case highlights a few of the problems with the criticism the Investor State Dispute Settlement (ISDS) regime has been facing in the past few years.

The Use Regulators and States Make in ISDS to Promote Desired Policies

Over the past few years a growing number of governments and international law experts have expressed their concern about the potential negative impact of the ISDS regime, on the ability of states to govern and regulate their internal affairs in light of the potentially grave economic impact such policy decisions may have due to legal proceedings foreign investors might initiate against them. This concern has started a public debate and eventually brought policy makers to revisit the core fundamentals of the ISDS regime (see, as an example, Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing, and the

comments received to it) and question its basis altogether (such is the decision of the government of Australia not to include ISDS provisions in its future Bilateral Investment Treaties).

This fundamental criticism, together with problems with the adjudication procedures, has also brought several states to withdraw from the ICSID convention (in January 2012, the Bolivarian Republic of Venezuela denounced the ICSID Convention, being the 3rd state to do so after Bolivia had denounced it in 2007 and Ecuador denounced it in 2009), and in other cases try to rethink the dispute resolution procedure governing ISDS (see the ISDS mechanism in the Comprehensive Economic and Trade Agreement between Canada and the EU).

However, it seems that while both supporters and objectors of the ISDS regime discussed in length the effect ISDS may have on intra-state policy making and regulation, and the massive pressure foreign investors apply on states and regulators to continue and promote their investments, this debate has generally overlooked the other side of the coin, i.e., the use state entities and regulators make of the ISDS in order to promote desired policies in internal debates.

As we described above, the use of ISDS by the State of Israel, as expressed in the secret opinion and in the implied threat (voiced by Noble officials on several occasions and argued by the state before the Supreme Court) of initiating arbitration proceedings and paying billions of dollars if the gas deal is not approved, in order to promote the gas deal and the state's desired policy, is the same use of ISDS foreign investors make, in order to try and suppress new policies promoted by the host states that may impair their investments. In both cases, one of the parties is using the ISDS mechanism in order to apply pressure on its adversary (be it the state itself or an organ within the state) in order to promote its interests and its desired policy.

The proceedings leading to the decision of the Supreme Court of Israel offer a unique opportunity to understand that, although these actions are usually made behind closed doors and in internal discussions between different parts of the administration, states and state entities are also using ISDS to promote policy and regulatory considerations, and not just investors, as the critics largely claim.

These proceedings also show that the main and perhaps only difference between a foreign investors using ISDS to fight decisions made by the host state, and the state itself using ISDS to promote its decisions within the different internal regulatory bodies, is the fact that the foreign investor is usually required to voice its objections loud and clear (through arbitration proceedings), after a decision has been made, while the state and its regulators are not required to do so and may use ISDS through internal debates and policy considerations, within the decision making process itself, without even exposing the fact that the ISDS threat was even considered, let alone, the fact that it played a role in the decision making process.

In this note, I am not discussing the question of if it is right that states and investors be allowed to use ISDS in order to promote their interests and policies. Such a discussion clearly goes beyond the scope of this note. But it is clear, as the proceedings before the Supreme Court in Israel clearly show, that one of the main criticism against the ISDS regime should be re-evaluated, if not revisited altogether.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, April 14th, 2016 at 6:07 am and is filed under ISDS, Israel
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.