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www.transnational-dispute-management.com ISSN 1875-4120

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Addressing Investment in a Possible Comprehensive Economic Partnership Initiative Between The United States and Egypt?

by H. El-Kady, UNCTAD

Introduction

The still unfolding Egyptian revolution has achieved its immediate political objective of overthrowing the regime of President Hosni Mubarak. Encouraging democratic developments are making headway. A nationwide campaign against corruption has started, accountability of government to the people is the order of the day. Parliamentary elections are planned for September 2011 and presidential elections are expected to take pace in November 2011.

At the same time, economic reforms are taking place to offset the transitory but considerable economic losses the revolution brought. The Government reports that one of the most important components of Egypt's resource flows, namely foreign direct investment (FDI) has retracted significantly in the first quarter of 2011, unemployment is peaking and tourism has slowed relative to the flow in the same season last year. The Cairo stock exchange lost around one third of its value thought it has regained most of the losses in the month of May, and the Egyptian Central Bank reserves have fallen by more than 12% in the first three months after the revolution. GDP growth for Egypt for 2010-11 was projected at 5% and this has now been revised down to about 1.5%, which translates as a loss of about US$ 8 billion to the economy.

Despite these transitory losses, there is a great opportunity for Egypt to reestablish itself as a regional power house and a hub of democracy and social justice in the Arab world. The international community has a moral obligation as well as vested interest in supporting the political and economic reforms in Egypt. A successful democratic transition in Egypt will have important regional as well as international implications.

Mirages of International Justice - The Elusive Pursuit of a Transnational Legal Order (Introduction)

by M. Parish, Akin Gump Strauss Hauer & Feld LLP

Introduction (Chapter one from the book)

International law is an industry. It is driven not by a demand for justice, but by the pursuit of its own self-propagation. The determinants of its growth are not principally exogenous but endogenous. It achieves remarkably few of the goals it purports to advance. It is not a legal system at all in the conventional sense. At best it is a bogus and impotent bureaucracy; at worst a rhetorical cloud that obscures naked exercise of political power.

Yet it is here to stay, it is liable to grow and prospects for its reform are bleak. Those are the themes of this book. In arguing for my stark conclusions, I shall explore how international law is made, how it is discussed, and how it is enforced. In fact, I shall conclude, it is not enforced at all.

This book focuses upon the international courts and tribunals that purport to apply international law, and I should warn the reader that my intention is to make those bodies appear eff ete and futile. I shall also spend some time considering the institutions that create international law.

Mirages of International Justice - The Elusive Pursuit of a Transnational Legal Order by Matthew Parish, 2011 288 pp Hardback 978 1 84980 408 0 http://www.e-elgar.com/bookentry_main.lasso?id=14119
Available with a discount for TDM/OGEMID members, contact us for details, or see OGEMID post June 15th.

Kingdom of Spain v. Estate of Claude Cassirer - "invitation brief" (CVSG brief)

The Office of the Solicitor General (the SG), U.S. Department of Justice, filed an "invitation brief" with the U.S. Supreme Court in *Kingdom of Spain v. Estate of Claude Cassirer*, recommending denial of certiorari in the case (which involves a claim by Cassirer's estate against Spain and one of its instrumentalities for recovery of a painting confiscated by Nazi Germany and subsequently acquired by the Spanish state instrumentality). The SG concluded, significantly, that a State owning expropriated property (and otherwise satisfying the commercial activities requirements of the FSIA) has waived immunity and is subject to U.S. court jurisdiction even if that State was not the expropriating State. Thus, the Spanish state instrumentality could have lost its immunity to U.S. court jurisdiction despite the fact that Nazi Germany was the expropriator. Importantly, the SG also concluded that that no exhaustion of local remedies (whether in Spain or in Germany) is required under either the FSIA or international law for an unlawful expropriation. In view of the claim by opponents of investment arbitration that that lack of an exhaustion requirement in investment treaties means foreign investors are treated more favorably under those treaties than under U.S. domestic law, the latter conclusion is a quite significant statement of the position of the United States about exhaustion of local remedies in expropriation cases.

A "call for the views of the Solicitor General" (CVSG) is a request by at least 4 Justices of the U.S. Supreme Court for the views of the United States, represented by the Solicitor General, in a case in which the U.S. is not a party. Justice Ginsburg has described the nature of an invitation (CVSG) brief from the SG in the following terms.

"Occasionally, the justices invite the views of the Solicitor General before voting on a review petition. The Solicitor General is the Department of Justice officer responsible for representing the United States in the Supreme Court. When we call for the Solicitor's views in a case in which the United States is not a party, the Solicitor acts as a true friend of the Court; after consulting with federal executive agencies and officers with relevant expertise, he offers his views on the importance or unimportance of the question presented to the sound development of federal law."

In the invitation brief in *Kingdom of Spain v. Estate of Claude Cassirer*, the SG responded to two questions presented in the petition for certiorari:

1. Whether a district court may exercise subject-matter jurisdiction under 28 U.S.C. 1605(a)(3) [the expropriation exception to sovereign immunity in the Foreign Sovereign Immunities Act (FSIA] over the Kingdom of Spain and its instrumentality, the Thyssen-Bornemisza Collection Foundation (Foundation), based on allegations that the Foundation has possession of a painting that was previously taken by the Nazi government in violation of international law.

2. Whether respondent must exhaust available remedies in Spain or Germany before being permitted to sue under 28 U.S.C. 1605(a)(3).

The expropriation exception of the FSIA provides in Section 1605(a)(3) for subject-matter jurisdiction in U.S. District Courts over a State or State agency or instrumentality in any case:

"in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

If an exception to immunity under the FSIA (such as the expropriation exception) applies in the circumstances, then the FSIA itself operates to confer jurisdiction over the State in U.S. courts. The conclusions of the SG in this brief are thus of particular interest to claimants bringing expropriation claims in U.S. courts against foreign sovereigns.

With respect to whether the foreign State (or State agency or instrumentality) that owns the property must also be the foreign State that expropriated the property in violation of international law, the SG wrote that petitioners "contend that this supposed ambiguity [in the FSIA] should be resolved by requiring that the defendant foreign state have been the wrongdoer. But the absence of any reference to the responsible foreign state indicates that Congress was interested in the fact of the unlawful expropriation, not the identity of the expropriator."

The SG also concluded, importantly, that the FSIA does not require as a jurisdictional matter that the claimant first exhaust local remedies in the subject State. Moreover, in reaching its conclusions, the SG also asserted that international law does not require exhaustion of local remedies for a wrongful expropriation, but only for a lawful expropriation in which only the question of the proper compensation remains to be resolved.

With respect to the requirements of the FSIA, the SG stated "The court of appeals correctly held that Section 1605(a)(3) [the exhaustion exception to sovereign immunity] does not mandate that a plaintiff exhaust foreign remedies before bringing suit against a foreign state or instrumentality. Section 1605(a)(3) itself says nothing about exhaustion. That is in contrast to the former Section 1605(a)(7), which required that a plaintiff suing a foreign state for state-sponsored terrorism "afford[] the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration." 28 U.S.C. 1605(a)(7)(B)(i)

(2006). Congress knows how to require plaintiffs to seek other remedies before bringing suit under Section 1605(a), and it has not done so in Section 1605(a)(3)."

In addition to looking at the text of the FSIA, the SG specifically addressed the question of whether there is a requirement under international expropriation law for exhaustion of local remedies. The SG concluded that, when the expropriation was unlawful, there was not such an exhaustion requirement. The SG noted the analogy to U.S. Takings law under the 5th Amendment in this regard, citing to the leading U.S. Supreme Court case on the issue (*Williamson County*). The SG, like the underlying 9th Circuit Court of Appeals decision at issue in *Kingdom of Spain v. Estate of Claude Cassirer*, left for another day whether a prudential (i.e., not jurisdictional) court-ordered exhaustion of local remedies requirement might be appropriate under the FSIA in case-specific circumstances.

"Petitioners invoke (Pet. 29-32) international law, but there is no requirement in international law that a plaintiff must exhaust local remedies for a viable expropriation claim to arise. To be sure, if a taking of property by a foreign state is for a public purpose and is not discriminatory, then the taking violates international law only if it is not accompanied by prompt, adequate, and effective compensation. 2 Restatement § 712(1)(c) & cmt. c at 196, 198. Accordingly, for those types of takings, a plaintiff may need to have pursued and been denied compensation in the foreign state for there to be a ripe taking claim at all. Cf. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-195 (1985). But where, as here, the taking violated international law because it was not for a public purpose or was discriminatory, the taking claim does not depend upon a showing that the plaintiff has sought and been denied just compensation. In any event, these considerations go to whether a taking in violation of international law has occurred, and here petitioners concede that such a taking occurred. Accordingly, to the extent that these considerations bear at all on this case, they can be taken into account on remand in determining whether exhaustion should be required as a prudential matter."

Rationalizing Costs in Investment Treaty Arbitration (S.D. Franck) - Article review

by O. Babiak, International Chamber of Commerce, Dispute Resolution Services

Introduction

In her article "*Rationalizing Costs in Investment Treaty Arbitration,*" Professor Susan D. Franck takes on the hot issue of investment treaty arbitration (ITA") costs and offers much needed insight into current trends and future implications. She analyzes the data obtained through careful statistical methodology and evaluates the findings with an eye towards refuting misperceptions and exposing practical realities.

Given the ongoing debate about the legitimacy of ITA, her article is a much needed contribution to the effort to improve transparency, diminish ambiguity and support the continued development of a just, efficient, and thereby sustainable system of investment treaty arbitration. Readers can only hope that her methodical data collection, insightful analysis, and persuasive arguments will encourage arbitral tribunals and parties alike to consider the sometimes disturbing realities and perhaps even heed her call for greater rationalization of ITA cost decisions.

This review of Professor Franck's article provides a short summary of her empirical findings and analysis of investment arbitration costs. It also explores the potential reforms Franck suggests and assesses their implications for states, investors, practitioners and arbitrators alike based on consideration of the available data and relevant norms. It also seeks to identify aspects of costs in investment treaty arbitration that could be further explored by Professor Franck and other commentators.

Franck, Susan D., Rationalizing Costs in Investment Treaty Arbitration (March 9, 2011). Washington University Law Review, Vol. 88, No. 4, 2011. Available at SSRN: http://ssrn.com/abstract=1781844.

International Commercial Arbitration - An Asia-Pacific Perspective (S. Greenberg, C. Kee, J. Romesh Weeramantry) - Book review

by M. Hwang, Michael Hwang S.C.

Introduction

This is a unique book. It is an Asia-Pacific focused international arbitration textbook, and therefore aimed at students in Asia-Pacific universities as well as arbitration practitioners with an interest in arbitration in this area. There are other books which have covered the arbitration laws of Asia-Pacific countries, but this is the first book to approach international commercial arbitration on a thematic, rather than a country by country, basis.

International Commercial Arbitration - An Asia-Pacific Perspective. Simon Greenberg, Christopher Kee, J. Romesh Weeramantry. ISBN: 9780521695701. Available with a 20% discount for TDM/OGEMID members, see instructions at the end of this review.

The **Transnational Dispute Management (TDM, ISSN 1875-4120)** Journal and **OGEMID** listserv focus on recent developments in the area of (investment) arbitration and dispute management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting. Published by MARIS. More information at www.transnational-dispute-management.com