ARBITRATION WATCH

March - Issue No. 71

Laws & Treaties

Model Clauses for BITs with Third Countries are published by the EU

The European Commission published a Non-Paper of Annotations to Model Clauses for Negotiation or Re-negotiation of Member States' Bilateral Investment Treaties ("BITs") with Third Countries ("Model Clauses").

The Model Clauses aim to guide EU States in negotiating or renegotiating their BITs with third States. Whilst they do not reflect the official position of the EU, they are nonetheless recommended to EU States for inclusion in their BITs with third countries.

The Model Clauses define terms such as *investor, investment, claims to money or dispute*, which are key to establish jurisdiction in Investor-State Dispute Settlement ("ISDS") mechanisms. They also provide an article on the host State's right to regulate for legitimate policy objectives, and comment on protection standards such as National Treatment, Most Favoured Nation Treatment, Fair and Equitable Treatment, Full Protection and Security, Protection against Unlawful Expropriation based on the "Hull Formula", or Umbrella Clauses.

They also contain a number ISDS-related provisions (including arbitration), yet do not mention any specific venue or applicable arbitration rules. The arbitrators' power to assess domestic and EU law in investor-state disputes is explicitly restricted, and reference is made to the future establishment of a standing multilateral investment court with an appellate mechanism.

Finally, the Model Clauses contain an Annex on the *"Code of Conduct for Members of Tribunals and Mediators"* which pursues the independence and impartiality of arbitrators and contains obligations around confidentiality and disclosure.

Guidelines on Conflicts of Interest in International Arbitration are updated

The International Bar Association ("IBA") has released the updated version of the Guidelines on Conflicts of Interest in International Arbitration.

The 2024 version reflects modern developments and promote best practices in international arbitration, providing guidance on conflict of interest and disclosure. Whilst they are not binding without party agreement, they are adopted by arbitral institutions worldwide.

The 2024 version maintains the past version's 4 lists to ensure the practical application of the general standards set out therein, i.e. Non-waivable Red List (where the arbitrator should decline or refuse to act), Waivable Red List (when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator,), Orange List (where the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made), and Green List (where no disclosure is required since no actual conflict of interest can exist).

Arbitration Centres

LMAA case load statistics of 2023 are released

The London Maritime Arbitrators Association ("LMAA") has published their case load statistics for 2023.

Arbitrators reported 3,268 new appointments under our Terms and Procedures in an estimated 1,845 references. This represents an increase from the numbers of appointments and references in 2022, which were themselves significantly higher than those of the previous year.

In LMAA references, arbitrators published an estimated 436 awards in 2023. 69 awards were made after oral hearings, in comparison to 93 in

2022. Given that the total number of awards is up from 420 in 2022, this may indicate that more cases were resolved by reference to documents and written submissions only, a particularly efficient and cost-effective procedure in appropriate cases.

LMAA President David Steward said: "The LMAA's case statistics continue to reflect the huge number of parties worldwide who choose international arbitration on the Association's Terms and Procedures to resolve their maritime disputes, not only in the shipping industry but also in offshore energy and international trade. We are very grateful to all the arbitrators who contributed to these statistics."

Amendments to the FOSFA Rules and Guide on Arbitration and Appeal

With effect from 1 April 2024, the Federation of Oils, Seeds and Fats Association (FOSFA) has approved a number of amendments to their Rules of Arbitration and Appeal.

The procedure of Appeal is now made on the premise that the Respondents should also serve submissions before the hearing, whereas in the past only an Outline Reasons for Appeal was to be served. In addition, the Appellants are now given the right of reply if any cross-appeal is lodged. And, it has also been included in the FOSFA Rules of Arbitration and Appeal the requirement for the Appellants to deliver an agreed common bundle 21 days before the hearing to the Federation.

The FOSFA Guide to Arbitration and Appeals has also been amended to reflect the above changes. In addition to that, the Guide includes an amended Arbitration Clause drafted in these terms: "*ARBITRATION*: *(a) Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Associations Limited, in force at the date of this contract and of which both parties hereto shall be deemed to be cognizant. (b) Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the arbitrator(s), or Board of Appeal (as the case may be), in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, chairperson or Board of Appeal (as the case may be), shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute. (c) Nothing contained under this Arbitration Clause shall prevent the parties from seeking to obtain security in respect of their claim or counterclaim via legal proceedings in any jurisdiction, provided such legal proceedings shall be limited to applying for and/or obtaining security for a claim or counterclaim, it being understood and agreed that the substantive merits of any dispute or claim shall be determined solely by arbitration in accordance with the FOSFA Rules of Arbitration and Appeal.*"

Investment Arbitration

***Orazul International España Holdings S.L. v Argentine Republic*, ICSID Case No. ARB/19/25**

Award dated 14 December 2023 under the Argentina-Spain BIT of 1991.

The dispute concerns a claim lodged by a Spanish-incorporated investor, Orazul International España Holdings SL ("Claimant"), which held a majority interest in a concessionary of a hydroelectric power plant in Argentina. The case revolves around the measures for the liberalisation of the electricity market adopted in Argentina between 2003 and 2013, and the allegedly negative impact they had on the Claimant's collection of revenues. According to the Claimant, those measures were meant to be temporary and should have been reversed in 2006 or thereafter, but never were.

After dismissing all the objections on admissibility

and jurisdiction, the Tribunal went into the merits of the dispute. One of the Claimant's points was that Argentina frustrated their legitimate expectations and failed to provide a stable and predictable environment in breach of Article IV(1) of the BIT, which reads: "Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party." To address the (FET) claim, the Tribunal adopted the three-prong test set forth in *Duke Energy* v. *Ecuador*, thus posing these three questions: Did Argentina create expectations that were legitimate? Did the Claimant rely on those legitimate expectations? Did Argentina breach the legitimate expectations?

The Tribunal found that the Claimant's legitimate expectations (if any) should be assessed at the time of making the investment, which in the present case occurred when in December 2023 the Claimant acquired a majority shareholding interest in the Argentinian concessionary. The relevant question to be determined was therefore not whether the Claimant had a legitimate expectation of stability and immutability of the legal framework as existing in 2003, but rather whether he had a legitimate expectation that the regulatory framework as existing in 2003 would be modified by 2006 or thereafter.

The Tribunal came to the conclusion that there was no State conduct based on which the Claimant could have formed such a legitimate expectation. Thus, it said: *"The Claimant's subjective expectations do not suffice as a basis for legitimate expectations (…) While the Tribunal thus accepts that it may well have been the Claimant's subjective expectation that the market would be restored by mid-2006, the Tribunal recalls that the expectations warranting protection under the FET standard of the BIT are those that are objectively reasonable, created by the host State, and relied upon by the investor. The Claimant itself has acknowledged that subjective expectations of the investor, in and of themselves, do not suffice as a basis for legitimate expectations."* In addition to that, the Tribunal found that the Claimant's books showed that he had anticipated a less favourable outcome than the actual one.

Case note: England & Wales

The Federal Republic of Nigeria v Process & Industrial Developments Limited, [2023] EWHC 2638 (Comm)

Facts: In 2010, the Federal Republic of Nigeria ("Nigeria") and Process & Industrial Developments Limited ("P&ID") signed a contract ("the Contract") whereby the first agreed to supply gas to the processing facilities that would be constructed by the second. Eventually, Nigeria failed to supply any gas and P&ID, in turn, failed to construct the processing facilities. Consequently, in 2012 P&ID commenced arbitration against Nigeria. In 2015, the arbitral tribunal found that Nigeria had repudiated the Contract and was therefore liable for USD 10 billion damages. Nigeria challenged the Award under section 68(2)(g) of the Arbitration Act 1996 on the grounds that there was a serious irregularity in how the Award was obtained. Nigeria argued that bribery, perjury and corruption had taken place, not only in obtaining the Contract but also in manipulating the arbitration, and even alleged that two of its own lead counsel had been corrupted by P&ID.

Held: According to Section 68(2(g), a "serious irregularity" means an irregularity that has caused or will cause substantial injustice, such being -among others- the case of an award "being obtained by fraud or the award or the way in which it was procured being contrary to public policy". The Court found three reasons constituting a serious irregularity in this case: the first was the fact that P&ID submitted evidence before the tribunal that P&ID knew to be false; the second was that P&ID bribed a Nigerian official during the arbitration proceedings in order to suppress from the tribunal and Nigeria the fact that she had been bribed when the Contract came about; and the third was P&ID's improper retention of Nigeria's internal legal documents that it had received during the arbitration. To establish the "seriousness" of the irregularity, the court referred to *RAV Bahamas v Therapy Beach Club* [2021] UKPC 8, emphasizing one of the criteria to determine substantial injustice, which is established when it becomes evident that, had the irregularity not occurred, the outcome of the arbitration could have been significantly different.

Tip of the month

☑ The arbitrators' duty of disclosure: what are the rules to apply?

An arbitrator has a duty to disclose any fact or circumstance which may give rise to justifiable doubts as to his or her impartiality or independence. Suh duty can be regulated by the national laws of the jurisdiction in which the arbitration takes place. However, the arbitration centres and adjudication bodies may enforce their own rules and standards, which shall be binding by consent. Other institutions, like the International Bar Association and the United Nations Commission on International Trade Law, have published, respectively, the *Guidelines on Conflicts of Interest in International Arbitration and the Code of Conduct for Arbitrators* in International Investment Dispute Resolution, which compile standards and best practices in this area.

For more information, please contact any of the following members of our Arbitration Team:

Albert Badia

Ana Maria Daza

Erman Ozgur

An International Law Firm

AACNI (England) Limited

25 Southampton Buildings | WC2A 1AL London | United Kingdom | Phone: +44 02071291271 | Email: aacni@aacni.com

AACNI (England) Ltd. is a Private Limited Company with number 14021820 and registered office address in Palladia, Central Court, 25 Southampton Buildings, London WC2A 1AL, United Kingdom. It is recognised by the Solicitors Regulation Authority and its SRA no. is 8000602. AACNI is a trademark registered in the EU.

This publication does not constitute legal advice.