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Important New U.S. Appellate Decisions for Corporations Claiming Against Foreign States for Asset Expropriation

The United States has signed approximately 41 Bilateral Investment Treaties (BITs), 12 Free Trade Agreements (FTAs) and 20 Friendship, Commerce and Navigation treaties (FCNs) with foreign governments, each providing guarantees against expropriation or other hostile state measures. Most BITs/FTAs allow arbitration under the rules of the International Centre for the Settlement of Investment Disputes (ICSID) or the United Nations Commission for International Trade (UNCITRAL). Recent BIT awards include:

- *SGS Société Générale de Surveillance S.A. v. Paraguay* (ICSID 2012) (awarding $57 million against host state that failed to pay money due under a customs services contract, in breach of an "umbrella" clause in the Swiss-Paraguay BIT);
- *White Industries Australia Ltd. v. India* (UNCITRAL 2011) (awarding approximately AUD $4 million for failure to honor an earlier arbitral award, in breach of certain provisions of the Australia-India BIT); and
- *Gemplus S.A. v. Mexico* (ICSID Additional Facility 2010) (awarding approximately $16.3 million for expropriation of a car registry business, in violation of the France-Mexico and Argentina-Mexico BITs).

Two recent decisions of the U.S. Court of Appeals for the District of Columbia have illuminated the opportunities and risks involved in pursuing expropriation claims against foreign states.

BG Group v. Argentina

In *BG Group v. Republic of Argentina*, 665 F.3d 1363 (D.C. Cir. 2012), the D.C. Circuit vacated, on jurisdictional grounds, a $185 million UNCITRAL arbitral award that had found Argentina in breach of the UK-Argentina BIT. That dispute originated with Argentine government decrees in 2001-02 that "pesified" energy utilities' contracts, redenominating tariffs from U.S. dollars to Argentine pesos. In 2003, a UK investor in an Argentine utility instituted an UNCITRAL arbitration against Argentina under the BIT. In 2007, after a full hearing, an UNCITRAL tribunal issued an award finding pesification "unfair and inequitable" and rejecting Argentina's challenges to jurisdiction. In 2010, the UNCITRAL award was upheld by the D.C. Circuit.

In January 2012, the D.C. Circuit granted Argentina's appeal and vacated the UNCITRAL award in its entirety. It focused on Article 8(2) of the BIT, stating that UNCITRAL arbitration could be sought "after a period of 18 months ha[d] elapsed from the moment when the dispute was submitted to the competent tribunal" in the host state. In the D.C. Circuit's view, Article 8(2) required a UK claimant to litigate its grievances in the Argentine courts for at least 18 months prior to instituting UNCITRAL arbitration. Although the UNCITRAL tribunal had earlier rejected Argentina's attempt to invoke the 18-month requirement, its views were not dispositive because (in the D.C. Circuit's opinion) "a court cannot lose sight of the principle that led to a policy in favor of arbi-

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tral resolution of international trade disputes: enforcing the intent of the parties." It concluded that the UNCITRAL tribunal had thus exceeded its authority for purposes of Section 10 of the Federal Arbitration Act. Subsequent petitions for panel rehearing and en banc review were rejected.

McKesson v. Iran

An investor's expropriation claims were upheld in *McKesson Corp. v. Islamic Republic of Iran*, No. 10-7174, 2012 WL 615831, at *1 (D.C. Cir. Feb. 28, 2012), on a novel basis. In the early 1980s, McKesson's 31 percent interest in Pak Dairy, an Iranian agricultural business, was "frozen out" by the government, prompting McKesson to sue Iran for expropriation in a Washington, D.C. federal court.

After a lengthy process (including a failed reference to arbitration), a D.C. district court eventually found that Iran indeed had confiscated McKesson's investment and that the country's actions were "commercial activities" and thus not covered by sovereign immunity. Identifying the precise legal basis for recovery, however, proved problematic. In 2008, the D.C. Circuit ruled that, although Iran was bound by an FCN with the United States (a 1955 "Treaty of Amity") that barred Iran from confiscating property of U.S. nationals except upon "prompt payment of just compensation," the FCN did not create a private right of action for U.S. citizens. The D.C. Circuit nevertheless held that a cause of action might arise on other legal grounds. On remand, the D.C. district court held: (1) the expropriation violated both customary international law and Iranian law; (2) Iranian law (in contrast to U.S. law) recognized a private law remedy under the FCN for expropriation; and (3) McKesson was entitled to damages.

On February 28, 2012, the D.C. Circuit upheld Iran's liability for expropriation, but solely on the basis that Iranian law permitted a direct claim under the FCN. It held that private claims cannot be made in the U.S. courts for violation of customary international law. Thus, although the "commercial activities" exception in the FSIA only referred jurisdiction to the federal courts, and "create[d] no cause of action," the court held that "under Iranian law, [the FCN] provides McKesson with a private right of action against the government of Iran." Thus, the court awarded damages for "the expropriation of McKesson's equity interest in Pak [Dairy] and the withholding of McKesson's dividend payments."

Implications

McKesson indicates a potentially useful basis for litigating expropriation claims against foreign governments that are party to an FCN. The opinion suggests it may be possible to invoke against a foreign government all of the provisions of its own internal law — including treaties to which that government is a party, provided that such treaties form part of its internal domestic law and that they support a private damages claim.

BG Group, by contrast, reminds investors that a BIT expropriation claim, even if upheld by an eminent panel of arbitrators, may be vulnerable to jurisdictional challenge if the investor fails (or is held to have failed) to observe the "gateway" prerequisites to arbitration contained in the relevant BIT. It illustrates the risks of failing to adhere to such provisions, as well as the importance of the choice of hearing place or "seat" for international arbitrations, particularly those governed by UNCITRAL rules — which, unlike arbitrations conducted under the ICSID Convention, are subject to review and possible annulment in the courts of the place in which they are made (such as, in this instance, Washington, D.C.).