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JUDICIAL AND SIMILAR PROCEEDINGS
International Centre for Settlement of Investment Disputes (ICSID):
MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (Case No. ARB/01/7) (May 25, 2004)

The Tribunal held that the Republic of Chile ("Chile") breached its obligations under the fair and equitable treatment provisions of the 1992 Agreement between the Government of Malaysia and the Government of the Republic of Chile for the Promotion and Protection of Investments (the Bilateral Investment Treaty or "BIT").

The foreign investment at issue relates to the design of a mixed-use planned community based on a Malaysian model to be built in Pirque, an area in Santiago, Chile. MTD Equity, a Malaysian company, entered into a foreign investment contract that would provide for the development of land and for the creation of a Chilean corporation, MTD Chile S.A. which would be majority owned by MTD Equity. After the foreign investment contract was signed and approved by the Chilean Foreign Investment Commission in March 1997, and after MTD invested several millions in capital contributions, problems occurred related to obtaining zoning for the project. A series of meetings between MTD and various Chilean officials including the Ministry of Housing and Urban Development ("MINVU") took place. In November 1998, the MINVU rejected the project on the grounds that it conflicted with existing urban development policy and that the Mayor of Pirque no longer supported the project. In October 8,1999, MTD brought a claim against Chile pursuant to the Malaysia-Chile BIT before ICSID.

MTD based part of its claims on provisions of other BITs and contended that these provisions apply by operation of the Most Favored Nations ("MFN") Clause of the Malaysia-Chile BIT. The first paragraph of Article 3(1) of the Malaysia-Chile BIT provides that:"1. Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State." MTD claimed that the provisions of the Croatia BIT and the Denmark BIT with Chile dealing with Chile's obligation to award permits subsequent to the approval of foreign investment and to fulfill contractual obligations were part of the duty to provide fair and equitable treatment. MTD submitted that as such obligations were part of the fair and equitable treatment standard, it could invoke them pursuant to the Most Favored Nations ("MFN") clause of the Malaysia-Chile BIT. According to MTD, Chile breached the fair and equitable treatment provisions of the BIT when it "created and encouraged strong expectations that the Project, which was the object of the investment, could be built in the specified proposed location and entered into a contract confirming that location, but then disapproved that location as a matter of policy after MTD irrevocably committed its investment to build the Project in that location."

The Tribunal concluded that "under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose. The Tribunal is further convinced of this conclusion by the fact that the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of the MFN clause, the Contracting Parties considered it prudent to exclude. A contrario sensu, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause." The Tribunal further noted that "...Chile ...has an obligation to act coherently and to apply its policies consistently, independently of how diligent an investor is." The Tribunal found that the approval of MTD's investment, one that was against the urban policy of the Government, was a breach of the fair and equitable treatment obligation.

The Tribunal did not, however, attribute all of the Claimant's business loss to violations of the BIT by Chile. Rather, it found that MTD "...made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection." The Tribunal therefore found that the MTD had to bear 50% of the damages after deduction of the residual value of their investment as calculated by the Tribunal. In sum, The Tribunal ordered Chile to pay US$5,871,322.42 to MTD, and ordered the parties to bear the arbitration costs equally.

Click here <http://www.asil.org/ilib/MTDvChile.pdf> for the decision.

Members of the Tribunal:
Mr. Andrés Rigo Sureda, President
Mr. Marc Lalonde
Mr. Rodrigo Oreamuno Blanco