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Gruslin v Malaysia (Belgium & Luxembourg-Malaysia BIT)

AREAS OF POLICY AFFECTED: monetary system (capital controls), financial regulation (banking).

CASE SUMMARY: A Belgian investor sued Malaysia under a bilateral investment treaty (BIT) after losing money on portfolio investments in the Kuala Lumpur Stock Exchange. He argued that the loss was caused by Malaysia's introduction of exchange controls in September 1998 in the context of the Asian financial crisis.

The tribunal rejected the claim on the basis that it fell outside the scope of the relevant investment treaty. The treaty only applied to investments in approved projects and the investor's assets did not qualify. The treaty also required that investments be made in the territory of the host state, although the tribunal did not resolve conclusively this aspect of the claim.

COMMENT: Although the claimant was unsuccessful, the case demonstrates that general financial regulatory measures are subject to challenge by foreign investors under investment treaties. Unlike in the present case, an investment treaty is typically not limited to affirmatively-approved investments. Also, many investment treaties, such as those concluded by the United States, do not include exceptions for measures undertaken in response to a financial or balance of payments crisis.

Source: www.iiapp.org (May 2011), based on information in publicly-available awards and materials in known investment arbitrations (for texts of awards, see www.italaw.com). This report was produced by a research team coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada. Please see the disclaimer and statement on terms of use available at www.iiapp.org. © Gus Van Harten 2011. *You may forward or re-publish the information in this report with attribution to www.iiapp.org.*