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Arbitration Watch:
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1. ICSID Tribunal issues ruling on confidentiality in Tanzanian water concession dispute, By Luke Eric Peterson

An ICSID arbitration tribunal has issued a Procedural Order which lays out confidentiality obligations for the two parties embroiled in a spirited arbitration over a disputed water services concession.

The Order comes in response to a request by the water firm Biwater Gauff Tanzania (BGT) for the presiding tribunal to clamp down on the unilateral release of documents related to the ongoing arbitration.

BGT has complained that the release of documents has stoked media and NGO scrutiny and criticism. The firm, which is majority-owned by UK-based Biwater PLC, also

expressed fears as to the procedural integrity of the process, as well as the potential to aggravate the dispute. BGT says it wishes to present it case “without the threat of increased harassment and interference from third parties, whose object is to mount pressure on BGT to discontinue the ICSID proceedings.”

In its request to the tribunal, BGT urgently sought several specific outcomes, including that any decisions issued by the tribunal (apart from the final award, which may be released unilaterally) would be released only after the two parties had discussed disclosure of the relevant document, and if unable to reach consensus, would turn to the tribunal for further guidance.

BGT also requested that the parties refrain from disclosing to third parties copies of the pleadings (i.e. legal briefs) filed by each side in the arbitration. Furthermore, the investor also sought a ruling which would bar the parties from disclosing any correspondence exchanged between the parties and/or the tribunal.

For its part, the Tanzanian Government opposed the bid by BGT, and characterized the request as running counter to a broader trend towards transparency in the conduct of investment treaty arbitrations.

Lawyers for Tanzania expressed doubts as to whether the disclosure of certain documents related to the arbitration proceeding has contributed to harassment of BGT; in particular, Tanzania noted that the World Development Movement, a UK-based NGO, had mounted a campaign targeting BGT prior to the time when certain arbitral documents began to surface.

Pointing to BGT’s own efforts to publicize its dispute with Tanzania, lawyers for the Tanzanian government argued that the dispute was clearly a matter of public interest, and “involves not only the provision of a critical public service in a particular developing country but also larger (and often controversial) questions of international development policy.”

In weighing BGT’s request, the tribunal noted that there is no general duty of confidentiality under the ICSID rules, nor is there one imposing a general duty of transparency. To the extent that the ICSID rules address confidentiality, they tend to set forth obligations for the tribunal and the ICSID Secretariat, rather than the parties to a given arbitration.

What’s more, the tribunal acknowledged that there has been a general drift of late in the direction of greater transparency in investment treaty arbitrations, as compared for example to private commercial arbitrations. Indeed, the tribunal added that there is an “accepted need for greater transparency in this field”, at the same time as it noted that there might be specific circumstances which would “militate in favour of restrictions” on disclosure of documents in a given arbitration.

Before turning to examine the specific circumstances of the BGT v. Tanzania arbitration, the tribunal expressed the general view that "the prosecution of a dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure."

Ultimately, the tribunal took the view that, in the Biwater v. Tanzania case, there exists "a sufficient risk of harm or prejudice, as well as aggravation," which warrants some controls on the disclosure of documents. At the same time, the tribunal indicated that it would impose restrictions which were "carefully and narrowly delimited", in deference to the "public nature of this dispute and the range of interests that are potentially affected, including interests in transparency and public information".

Accordingly, the tribunal held that parties could continue to discuss the dispute in general terms, while endeavouring not to aggravate the dispute. More specifically, the tribunal affirmed that the final award would be released as per the agreement of the two parties.

As for other decisions, rulings or orders of the tribunal, the tribunal acknowledged that these should be released, as a general rule, following case-by-case scrutiny by the tribunal of each document.

Beyond this, the tribunal dictated that transcripts of the proceedings (i.e. written records of the oral hearings which are closed to the public) should not be released unless both parties consented. Additionally, the tribunal affirmed that each party could disclose its own documents which have been filed in the course of the arbitration, but not those of the other party. This did not extend, however, to the pleadings (i.e. the legal briefs submitted by each party in defence of its positions) and expert reports filed by the parties, which were to be embargoed until the end of the proceedings, unless the parties or the tribunal ordered otherwise in a given instance.

Finally, the tribunal declined to permit the parties to disclose any correspondence between themselves, and/or with the tribunal, noting that such correspondence usually concerns "the very conduct of the process itself, rather than issues of substance, and as such do not warrant wider distribution."

The tribunal also indicated that it would continue to serve as a gate-keeper, after the cessation of the arbitration, so as to help resolve any disagreements as to disclosure of documents.

According to one expert on transparency and third-party participation, Dr. Christina Knahr, the tribunal's Order is notable for being the first where the risk of harm arising from further publicity was thought to be serious enough to warrant additional restrictions on the release of certain documents.

Dr. Knahr, a Research Fellow at the University of Vienna, adds that the Order is also notable the distinctions drawn between various categories of documents, and the

tribunal's determination to review the disclosure of certain documents on a case-by-case basis in future.

Peter Hardstaff, Head of Policy at the World Development Movement, a UK-based group which has campaigned against water privatization in developing countries, including in relation to the Biwater project in Tanzania, professes to be unimpressed with the latest development in the Biwater arbitration.

"Last year, (a Biwater official) told me that they have 'nothing to hide' and would welcome an open process if the Tanzanian Government were to agree. This year, the company's lawyers are going out of their way to ensure as much as possible is kept secret. They have batted away requests from Tanzania for open hearings and now they have called for, and been largely granted, a clamp down on the information that can be publicly released in this case."

"Companies are often the first to complain about a lack of transparency and accountability in developing countries, yet the first to demand secrecy when their own operations are under scrutiny. It is a disgrace that Biwater are resorting to these tactics, setting back the cause of transparency and accountability not only in this case, but in the wider arena of investor-state arbitration."

Meanwhile, a spokesperson for Biwater tells ITN that they welcome the recent Order of the tribunal:

"We agree with the Tribunal that there is sufficient risk to the integrity of the proceedings to warrant controlling the publication of minutes or records of hearings and other documents and correspondence. We have faith in the ICSID process. The parties have agreed that the Tribunal may publish its final decision, so this will become available in due course."

Biwater mounted its arbitration claim at ICSID in 2005, alleging that Tanzania had illegally terminated a contract held by its subsidiary for the provision of water services to the city of Dar es Salaam. In December of 2005, the UK firm stated that "(t)his project failed because of a lack of political will and we cannot stand idly by while the Government of Tanzania makes unsubstantiated allegations, steals our assets and flouts the terms of our contract."

Sources:

ITN Interviews

Procedural Order No. 3, Sept.29, 2006, in Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, available on-line at: http://www.worldbank.org/icsid/cases/arb0522_procedural_order3.pdf

2. Challenge to Eureko award and challenge to arbitrator both pending in Belgian courts, By Luke Eric Peterson

The Polish Government's effort to challenge Judge Stephen Schwebel in his capacity as arbitrator in a high-profile investment treaty arbitration is to revert to the Belgian courts, following a recent indication from a Belgian arbitration centre that it is not the appropriate body to resolve Poland's challenge request.

The Polish Government had turned to CEPANI, a Belgian arbitration centre, at the suggestion of the Brussels Court of First Instance, following a June ruling wherein the Belgian court declined to decide Poland's challenge on its merits. The Brussels Court insisted that Poland first turn to CEPANI so as to ascertain whether the centre was in fact the appropriate venue for hearing such a challenge.

However, following CEPANI's recent signal to Polish authorities that it is not the appropriate venue for such a challenge, a Polish media report suggests that the dispute will now revert to the Belgian courts, to be heard on November 3rd.

Poland's challenge to Judge Schwebel was mounted following a split-ruling by a three-member tribunal, whereby Poland was held to have violated the terms of the Netherlands-Poland bilateral investment treaty in its treatment of the Dutch insurance company Eureko. The underlying dispute related to the proposed privatization of Poland's largest insurance company, and the Dutch firm has signaled publicly that it seeks more than 1 Billion Euros (1.25 Billion US) in compensation for its thwarted bid to acquire the state-owned insurer PZU.

The Eureko arbitration is legally sited in Belgium, and in addition to Eureko's challenge to Judge Schwebel, a separate effort has been launched to overturn the partial award rendered in the arbitration. A hearing on Poland's latter request is scheduled for October 19th.

As for Poland's challenge to Judge Schwebel, the Belgian Judicial Code provides that arbitrators may be challenged "when circumstances arise which cause legitimate doubts regarding their impartiality or independence." The Code also prescribes that "(a) party can challenge an arbitrator only for cause that emerges after his appointment."

In public comments, Polish government officials have acknowledged the leading reputation of Judge Schwebel, including his service as a Judge on the International Court of Justice, at the same time as they have raised doubts as to Judge Schwebel's impartiality to sit in the Eureko arbitration. At the root of Poland's concern appears to be Judge Schwebel's relationship with a US-based law firm which is suing Poland in a separate investment treaty arbitration on behalf of Cargill, a US agricultural company.

Last year, a US-based magazine, The American Lawyer, had reported that Judge Schwebel served as co-counsel with Sidley Austin on behalf of Cargill in its claim against Poland. However, The American Lawyer magazine later issued an on-line

retraction stating that Judge Schwebel had no involvement in the Cargill v. Poland arbitration.

Polish Government officials, including former Treasury Minister Andrzej Mikosz, have continued to raise questions about Judge Schwebel's alleged involvement as counsel in the Cargill matter, however no evidence, beyond the (since retracted) American Lawyer notice, has been publicly tendered to support such allegations.

Poland has also voiced more general concerns about Judge Schwebel's close working relationship with the Sidley Austin firm.

In 2002, the firm announced that Judge Schwebel had moved his legal practice to an office located in Sidley's Washington office, and would advise the firm on "matters of international law and dispute settlement." He has appeared as co-counsel beside Sidley Austin in several investment treaty arbitrations, for e.g. Vivendi v. Argentina and Fireman's Fund v. Mexico.

Counsel for Judge Schwebel are understood to have rejected Poland's allegations as to any alleged partiality or conflict of interest.

It is unclear when the Belgian courts will rule on the two challenges made by Poland in the Eureko matter, however ITN will endeavour to report on the outcome of both.

Sources:

Earlier ITN reporting on Eureko arbitration:

http://www.iisd.org/pdf/2005/investment_investsd_sept15_2005.pdf

3. Bolivia tables new contracts to energy firms as deadline for "migration" looms,
By Luke Eric Peterson

The Bolivian Government has finally presented draft model contracts to foreign energy firms, and negotiations with the Government are now taking place in an effort to ascertain how these new contracts would impact upon the bottom line of existing natural gas projects in Bolivia.

As earlier reported in ITN, a 2005 Hydrocarbons Law gave foreign investors a 180 day window period in which to migrate to new contracts. However, this deadline came and went without the Government having tabled model contracts for consideration by the companies.

In the mean time, gas producers are paying enhanced royalties to the Bolivian Government - albeit under protest. Most of the major foreign players in Bolivia long ago served so-called triggering letters on the Government – setting in motion mandatory 3 or

6 month negotiation periods before they could turn to arbitration under bilateral investment treaties.

Thus far, companies have refrained from turning to arbitration until they can acquire a clearer picture of how Bolivia's plans for "nationalization" of the hydrocarbons sector will affect existing investments.

Several sources familiar with the legal posture adopted by key foreign investors in Bolivia tell ITN that the companies continue to seek clarification as to the impact of model contracts upon their ongoing operations. While the 2005 Hydrocarbons Law introduced a 32% royalty (sometimes characterized as a "tax"), which was to be added to the existing 18% royalty, companies wonder if they will be able to off-set this new liability in some fashion.

A new window imposed by the Bolivian government demands that companies migrate to new contracts as of Oct.31, 2006. A bill currently before Bolivia's legislature could provide for a 30 day extension to this deadline.

However, the aforementioned sources tell ITN that there is a widely-held view amongst foreign investors that such short-term deadlines are unrealistic, particularly as it remains unclear what the net financial impact will be of the Government's new contractual regime, and what sort of financial losses the companies will be asked to shoulder as a result of the migration from older contracts. One distinct possibility is that companies could agree to transitional arrangements with the government, while agreeing to negotiate new contractual terms over a longer time horizon.

Another observer with knowledge of Bolivia's hydrocarbons industry tells ITN that the original October 31st deadline had been set with an eye to the current elections in Brazil - as Brazil represents one of the two main consumers of Bolivian gas, and the Brazilian energy company Petrobras owns or controls the lion's share of Bolivian gas production. However, a clear-cut winner did not emerge in the first-round of Presidential elections on October 1st, necessitating the need for a run-off scheduled for Oct.29th.

While other foreign investors (including Vintage Petroleum, Total, British Gas, British Petroleum, and Exxon-Mobil) are involved in negotiations with the Bolivian government, their investments pale in comparison to those of Petrobras (and the Spanish firm Repsol which owns a joint-venture with Petrobras).

4. Argentina asks ICSID for the removal of lead arbitrator in Asset Recovery Trust case, By Fernando Cabrera Diaz

The Argentine Republic has filed a demand with the International Centre for Settlement of Investment Disputes (ICSID) for the removal of an arbitrator presiding over an arbitration claim brought against Argentina by the US-owned company, Asset Recovery Trust.

In a letter sent to ICSID, Argentine Attorney General Osvaldo Guglielamino seeks the removal of Mr. Jaime Irarrázabal Covarrubias on the grounds that he lacks the requisite impartiality to serve as arbitrator in the dispute.

Asset Recovery Trust is an Argentinean debt recovery company owned by American investors. The firm won a contract with the Argentinean province of Mendoza to recover debts owned by public banks that were slated for privatization by the province.

According to a source familiar with Asset Recovery Trust's ICSID claim, the firm alleges that it concluded a contract which set the rates and rules for debt recovery, after which the province of Mendoza passed several laws in which it forgave some debts and extended due dates on others. In doing so the province is alleged to have destroyed the value of the investments by Asset Recovery Trust, leading the company to seek some $13 Million USD in damages.

The claim has been submitted to ICSID in accordance with the consent to arbitration contained in the Argentina-U.S. Bilateral Investment Treaty. Mr. Irarrázabal was nominated by ICSID to serve as President of the 3 member arbitral tribunal which will preside over the claim.

However, with Argentina's recent challenge to the President of the tribunal, the case is temporarily suspended. At the crux of Argentina's objections is Mr. Irarrázabal's role as a director of the Chilean-American Chamber of Commerce (AmCham). Argentina alleges that Mr. Irarrázabal's advocacy upon behalf of US firms in Chile should raise questions about his capacity to serve as a neutral arbitrator in disputes involving US investors. Argentina also questions what it deems to be Mr. Irarrázabal's relative lack of experience in presiding over ICSID arbitrations.

Under the ICSID rules, an arbitrator may be challenged by a party if there is a question as to the "manifest lack" of those qualities which ICSID arbitrators are expected to demonstrate, including the capacity to exercise independent judgment.

Following Argentina's challenge to Mr. Irarrázabal, it falls to the remaining two arbitrators in the case, Ernesto Canales Santos and A. A. Cançado Trindade, to decide on the request to disqualify Mr. Irarrázabal.

Mr. Irarrázabal is understood to reject any allegations of impartiality or incapacity. He has made no public comment on the case, and is awaiting the decision of the two remaining arbitrators who must rule on Argentina's challenge.

The challenge to Mr. Irarrázabal is the latest in a growing line of challenges mounted by Argentina in various of the cases in which it is a respondent at the Washington-based ICSID. (See: "Argentina persists with challenges to arbitrators in BITs cases", Investment Treaty News, July 19, 2006, http://www.iisd.org/pdf/2006/itn_july19_2006.pdf)

Briefly Noted:
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5. UNCTAD Releases World Investment Report, as number of BITs exceeds 2500,

The latest United Nations Conference on Trade and Development (UNCTAD) World Investment Report examines Foreign Direct Investment (FDI) flows emanating from developing and transition economies. UNCTAD notes that a growing number of trans-national corporations hailing from such countries are becoming regional – and even global – players.

The report also highlights key developments in relation to the national and international policy environment for FDI. In particular, UNCTAD finds that the number of bilateral investment treaties reached 2495 as of the end of 2005 – a sign that the current number of these agreements likely eclipsed 2500 early in 2006.

Given the focus of this year's World Investment Report, the publication devotes special attention to investment agreements concluded by those developing and transition economies which are notable capital-exporters. UNCTAD finds that agreements negotiated by such countries are on the rise. What's more, there are a growing number of so-called South-South investment agreements; with 644 bilateral investment treaties having been concluded solely between developing countries and/or transition economies.

UNCTAD notes that as developing and transition economies are becoming significant capital exporters – in addition to potential markets for inward investment - "they have to consider a wider spectrum of priorities when negotiating international agreements."

The full World Investment Report 2006 is available on-line here:
http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3968&lang=1

6. ICSID/ICC/AAA to host Arbitration Colloquium in DC on November 17,

The International Centre for Settlement of Investment Disputes (ICSID) will play host to an arbitration colloquium on November 17 in Washington DC. The event is co-hosted by the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) and will feature panel discussions on a range of issues of interest to the three host organizations, including new challenges regarding confidentiality, and selected substantive issues arising from arbitration involving State parties.

For more information or to register see:
http://www.worldbank.org/icsid/highlights/conf-072006/main.htm

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