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1. Bolivia notifies World Bank of withdrawal from ICSID, pursues BIT revisions,
By Damon Vis-Dunbar, Luke Eric Peterson and Fernando Cabrera Diaz

Investment Treaty News has learned that Bolivia has sent a formal notice to the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) declaring its withdrawal from the ICSID convention.

In widely reported comments made late last month, Bolivian President Evo Morales had called upon Latin American Governments to withdraw from the World Bank's investment dispute facility. The Washington Post quoted President Morales as saying that "(We) emphatically reject the legal, media and diplomatic pressure of some multinationals that ... resist the sovereign rulings of countries, making threats and initiating suits in international arbitration".

It remained unclear, however, if such political rhetoric had been accompanied by an actual move to exit ICSID – although there were persistent rumours circulating in the arbitration community and in Bolivia that the Morales Government had moved to withdraw from ICSID.

In an interview with Investment Treaty News, Pablo Solon, Bolivia's Charge D'affaires for Trade with the Ministry of Foreign Affairs in La Paz, says that a letter dated May 1st, 2007 was sent to the World Bank's president Paul Wolfowitz giving formal notice of Bolivia's departure from ICSID.

INVESTMENT TREATIES ALSO SLATED FOR REVISION OR TERMINATION

Mr. Solon also said that Bolivia intends to pursue revisions to its 24 bilateral investment treaties (BITs). These revisions will be sought in three areas: the definition of investment; performance requirements; and dispute resolution.

Mr. Solon said Bolivia wants to limit the definition of an investment to those that "truly generate a value to the country." For rules on performance requirements, Bolivia wants greater scope to set requirements for the use of domestic inputs and set rules for the transfer of technology. Finally, in the area of dispute resolution, Bolivia is aiming to limit investor-state arbitrations to domestic fora, rather than international venues such as ICSID.

Bolivia intends to pursue these changes one at a time, as these existing BITs are set to expire. Many of Bolivia's BITs stipulate that they are in force for 10 years, after which either country can choose to end the treaty. If the original 10 year period elapses without a notice to terminate, then the BIT remains in force in one of two ways. Some BITs are renewed for 6 or 10 year periods and can only be terminated if notice is given in advance of the end of one of those periods. Other BITs, such as the Bolivia-United States agreement – which came into force in June of 2001 - are renewed indefinitely and can be terminated at any time after the initial ten year time-span, given one year's notice.

Notably, most of Bolivia's BITs also contain a so-called survival clause, which ensures that most of the protections offered in the BIT will continue to apply to investments made prior to the termination of the treaty, for 10 to 20 years after that termination date.

Mr. Solon tells ITN that Bolivia has already notified several countries of its intention to renegotiate their bilateral investment treaties.

IMPLICATIONS OF BOLIVIA'S WITHDRAWAL FROM ICSID UNCLEAR

Although there are currently 144 adherents to the ICSID Convention, thus far, no government has formally withdrawn from the ICSID system. As such, the implications for foreign investors of Bolivia's move are a matter of debate amongst lawyers specializing in investment treaty arbitration.

The ICSID Convention allows states to withdraw from ICSID, with Article 71 of the ICSID Convention stating that denunciation shall take effect six months after the receipt by the World Bank of a notice to withdraw.

However, one prominent legal expert says that, from the moment a notice of withdrawal has been received by the World Bank, the door to ICSID arbitration may already be closed to some foreign investors.

“If you look closer ... the six month notice period offers very little comfort to investors and potential litigants,” says Professor Christoph H. Schreuer, Professor of International Law at the University of Vienna, and author of a well-known academic commentary on the ICSID Convention.

Professor Schreuer points to Article 72 of the ICSID Convention, which states that a notice to withdraw will not affect arbitrations where “consent” has been given prior to the notice of withdrawal.

According to Professor Schreuer’s interpretation of this article, any consent to ICSID arbitration given prior to the notice of withdrawal will not be impacted. However, after a notice of withdrawal, any attempt by an investor to give consent would be too late.

The key question is what constitutes consent.

“My reading is that consent under the ICSID Convention is always by agreement. If there is an ICSID clause in a bilateral investment treaty or national legislation, that does not in itself constitute consent. That consent needs to be accepted by the other party.”

Such consent does not need to take the form of a request for arbitration, said Schreuer. It does, however, need to take the form of a written letter to Bolivia accepting the state’s offer of consent to jurisdiction under ICSID.

Fernando Mantilla-Serrano, a Partner with the international arbitration group at the law firm Shearman and Sterling, takes a differing point of view on this matter. He argues that Article 72 of the Convention refers to consent to arbitration by just one of the parties.

"At least from the plain meaning of the text of the Convention, you don't need any other party to have acted on that consent," said Mr. Mantilla, who advises foreign investors in Latin America, including in Bolivia and Venezuela.

According to this view, foreign investors protected under a BIT that had been in force prior to ICSID’s receipt of Bolivia’s withdrawal notice would continue to enjoy access to arbitration at ICSID well into the future. On Mantilla’s reasoning, Bolivia’s consent to ICSID arbitration is grounded in the relevant bilateral investment treaties, and investors can continue to take advantage of that consent notwithstanding Bolivia’s withdrawal from the ICSID Convention.

One upshot of this view would be that arbitrations against Bolivia could be handled by ICSID many years after Bolivia had withdrawn from the ICSID Convention, provided that the investors could avail themselves of the arbitration clauses contained in Bolivia’s bilateral investment treaties.

Mantilla acknowledges, of course, that this is a legal “theory”, and that it would fall to the ICSID Secretariat, in the first instance, and perhaps to arbitral tribunals, to decide how to handle future claims brought to ICSID against Bolivia.

While debate is likely to swirl as to the legal implications of Bolivia’s move to withdraw from ICSID, other avenues also appear open for investor arbitration – at least until the obligations in Bolivia’s existing treaties expire.

Robert Volterra, a London-based Partner with Latham & Watkins, notes that the ability of investors to pursue a claim against the host state is rooted in the various investment treaties signed by that country. Volterra, who was lead counsel for Aguas del Tunari and Bechtel in an earlier arbitration against the Bolivian Government, points out that many Bolivian investment treaties provide for non-ICSID arbitration options, for example under the ad-hoc UNCITRAL rules.

NATIONALIZATION SPURS INTEREST IN BIT PROTECTIONS

Bolivia’s move to withdraw from ICSID comes at a time when the country is in the midst of nationalizing key sectors of its economy. In recent months several adversely affected foreign investors have hinted at international arbitration as a possible recourse.

Glencore, the Swiss commodity trader, is known to have sent the Bolivian government a so-called triggering letter - setting in motion a mandatory negotiation period before they could turn to arbitration under the Swiss-Bolivia bilateral investment treaty – after one of its plants was seized earlier this year.

Telecom Italia, the Italian Telecommunications firm, has also adverted to its investment treaty protections, in the wake of an announcement that Bolivia intends to nationalize Entel Bolivia.

Bolivia is currently party to one arbitration at ICSID. In 2006, a Chilean chemical firm, Quimica e Industrial del Borax Limitada (Quiborax), initiated arbitration proceedings claiming that its Bolivian mining company was expropriated, in breach of a Bolivia-Chile bilateral investment treaty.

Bolivia was also involved in an earlier arbitration at ICSID – one which drew widespread media coverage – involving a controversial dispute over a water services concession in Cochabamba. That arbitration with the Dutch-based Aguas del Tunari was settled in early 2006, and the arbitration claim withdrawn.*

Otherwise, a Bolivian government source says that the country has not been involved in other arbitrations under its investment treaties, although the country has been threatened with arbitration from time to time.

Sources:

ITN Interviews

* "Bolivian water dispute settled, Bechtel foregoes compensation", By Luke Eric Peterson, Investment Treaty News, January 20, 2006.

2. Ecuador announces that it wants out of US investment treaty,
By Luke Eric Peterson

On the heels of an announcement by Bolivia that it is seeking to withdraw from ICSID and renegotiate its investment treaties, the Republic of Ecuador have signaled their own plans to terminate an investment protection treaty with the United States Government.

The agreement which was signed in 1993, and which entered into force on May 11, 1997, provides that either party may give notice to terminate the agreement after it has been in force for ten years.

With the ten year anniversary looming later this week, Ecuadorian officials can move to terminate the agreement unilaterally. Under the terms of the treaty, a party wishing to terminate the agreement would need to provide one year's notice prior to the termination becoming effective. (Moreover, the agreement provides that the treaty protections will continue to be available for a further time-period of ten years, for "investments made or acquired prior to the date of termination")

Reuters reports that Ecuador's Foreign Affairs Minister Maria Espinosa has announced that her Government does not wish to maintain the treaty with the United States, but is open to exploring other avenues for the mutual protection of EU-Ecuador investment.

ECUADOR HAS FACED MANY INVESTMENT TREATY ARBITRATIONS

For its part, Ecuador has found itself on the receiving end of a growing number of bilateral investment treaty arbitrations, and the country has publicly chafed at the obligations contained in such international treaties.

The Ecuadorian Government has handled a pair of arbitrations over Value-Added Taxes (VAT) paid by multinational oil companies, and for which the companies claimed that they were entitled to refunds.

US-based Occidental prevailed in its claim, with a tribunal holding Ecuador to have breached provisions of the US-Ecuador bilateral investment treaty. Ecuador is currently challenging the $75 Million (US) arbitration award in the United Kingdom (where the arbitrated was legally seated).

However, the Canadian firm Encana in 2006 lost its own VAT-related arbitration claim under the Canada-Ecuador bilateral investment treaty.

Ecuador has been embroiled in a further number of treaty-based arbitrations, including one brought pursuant to the US-Ecuador BIT by IBM World Trade Corporation; that ICSID arbitration claim was settled on confidential terms in 2004.

Otherwise, Occidental has initiated a new arbitration under the US-Ecuador BIT alleging expropriation of its Billion Dollar plus investments in the Ecuadorian oil sector. Four other ICSID arbitrations have also been launched pursuant to the US-Ecuador BIT, and remain pending at this time.*

Last year, a pair of Spanish firms, Técnicas Reunidas, S.A. and Eurocontrol, S.A., also initiated arbitration at ICSID under the Spain-Ecuador BIT.

At press time, an economic affairs official with the Ecuadorian Embassy in Washington DC had not returned a call from ITN seeking more information about the country's posture towards its bilateral investment treaties.

Sources:

* M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador (Case No. ARB/03/6); Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador (Case No. ARB/04/19); Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador (Case No. ARB/05/9); Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad (Case No. ARB/05/12)

"Trade benefits at risk as Ecuador scraps US Treaty", Reuters, May, 7, 2007.

3. Argentina moves to disqualify tribunal in dispute over admitting earlier rulings,
By Fernando Cabrera and Luke Eric Peterson

The Republic of Argentina has asked the International Centre for Settlement of Investment Disputes (ICSID) for the disqualification of all three arbitrators in a dispute with Camuzzi International S.A. and Sempra International Energy*.

The request comes after the tribunal declined to admit a post-hearing submission by Argentina which had appended two legal documents: the Decision on Liability issued last autumn in the LG&E v. Argentina arbitration at ICSID, and a separate Procedural Order on damages valuation from that same arbitration.

By letter dated February 9th, Argentina had called the tribunal's attention to the LG&E rulings citing the relevance of the rulings to the issues under consideration in the Sempra-Camuzzi dispute.

In the LG&E case, Argentina was found in breach of its BIT obligations to the US-based gas company; however, in a notable partial-victory for Argentina, the tribunal held that Argentina was exempted from liability for a period of 17 months during which the financial crisis stricken country was held to have been in a state of “necessity”.

Thus, Argentina had sought to have the LG&E Decision on Liability, as well as a more recent Procedural Order, brought to the tribunal’s attention in the parallel Sempra-Camuzzi arbitration.

In a letter to the Sempra-Camuzzi tribunal Argentina pointedly argued that the LG&E decision “flatly contradict(s)” an earlier ruling in another ICSID arbitration, CMS v. Argentina “on a fundamental issue of international law”. Indeed, in the CMS case, Argentina’s plea of necessity had been rejected by the ICSID tribunal presiding over that claim.

Seeking to have the more favourable LG&E ruling on liability weighed alongside the less-favourable CMS ruling, Argentina moved in February of this year to submit the former ruling to the Sempra-Camuzzi tribunal.

(NB: Members of ICSID arbitration tribunals typically differ from case to case, although some individuals may serve on multiple such panels. Two members of the CMS v. Argentina tribunal, which rejected Argentina’s “necessity” defence, also sit on the arbitration tribunal in the Sempra-Camuzzi dispute).

Following this approach by Argentina to the Sempra-Camuzzi tribunal – which came at a late stage in the proceedings, with oral hearings on the merits having been conducted in February of last year – the claimants, in correspondence to the tribunal, took the view that Argentina was merely engaging in delay tactics so as to prevent the tribunal from rendering its award. The claimants also made some substantive arguments directed at the relevance of the LG&E rulings to the Sempra-Camuzzi case.

TRIBUNAL DECLINES TO ADMIT NEW SUBMISSION

On February 22nd, the tribunal in the Sempra-Camuzzi case informed Argentina that it had decided “not to admit” the two LG&E rulings. The tribunal added that to accept Argentina’s “non-invited submission at this late stage of the proceedings would open the door for a never ending exchange of arguments, unduly burdening both parties.”

In a letter dated February 22nd, ICSID, writing on behalf of the Sempra-Camuzzi tribunal, notified the parties that,

“The Tribunal is mindful of the parties’ wish and right to fully present their cases. The Tribunal also understands its duty to conduct the proceedings in an orderly and efficient manner. The Tribunal is confident that the parties in these proceedings have been given plenty of opportunities to fully present their arguments on each issue in dispute. Accepting Argentina’s non-invited submission at this late stage of the proceedings would open the door for a never ending exchange of arguments, unduly burdening both parties.”

“Having reached its conclusion for the reasons set above, the Tribunal does not consider necessary to review the relevance of the decision enclosed with Argentina’s submission, which was rendered by a different tribunal, over a distinctive set of facts, and in view of a likely different set of arguments and evidence.”

Following receipt of this letter from ICSID, the Argentine Government moved to have the tribunal disqualified for what it deemed to be an arbitrary decision – one which Argentina held to have raised concerns about the capacity of the tribunal to exercise independent judgment.

ARGENTINA BID TO DISQUALIFY; TRIBUNAL OFFERS FURTHER REASONS

In response to that initial disqualification request, the tribunal decided to offer more explanation for its decision not to admit the LG&E rulings into the Sempra-Camuzzi proceeding. Thus, in late March, each member of the tribunal sent separate but identical letters expanding on their decision.

The tribunal members re-iterated their position concerning the late stage at which Argentina had submitted its request. They also wrote that that they did not have knowledge of the evidentiary record, views of the parties, facts and circumstances surrounding the LG&E rulings - and that the need for confidentiality prevented them from acquiring such knowledge.

For the tribunal to take “judicial notice” of the LG&E rulings, the tribunal held, would require that Sempra and Camuzzi be allowed the opportunity to express their views based on pertinent information; however, that information was not publicly available. Thus, the tribunal reasoned that if the rulings were admitted, the investors would be placed at an unfair disadvantage, contrary to due process.

SEMPRA AND CAMUZZI OPPOSE ADMITTING LG&E DECISIONS

ITN understands that in correspondence between the parties and the tribunal, the investors expressed the view that the holding of necessity contained in the Decision on Liability in the LG&E case had hinged upon the LG&E tribunal’s evidentiary finding that there was no evidence to show that Argentina had contributed to its financial crisis.

For their part, Sempra and Camuzzi had presented their own evidence in their arbitration with Argentina, which they argued would demonstrate that Argentina had contributed to the financial crisis – thereby foreclosing a defence of “necessity” in relation to allegations that Argentina’s treatment of Sempra and Camuzzi had breached BIT obligations.

Sempra and Camuzzi opposed efforts to have the LG&E Decision admitted at such a late stage in the their case, arguing that neither they nor the tribunal were privy to the evidence which had been admitted in the LG&E case, and which had led the LG&E tribunal to find that Argentina had not contributed to its financial crisis (and could therefore remain eligible to make a defence of necessity).

ITN also understands that Sempra and Camuzzi opposed the effort by Argentina to have the Sempra-Camuzzi tribunal admit a recent Procedural Order from the LG&E case. That Procedural Order, which sets out a method by which the tribunal will evaluate damages in the LG&E case, presented a different methodology from that used by an independent expert appointed by the Sempra-Camuzzi tribunal to issue a report on damages evaluation.

ARGENTINA ADDUCES ADDITIONAL ARGUMENTS FOR DISQUALIFICATION

Following further efforts by the Sempra-Camuzzi tribunal to explain their decision not to admit the LG&E rulings, Argentina responded by a letter of April 10th, 2007, adducing additional grounds upon which the tribunal might be disqualified.

In initially seeking disqualification of the Sempra-Camuzzi tribunal Argentina had argued that that tribunal's rejection of their submission simply because of the advanced stage of the proceedings was behaviour that is manifestly arbitrary and a grave violation of due process.

Further to this, in its April 10th letter, Argentina went on to allege that the tribunal had committed a "manifest prejudgment" when it signaled that it "does not consider necessary to review the relevance of the decision enclosed with Argentina's submission, which was rendered by a different tribunal, over a distinctive set of facts, and in view of a likely different set of arguments and evidence."

According to Argentina, such a conclusion on the relevance of a "precedent" should only be reached after a thorough analysis of the available evidence and reasoning behind the "precedent" in question.

As a consequence, Argentina contended that the alleged prejudgment (coupled with the earlier-alleged arbitrariness) exhibited by the Sempra-Camuzzi tribunal demonstrated a manifest lack of the tribunal's ability to exercise independent judgment - a potential ground for removal under the ICSID system.

Argentina added that the tribunal's position was tantamount to affirming that it could not judge the value of potential precedents simply because it does not have the same factual knowledge as the authors of that precedent. This, according to Argentina, is an idea that finds no acceptance in any legal system that accepts jurisprudence as a source of law.

DECISION EXPECTED IMMINENTLY

ITN understands that a decision on the challenge to the tribunal ought to have been forthcoming 30 days from mid-April.

Under ICSID rules a request for the disqualification of an arbitrator is normally decided on by the two remaining arbitrators in the panel. In this case since the request calls for the disqualification of the majority of the panel, ICSID rules call for the decision to be made by the Chairman of the Administrative Council, World Bank President Paul Wolfowitz. In practice, such decisions are often made upon the recommendation of the Secretary General of ICSID. It is unknown if the present ethics controversy buffeting the World Bank President will lead to a delay in the resolution of the challenge to the tribunal.

ITN will continue to monitor the situation and report when a ruling on the disqualification request is handed down.

Sources

* ICSID Case No. ARB/02/16 and ICSID Case No. ARB/03/2

"Latest Arbitration Against Argentine Financial Measures," Invest-SD News Bulletin, March, 2003.

"Tribunal holds Argentina Liable for BIT breaches, but accepts necessity plea in part", By Luke Eric Peterson, Investment Treaty News, Oct.5, 2006.

4. Shell drops ICSID suit against Nicaragua over seizure of trademarks,
By Damon Vis-Dunbar and Luke Eric Peterson

Two companies linked to the petrochemical company Shell Group have withdrawn an investment treaty arbitration against the government of Nicaragua.

Shell Brands International, a subsidiary of the Dutch-based Shell Petroleum Naamloze Vennootschap, and Shell Nicaragua S.A., a Nicaraguan company, had brought Nicaragua to the International Centre for the Settlement of Investment Disputes (ICSID) following the alleged expropriation of the Shell logo and brand name in Nicaragua.

A Nicaraguan court had seized those trademarks in an effort to enforce a 489 Million Dollar (US) judgment handed down in 2002 against the Shell Oil Company, Dow Chemical, Dole Foods Corporation, Inc., and Standard Fruit and Vegetables Co., Inc.

The ruling was in favour of some 500 Nicaraguan citizens who claim a myriad of health effects linked to the pesticide DBCP (1,2-dibromo-3-chloropropane).

Shell Brands International and Shell Nicaragua S.A. countered that the Nicaraguan judgment was not against them, but rather the US-based Shell Oil Company, which is a separate entity. For this reason, the two Dutch entities turned to ICSID in the summer of 2006 alleging that Nicaragua's "illegal" actions constituted a breach of the Netherlands-

Nicaragua bilateral investment treaty.

However, in November 2006, a Nicaraguan court reversed the earlier embargo order. With the trademarks released, the two Shell companies dropped their ICSID claim. Proceedings were officially discontinued in March 2007.

Yet the larger saga involving numerous lawsuits related to the use of the pesticide DBCP continues. The pesticide was banned in the United States in 1979 after it was linked to sterility and cancers. But wide-spread use on banana plantations in the 1960s and 70s, in Latin America and elsewhere, continues to haunt a number of large multinationals.

For its part, US-based Shell Oil, maintains that it never sold DBCP in Nicaragua. The firm turned to US courts in 2005 to challenge the enforceability of the Nicaraguan court ruling in the United States. Ultimately, Shell Oil convinced a US District Court in California that the company had not marketed or sold DBCP in Nicaragua (although it had sold the product elsewhere in Latin America) and that the Nicaraguan courts lacked jurisdiction over Shell Oil for that reason.

Sources:

"Shell launches claim against Nicaragua over seizure of intellectual property", By Damon Vis-Dunbar, Investment Treaty News, October 13, 2006.

"Pesticide company settles sterility suit for $300,000", By T. Christian Miller, The Los Angeles Times, April 16, 2007

"Court sides with Shell in pesticide damage case", Pesticide & Toxic Chemicals News, November 21, 2005

5. Dispossessed Dutch farmers continue to pursue arbitration over Zimbabwe losses, By Luke Eric Peterson

A group of fourteen Dutch farmers have filed written legal arguments in an ongoing arbitration against the Republic of Zimbabwe.*

The claimants mounted their arbitration at ICSID in 2005, alleging that Zimbabwe has breached various provisions of the Netherlands-Zimbabwe bilateral investment treaty - an agreement which came into force in 1998.

During the turbulent period from 2000 to 2002, the claimants allege that they were deprived of their agricultural landholdings and other property, following a series of intimidating and occasionally-violent land invasions. The claimants contend that the Zimbabwean police failed to provide physical protection and security in the face of such land invasions, notwithstanding the international law obligations of the Zimbabwean

Government (embodied in the Netherlands-Zimbabwe BIT) and in spite of a 2000 Order by the Zimbabwean High Court which had bade the police to bring an end to the land invasions.

While a 2005 constitutional amendment is alleged to have effected a formal expropriation of the claimants' landholdings in Zimbabwe, in actual fact, the claimants argue that they had been deprived of their investments well in advance of that date, thanks to a pattern of harassment, intimidation and violence which led them to abandon their holdings in the period from 2000 to 2002.

The Dutch farmers say that they received no financial compensation for their losses, and they invoke the terms of the Netherlands-Zimbabwe BIT which mandates that just compensation (amounting to the "genuine value" of investments) be paid in cases where deprivation has taken place at the hands of the Zimbabwean government.

In addition to claims for breach of the deprivation and full protection and security provisions, the claimants also allege that they were singled out for racial discrimination contrary to the treaty, and that they suffered failures of due process (in particular, by the administrative courts which ought to have supervised any compulsory land acquisition by the Government) amounting to a breach of the fair and equitable treatment standard in the Netherlands-Zimbabwe treaty.

CASE HAS NOTABLE ANGLES; MAY BE HARBINGER OF OTHERS TO COME

The ICSID claim is notable for several reasons, not least because it has been brought by a group of individual claimants, rather than the multinational corporations, who more typically avail themselves of the ICSID facility. Even more noteworthy, the claim is in the vanguard of investment treaty disputes arising out of the politically divisive issue of land reform in developing countries.

While the Dutch claimants emphasize that they have not received any compensation for their losses – which in many cases are alleged to exceed 1 Million (US) per farmer – they also stress that any domestic law providing for compensation would fall short of the need to provide the "genuine value" of the investments as mandated by the Netherlands-Zimbabwe treaty.

Indeed, in future investment treaty arbitrations over land reform, tribunals might be asked to review compensation offers which meet lesser standards set by national or local governments, but which are alleged to fall short of the potentially higher standards offered in many bilateral investment treaties.

For its part, the Government of Zimbabwe has faced certain obstacles in defending against the ICSID arbitration. Most notably, the Zimbabwe Attorney General Sobuza Gula-Ndebele was denied a visa to attend a preliminary meeting of the parties with the tribunal in Paris, France, in December of last year. This denial, by the French Embassy in Harare, arose out of a series of sanctions leveled by European Union countries against key members of the Zimbabwe Government, because of political violence and human rights abuses in that country.

ITN can report that the ICSID Secretary-General subsequently wrote to the Government of France in order to draw attention to the obligations of France pursuant to the ICSID Convention, including granting the relevant visas so that officials might take part in ICSID proceedings.

Following this missive from ICSID, the French Foreign Affairs Minister responded in a letter dated April 16th to indicate that the French Government would ensure that members of the Zimbabwean Government are granted visas so that they may participate in any future meetings taking place on French territory.

Pending a further exchange of written arguments, a hearing date of late October 2007 has been set to hear oral arguments in Paris, France.

Sources

ITN Interviews

* Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe (ICSID Case No. ARB/05/6)

6. Canadians sue Costa Rica after controversial financial firm shut down by authorities, By Luke Eric Peterson

A group of Canadian individuals have launched a class-action style claim* against the Government of Costa Rica, arguing that that country's shuttering of a controversial investment firm served to violate the terms of the Canada-Costa Rica bilateral investment treaty.

The claim was registered by the Washington-based International Centre for Settlement of Investment Disputes (ICSID) on March 27th, 2007 – nearly three years after a request for arbitration was first submitted to ICSID.

ITN understands that the registration process saw a large exchange of correspondence between the ICSID secretariat and the claimants, so as to clarify whether the unusual claim fell within the remit of the ICSID.

At the root of the claim is a move by the Costa Rican Government in July of 2002 to close down a local investment firm, Ofinter Foreign Exchange S.A., following a request by Canadian police to investigate potential use of Ofinter by a group of alleged drug dealers for money-laundering purposes.

In response to that Canadian request, Costa Rican authorities shut down Ofinter in 2002, leading to a hue and cry from many of the firm's clients, estimated by media outlets to be in the thousands, if not tens of thousands.

Many individuals had deposited large sums of money with Ofinter, colloquially known as The Brothers Fund, and were receiving monthly interest payments of 3% on those funds (providing for an annualized return of 36%). The principal of these deposits was reportedly re-invested by Ofinter in unnamed investments in Costa Rica; however no public information has come to light as to whether and how such investments were made.

Costa Rican officials tell ITN that the Government had undertaken its own investigation into Ofinter in 2001, seeking to determine whether the firm operated as an unlicensed financial intermediary. However, that investigation found insufficient evidence for such allegations at that time, and failed to establish whether and, if so, how deposits were being used for investment purposes.

Following, inquiries by the Canadian Royal Canadian Mounted Police the following year, Ofinter was shut down by authorities and the proprietor was charged with money-laundering and other financial crimes. Those proceedings are still ongoing and no allegations of wrongdoing on the part of Ofinter have yet to be borne out by a court of law.

Civil actions have been launched in Costa Rica in an effort by some depositors to recoup their deposits. When Ofinter's accounts were frozen by authorities in 2002, a mere $7 Million (US) was found; a mere sliver of the sums thought to have been deposited with Ofinter.

The recently-launched arbitration claim at ICSID has been brought by approximately 100 Canadians who allege that the Costa Rican Government failed to supervise local financial institutions adequately – thus exposing foreigners to undue risks. The claimants also accuse local officials of over-reacting by shutting down Ofinter on the basis of the alleged wrong-doing of a single group of possible Ofinter clients.

They hope that an arbitration tribunal will agree that Costa Rica failed to provide protection and security to Canadian "investments" in Costa Rica.

The Ofinter debacle has attracted media coverage in various countries, including in the United States where a lengthy report by the Wall Street Journal in December of 2002 noted that there was much speculation – but little clarity - as to how Ofinter managed to provide such massive returns to its depositors:
"Now dazed investors and curious prosecutors are puzzling at how the Brothers Fund was able to deliver such high yields for so many years. If, as many suspect, it was a Ponzi scheme, it was a very unusual one. Typical Ponzi schemes, where the money garnered from late-arriving investors is used to pay off earlier investors until the fraudsters suddenly vanish, tend to collapse within a few years at the most. But investors say the Villalobos brothers were operating for more than a decade."

ITN will continue to report on this claim as it moves forward at ICSID.

As yet, there are no other publicly-disclosed arbitration claims taking place under other agreements in relation to the Ofinter matter.

Currently, US investors do not enjoy the protection of an investment protection treaty with Costa Rica. However, a US trade agreement concluded with the Dominican Republic and Central America would provide for investment treaty style rights.

A decision by Costa Rica to ratify that agreement is still pending. Recently, Costa Rica's Supreme Elections Tribunal ruled that a national referendum should be held to determine whether the country will ratify the US trade agreement.

Sources:

With reporting by Fernando Cabrera Diaz

ITN Interviews

* Alasdair Ross Anderson and others v. Republic of Costa Rica (Case No. ARB(AF)/07/3)

"Costa Rica retirees breaking into a sweat; Raid freezes assets at lending house; Investors skeptical money will be repaid", By James Varney, The Times Picayune (New Orleans), October, 26, 2002

"Canadians take big losses in Costa Rica", By Victor Malarek, The Globe and Mail, December 3, 2002

"Retirement Dreams Fall Prey to Schemes In Sunny Costa Rica --- Collapse of `Brothers Fund' Rattles U.S. Expatriates; Envelopes Full of Cash", By Jose de Cordoba, the Wall Street Journal, December 13, 2002

"CAFTA faces new uncertainty in Costa Rica with public referendum", Inside US Trade, May 4, 2007

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