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Contents at a Glance:

Editor's Note:
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1. Clarification RE: Bolivia's reliance on Prof. Christoph Schreuer's arguments

In the previous edition of ITN, we reported that the Republic of Bolivia has objected to the registration of an arbitration claim filed by Euro Telecom at the International Centre for Settlement of Investment Disputes. In a letter to ICSID, Bolivia cited the writings of Prof. Christoph Schreuer in an effort to argue that Euro Telecom did not give its consent to ICSID arbitration prior to Bolivia's announced withdrawal from the ICSID Convention.

Some readers might have read Bolivia's invocation of Prof. Schreuer's arguments as a

signal that Prof. Schreuer himself acts for Bolivia in some capacity as advisor or counsel. However, this is not the case. Rather, Bolivia is relying on a well-known Commentary on the ICSID Convention published by Prof. Schreuer in 2001.

Arbitration Watch:
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2. More details emerge of miner's case against South Africa,
By Luke Eric Peterson

A recent speech by counsel for a group of European mining companies embroiled in an international arbitration with South Africa offers further details of the claimants' case.

As earlier reported in ITN, the firms accuse South Africa of violating protections contained in investment protection treaties between SA and Belgium-Luxembourg and Italy.

The claimants, who hold investments in two major players in South Africa's stone industry, Marlin and Red Graniti, filed their Request for Arbitration with ICSID on November 1 2006.

The investors posit two main claims: that South Africa's new system of mining rights effectively expropriates the claimants' pre-existing mineral rights, leases and authorizations; and that a series of obligations imposed upon mining companies, including hiring "historically disadvantaged South Africans", violates treaty undertakings by South Africa to provide fair and equitable treatment to foreign investors.

More specifically, the claimants maintain that South Africa's Mineral and Petroleum Resources Development Act, which entered into force on May 1, 2004, "extinguished" their long-standing ownership and lease of various mineral rights. While there remains a possibility for holders of "old order rights" to convert these into "new order rights", the claimants argue that the latter are of "lower value" and subject to a variety of conditions and restrictions.

In addition, the claimants note that they are obliged to comply with a Broad-based Socio-Economic Mining Charter for the South African Mining Industry – a document which had been endorsed by a majority of investors in the South African mining sector, but not by the claimants.

Notwithstanding the fact that they may convert their existing mineral rights to new-order rights, the claimants view these as less valuable – and subject to various restrictions. As such, they say they have suffered an expropriation of their existing mining rights, leases and authorizations, in violation of South Africa's investment treaties with Italy and Luxembourg.

The claimants also take issue with the fact that their "old order" rights will be converted to new order rights only if they comply with South Africa's Mining Charter, which obliges that 15% of equity be sold to "historically disadvantaged South Africans (HDSAs)" within 5 years after the entry into force of the Minerals and Petroleum Resources Development Act, and that 26% equity be divested by 10 years from that date.

According to the claimants, these equity divestitures are unfair and inequitable and serve to discriminate against European nationals contrary to South Africa's treaty obligations.

The implications of the pending ICSID arbitration were elaborated upon by the claimants' lead lawyer in a recent speech to Harvard University law students.

In an October 1, 2007 presentation, Peter Leon, Partner at the South African law firm Webber Wentzel Bowens, argued that South Africa's new minerals regime, "however well intended, has created an unpredictable, discretionary regulatory environment which hampers, rather than promotes mining investment".

According to Mr. Leon, the key tenets of the new mining regime, including the Black Economic Empowerment requirements, "potentially conflict with South Africa's international law obligations".

Mr. Leon opined that bilateral investment treaties should afford foreign investors higher levels of financial compensation than would be available under South Africa's Constitution. He added that by signing and ratifying a series of bilateral investment treaties, South Africa "has, in effect, outsourced the adjudication of key elements of its public policy to foreign arbitral tribunals".

Thus far, the South African Government has made little in the way of public comment on the pending arbitration at ICSID. In response to a query from ITN, a senior government official, speaking through counsel, offered this statement:

"It is difficult to do justice, in a few lines of text, to the regulatory and policy considerations that are apposite to this case. The RSA Government trusts there will be future opportunities to offer comprehensive commentary, in a way that is not coloured by litigation needs"

The Government has not, as yet, had to file counter-arguments in the ICSID proceeding. A procedural hearing in December will likely set a timetable for an exchange of written legal arguments; it remains unknown at this stage whether the parties will elect to release to the public some or all of those written briefs.

3. EU envoy says Malaysian race-based affirmative action policies hindering trade talks, By Luke Eric Peterson

At the same time as South Africa's race-based affirmative action policies have been at the center of an arbitration brought by foreign investors, a similarly-inspired program in Malaysia has been a source of friction in economic negotiations between Malaysia and other trading blocs.

Recently, Malaysia's race-based affirmative action policies have been flagged by the European Union's envoy to Malaysia as an impediment to a free-trade agreement between the EU and a trading bloc of Southeast Asian countries.

``This protection is a disservice to Malaysia in the long run,'' said Thierry Rommel in comments reported by Bloomberg News. ``It has already hampered free-trade talks with the U.S. and with Australia, and it will certainly complicate free-trade talks (with the EU)''

Malaysia's race-based program of preferences for ethnic Malays in areas such as hiring, procurement and company ownership were adopted in the late 1960s as a response to ethnic race riots in that country.

While the EU has objected to what it views as the protectionist and discriminatory import of such policies, Bloomberg reports that Malaysian ministers have stressed the necessity of such policies for maintaining greater equality, social harmony and stability.

Notwithstanding its posture on the affirmative action question, the EU is eager to see some human rights issues addressed as part of a bilateral EU cooperation agreement with Malaysia – which would run in parallel to a broader economic agreement between the EU and the Association of South-East Asian Nations (ASEAN).

In recent years, the US Government has also pursued negotiations with Malaysia on a free-trade agreement. However, those negotiations could not be concluded in time to take advantage of President George W. Bush's fast-track negotiating authority. Had an agreement been reached during that window, it might have enjoyed smoother passage through the US Houses of Congress.

According to various published reports in the Washington-based news service Inside US Trade, Malaysia's affirmative action policies were a source of sharp disagreement in the US-Malaysia trade talks.

Sources:

"Malaysia's Racial Policies Jeopardize Trade Deal, EU Envoy Says", By Stephanie Phang, Bloomberg News, Nov.14, 2007

4, Argentina fails in bid to have arbitrator removed from water services arbitrations,

By Luke Eric Peterson

The Republic of Argentina has failed in a bid to have an arbitrator removed from three arbitral tribunals presiding over investment treaty disputes related to water privatization projects in that country.*

The Argentine Government had filed a challenge to Prof. Gabrielle Kaufmann-Kohler, alleging that she lacked the requisite impartiality and independence due to her having sat on an ICSID tribunal which recently held Argentina liable for investment treaty breaches in a separate claim brought by the French-based water services company Vivendi Universal. (As earlier reported in ITN, Argentina was held liable for some $105 Million (US) in damages in the Vivendi arbitration)**.

In Argentina's view, the award rendered in the Vivendi case was so flawed – particularly in its appraisal of the facts and evidence – that Prof. Kaufmann-Kohler's very service on that tribunal signaled that she lacked the impartiality to sit as arbitrator in additional water services arbitrations.

For her part, Prof. Kaufmann-Kohler rejected Argentina's allegations. It fell to the two remaining tribunal members to rule on the challenge, and in a decision dated October 22, 2007 Prof. Jeswald Salacuse and Professor Pedro Nikken rejected the challenge.

First, it was held that the challenge had not been made by Argentina in a timely fashion. After noting that the challenge was filed some two months after the Vivendi award had been rendered, Professors Salacuse and Nikken held that the challenge had not been made promptly (as required under the ICSID rules) or within 15 days (as required under the UNCITRAL rules which apply in one of the three arbitrations at issue.

Second, the two remaining tribunal members also signaled that the challenge should fail on its substance. They noted that the challenge was unusual in that it was not rooted in some alleged professional ties or relationship between the challenged arbitrator and one of the parties. The two arbitrators had little difficulty in holding that stronger evidence would need to be adduced when a party sought to disqualify an arbitrator by virtue of his or her service in an earlier case which was resolved in a manner deemed unfavourable to the party in question.

Further, it was noted that the three cases at issue are different from the earlier Vivendi case, as the former all relate to alleged treaty breaches arising out of Argentina's response to its recent financial crisis, whereas the Vivendi dispute pre-dated that financial crisis and was clearly distinct in the view of Professors Salacuse and Nikken.

Of legal interest, the two arbitrators also acknowledged that the English and Spanish versions of the ICSID Convention gave some appearance of setting different standards for challenges to arbitrators – with the former calling for arbitrators to exercise independent judgment and the latter stipulating that an arbitrator be someone "who inspires full confidence in his impartiality of judgment". Thus, it was asked whether the

latter wording might indicate that the standard is a subjective one, whereby the challenging party would need to have "full confidence" in the arbitrator's independence.

Ultimately, Professors Salacuse and Nikken would hold that the standard should be read as an objective one, where objective evidence – rather than the challenger's convictions – would be determinative.

Following rejection of the challenge, the path was cleared for hearings on the merits to be held in early November. As is typical in ICSID proceedings, those hearings were held in-camera. As such, fuller details of those proceedings are not on the public record.

The three separate disputes being heard by the tribunal relate to several water privatization concessions, including projects in Buenos Aires and the Santa Fe province of Argentina. The investors in each case allege that Argentina's treatment of the water concessions has led to breaches of investment treaty protections owed to the investments.

* The three cases in which the challenge to Prof. Kaufmann-Kohler was made are: Suez, Sociedad General de Aguas d Barcelona S.A., and Inter-Aguas Servicios Integrales del Agua S.A. v. Argentina (ICSID Case No. ARB/03/17), Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina (ICSID Case No. ARB/03/19), an AWG Group v. Argentina (an UNCITRAL Rules proceeding administered by the ICSID Secretariat).

** Earlier ITN reporting on the Vivendi v. Argentina arbitration outcome: "Argentina liable for $100 Million+ after expropriating Vivendi water concession", Investment Treaty News, Aug.30, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_aug30_2007.pdf

5. Ecuador wants ICSID to stop presiding over mining and energy arbitrations,
By Luke Eric Peterson

In a move which, on its own, may have more symbolic than legal repercussions, the Republic of Ecuador has formally notified ICSID that it will not consent to see disputes over non-renewable resources arbitrated at the Centre. The move by Ecuador comes as a multitude of foreign investors are girding to challenge a recent windfall royalty tax imposed upon hydrocarbons investments in that country.

In a letter dated October 29, 2007, Maria Fernanda Espinosa Gardes, Ecuador's Minister of External Relations, notified ICSID Secretary General Ana Palacios of this decision.

In legal terms, the notification is made pursuant to Article 25(4) of the ICSID Convention – a provision which permits parties to signal which types of disputes they would not wish

to see arbitrated at the Centre.

However, where parties have elsewhere given their consent to arbitrate disputes – for example, in bilateral investment treaties or contracts – then they may find themselves bound by such commitments, notwithstanding any declarations lodged with the ICSID.

As such, it remains to be seen whether Ecuador will move forward with its signaled intentions to revise certain of its bilateral investment treaties.

Government officials have made various critical comments about investment treaties in recent months. In May of this year, ITN reported that Ecuadorian Government officials had expressed a desire to terminate an investment treaty with the United States Government.

Meanwhile, various foreign investors including Repsol and two state-owned Chinese oil companies are reportedly contemplating arbitration claims against Ecuador. Indeed, according to Reuters, Sinochem and China National Petroleum Corporation (who hold stakes in Andes Petroleum) are going to move forward with an arbitration claim.

A source close to those Chinese investors tells ITN that a request for arbitration has not yet been filed, however formal notice of a dispute has been given to Ecuador – including the investor's consent to see the dispute arbitrated pursuant to the France-Ecuador and China-Ecuador bilateral investment treaties.

For past ITN reporting on investment treaty disputes involving Ecuador see:

MCI v. Ecuador:
"ICSID tribunal rejects claims of treaty breach by Ecuador in US power case", By Fernando Cabrera-Diaz, Investment Treaty News, August 10, 2007, available at: http://www.iisd.org/pdf/2007/itn_aug10_2007.pdf

Occidental v. Ecuador
"UK court rejects Ecuador's bid to overturn $71 Mil Occidental award", By Luke Eric Peterson, Investment Treaty News, July 12, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_july12_2007.pdf

Encana v. Ecuador
"Analysis: Ecuador and its tax arbitrations with Occidental and Encana", By Luke Eric Peterson, Investment Treaty News, March 14, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_mar14_2006.pdf)

6. SGS v. Philippines case at ICSID stirs, as new case filed against Paraguay,
By Damon Vis-Dunbar

An arbitration involving the Swiss firm Societé Générale de Surveillance (SGS) and the government of the Philippines is resuming following a nearly four-year hiatus.

SGS, a company that provides import and customs verification and certification services to numerous countries around the world, maintains it has not been paid by the Philippines for services rendered between 1998 and 2000. The failure to reach an agreement on the outstanding amount owed to SGS led to arbitration proceedings under the Swiss-Philippines bilateral investment treaty (BIT) in 2002.

However, proceedings at the International Centre for the Settlement of Investment Disputes were stayed in 2004 as a result of a decision on jurisdiction in which the tribunal found the case was inadmissible at that point in time. The tribunal implored the parties to agree the amount owed to SGS – either by negotiation or through proceedings in the local courts (which had been designated as the appropriate legal forum under a Comprehensive Imports Supervision inspections agreement concluded between the two sides).

However, the door to ICSID arbitration was left ajar; “proceedings may be lifted for sufficient reason on application by either party,” said the tribunal.

Earlier this year, SGS made an application that the proceedings should recommence because the parties had come to an agreement, in principle, on the amount due to SGS.

The parties have avoided litigating in the Philippine courts, but they have been engaged in negotiations. It is during these negotiations that SGS holds it came to an agreement with the Philippines on the outstanding amount owed to the company. It is understood that the Philippines denies that an agreement has been reached.

The ICSID tribunal has agreed to hold hearings on December 4-5 in Paris, to allow both parties to argue whether the stay of arbitration should be lifted.

Meanwhile, in a separate legal development, the Swiss firm has filed a separate arbitration claim against Paraguay. That case was recently registered by the Washington-based ICSID.

EARLIER RULING DEALT WITH SO-CALLED UMBRELLA CLAUSE

The jurisdictional award rendered in 2004 in the SGS-Philippines dispute was notable for the line it took on whether the dispute was essentially contractual, and should be dealt with in local courts, or whether it could be settled through international arbitration under the relevant BIT.

Indeed, the decision has been widely cited in discussions on so-called umbrella clauses in investment treaties: provisions that oblige states to observe all obligations with respect to an investment, including perhaps contractual commitments. Tribunals have come to divergent opinions on whether umbrella clauses allow claims for breach of contract to be brought before an international tribunal – rather than to a local court specified in the

given contract.

In this case, the tribunal found that the existence of an umbrella clause did provide it with jurisdiction to hear what is essentially a contractual dispute, even if it did not involve a substantive breach of the BIT. In other words, the investors could use the BIT to pursue international arbitration. However, the tribunal also held that it was bound to respect an exclusive jurisdiction clause in the contract, which relegated litigation for a breach of the contract to local courts.

As such, the majority of the tribunal decided that it was for the Philippine courts to decide how much money, if any, was owed to SGS, and the parties were ordered to pursue a negotiated settlement or a resolution in domestic courts. At the same time, further recourse to the international tribunal loomed in the background – an avenue of which SGS has recently sought to take advantage.

Sources:

"Investment Treaty Tribunal Looks Under the Umbrella", By Luke Eric Peterson, INVEST-SD, February 16, 2004

7. Dutch company pursuing treaty claim against Kazakhstan,
By Damon Vis-Dunbar and Luke Eric Peterson

A company incorporated in the Netherlands has brought the government of Kazakhstan to arbitration after it was stripped of a license to extract oil and gas near the Caspian Sea.

The company, Liman Caspian Oil, maintains that it obtained the license in 2002 from its original holder, Aral, in a transfer that was approved by the Ministry of Energy and Mineral. However, "Kazakhstan courts annulled the transfer on wholly specious grounds," says the law firm for the claimant. Thus one of the grounds for the claim is "injustices perpetrated by the Kazakhstan courts."

Liman Caspian Oil says that it poured some $60 million US into exploration before it lost the license, and has not received any compensation, according to the law firm representing the company.

Liman Caspian Oil, a subsidiary of the Canadian company Aurado Energy Inc., is alleging breaches of the fair and equitable treatment and expropriation provisions of the Energy Charter Treaty (ECT) - a multilateral agreement that governs investments in the energy sector. The claim was recently lodged with ICSID.

The Liman Caspian Oil claim marks the first known arbitration involving Kazakhstan under the ECT. The Central Asian republic has faced a handful of known arbitrations pursuant to investment treaties, including two cases arbitrated at the Stockholm Chamber of Commerce (CCL Oil and Biedermann International Inc) and two cases at ICSID (AIG

and Rumeli Telekom A.S. & Telsim Mobil).

Although three of these BIT arbitrations against Kazakhstan have been concluded for some time, the final award in only one of these cases has been published. The Stockholm Chamber of Commerce has published a version of what is understood to be the CCL Oil award, albeit with the names of the parties omitted. The AIG-Kazakhstan case at ICSID led to an award in favour of AIG, but that ruling has not been published to date.

Meanwhile, a source familiar with the outcome of the Stockholma Arbitration Institute case between Biedermann International and Kazakhstan tells ITN that the award in that case under the US-Kazakhstan BIT remained confidential as part of a deal whereby the Kazakh Government agreed to pay the amount ordered by the tribunal – rather than oppose enforcement and collection of the award.

A well-placed source tells ITN that the Kazakh Government makes it a policy to keep confidential any arbitration awards rendered in cases in which it has been involved – irrespective of who has prevailed in such matters.

It is unknown if the Government has been involved in other treaty-based arbitrations beyond those cited here.

As reported in an earlier edition of ITN, a Canadian firm World Wide Minerals has recently initiated arbitration with Kazakhstan pursuant to contracts and the Kazakh Foreign Investment Law. (See: "Canadian Uranium Miner sues Kazakhstan under Foreign Investment Law", Investment Treaty News, July 12, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_july12_2007.pdf

8. BIICL event in January to focus on domestic review of BIT awards

On Thursday January 17th, 2008, the Investment Treaty Forum of the British Institute for International and Comparative Law will host a seminar on the subject of domestic review of investment treaty awards. The event takes place from 4:30PM to 6:30 PM.

ITN readers may be aware that investment treaty arbitrations may be subject to some limited review by domestic court systems. Depending upon the arbitration rules used for a given arbitration, the courts of a particular country may have the ability to review the resulting arbitral awards, including for purposes of annulment or set-aside.

While arbitrations under the ICSID rules are challengeable only through recourse to the ICSID's internal annulments process, arbitrations under the so-called ICSID Additional Facility, as well as those conducted under commercial arbitrations rules (e.g. UNCITRAL, ICC, etc.) may be reviewed in local courts.

Accordingly, a growing body of domestic court cases – not all of which are in the public

domain – are dealing with international investment treaty arbitrations. Several NAFTA Chapter 11 arbitration rulings have been referred to local courts in one of the three NAFTA countries; likewise, an unknown number of BIT arbitrations have dipped into local courts in various jurisdictions.

The BIICL event on January 17th will be chaired by George Burn of the law firm Salans. Speakers will include Sarah Francois Poncet, Veijo Heiskanen, Toby Landau and Kaj Hober. For more information about the event see:
http://www.biicl.org/events/view/-/id/225/

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