

Research Note:
Emerging Bilateral Investment Treaty Arbitration and Sustainable Development

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When a series of seemingly inauspicious investor rights were written into the North American Free Trade Agreement (NAFTA), few anticipated that they would occasion so much controversy. Nevertheless, shortly after the conclusion of the NAFTA, investors began to awaken to the latent possibilities in NAFTA's Chapter 11. In addition to a series of rights and protections (entitlement to non-discriminatory treatment, guarantees against expropriation without compensation, etc.), the NAFTA also extended to investors the ability to challenge alleged violations of these rights through international arbitration with the host state.

In comparison to the World Trading system - which still restricts access to its dispute-settlement body to cases brought by member nations - the privilege of investor-state arbitration represents a quantum leap forward; investors may mount their own claims, irrespective of the wishes of their home state. While the NAFTA's investor-state provisions have been much scrutinized, it bears notice that they followed the established practice as set out in earlier Bilateral Investment Treaties (BITs) concluded by Western nations, typically with developing countries.¹

Indeed, in the period since the NAFTA's conclusion in 1994, these BITs have been negotiated at an ever-accelerating rate. In 2001 alone, UN figures show that some 158 new BITs were negotiated, bringing the total to some 2099 by year's end.² In recent years, it has become virtually standard for new BITs (and free trade agreements with investment provisions) to open up the same model of investor-state arbitration as seen in the NAFTA.

One result of this has been a steady increase in the number of investment disputes arising under these treaties. A series of controversial cases have emerged under the NAFTA, sometimes challenging regulations and measures on public health, environmental protection.³ After some initial reluctance, the three NAFTA parties (Canada, USA, and Mexico) have now agreed to publicly disclose any investment arbitrations filed against them; however, efforts to ascertain the volume and nature of arbitrations emerging under *other* investment treaties is much more difficult. In large measure, this owes to the fact that several of the key sets of arbitration rules used in investment treaties were borrowed from the world of Alternative Dispute Resolution (ADR). As such, these rules often favor confidentiality of the proceedings – unless the parties desire otherwise – along with other

¹ More recent treaties are also being concluded between developing countries.

² United Nations Conference on Trade and Development, *World Investment Report 2002: Transnational Corporations and Export Competitiveness*, Overview, pg.8

³ see IISD's work in this area at: www.iisd.org/trade/investment_regime.htm, particularly, IISD/WWF-US, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights*, 2001.

features designed to accommodate the resolution of primarily commercial disputes between two private parties.⁴

The International Center for the Settlement of Investment Disputes (ICSID), part of the World Bank Group, is the most commonly referenced arbitration mechanism in investment treaties.⁵ And unlike other common arbitral rules, the ICSID rules do provide that cases launched under them must be publicly registered. While this does not mean that the proceedings will be open to the public, unless the parties agree otherwise, it at least allows for the existence of cases to be publicized. And it is clear from an examination of ICSID's docket (in section 2 below) that the volume of BITs cases now far exceeds the number of cases brought under the better-known NAFTA.

Unfortunately, the other key arbitration avenues offered in modern investment treaties open up something of a black hole of dispute resolution. A number of BITs will offer investors the ability to take disputes to the arbitration facilities of the International Chamber of Commerce (ICC) in Paris, or the Stockholm Chamber of Commerce (SCC); neither institution maintains publicly available records on the number of treaty disputes they handle. And even where disputes might come to public notice through other means (such as disclosure by one of the parties) these institutions do not permit public access to any of the arbitral proceedings or to related documents. Even the final awards (judgments) in disputes will remain confidential unless the parties desire otherwise.⁶

Posing an even greater problem is so-called ad-hoc arbitration, where no institution is involved in the administration of the arbitration. Literally hundreds of investment treaties offer investors the ability to invoke the UNCITRAL arbitration rules, or some other ad-hoc arrangement agreed by the two parties.⁷ The adaptability of these rules means that the parties may arbitrate their dispute without any assistance from a supervising institution, or any awareness of the media and the broader public.⁸

⁴ Two new free trade agreements negotiated by the US with Chile and Singapore are notable for requiring greater openness in the dispute settlement process. Ironically, efforts by civil society to review the texts of these agreements has been held up by the reluctance of the US Administration to allow the agreements to circulate too far in advance of their entry into force. See Luke Eric Peterson, "Industry Decries Cumbersome Review of FTAs; Enviro Groups Offer Initial Comments Based on First Public Summary of Text", INVEST-SD Bulletin, March 7, 2003

⁵ www.worldbank.org/icsid

⁶ For an in-depth survey of the common arbitration rules included in BITs, see Luke Eric Peterson, "All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties", International Sustainable and Ethical Investment Rules Project, available online at: <http://www.nautilus.org/enviro/partners.html>

⁷ See for example the formulation used in a number of the United Kingdom's Investment Promotion and Protection Agreements, which offers both UNCITRAL arbitration or other ad-hoc arrangements. Recent examples of this can be seen in treaties with Uruguay (Treaty Series no. 69, 1997), South Africa (Treaty Series no.35, 1998), Kyrgyz Republic (Treaty Series No.7, 1999), and Tonga (Treaty Series No.71, 1997)

⁸ whereas officials with the ICC or SCC institutions may have some rough understanding of how many treaty arbitrations pass through their doors - even if details are kept under wraps - UNCITRAL disputes may take place anywhere, at anytime, without the intermediation of any institution. Only the parties, their counsel and the arbitrators need know that an UNCITRAL arbitration is taking place.

Given the opaque dispute settlement avenues opened up by many international investment treaties, it is difficult to generalize about the full extent of emerging disputes between investors and states. The best that can be said is that all ICSID cases will be registered – if rarely open to the public – and a handful of cases in non-ICSID forums will become known for a variety of reasons (including as a result of publicity sought by the parties; mandatory disclosures to shareholders made by public traded corporations; or subsequent attempts to enforce or challenge a hitherto secretive arbitration award in domestic courts). It is apparent from conversations with practising lawyers and arbitrators that a sizable number of cases goes forward under the radar, i.e. through non-ICSID channels and without public notice; an important future challenge for researchers will be to shine a spotlight deeper into these darkened arbitral avenues.

For present purposes, however, knowledge of treaty arbitrations derives almost exclusively from the registry of cases proceeding under ICSID's arbitration rules.⁹ This Research Note represents a first attempt to identify some of the issues at stake in these ongoing arbitrations. Although investors may arbitrate against host states on the basis of investment contracts negotiated between an investor and a state, or national investment laws, this Research Note focuses upon BIT cases only¹⁰ It is these latter cases which account for an ever larger proportion of all disputes at ICSID. As noted earlier, the number of BITs cases now eclipses the number of cases emerging under NAFTA's notorious Chapter 11.

Further narrowing the scope, this Note does not focus upon the small number of treaty arbitrations which have already been resolved, either through a negotiated settlement or a ruling of the arbitral tribunal. Research by my colleague Howard Mann of IISD is currently examining those, some dozen, BITs cases which have been concluded. This Note has the modest aim of identifying some of the issues at stake in the larger cohort of BIT arbitrations which have been mounted in the past few years, and which are *still* before Tribunals at the time of this writing.

2. Pending BITs Cases: The Numbers

Data available from ICSID leaves no doubt that arbitration under bilateral investment treaties is on the rise. BITs cases accounted for 5 of 12 new arbitrations in 2000, 12 of 14 in 2001, and a striking 15 of 19 in 2002.¹¹

⁹ A number of cases have been mounted or threatened against the Czech Republic pursuant to non-ICSID arbitration rules. See: Luke Eric Peterson, "Investors Emboldened by Arbitral Verdict Against Czech Republic", INVEST-SD bulletin, April 11, 2003

¹⁰ This is not to say, however, that arbitrations arising out of contracts and national investment laws, may not implicate sensitive sustainable development concerns. Exploration of these other types of investment disputes – particularly the voluminous contract-based disputes – remains a future priority.

¹¹ One of the 12 BITs cases in 2001, AES Corporation v. Hungary, also alleged violations of the Energy Charter Treaty in addition to a BIT.

At the time of this writing¹², 48 cases are pending at ICSID, and of these 38 arise out of alleged violations of Bilateral Investment Treaties. Several of these 48 cases arises under the NAFTA, while the remainder put forward claims based on arbitration clauses contained in contracts or national investment laws. All of these BITs cases are listed in Annex 1, along with their respective ICSID case numbers. The author's information about these disputes differs widely from case to case. A handful of arbitrations arise out of notorious conflicts between investors and host states, and have generated a considerable amount of media coverage before ever ending up in arbitration. Others are far more resistant to inquiry, particularly where media information is scant and the parties are reticent or not easily contacted (as is the case with some smaller host states).

Nevertheless, available evidence suggests that a number of these cases implicate a range of matters which are of public interest. And in a number of instances, it can be surmised that core sustainable development concerns come into play in pending arbitrations.¹³

3. Pending BITs Cases: The Details

a. Disputes Arising out of the Argentine Financial Crisis

Several pending cases before ICSID seek to contest a series of emergency measures put into effect by the Argentine Republic in response to its financial crisis. In 2001 and 2002, the Argentine Government instituted a series of emergency measures which have affected foreign investors, these include a repeal of the parity between the US Dollar and the Argentine Peso, and a 25% tax levied on the exportation of oil and gas. These and other measures have had serious implications for investors operating under earlier-negotiated concession contracts.¹⁴

The CMS Gas Transmission Company was the first foreign investor to challenge these emergency measures as they impacted upon its investment in a natural gas transportation network.¹⁵ More recent filings have been lodged by several other firms engaged in gas distribution & supply¹⁶, one involved in electricity generation & distribution¹⁷, and another involved in the manufacture of public transport vehicles.¹⁸ Anecdotal evidence suggests that many other investors have been engaged in informal negotiations with the

¹² April 15, 2003

¹³ Sustainable Development is here defined as the pursuit of economic development without compromising the well-being of future generations. An important component of sustainable development is the ability of governments to regulate investments so as to protect the environment and human health.

¹⁴ See: Freshfields Bruckhaus Deringer, "The Argentine Crisis: Foreign Investor's Rights", January 2002, available at: www.freshfields.com/places/latinamerica/publications/pdfs/2431.pdf

¹⁵ CMS Gas Transmission Company v. Argentine Republic (Case No. ARB/01/8); See the testimonial of the firm representing CMS at: <http://www.freshfields.com/publications/pdfs/annualreport2002.pdf>

¹⁶ LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (Case No. ARB/02/1), Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16) and Camuzzi International S.A. v. Argentine Republic (ICSID Case No. ARB/03/02)

¹⁷ AES Corporation v. Argentine Republic (ICSID Case No. ARB/02/17)

¹⁸ Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (Case No. ARB/03/5)

Argentine Government, without foreclosing the possibility of formal arbitration at a later date.¹⁹

A troubling feature of this growing spate of cases against the Argentine Republic, is that foreign investors are mounting a series of individual ad-hoc arbitrations which may challenge essentially the *same* government measures. Because these arbitrations are proceeding in parallel, and Tribunals are not strictly bound by the determinations of other (or earlier) Tribunals, the stage is set for a series of potentially divergent or even conflicting rulings. This prospect first emerged when two related UNCITRAL arbitrations were brought against the Czech Republic in the late 1990s challenging essentially the same government conduct (in one case the dispute was mounted by the affected company, and in another by its major shareholder).²⁰ Remarkably two separate Tribunals handed down contradictory opinions of the Czech Republic's treatment of the foreign investor. In one case, the Czech Republic was almost wholly vindicated, while in the other, the government was found to have violated various key provisions of the relevant BIT and ordered to pay some 360 million US dollars in damages.²¹ Respected arbitrators have since warned that the lack of any mechanism for consolidation of related proceedings under BITs threatens to undermine the legitimacy of the arbitration process itself.²²

b. Challenges to Tax Policy

The Argentine emergency measures are hardly the only sensitive public policy measures to be challenged by foreign investor arbitration. Several known cases involve challenges to tax measures imposed by host governments. A dispute between the Enron Corporation and the Government of Argentina, is notable here. An Enron spokesperson reported in 2000 that the firm was challenging stamp taxes imposed by several Argentine provinces on a local gas transport company in which Enron held a stake.²³

Another dispute, *Antoine Goetz and Others v. Republic of Burundi*, is notable in that it arises out of undertakings made by a host state to accord a group of Belgian investors with tax and customs exemptions for their Burundi-based enterprise devoted to the production and export of precious metals. When the host state allegedly reneged upon

¹⁹ Luke Eric Peterson, "Latest Arbitration Against Argentine Emergency Financial Measures", INVEST-SD Bulletin, March 7, 2003; See also: "EDF Attempts to Salvage Investments in Argentina", Les Echos (French Business Newspaper), Sept. 12, 2003

²⁰ Ronald S. Lauder v. the Czech Republic and CME v. the Czech Republic. These two cases mark two of the only BIT cases using UNCITRAL rules which have come to public notice, due in large measure to the investor's efforts to generate negative publicity for the Czech Republic. The Tribunal awards are available on the website of the Czech Finance Ministry: www.mfcr.cz/scripts/hpe/default.asp

²¹ Luke Eric Peterson, "Czech Republic Hit With Massive Compensation Bill in Investment Treaty Dispute", INVEST-SD Bulletin, March 21, 2003 and Luke Eric Peterson, "Czech Broadcasting Dispute Heading Towards Final Damages, and Appeal in a Swedish Court", INVEST-SD Bulletin, February 21, 2003

²² Luke Eric Peterson, "Well-known Arbitrator Warns of 'Crisis of Legitimacy' in International Arbitration", INVEST-SD Bulletin, Nov. 21, 2003

²³ Alexander's Gas and Oil Connection, Company News: Latin America, April 27, 2000, Vol 5, Issue, 7, available at: <http://www.gasandoil.com/goc/company/cnl01733.htm>

these undertakings, the investors launched an arbitration in 1995.²⁴ At the behest of the Tribunal – which warned that it was minded to find Burundi’s measures “tantamount to an expropriation” – a settlement and compensation was agreed between the two sides.²⁵ When differences later emerged as to whether Burundi was living up to the terms of this settlement agreement, a new ICSID arbitration was launched in 2001, and continues to proceed.²⁶

c. Situations Where Investors are Embroiled in Armed Conflict or Coups

At least two ongoing BITs disputes arise out of alleged treatment at the hands of governments in times of military coup or civil war. The actions at the center of one case date to the 1970s when the socialist Allende Government of Chile was overthrown in a military coup. A pro-Allende newspaper run by a Spanish national, had its assets expropriated by the regime of General Augusto Pinochet. A dispute lodged with ICSID under the 1991 Spain-Chile BIT is currently examining this claim.²⁷

Meanwhile, another long-running ICSID case traces its origins to claims made by a small US law firm based in the Democratic Republic of Congo, which assists multinational investors operating in the DRC.²⁸ In 1999 the Congolese Justice Minister ordered the seizure of the law offices of Mitchell & Associates. Military personnel also seized a large sum of cash held at the offices, and arrested two of the firm’s partners.²⁹ The two law partners were accused by the Congolese government of collaborating with rebels intent upon overthrowing the government of then-President Laurent Kabila. The firm acted on behalf of a range of major clients, including the Banro Corporation, a Canadian mining company, which also saw its tin & gold mining concessions revoked around the same time by the DRC. Banro mounted an unsuccessful effort to challenge that action at ICSID.³⁰

While the Mitchell and Banro cases (one pending; one concluded) underscore the serious-stakes of promoting investment into the natural resources sector of unstable regions, the full details of these disputes are not available to the public. This is unfortunate as a number of foreign investors - including at least two which sought to mount claims at ICSID against the DRC - have been singled out for criticism in a special UN report on the illegal exploitation of natural resources in the DRC.³¹ While the precise role of these

²⁴ Antoine Goetz and Others v. Republic of Burundi, ICSID ARB/95/3

²⁵ see “introductory note” to the case at <http://www.worldbank.org/icsid/cases/awards.htm>

²⁶ Antoine Goetz and Others v. Republic of Burundi, ICSID ARB/01/2

²⁷ Victor Pey Casado and President Allende Foundation v. Republic of Chile (Case No. ARB/98/2)

²⁸ Patrick Mitchell v. Democratic Republic of the Congo (Case No. ARB/99/7)

²⁹ Claire Pickard-Cambridge, “US Firm Protests Against Congo Arrests”, *Business Day* (South Africa) March, 19, 1999, pg. 9

³⁰ Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo (Case No. ARB/98/7). Excerpts from the Decision on Jurisdiction is available at: [see www.worldbank.org/icsid/cases/awards.htm](http://www.worldbank.org/icsid/cases/awards.htm)

³¹ United Nations, *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, Oct. 16, 2002 (available online at: <http://www.un.org/News/dh/latest/drcongo.htm>). Banro Resources Corp is listed in an annex to this report as a company which is “importing minerals from the Democratic Republic of the Congo via Rwanda” to

investors in the conflict should not be prejudged, it is unclear whether these alleged linkages will be countenanced in the arbitrations, which go on behind closed doors.

d. Other Energy/Natural Resources Investments

Other emerging BITs disputes appear to center upon somewhat less dramatic forays by resource firms into the developing world, than those in the war-torn DRC. Of ICSID's current docket of BITs cases, one arises out of a deeply contentious bidding process for oil and gas development contracts in Trinidad & Tobago, while another relates to an electric power generating station in Turkey,³² A spokesperson for the investor in the latter case, US-based PSEG, would only suggest that its investment had been "stymied" by the government of Turkey.³³ However, English language news reports in Turkey and energy industry intelligence briefings suggest that the dispute is merely one of many which might end up in international arbitration as the government of Turkey seeks to move away from the so-called Buy-Operate-Transfer (BOT) contracts negotiated in the 1990s to attract investment into the newly privatized power sector.³⁴

Reports suggest that the World Bank and the IMF, are encouraging Turkey to re-design or foreshorten these BOT agreements, which would have locked it into underwriting some of the costs associated with these power plants, and to guarantee the purchase of energy supplies at fixed prices. The international financial institutions are reportedly encouraging Turkey to design a more market-driven energy sector – one where the government would purchase energy on a competitive basis, rather than through long-term fixed purchase contracts. In response to Turkey's back-tracking, PSEG and its partners have launched a claim under the US-Turkey BIT for \$20 million US in sunk costs and a further \$279 in envisioned future profits. As is customary in investment treaty arbitrations, the proceedings have not been open to public scrutiny.

e. Compensation Claims Jeopardizing Debt-Relief Eligibility for Poor Countries

Canada. Meanwhile, Billy Rautenbach, a businessman engaged in a separate investment contract arbitration at ICSID (*Ridgepointe Overseas Developments, Ltd. v. Democratic Republic of the Congo and Générale des Carrières et des Mines* (Case No. ARB/00/8)) has seen his ties to the government of Zimbabwe singled out for particular scrutiny in the body of the UN panel report. The panel notes that during Mr. Rautenbach's tenure as head of a mining company in the DRC, the operation is alleged to have paid bonuses to Zimbabwean soldiers involved in the military conflict in the DRC. These bonuses and other incentives have been said to have played a role in prolonging the destructive 6-nation civil war in Central Africa.

³² *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago* (Case No. ARB/01/14); *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (Case No. ARB/02/5)

³³ Author communication, Feb.18, 2003

³⁴ Energy Line Briefing on Turkey, Jan.21, 2002, Issue No.1/02, IBS Research & Consultancy (www.ibsresearch.com); "PSEG global Inc. BOT Model Konya-Ilgyn Lignite Power Plant Project", Turkish Economic Press Agency, April 22, 2002; "Government Must Face Power Policy Chaos After Court Verdict", April 22, 2002, *Ekonomik Basın Ajansı* (EBA) Briefing (by subscription only: <http://www.securities.com/ch.html?pc=TR>)

One dispute which has attracted the attention of overseas development campaigners is that of Booker PLC. v Co-Operative Republic of Guyana.³⁵ It arises out of an expropriation of a UK-firm's investments in the Guyanese sugar industry in the 1970s. Although the Guyanese government agreed to a long-term compensation plan, payment installments were interrupted in the late 1980s as a good-will gesture while the government considered the re-privatization of the sugar industry. When the government decided against this course of action, Booker PLC resumed its demands for full compensation. After protracted and unsuccessful negotiations, the firm invoked a BIT between the UK and Guyana to launch an arbitration. This move was criticized by development campaigners who noted that Guyana's efforts to comply with a special IMF debt-relief initiative may be jeopardized by any ruling which would force it to treat any of its myriad commercial creditors on more favorable terms. Following negative publicity in the UK press, Booker plc's parent firm indicated that it would abandon its claim against Guyana.³⁶ At the time of this writing, the parties were still discussing with the Tribunal the apportionment of costs for the proceedings to date.

f. Environmental Regulation

Another dispute which ought to be of particular interest to the sustainable development community is that between a Spanish firm Técnicas Medioambientales Tecmed, S.A., and Mexico.³⁷ Tecmed is seeking undisclosed damages as a result of a decision by the Mexican authorities to refuse the firm a renewal of its annual permit to operate the Cytrar hazardous waste confinement facility in Hermosillo. The waste site had been the object of community opposition, however Tecmed has characterized these protests as a ploy designed to promote the interests of another Mexican-owned waste facility.³⁸ While Tecmed's arbitration claim proceeds at ICSID, a separate fact-finding inquiry demanded by citizens' groups under the terms of the so-called environmental side agreement to the NAFTA, was vetoed by trade ministers in December of 2002.³⁹ Despite a recommendation from the Secretariat of the NAFTA's Commission on Environmental Cooperation, trade ministers ruled against an investigation of the waste site's environmental record – in deference to the ongoing BITs arbitration.

Meanwhile, another recent dispute at ICSID pits a Chilean pasta company, Lucchetti, against the Peruvian Government.⁴⁰ The case arises out of an order for the Chilean firm to move its factory which is located adjacent to an ecological preserve. For its part, the firm

³⁵ See Luke Eric Peterson, "Development Campaigners Decry Investment Arbitration Against Guyana", INVEST-SD News Bulletin, February 7 & 14, 2003

³⁶ See Luke Eric Peterson, "Public Outcry Leads to Abandonment of Investment Treaty Arbitration Against Guyana", INVEST-SD Bulletin, March 28, 2003

³⁷ Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2)

³⁸ Trineesh Biswas, "NAFTA Environmental Fact-Finding Inquiry Quashed in Deference to Ongoing Investor Dispute", INVEST-SD Bulletin, Dec. 29, 2002

³⁹ *ibid.*

⁴⁰ Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Peru (Case No. ARB/03/04)

protests that it is the victim of discrimination, as other foreign investors located in the same region have not been subjected to similar treatment.⁴¹

Both the Tecmed and Lucchetti cases, in common with all of the BITs disputes surveyed here, are proceeding in-camera.

f. Water and Sewage Service Concessions

Several pending BITs arbitrations arise out of disputes surrounding the privatization of water & sewage concessions in the developing world. Indeed, the longest-running pending case at ICSID is a dispute launched by a subsidiary of the Vivendi company against the Government of Argentina.⁴² In 1996, Vivendi/CGE brought a BIT claim arising out of an investment in water & sewage services provision in the Tucuman province of Argentina. Among its claims, Vivendi/CGE alleged violations of the BIT's provisions on fair & equitable treatment and against expropriation without compensation. While the investor complained of obstruction and harassment from various branches of the Tucuman provincial government, the Argentine Republic countered that the investor was responsible for various failures under the concession contract.

The Tribunal noted that Vivendi/CGE and the Tucuman authorities had differed over a number of sensitive questions related to access and quality of water resources, including:

"the method for measuring water consumption, the level of tariffs for customers, the timing and percentage of any increase in tariffs, the remedy for non-payment of tariffs, the right of CGE to pass-through to customers certain taxes and the quality of the water delivered."⁴³

In a disappointing setback for the claimants, however, the ICSID Tribunal ruled in November of 2000, that the nature of the claims in this dispute were so closely intertwined with the interpretation of the provisions of the concession agreement between the two parties, that the Tribunal could not assess alleged violations of the bilateral investment treaty, without first having to interpret the Concession Agreement itself. And the Tribunal noted that the Concession Agreement had explicitly assigned such an interpretive task exclusively to the administrative courts of Tucuman province.

Thus, despite holding that it had jurisdiction to hear this BITs dispute, the Tribunal went on to dismiss the claim and insisted that the claimants ought to first pursue their case in the Tucuman courts.

⁴¹ See Luke Eric Peterson, "Peru Closes Chilean Factory in Environmental Reserve; Triggers Investment Treaty Dispute", INVEST-SD Bulletin, Jan.24, 2003

⁴² *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (Case No. ARB/97/3)

⁴³ Award of the Tribunal, Nov.21, 2000, at Paragraph 32, available at: <http://www.worldbank.org/icsid/cases/awards.htm>

This was not to be the final word in the case.

At the request of the investor, an ICSID annulment committee reviewed the Tribunal's ruling, and came to the conclusion that the Tribunal had failed to exercise fully its power in the original arbitration.⁴⁴ According to the annulment committee, the tribunal's finding of jurisdiction in the case, should have compelled it to consider further the alleged violations of the BIT and international law - quite apart from any separate claims for violation of the concession agreement provisions, which the investor could have pursued in the local administrative courts.

The Argentine Republic has now requested a rectification of the annulment decision, pursuant to a little-used ICSID procedure. Counsel for Vivendi/CGE have hinted that if the annulment of the original award stands, the investor may submit the dispute to a new Tribunal, as is its prerogative under ICSID rules.⁴⁵ While the Vivendi/CGE case heads toward round two, several other emerging ICSID cases also arise out of clashes between investors and host states related to water privatization.

A particularly well known case is that of *Aguas del Tunari v. Bolivia*, where a subsidiary of the US-based Bechtel Corporation ultimately abandoned its concession in Cochabamba in the face of widespread public protest over steeply increased water tariffs.⁴⁶ *Aguas Del Tunari* has invoked the provisions of a BIT signed between Holland and Bolivia – having earlier moved its corporate headquarters to Holland – in an effort to recoup losses on its abandoned concession. Recently, a coalition of concerned citizens and public interest groups were informed by the President of the Tribunal arbitrating the dispute, that the Tribunal has no power to open the proceedings to the public or to provide access to documents filed in the dispute without the consent of the parties.⁴⁷

Another water concession dispute which has led to a BIT arbitration is that between the Azurix Corporation and the Government of Argentina. The government of Buenos Aires had complained of poor water quality and pressure, whilst the investor decried the government's failure to provide promised infrastructure. In 2001, the investor launched a BIT case alleging that the regulatory actions of the government have violated several commitments including those against expropriation.

Still other investors in the water & sewage sector are known to be mulling future BITs arbitrations. For instance, the Suez Corporation announced last year that they were seeking to negotiate an amicable settlement with the Argentine government over losses resulting from the emergency measures put into place by the Government, and which have affected its various water interests in the country. Failing a negotiated settlement,

⁴⁴ *Compania de Aguas Del Aconquija S.A. and Vivendi Universal (formerly Compagnie Des Eaux) v. Argentine Republic*, Decision on Annulment, reproduced in: *International Legal Materials*, Volume 41, Number 5, September, 2002, pg. 1135

⁴⁵ See Luke Eric Peterson, "Vivendi-Argentina Water Dispute Heading Back to BIT Arbitration?", *INVEST-SD Bulletin*, Jan.17, 2003

⁴⁶ See for example: William Finnegan, "Leasing the Rain", *The New Yorker*, April 8, 2002, pg. 43

⁴⁷ See Luke Eric Peterson, "Bolivian Water Privatization Dispute Will Continue Behind Closed Doors", *INVEST-SD Bulletin*, Feb 7 & 14, 2003

the company signaled that it would launch an ICSID arbitration under the French-Argentine BIT.⁴⁸ This case had not been forwarded to ICSID at the time of this writing.⁴⁹ It is clear that some of these water cases center upon critical regulatory and policy issues. As always, however, the bounds of legitimate government regulation of foreign investors, are being elaborated upon and demarcated behind closed doors.

3. Conclusion

This brief survey illustrates that *known* pending investment treaty arbitrations are not always narrow commercial disputes of interest only to the two contesting parties. In a number of instances they turn upon questions about the bounds of legitimate government treatment of investors in sensitive sectors or industries. At other times, the cases seem to presage frictions with other international policy objectives, including: access to essential resources such as water, eligibility for international debt-relief, or environmental protection.

Unfortunately, despite the significant issues at stake in a number of these arbitrations, investors will often enjoy the ability to pursue their claims against host states without any public notification whatsoever (by using ad-hoc commercial rules such as those of the ICC or UNCITRAL). Even where cases are registered (for example at ICSID) or come to light for some other reason, the proceedings and legal arguments may still occur behind closed doors. This opaque and disparate process of dispute resolution is deeply concerning given that arbitration experts readily concede that the concrete import of key investment treaty provisions can be ambiguous - and even “maddeningly imprecise” - and will only be elucidated in the context of *actual* arbitrations between investors and states.⁵⁰ Seen in this light, it appears quite difficult for developing nations - who face the overwhelming majority of these arbitration claims - to stay fully abreast of the evolution and elaboration of the global rules which govern foreign direct investment flows into the developing world.

At the same time, it should be clear that the current process for dispute settlement means that policy-makers contemplating the negotiation of further bilateral, regional or multilateral rules on investment, will lack important information about the actual uses and implications of existing investment treaties. The only perverse consolation to be drawn here, may come from the fact that so few policy-makers have displayed much

⁴⁸ “Suez to Take US \$496MN Charge – Argentina”, Business News America, July 1, 2002

⁴⁹ Author communication with ICSID, March, 2003

⁵⁰ Thomas Walde and Stephen Dow, “Treaties and Regulatory Risk in Infrastructure Investment: The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrastructure Investment,” *Journal of World Trade* 34(2), 2000, pg.45; William D. Rogers, “Emergence of the International Center for Settlement of Investment Disputes (ICSID) as the Most Significant Forum for Submission of Bilateral Investment Treaty Disputes”, Presentation to Inter-American Development Bank Conference, October 26-27, 2000, pg. 4

interest in taking stock of the implications of existing investment commitments before moving to cement further such commitments into place.

Annex 1

Pending BITs cases before ICSID

Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic
(Case No. ARB/97/3)

Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (Case No. ARB/97/4)

Victor Pey Casado and President Allende Foundation v. Republic of Chile (Case No. ARB/98/2)

Patrick Mitchell v. Democratic Republic of the Congo (Case No. ARB/99/7)

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (Case No. ARB/00/4)

Consortium R.F.C.C. v. Kingdom of Morocco (Case No. ARB/00/6)

Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB(AF)/00/2)

Generation Ukraine Inc. v. Ukraine (Case No. ARB/00/9)

Antoine Goetz & Others v. Republic of Burundi (Case No. ARB/01/2)

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (Case No. ARB/01/3)

AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan (Case No. ARB/01/6)

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile (Case No. ARB/01/7)

CMS Gas Transmission Company v. Argentine Republic (Case No. ARB/01/8)

Booker plc v. Co-operative Republic of Guyana (Case No. ARB/01/9)

Noble Ventures, Inc. v. Republic of Romania (Case No. ARB/01/11)

Azurix Corp. v. Argentine Republic (Case No. ARB/01/12)

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (Case No. ARB/01/13)

F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago (Case No. ARB/01/14)

LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (Case No. ARB/02/1)

Aguas del Tunari S.A. v. Republic of Bolivia (Case No. ARB/02/3)

PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (Case No. ARB/02/5)

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Case No. ARB/02/6)

Hussein Nuaman Soufraki v. United Arab Emirates (Case No. ARB/02/7)

Siemens A.G. v. Argentine Republic (Case No. ARB/02/8)

Champion Trading Company and others v. Arab Republic of Egypt (Case No. ARB/02/9)

IBM World Trade Corp. v. Republic of Ecuador (Case No. ARB/02/10)

JacobsGibb Limited v. Hashemite Kingdom of Jordan (Case No. ARB/02/12)

Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan (Case No. ARB/02/13)

Ahmonseto, Inc. and others v. Arab Republic of Egypt (ICSID Case No. ARB/02/15)

Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16)

AES Corporation v. Argentine Republic (ICSID Case No. ARB/02/17)

Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18)

Ed. Züblin AG v. Kingdom of Saudi Arabia (ICSID Case No. ARB/03/01)

Camuzzi International S.A. v. Argentine Republic (ICSID Case No. ARB/03/02)

Impreglio S.p.a. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/03)

Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Peru (Case No. ARB/03/4)

Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (Case No. ARB/03/5)

M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador (Case No. ARB/03/6)