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Contents at a Glance:

Editor's Note:
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1. Argentina and its defence of necessity in the face of financial crisis claims,
By Luke Eric Peterson

On September 28th, yet another arbitration tribunal issued a ruling on the merits in an investment treaty arbitration claim against the Argentine Republic. The Sempra-Argentina case marks the seventh instance (following CMS, LG&E, Siemens, Enron, Azurix, and Vivendi) where ICSID tribunals have upheld (at least in part) claims against Argentina, leading to a cumulative liability of some three-quarters of a Billion Dollars (US).

Argentina remains far and away the most popular respondent in international arbitrations brought to the Washington-based ICSID – with most (but not all) such claims related to damages allegedly suffered by foreign investors during and after the period when Argentina was struck by a financial crisis.

While these financial crisis claims are having serious ramifications for the Argentine Government, they also harbour lessons for investors and policymakers in other countries. Foreign investors – many of whom engaged in the provision of public utilities - contend that Argentina, through contractual commitments and investment treaty strictures, agreed to shoulder the risks of a massive currency devaluation and any economic shocks that might ripple through the economy.

One of the central issues discussed in these cases has been whether Argentina may avoid liability for alleged failures to live up to its investment protection treaty commitments, by invoking a defence of "necessity". On this view, government officials acted out of necessity when they took certain emergency measures – such as a freeze on gas, electricity and other prices - to stabilize the Argentine economy.

Thus far, arbitrators have taken different positions on this important question. As has been reported in previous editions of ITN*, tribunals reached differing positions in two separate cases brought by different US-based investors in Argentina's natural gas sector. While the tribunal in the CMS-Argentina case rejected the necessity defence, a tribunal in the LG&E-Argentina case accepted the necessity defence, at least during the months when the Argentine financial crisis was at its peak.

Argentina later moved to overturn the less-favourable CMS ruling at ICSID, and Item 1 in this edition of ITN reports on the ultimate outcome of that bid. Meanwhile, other tribunals are rumbling towards final rulings in some of the myriad other arbitration claims pending against Argentina. Item 2 of this newsletter reports on the latest ruling, in the Sempra-Argentina case – where a tribunal (whose membership overlapped with that of the earlier CMS tribunal) also rejected Argentina's efforts to invoke a necessity

defence.

(*For ITN reporting on the LG&E decision and its contrast with the earlier CMS decision, see: http://www.iisd.org/pdf/2006/itn_oct5_2006.pdf)

Arbitration Watch:
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2. Argentina must respect award despite ICSID finding that it has errors of law,
By Luke Eric Peterson

In a bitter-sweet development for the Argentine Government, an ICSID annulment committee has overturned a portion of an adverse arbitration ruling, while holding that it lacks the power to overturn certain other portions of that award which the committee found to contain significant legal errors.

The annulment decision in the long-running CMS v. Argentina case was briefly noted in the previous edition of this newsletter; the decision has since been released to the public.

CMS, a US-based energy firm, turned to ICSID in 2003, alleging that various Argentine actions taken during and after that country's financial crisis served to violate the terms of the US-Argentine BIT. CMS was the first of dozens of foreign investors to file for arbitration following Argentina's financial crisis.

In 2005, an ICSID arbitration tribunal upheld portions of CMS's case, awarding the company some $133 Million (US) in compensation. Following this, Argentina sought annulment of the ICSID ruling – a process by which a narrow form of review may be undertaken by a new panel of three individuals appointed by the ICSID facility. For example, an annulment committee can determine whether a tribunal "manifestly exceeded its powers" or failed to apply the applicable law; however an annulment committee may not overturn an award due to a simple error of fact or law.

The September 25th ruling of the ad-hoc annulment committee brings to a close the CMS dispute at ICSID. Notwithstanding the committee's decision to annul a small portion of the 2005 arbitration award, the financial bottom-line for Argentina remains unchanged; the Government must now pay the US company the damages awarded in the original 2005 ruling.

ANNULMENT COMMITTEE CREDITS CERTAIN ARGENTINE ARGUMENTS

As noted in the previous edition of ITN*, the annulment committee annulled that portion of the earlier arbitration award which had held Argentina to have violated Article II (2) (c) of the US-Argentina bilateral investment treaty, the so-called umbrella clause.

However, in a setback for Argentina, the committee held that it was powerless to annul other portions of the award, including certain portions which the annulment committee identified as containing errors of legal reasoning which may have had a "decisive impact on the operative part of the award".

Argentina had argued during the original arbitration proceedings that it had acted out of a state of emergency or a state of necessity during its financial crisis, thus precluding the country's liability for breach of the US-Argentina BIT's provisions.

This defence was ultimately rejected by the CMS tribunal, which would go on to hold that Argentina had not met the stringent tests imposed by customary international law, nor was it excused from liability thanks to the terms of Article 11 of the US-Argentina BIT. (Article 11 of the BIT sets out several exceptions available to state-parties to the agreement, including that the treaty would not "preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.")

For its part, the annulment committee leveled a sharp critique at the tribunal's handling of Argentina's "necessity" defence. In particular, the committee said that the tribunal had failed to examine whether conditions laid down by Article 11 had been fulfilled, and thus whether it was even possible for Argentina to have been in violation of any of the substantive obligations in the treaty. Instead, the tribunal appeared to have conflated the interpretation of Article 11 of the BIT with the approach under customary international law used to assess states of necessity.

In lay terms, the annulment committee maintained that the tribunal failed to interpret Article 11 on its own merits, perhaps precluding Argentina from taking advantage of one of several general exceptions provided under the treaty (for e.g. measures related to maintenance of public order or protecting its own essential security interests).

Strikingly, the committee noted that if it were "acting as a court of appeal, it would have to reconsider the Award on this ground." As it was, however, the committee was impotent to overturn this error of law, given the very narrow authority enjoyed by ICSID annulment committees. On the committee's view, the original tribunal had applied the relevant law – albeit in a defective manner – and this meant that the annulment committee could not annul the erroneous award.

While the CMS annulment committee's criticism of the CMS Tribunal's reasoning on Article 11 of the US-Argentina BIT has been criticized by some counsel acting for foreign investors as "obiter dicta", it may reverberate, however, in subsequent arbitrations involving Argentina.

Prof. Andrea Bjorklund, of the University of California at Davis, tells ITN that the CMS annulment ruling may give "greater currency" to a separate treaty-based defense of necessity in other Argentine financial crisis arbitrations.

In addition, the holdings of the CMS annulment committee could provide further fodder for the long-running debate as to whether there is a need for an appellate mechanism which might review investment treaty arbitration awards so as to ensure greater consistency.

As was previously reported in ITN**, a discussion paper prepared by the ICSID Secretariat in 2004 had called for an exploration of such an appellate review mechanism; however that proposal was ultimately nixed following a round of consultations by ICSID with its member-states and other stakeholders.

ANOTHER AWARD FOLLOWS CLOSE ON HEELS OF CMS DEVELOPMENTS

If the annulment ruling in the CMS-Argentina case can indeed be characterized as bitter-sweet for the Argentine Government, the Government had little time in which to savour the sweet portions of that ruling.

Indeed, a mere 3 days after the ICSID annulment committee partially annulled the CMS-Argentina award – and offered sharp criticism of certain other portions of that award which the committee lacked the authority to annul - another tribunal sitting in one of a string of claims against Argentina issued a final award holding Argentina liable for new breaches of the US-Argentina bilateral investment treaty in relation to another US-based multinational. (See next item).

Sources:

* “Umbrella clause reasoning upheld in CMS-Argentina case; remainder upheld”, By Luke Eric Peterson, Investment Treaty News, September 28, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_sep28_2007.pdf

** “Detailed ICSID amendments tabled, openness pondered, appeals facility nixed”, By Bonnie R. Penfold, INVEST-SD News Bulletin, June 10, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_june10_2005.pdf

A copy of the CMS annulment decision is available at: http://ita.law.uvic.ca/documents/CMSAnnulmentDecision.pdf

ITN’s earlier report on the 2005 award in the CMS-Argentina case is available here: http://www.iisd.org/pdf/2005/investment_investsd_may27_2005.pdf

3. Argentina liable for breaches of US-Argentina BIT in claim by US gas co. Sempra; latest award to be rendered in spate of financial crisis claims by foreign investors,
By Luke Eric Peterson

In an award rendered on September 28th, 2007, an ICSID tribunal has held Argentina to have breached the fair and equitable treatment standard of the US-Argentina bilateral investment treaty, in relation to its treatment of US-based Sempra Energy. Argentina was also held liable for breach of the so-called umbrella clause contained in Article II (2) (c) of the US-Argentina agreement.

At the same time, the tribunal rejected claims that Argentina had expropriated Sempra's investments in a pair of Argentine gas distribution companies, as well as claims that Argentina had violated treaty provisions which bar discriminatory or arbitrary treatment.

The tribunal also rejected a bid by the claimant to interpret the "full protection & security" provision of the relevant treaty in an expansive fashion so as to provide not only for physical protection of investments, but for protection of the "legal" security of those investments.

Under the award, Argentina is obligated to pay US $128 Million (to be calculated up to the date of the award) in damages, and to reimburse the US-based gas company for US $36 Million in subsidies which had yet to be reimbursed by Argentina as per its earlier commitments. (Arbitrator Marc Lalonde in a separate opinion took the view that interest should continue to accrue until the date when the award had been paid by Argentina).

Sempra had complained that its investments in two Argentine gas distribution enterprises had suffered serious damage as a result of several emergency measures taken by Argentina during and after its financial crisis. Among the impugned measures was the compulsory "Pesification" of utility tariffs (which had been previously calculated in US Dollars), and the abandonment by Argentina of periodic adjustments to gas tariffs in line with a US inflation index.

Notably, two of the three arbitrators presiding in the Sempra case, tribunal president Prof. Francisco Orrego Vicuna and Marc Lalonde, also sat in the earlier CMS arbitration which recently culminated in a partial annulment of the tribunal's ruling (see previous item).

ITN readers may recall that Argentina had earlier sought to remove the three arbitrators in the Sempra arbitration, citing concerns that the tribunal had declined to admit a post-hearing submission from Argentina – a submission which had appended two arbitral rulings rendered in other pending ICSID claims against Argentina, and deemed to be more supportive of Argentina's legal positions.

This bid by Argentina to disqualify the tribunal members was ultimately rejected by the ICSID facility.* Following this, the tribunal moved to close the arbitral proceedings. By late September it had issued its award.

In its September 28 award, the Sempra tribunal takes pains to emphasize that it has taken note of the arbitral rulings which Argentina had sought to submit some months earlier. In particular, the tribunal takes note of the Decision on Liability rendered in the LG&E v.

Argentina case – a decision which had accepted, in part, a defence of necessity raised by Argentina in another ongoing financial crisis claim at ICSID.

For its part, however, the Sempra tribunal denied Argentina a defence of necessity both as a matter of customary international law and under Article 11 of the US-Argentina bilateral investment treaty. This finding may generate further legal debate given that a similar holding in the CMS-Argentina case was recently singled out for criticism by an ICSID annulment committee (see previous item in this newsletter).

However, the Sempra tribunal does offer somewhat more elaboration than the earlier CMS tribunal as to its approach to interpreting Article 11 of the US-Argentina BIT (which sets out certain exceptions, including an "essential security" exception).

In particular, the tribunal writes at paragraph 376 of its award:

"It is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. The problem here, however, is that the Treaty itself does not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law. As concluded above, such requirements and conditions have not been fully met in this case."

Also of note, the tribunal in the Sempra case held Argentina to have violated the terms of the so-called umbrella clause in the US-Argentina BIT. Controversy has swirled around this particular provision of the US-Argentina treaty, with ICSID tribunals diverging as to whether foreign companies can claim for breach of commitments (such as licenses) which have been entered into between local subsidiaries and the Argentine Government. In particular, tribunals have differed as to whether such commitments can be said to be owed to the foreign investor in circumstances where the foreign investor is not a party to the relevant contracts or licenses.

Sources:

Sempra-Argentina Award of September 28, 2007 is available at:
http://www.investmentclaims.com/decisions/Sempra_Energy-Award.pdf

Separate Opinion of Marc Lalonde available at:
http://www.investmentclaims.com/decisions/Sempra_Energy-Opinion.pdf

*"ICSID rejects Argentina's bid to disqualify tribunal in Sempra/Camuzzi arbitration", By Luke Eric Peterson and Fernando Cabrera, Investment Treaty News, June 13, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_june13_2007.pdf

4. UK salvaging firm moves to annul ICSID award: Arbitrator had denied jurisdiction due to contract not making significant contribution to Malaysia economic development, By Damon Vis-Dunbar

A British underwater salvaging firm has moved to annul a decision on jurisdiction in a dispute with the Government of Malaysia. As earlier reported by ITN, the UK company, Malaysian Historical Salvors (MHS), had failed at the jurisdictional phase in its efforts to hold Malaysia liable for breaches of the UK-Malaysia bilateral investment treaty.

MHS had recovered thousands of pieces of ancient Chinese porcelain from the bottom of the Straight of Malacca in the early 1990s. It was later alleged by the company that the Government of Malaysia breached a contract by failing to provide MHS with its full share of the proceeds from the sale of the treasure.

MHS's bid to recover damages under the UK-Malaysia bilateral investment treaty failed when the sole arbitrator in the case, Michael Hwang, declined jurisdiction earlier this year on the grounds that MHS did not have an "investment" in Malaysia as defined under the ICSID Convention.

Under the ICSID system, an ad-hoc committee may annul an award on a handful of narrow grounds. In this case, the claimant argues that Mr. Hwang manifestly exceeded his powers as arbitrator.

Mr. Hwang's jurisdictional decision was notable for the strong line it took on the matter of what constitutes an investment. In coming to a judgment, Mr. Hwang considered whether the investment made a "significant" contribution to the economic development of Malaysia. "Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy, by any amount, however small, would qualify as an 'investment'", wrote Mr. Hwang.

Mr. Hwang ultimately held that the "quality and quantity" of MHS's contribution to the Malaysian economy did not meet the threshold for what amounts to an investment as defined under the ICSID Convention. It is understood that the claimant objects to the size of their involvement in Malaysian economy being used as a criterion for what constitutes an investment eligible for ICSID arbitration.

The request for annulment was registered on 17 September, and the ad-hoc committee which will hear this phase of the proceedings has not yet been constituted by ICSID.

Sources:

"Underwater salvaging firm fails 'investment' test in ICSID case against Malaysia", By Damon Vis-Dunbar, Investment Treaty News, June 30, 2007

"British investor sues Malaysia over sunken treasure, pleadings posted by ICSID", By Damon Vis-Dunbar, Investment Treaty News, April 11, 2006

5. ANALYSIS: Tribunals differ as to whether ICSID system imposes its own (more stringent) definition of "investment",
By Luke Eric Peterson

Article 25(1) of the ICSID Convention specifies that the World Bank arbitration facility will have jurisdiction over legal disputes "arising directly out of an investment."

However, the Convention offers no further hint as to what qualifies as an investment.

Arbitrator Michael Hwang, in his jurisdictional decision in the MHS-Malaysia case ruled that a "broad trend" can be discerned in ICSID cases whereby tribunals hold there to be a so-called objective definition of what does (and does not) constitute an "investment" under the ICSID system. On this reading, arbitrators have identified various criteria which may be relevant, or indeed essential, for purposes of determining what qualifies as an investment eligible for ICSID arbitration.

One practical upshot of this approach is that certain "investments" which might qualify for protection under a bilateral investment treaty may not qualify as "investments" which are eligible for arbitration at the ICSID facility.

In the MHS v. Malaysia case, the underwater salvaging contract failed this objective test, leading to a finding that ICSID lacked jurisdiction over the dispute.

When faced with such a jurisdictional requirement, prospective claimants might seek to detour around the ICSID system and use other arbitration avenues (if any are provided in a given investment treaty). For example, UNCITRAL-based arbitration imposes no requirement that disputes arise out of an investment – thus ensuring that arbitrators will not delve into the thorny question of what does (and does not) qualify as an arbitrable investment. Notably, in the MHS-Malaysia case, the UK-Malaysia bilateral investment treaty provides only for ICSID arbitration.

Not all arbitrators take the view that the ICSID Convention imposes its own objective definition of investment. In a keynote address* to a September conference organized by the British Institute for International and Comparative Law (BIICL), Paris-based arbitration lawyer Jan Paulsson stressed that there are ICSID precedents which "go the other way" on the question of an "objective" definition of investment.

Of course, even where tribunals hold there to be an objective definition of investment under the ICSID Convention, they do not always agree on the criteria to be used to define eligible investments – nor on the weighting or necessity to be attached to each such criterion.

As was reported in this newsletter in late 2006**, one ICSID annulment committee overturned an arbitration award against the Democratic Republic of Congo, on the basis that the economic activities at the heart of the dispute – namely a small legal firm - failed to meet what it viewed as the "essential" requirement that "investments" contribute to the economic development of the host state.

* "Awards – and Awards", Keynote Address, BIICL, 9th Investment Treaty Forum Public Conference on the Emerging Jurisprudence of International Investment Law", September 14, 2007

** "ICSID award against the Democratic Republic of Congo is annulled", By Luke Eric Peterson, Investment Treaty News, November 24, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_nov24_2006.pdf

6. New arbitrator appointed in Menatep-Russia arbitration over Yukos oil corp
By Luke Eric Peterson

An arbitration tribunal hearing a multi-billion dollar arbitration claim against the Russian Federation has been reconstituted following the resignation of one of the tribunal members.

Group Menatep Ltd., the majority shareholder of the Yukos Corporation, initiated arbitration against Russia in 2005 under the Energy Charter Treaty. The claimants allege that a Russian tax investigation pushed Yukos into bankruptcy, effectively expropriating the shareholders' investments.

Recently, a member of the three-person arbitration tribunal, DC lawyer Daniel L. Price, resigned as arbitrator so that he could take up a position as Deputy US National Security Advisor for International Economic Affairs.

The claimants nominated a replacement for Mr. Price, Geneva lawyer and commercial arbitration specialist Charles Poncet. The 15 day period in which Russia might have raised objections to this appointment has now lapsed, and the tribunal has been formally reconstituted. Judge Stephen Schwebel sits as arbitrator, having been appointed by Russia; whilst Maitre L. Yves Fortier sits as chairman of the tribunal.

A jurisdictional hearing is scheduled for spring of 2008.

The claim is one of several investment treaty arbitrations to have been initiated against Russia by different blocs of Yukos shareholders. Other claims reportedly afoot include an arbitration by UK financial interests, brought pursuant to the UK-Russia bilateral investment treaty, as well as a claim by Spanish financial interests, Renta 4, et. al.,

pursuant to the Spain-Russia bilateral investment treaty.

7. Texans turn to Ontario Court in effort to overturn unfavourable NAFTA ruling in water dispute with Mexico: arbitrators had insisted on need for cross-border investments, By Damon Vis-Dunbar

A group of US citizens embroiled in a dispute over water-access rights with the Government of Mexico have moved to overturn an unfavourable NAFTA decision on jurisdiction.

The Texas-based coalition - Bayview Irrigation District et. al. - launched a claim under NAFTA's investment chapter in 2005, alleging that Mexico had breached a 1944 treaty between Mexico and the United States which divided the Rio Bravo between the two countries.

The claimants argued that the 1944 treaty granted them "water rights" - and that these rights amounted to an investment in Mexico which warranted the protection of NAFTA's Chapter 11. That investment was allegedly harmed when water was diverted toward Mexican farmers before it could reach Texas.

Mexico challenged the claimants' assertion, arguing that the 1944 treaty did not grant rights to Americans while the water flowed on Mexican territory. For its part, the tribunal agreed with Mexico, noting that "while the water is in Mexico it belongs to Mexico even though Mexico may be obliged to deliver a certain amount of it into the Rio Bravo/ Rio Grande for the taking by US nationals."

Ultimately, the tribunal would find that it lacked jurisdiction over the case. In the course of so doing, the tribunal would also reject a separate jurisdictional argument by the claimants to the effect that they could bring a claim under NAFTA Chapter 11 even if they did not have any relevant cross-border investments in Mexico.

Following their legal setback, the Texas group has now turned to a court in Ontario, Canada, in a bid to overturn the tribunal's jurisdictional decision. The claimants argue that whether they had water rights in Mexico was a question that ought to have been decided during subsequent proceedings on merits, and thus the claimants had not fully prepared their arguments on this matter during the jurisdictional phase.

"The Tribunal in its decision on jurisdiction made numerous factual findings that are contrary to the facts alleged by the applicants, including a finding that the applicants did not own any water located in Mexico," states the application to the Ontario Superior Court of Justice, filed on September 17. "The Tribunal made those factual findings despite the agreed-upon standard of review and procedure that, for purposes of determining jurisdiction, the Tribunal must assume that the facts alleged by the applicants ... are true."

There is scope for judicial review of arbitral awards where the arbitration is conducted under the ICSID's so-called Additional Facility rules (a set of special rules designed for the arbitration of disputes where both parties do not hail from ICSID Convention member-countries). Rather than submitting such awards to the ICSID's annulment process, a party will take the relevant award to a court in the country where the arbitration proceeding had been legally sited; in the Bayview case, that site is Ontario, Canada. A hearing date before the Ontario court has been set for January 17 2008.

Sources:

"NAFTA Tribunal lacks jurisdiction to hear Texans' water dispute with Mexico,
By Fernando Cabrera", By Fernando Cabrera, Investment Treaty News, July 12, 2007

8. Colombian court upholds constitutionality of BIT with Spain,
By Fernando Cabrera Diaz

The Constitutional Court of Colombia has upheld the validity of a revised Colombia-Spain Bilateral Investment Treaty (BIT). In a majority decision handed down earlier this year, the Court found that Law 1069 of 2006, which approved the BIT, was in harmony with the Constitution.

The new Colombia-Spain BIT was signed by the two countries in March of 2005, replacing a previous BIT signed in 1995. The new BIT went into effect this month after being ratified by both nations.

Under Colombian law all treaties approved by the Congress must first be reviewed by the Constitutional Court before being signed by the President. During the process any citizen has the right to intervene. Several parties including some government ministries and an industry group intervened in favour of Law 1069. Intervening against the law was Professor José Manuel Álvarez Zárate, a lawyer at Alvarez Zárate & Asociados in Bogota, who asked the Court to declare several provisions in the BIT unconstitutional.

According to Mr. Álvarez, Article 6.2 of the BIT, which grants investors the right to freely transfer capital and profits related to their investments, limits the autonomy of the Central Bank of Colombia to regulate its foreign reserves and to stabilize the balance of trade. He also questioned the constitutionality of the BIT's requirement that any restrictions to free transfers be in accordance with International Monetary Fund (IMF) agreements.

In upholding the BIT, Colombia's Constitutional Court placed considerable weight on the fact that Colombia had signed similar agreements with the United Kingdom, Cuba and Peru; agreements which the Constitutional Court had previously approved.

The court went on to say that these agreements, were common tools of international

integration meant to tighten commercial bonds and were in agreement with the Constitution because they satisfied the necessity to integrate the national economy with the world economy in light of the globalization of the latter. Such integration, the court reasoned, was perfectly compatible with the constitution which authorizes "the economic, social and political integration with other nations."

On the issue of financial transfers, the Court held that Article 6 of the BIT did not lead to a reduction of any of the powers that the Constitution granted to the Central Bank in regards to the management of exchange policy or the management of international reserves. In its reasoning the Court noted that paragraph 4 of BIT Article 6 allows restrictions to transfers in the event of macroeconomic stability, or disequilibrium in the balance of payments. The court concluded that the requirement that these restrictions be in accordance with IMF agreements was not unconstitutional per se given that Colombia has signed the treaty creating the Fund and that IMF agreements must be in accordance with that particular treaty.

Finally, in dealing with the investor-state dispute resolution mechanism (DSM), the court noted that due to the particular nature of investment disputes, it is sometimes more convenient for a specialized international body or tribunal to deal with them. Given this - and the fact that the investor-state DSM obliges investors to exhaust all "administrative" remedies* before seeking arbitration in respect to administrative acts, as required by Colombian law - the Court found the investor-state mechanism in accordance with the constitution.

Notably, two of the nine judges sitting on the Court dissented from the majority opinion. Judge Humberto Antonio Sierra found that several provisions of the investor-state DSM were in fact unconstitutional. He held that giving investors the right to go to international arbitration without first exhausting all local "judicial" remedies, as required by customary international law, violated the principle of state sovereignty. Judge Sierra also found that paragraph 6 of Article 10 of the BIT - which states that each party gives its advance and irrevocable consent to arbitration - also served to violate the principle of state sovereignty.

Judge Jaime Araujo Renteria also dissented on the grounds that the proper procedure had not been followed in the passage of Law 1069, because there had not been proper prior notice of the final vote approving the law as required by Colombian law.

The majority decision appears to open the way for the ratification of similar investment agreements including a Trade Promotion Agreement (TPA) with the United Sates. The Colombia-US TPA was signed in November of 2006. In July of 2007 US Trade Representative Susan Schwab announced that Colombia and the US had reached and agreement over amendments to the TPA reflecting a compromise reached between the Bush administration and the Democratic-controlled US Congress. However, the Colombia-US TPA still waits ratification by both Colombia and the US.

*Under Colombian law decisions by administrative bodies must first be challenged

through the administrative or governmental route (i.e. taking challenges directly to the officials who made the decisions, and if necessary their superiors) before recourse to the legal system can be made.

Briefly noted:

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9. Ecuador reportedly wants oil and mining disputes barred from ICSID

Ecuador intends to shield disputes relating to oil and mining from going to arbitration at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), according to a report by the Dow Jones news agency.

Dow Jones reports unnamed sources as saying that President Rafael Correa recently made the decision, and tasked the Foreign Ministry with notifying ICSID. According to those same sources, the Foreign Ministry was studying its options.

An official with the Ecuadorian Embassy in Washington tells ITN that no move had been made by Ecuador, as of press time, to notify ICSID of any changes to Ecuador's ICSID membership.

At least two options would be open to Ecuador. The country could elect to follow a path blazed by Bolivia earlier this year: denunciation of the ICSID Convention, following a 6 month waiting period. Alternatively, Ecuador could elect to notify ICSID that it no longer wished to allow certain categories of disputes to be arbitrated at the facility. However, the latter type of notification carries little weight under the ICSID system; while ICSID members may notify ICSID that they do not wish to arbitrate certain types of disputes at the facility, such notifications are purely "informational" in character and may be overridden by explicit arbitration offers which may have been made elsewhere. In the case of Ecuador, the country has concluded a string of bilateral investment treaties which contain broad consent-to-arbitration clauses.

Ecuador has faced a number of arbitrations brought under its bilateral investment treaties in recent years. In one of those cases, the US oil company Occidental is seeking a billion dollars. Occidental has already been awarded $75 million, from an earlier arbitration against Ecuador over a value-added tax rebate dispute. An effort by Ecuador to overturn that award in the UK courts failed this summer; an appeal of that UK court ruling is pending.

Sources:

"Ecuador won't allow World Bank Arbitration in Disputes" By Mercedes Alvaro, Dow Jones Newswires, October 9, 2007

10. Costa Ricans narrowly vote in favour of CAFTA-DR pact with United States

The Costa Rican public has voted narrowly in favour of ratification of a free trade agreement concluded between five Central American governments, the Dominican Republic and the United States.

The results of the public referendum pave the way for Costa Rican ratification of the agreement, and for the adoption of a string of implementing legislation – including elimination of current monopolies in the insurance and telecommunications sectors.

11. Canada seeks comments on initial enviro assessment of Korea FTA

The Government of Canada has released a report of its initial environmental assessment of the proposed Canada-Korea Free Trade Agreement, a pact which will also include a chapter on foreign investment protection. The report is open for public comment until November 16, 2007.

For more information see:
http://www.dfait-maeci.gc.ca/tna-nac/IYT/consult-regbil-en.asp#CKfta

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