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NEWS: PANTECHNIKI S.A. CONTRACTORS & ENGINEERS V. THE REPUBLIC OF ALBANIA: FORK-IN-THE-ROAD PROVISION PARTIALLY BARS CLAIM BY GREEK INVESTOR

By Damon Vis-Dunbar

A Greek company's decision to litigate in Albania's domestic courts has prevented it from arbitrating a similar claim under the Albania-Greece bilateral investment treaty.

The Claimant, Pantechniki S.A. Contractors & Engineers, sought to recoup losses sustained during the wide-spread civil strife that shook Albania in 1997 when some two-thirds of the population lost their savings in Ponzi schemes. The Greek investor, which was under contract to construct roads in Albania, had its work site overtaken by rioters.

The Ministry of Public Works had committed to compensating the Claimant for its losses, but both the Public Works Ministry and the Finance Ministry claimed to be prevented from doing so. According to the Claimant, the Finance Minister at the time recommended bringing a case to court, on the grounds that a court order would allow his ministry to provide compensation.

Following a series of unfavourable court decisions, however, Pantechniki abandoned its efforts before Albania's judiciary and filed a claim under the Albania-Greece BIT in 2007.

As it is, the Claimant's decision to turn first to Albania's courts proved fatal to its efforts to arbitrate a similar claim under the Albania-Greece BIT. The BIT's so-called fork-in-road provision requires that investors elect either courts or an international arbitration tribunal to settle disputes.

"The Claimant chose to take this matter to the Albanian courts", writes the sole arbitrator, Jan Paulsson, in the 30 July 2009 award. "It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. Having made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID."

While Pantechniki was prevented from arbitrating a dispute which had already been brought before Albanian courts, Paulsson holds several other causes of action were not disbarred. These are the claims that Albania failed to offer the Claimant "full protection and security" and "fair and equitable treatment" and that the Albanian courts had committed a denial of justice. Ultimately, Paulsson holds that these further causes of action failed on their merits.

In determining whether Albania violated its duty to provide the Claimant "full protection and security", Paulsson prefaced his decision by noting that a host country's level of development required consideration. Given the "environment of desolation and lawlessness" in Albania at the time that the Claimant established its investment, Paulsson determined that it was unreasonable to expect high standards of police protection.

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Paulsson noted that his assessment of the claim may have been different if police had refused to intervene. But having determined that Albanian police were powerless to protect the Claimant's investment, Paulsson concluded that Albania had not breached its duty to provide full protection and security.

Paulsson also went on to reject the denial of justice claim, despite taking a dim view of the courts' treatment of the Claimant.

The Claimant argued before Albania's courts that the General Road Directorate had assumed responsibility for losses due to civil disturbances under contract. Yet the courts ruled that the relevant contractual clause could not be upheld under Albanian law.

Paulsson confessed to being "troubled" by the courts' decision, noting that the clause deemed null by the courts is a common one, appearing "in myriad international construction contracts."

Nonetheless, Paulsson stressed that a denial of justice does not arise until "a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole." By electing not to try its case before Albania's Supreme Court, Paulsson found that the Claimant had not given the Albanian legal system an adequate opportunity to address the failures of its lower courts.

While rejecting all of Pantechniki's claims, Paulsson nonetheless ordered that the parties split the cost of the proceedings, noting that the Greek investor appears to have a valid contractual complaint, even if it could not seek refuge under the Albania-Greece BIT due to its fork-in-the-road clause. He also praised the lawyers representing Albania and Pantechniki, noting that the legal fees (EUR 154,523 in the case of Pantechniki and EUR 269,657 in the case of Albania) "are but fractions of the cost claims submitted in other ICSID cases. Yet the written and oral presentations were highly competent."

The award, *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania* (ICSID Case No. Arb/07/21) is available here: http://ita.law.uvic.ca/documents/PantechnikiAward.pdf

COMMENTARY: PANTECHNIKI V. ALBANIA DECISION OFFERS PRAGMATIC APPROACH TO INTERPRETING FORK-IN-THE-ROAD CLAUSES

By Fiona Marshall

The recent decision in *Pantechniki v. Albania* that the investor's claim was partially barred because of its earlier court proceedings appears to be the only award in the public domain in which a tribunal has held a fork-in-the-road clause to have been triggered by an investor's prior court proceedings. As such, the approach used in the decision may signal a pragmatic way forward in the interpretation of fork-in-the-road clauses, which until now, has repeatedly left them without effect.

The award is especially noteworthy considering that the clause in question does not expressly state that the investor's election to submit a dispute to the courts or arbitration will be final. The wording of fork-in-the-road clauses found in investment treaties differ, but many are along the lines of the relevant clause in the China-Argentina BIT:

> "Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party where the investment has been made or to international arbitration, this choice shall be final."

Such clauses expressly stipulate that the investor must make a definitive election. The relevant clause in the *Pantechniki* case differs, however, in that it does not explicitly indicate that the investor's choice of forum will be definitive. The applicable clause in the Greece-Albania BIT states that "... the investor or Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal ..."; but it does not expressly state that the investor's election will be final.

Pantechniki is not the only case to have accepted a similar clause as a fork-in-the-road clause. The tribunal in the 2002 case of *Middle East Cement v. Egypt* likewise appears to have accepted a forum-selection clause as a fork-in-the-road clause, although it went on to hold that it had not been triggered.*

The majority of cases to date, however, have concerned clauses that expressly indicate that the investor's choice of forum will be definitive.** The annulment committee in *Vivendi v. Argentina* held that the fork-in-the-road clause in the France-Argentina BIT "would have been triggered" if the investor had attempted to enforce its concession contract through the courts (the investor had not done

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NEWS: ECUADOR PREPARES FOR LIFE AFTER ICSID, WHILE DEBATE CONTINUES OVER EFFECT OF ITS EXIT FROM THE CENTRE

By Fernando Cabrera Diaz

Ecuador's announcement in July that it was denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) has prompted renewed debate on the legal effects of the decision with respect to settling disputes under the auspices of the ICSID arbitration facility.

Following Ecuador's formal notice of denunciation, the ICSID Secretariat declared: "In accordance with Article 71 of the ICSID Convention, the denunciation will take effect six months after the receipt of Ecuador's notice, i.e., on January 7, 2010."

Yet this seemingly simple statement belies the ambiguity that surrounds Ecuador's decision. The uncertainty stems in part from the fact that Article 71 on denunciation, and in particular Article 72 on the effects of denunciation, are unspecific and have yet to be interpreted by a tribunal in the context of a country exiting the Convention.

Indeed, before Ecuador, Bolivia was the only country to have denounced the ICSID Convention. Bolivia was taken to arbitration in October of 2007, five months after its announcement in May of 2007 (within the six month period required under Article 71 for denunciation to take effect). Yet that case*, which could potentially be the first to deal with the effects of denouncing the Convention, is still in the preliminary stages of a jurisdictional dispute.

In a recent paper "Once and Forever? The Legal Effects of a Denunciation of ICSID" (Transnational Dispute Management, Vol 6, Issue 1, March 2009) Christian Tietje, Karsten Nowrot and Clemens Wackernagel examine the issue of denunciation.

According to the authors, the central question is the meaning of consent in Article 72 which reads: "Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary." (Italics added)

> *"A senior Ecuadorian official, who wished to remain anonymous because he was not speaking in his official capacity, said that Ecuador is trying to reach agreements with investor considering arbitration in order to prevent future ICSID claims from arising."*

Disagreement over the meaning of consent in this last phrase has lead to three broad theories explaining the effect of denouncing the Convention.

On one side of the spectrum are those who argue that once the denunciation has been received by ICSID, investors who have not already done so can no longer initiate arbitration. According to this position, consent in Article 72 implies mutual consent to arbitration which is perfected when an investor files a notice of arbitration.

A contrasting opinion, held by the authors of the paper, is that consent in Article 72 is simply unilateral consent such as that offered by a country in a Bilateral Investment Treaty. According to this theory, any BITs in which a country offers its consent to ICSID arbitration before it denounces the Convention continue to protect the relevant investors for the life of the BIT even after the denunciation takes effect.

A third opinion holds that investors can initiate arbitration after the denunciation has been made but before it takes effect six months later. This view appears to lack a basis in Article 72, said Dr. Tietje in an interview with ITN.

Adding more uncertainty to the situation are BITs like that between the United States and Ecuador. Article VI(3)(a)(ii) of that BIT appears to allow investors of one party to launch arbitration against the host party at ICSID under the Additional Facility Rules if the host party is not a member of the Convention.

According to Dr. Tietje, this type of clause and indeed the Additional Facility Rules themselves were intended to give states which were considering joining the Convention a chance to test the system. In his view an argument could be made that the purpose of this clause and the Rules precludes them from applying to a country such as Ecuador which has left the Convention.

However, focusing on the text of the BIT itself an argument could be made that this clause does indeed allow U.S. investors to continue to take Ecuador to ICSID under the Additional Facility Rules even after it fully exits the Convention, says Dr. Tietje.

Given this disagreement on the issue it is not surprising that Ecuador has begun to prepare itself for the different possible effects of its denunciation. A senior Ecuadorian official, who wished to remain anonymous because he was

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NEWS: UNITED STATES TRADE REPRESENTATIVE AND STATE DEPARTMENT HOLD PUBLIC HEARING AND SOLICIT WRITTEN COMMENTS IN US MODEL BIT REVIEW

By Elizabeth Whitsitt

Last updated five years ago, the United States' Model Bilateral Investment Treaty (BIT) is currently under review by the US Administration to ensure that it is consistent with the public interest and the overall U.S. economic agenda.

As previously reported in the June 2009 edition of ITN*, an investment subcommittee to the Advisory Committee on International Economic Policy (ACIEP) has been established to advise the ACIEP (and in turn the US government) on the BIT review. While the precise mandate of the subcommittee is somewhat elusive, one thing is certain – a number of perspectives regarding different aspects of the US Model BIT will be canvassed given the diversity of interests represented by those individuals sitting on the subcommittee. The subcommittee consists of some 27 advisors, including participants from labour groups, business organizations, academia, public policy groups, and the legal profession.**

The investment subcommittee is expected to provide a report to the ACIEP at a meeting on 30 September 2009. The ACIEP will then determine whether further input from the investment subcommittee is required. Sometime after its September 30th meeting, the official ACIEP recommendation to the US State Department is expected to be made publicly available on the ACIEP website.

In addition to seeking the views of the ACIEP, the Office of the United States Trade Representative (USTR) and the Department of State have solicited input from interested groups and individuals by way of written comments and participation in a public hearing concerning the US Administration's model BIT review.

According to a recent press release from the USTR, more than 70 members of the public attended, and 17 people made statements, at the public hearing held on 29 July 2009. In addition, more than 50 written submissions*** have been made by various interested groups and individuals both inside and outside the United States.

> *"At one end of the spectrum are written submissions which reflect on the importance of US-based global businesses to access customers in foreign and high growth markets as a way to strengthen the US economy."*

The written submissions highlight the tensions that exist regarding the proper balance the US Model BIT should strike among: (1) encouraging foreign investment; (2) allowing governments the discretion to develop and regulate their own economies; and (3) ensuring the equitable governance of investment disputes so that foreign investors are not privileged, procedurally or substantively, over domestic investors and citizens.

At one end of the spectrum are written submissions which reflect on the importance of US-based global businesses to access customers in foreign and high growth markets as a way to strengthen the US economy. These comments tend to emphasize the importance of high-standard BITs as an essential element in strengthening the competitive position of the US in foreign markets and as a way of making the US a more attractive base for global business.

In contrast, other written comments focus on the impact of the US Model BIT on the interests of the public (including consumers) in the United States and in other state parties to the BIT, particularly when it is a developing country. These submissions posit that BITs undermine development by incorporating provisions (substantive and procedural) that unduly favour investors at the expense of the public interest and the foreign state's right to regulate.

Still other interested parties making written submissions appear to fall somewhere in between these two positions, recognizing the importance of BITs in encouraging and protecting foreign investments while at the same time making suggestions for reform so that governments are better able to develop and regulate their economies. Specific reforms to the US Model BIT in this category of comments include:

- modifications to its objectives by referring to, among other things, the equitable governance of investment disputes based on judicial openness, independence, and accountability;

- changes to its capital control provisions by permitting governments greater flexibility to use capital controls in the face of financial crises;

- dispute-settlement provisions that place more stringent limits on the availability of international arbitration and investor-state dispute-settlement;

- reforms to the exceptions available to state parties by incorporating more flexible exceptions for measures that aim to safeguard the financial system.

NEWS: TRIBUNAL DISMISSES CLAIM BY EUROPE CEMENT AGAINST TURKEY; CLAIMANT ORDERED TO BEAR COST OF THE ARBITRATION

By Damon Vis-Dunbar

An ICSID tribunal has rendered a decision after finding itself in the unusual position of facing requests from both the Claimant and Respondent for a claim to be dismissed for lack of jurisdiction.

In its ruling* dated 13 August 2009, the Tribunal declined jurisdiction, albeit on a basis aligned with the request of the Republic of Turkey, the Respondent, rather than of the Polish Claimant, Europe Cement Investment & Trade S.A.

Europe Cement launched its case against Turkey for alleged breaches of the Energy Charter Treaty (ECT) in 2007. The Polish company claimed to hold stocks in two Turkish electricity corporations, Cukarova Elektrik Anonim Sirketi (CEAS) and Kepez Elektrik T.A.S. (Kepez), which saw their concession agreements with the Turkish Ministry of Energy terminated in 2003.

The critical question facing the Tribunal as it considered its jurisdiction was whether Europe Cement was in possession of stakes in CEAS and Kepez in 2003. According to Europe Cement, the shares in CEAS and Kepez were originally held by the businessman Kemal Uzan and transferred to Europe Cement in 2003 shortly before the concession agreements were terminated.

But despite repeated requests from the Tribunal, the Claimant failed to produce convincing evidence that it owned shares in CEAS and Kepez in 2003. Following a series of assurances that evidence was forthcoming, the Claimant changed tracks and called for the case to be dismissed "due to our company's inability to show the shares legally acquired by our company."

As such, both Europe Cement and Turkey called on the Tribunal to dismiss the claim for lack of jurisdiction yet differed on the basis for their respective dismissal requests.

Europe Cement called for its claim to be dismissed on the grounds that it was temporarily unable to prove its investment in CEAS and Kepez, and argued that the Tribunal was not obligated to consider further arguments.

> *"After considering the arguments of both parties, the Tribunal concluded that the evidence "'points strongly to the conclusion that Europe Cement did not hold shares in ÇEAS and Kepez at the relevant time'".*

Meanwhile, Turkey maintained that the claim rested on fraud, and as such it was in the "international public interest" that the Tribunal renders an award "that contains full and transparent findings on Europe Cement's abuse of this process." Turkey also asked that the Tribunal award monetary relief on the grounds that Europe Cement's claim was fraudulent and caused damage to the country's reputation.

The Tribunal granted Turkey's request for a reasoned award, including consideration of its request for monetary damages, explaining that "the fact that the parties agree on the outcome – dismissal for lack of jurisdiction – does not mean that they must be deemed to have agreed on discontinuance or that there is no dispute between the Parties."

After considering the arguments of both parties, the Tribunal concluded that the evidence "points strongly to the conclusion that Europe Cement did not hold shares in CEAS and Kepez at the relevant time".

The Tribunal declined to award damages to Turkey, however, explaining that the conclusions reached in its award should remedy any damage inflicted on Turkey's reputation.

But Europe Cement has been ordered to bear the full cost of the arbitration proceedings, including Turkey's legal fees, which amounted to some US$3.9 million.

The claim by Europe Cement is one of a several claims** against Turkey which involve entities operated by the Uzan family, a wealthy clan whose members have been embroiled in multiple court cases around the world related to charges of fraud.

Counsel for Turkey, the law firm Freshfields Bruckhaus Deringer, claimed before the Tribunal in this case that the cumulative shares allegedly held by claimants in these cases amount to 130% of the shares of CEAS and 125% of the shares of Kepez.

"These multiple, overlapping and contradictory claims are, in the Respondent's view, supporting evidence that the claim by Europe Cement to own shares in CEAS and Kepez is baseless and fraudulent," observes the Tribunal.

**Award Europe Cement Investment & Trade S.A. v. Republic of Turkey* is available at: http://ita.law.uvic.ca/documents/EuropeCementAward.PDF

***Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2); *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8); *Polska Energetyka Holding SA v. Republic of Turkey* (ad-hoc UNCITRAL arbitration)

NEWS: EL SALVADOR GOVERNMENT CONSIDERS BAN ON MINING AS PERMIT FREEZE LEADS TO CAFTA ARBITRATION

By Fernando Cabrera Diaz

El Salvador's ruling FMLN party is considering a ban on precious metal mining in response to public opposition to perceived environmental degradation. The government of El Salvador has not issued mining permits for two years, and as a result is now facing two arbitration claims before the International Centre for Settlement of Investment Disputes (ICSID).

In August ICSID registered a claim by Commerce Group Corp., a company based in Milwaukee, Wisconsin, and its affiliate San Sebastian Gold Mines. The Claimants contend that El Salvador revoked its mining permits without justification, and in violation of the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR).

A similar claim by the Vancouver-based Pacific Rim was registered by ICSID in June. Pacific Rim claims that Ecuador violated CAFTA-DR by refusing to grant exploitation concessions and environmental permits after it had met the necessary requirements.

Pacific Rim is seeking in excess of the US$77 million it claims to have invested in El Salvador since 2002, mostly in its El Dorado Gold Mine project located in the north-central department of Cabañas. In a press release, the company charges: "Despite strong local support and the inclusion of carefully engineered and reliable environmental protections for the proposed El Dorado Mine, the Government has not met its responsibility to issue the Enterprises the permits necessary to advance the project to the final step of full production."

The CAFTA-DR claim was initiated by Pacific Rim's Nevada-based subsidiary Pac Rim Cayman LLC, which owns two local subsidiaries, Pacific Rim El Salvador (PRES) and Dorado Exploraciones (DOREX), which are involved in the El Dorado project in EL Salvador. Pac Rim Cayman is protect by CAFTA-DR unlike its Canadian parent company.

> *"Pacific Rim complains that the previous Salvadorian President Elias Antonio Saca froze the mining industry in the country by not issuing permits to miners for his last two years in office which ended with elections in March."*

Pacific Rim complains that the previous Salvadorian President Elias Antonio Saca froze the mining industry in the country by not issuing permits to miners for his last two years in office which ended with elections in March. In February Business News Americas quoted Saca as saying that he would rather pay US$90 million (in an eventual arbitration) than approve Pacific Rim's permit.

The current left-wing FMLN government of Muricio Funes has taken a more conciliatory tone, indicating it will try to reach negotiated settlements with mining companies. However, in June FMLN lawmaker Lourdes Palacios introduced a bill that would ban precious metal mining in the country. Under the proposed bill, mining firms would be given 6 months to wind down their operations.

The negative climate for mining in El Salvador is common in Central America where foreign mining companies are perceived to be degrading the environment and threatening public health without providing much benefit to locals.

The Catholic Church has been a leading critic of the mining industry in the region. In May 2007, the Episcopal Conference of El Salvador issued a statement calling the experiences of neighbours in the region that had authorized mining "lamentable", citing irreversible damage to the environment and harm to human health as a result of the use of large amounts of cyanide in the extraction of gold and silver.

Local civil society groups united under the banner of the Mesa Nacional Frente a la Minería Metálica have protested against the water contamination and corruption that they associate with the industry.

In December Pacific Rim President and CEO Tom Shrake lashed out at non-governmental organizations for their opposition to the mine, calling their resistance "anti-development." Mr. Shrake has argued that the El Dorado project would set new environmental standards within all of the Americas.

The use of cyanide to extract gold and silver is a common industry practice. Pacific Rim plans to oxidize and thus neutralize the cyanide before water containing it is released, as a response to concerns about the substance.

However, the use of cyanide remains a dangerous practice and over the last decade spills have had significant biological consequences in the United States, Europe, Central America, Africa, and Asia, said Thomas Power, a mining industry expect and economist at the University of Montana, in an interview with ITN. Leakage of cyanide has been reported at a significant percentage of mines using the chemical, said Professor Power.

NEWS: CLAIM BY CORN PRODUCTS INTERNATIONAL RESULTS IN A SOUR RESULT FOR MEXICO AND ITS SWEETENER INDUSTRY

By Elizabeth Whitsitt

The United Mexican States has suffered yet another setback in its long and protracted dispute with the United States of America over the sugar trade and the Mexican sweetener industry.

As noted in the May 2009 edition of ITN*, a NAFTA tribunal found Mexico liable to Corn Products International Inc. (CPI) for violating NAFTA Article 1102 after Mexico amended its excise tax legislation to impose a tax of 20% on any drink which used High Fructose Corn Syrup (HFSC) as a sweetener. The tribunal, however, reserved its decision on damages.

On 18 August 2009, just over 19 months after the initial liability ruling, the NAFTA tribunal issued its damages award ordering Mexico to pay CPI damages in the amount of US$58.386 million. The tribunal's written decision on damages has yet to be made public and it is uncertain whether Mexico or CPI will try to set aside the award or pursue other available remedies.

The award is the largest issued to a successful claimant in a NAFTA Chapter 11 dispute to date.

RECENTLY PUBLISHED: "RETHINKING FOREIGN INVESTMENT FOR SUSTAINABLE DEVELOPMENT: LESSONS FROM LATIN AMERICA"

Edited by Kevin P. Gallagher and Daniel Chudnovsky, with a Foreword by José Antonio Ocampo, Anthem Press February 2009, 315 pages

A series of essays published in book form provides a critique of foreign investment in Latin America. "Rethinking Foreign Investment for Sustainable Development: Lessons from Latin America", edited by Kevin P. Gallagher and Daniel Chudnovsky, features country case studies and comparative analysis on foreign investment and economic development in the region. The essays reveal that foreign investment has often failed to promote sustainable development, which helps explain why many governments in the region are re-evaluating their policies towards FDI. According to the editors: "The great promise of FDI by multinational corporations is that capital will flow into your country and be a source of dynamic growth ... this volume finds that when FDI did materialize it often fell far short of generating the necessary linkages required to make FDI work for sustainable economic development."

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not speaking in his official capacity, said that Ecuador is trying to reach agreements with investor considering arbitration in order to prevent future ICSID claims from arising.

Meanwhile, the government is finalizing a model BIT to be used as a basis for re-negotiating existing BITs and in future negotiations with other countries, says the official. As expected the model BIT will not include ICSID arbitration, but instead arbitration under UNCITRAL Rules with a venue not yet decided in the final text.

Ecuador is also part of a move to create a regional arbitration forum under the auspices of the Union of South American States (UNASUR) to deal with investment disputes. A working group has already been formed and will meet in September to advance the proposed regional centre for arbitration.

*E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia is currently in a jurisdictional phase; Bolivia objected to the tribunal's jurisdiction and filed its memorial on jurisdiction in March of 2009, while E.T.I. Euro Telecom filed its counter-memorial on jurisdiction in June of 2009.

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so).*** The Vivendi annulment notwithstanding, until *Pantechniki*, no tribunal had found an investor's claim under the BIT to have actually been barred by this type of clause.

Indeed, past tribunals have consistently found that the threshold for the triggering of a fork-in-the-road clause is a high one. In essence, they have identified two main requirements for this to occur. First, the parties in the other proceedings must be identical to the parties in the IIA arbitration. Second, the cause of action (and the object of the cause of action) before the courts and the arbitral tribunal must be identical. For example, the tribunal in *CMS v. Argentina* noted:

> "Decisions of several ICSID tribunals have held that as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration".****

"The fact that tribunals consistently held fork-in-the-road clauses not to have been triggered had led some commentators to query whether the threshold set was not too high as it appeared to leave such clauses without practical effect."

The fact that tribunals consistently held fork-in-the-road clauses not to have been triggered had led some commentators to query whether the threshold set was not too high as it appeared to leave such clauses without practical effect.***** This runs counter to a basic principle of the law of treaties that treaties must be interpreted, so far as possible, to give an effective meaning to all their provisions.

The *Pantechniki* award proposes a workable way forward out of this predicament. In doing so, it draws on the 1903 Woodruff case of the American-Venezuelan Commission. In line with the Woodruff case, the Pantechniki award holds that instead of focusing strictly on whether the causes of actions brought to the local courts and the arbitration are identical, one must assess whether the claims share the same "fundamental basis". The arbitrator in this case finds that they do, and that therefore the fork-in-the-road is triggered.

Whilst compact in length, the Pantechniki decision provides considerable food for thought. It remains to be seen whether its pragmatic approach will signal a shift in the interpretation of fork-in-the-road clauses so that they will, at last, have some practical effect.

Fiona Marshall is an International Law Advisor and Associate with IISD's Trade and Investment team.

*The clause of the Egypt-Greece BIT apparently accepted as a fork-in-the-road clause, Article 10(2), provides that the investor may submit an investment dispute "either to the competent court of the Contracting Party, or to an international arbitration tribunal."

**For example. *Genin and others v. Estonia*, ICSID Case No.ARB/99/2, award, 25 June 2001; *Lauder v. Czech Republic*, UNCITRAL, final award, 3 September 2001; *CMS Gas Transmission Company v. Argentina*, ICSID Case No.ARB/01/8, decision on jurisdiction, 17 July 2003; Azurix v. Argentina, ICSID Case No. ARB/01/12, decision on jurisdiction, 8 December 2003; *Middle East Cement Shipping v. Egypt*, ICSID Case No. ARB/99/6, final award, 12 April 2002; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, ICSID Case No.ARB/97/3, Decision on Annulment, 3 July 2002.

***Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, ICSID Case No.ARB/97/3, Decision on Annulment, 3 July 2002, para 55. Article 8(2) of the France-Argentina BIT provides that "[o]nce an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final."

****CMS Gas Transmission Company v. Argentina*, supra, para 511.

*****Campbell McLachlan, Laurence Shore, Matthew Weiniger, International Investment Law: Substantive Principles, Oxford University Press, para 4.82.

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