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Special update:
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1. Tribunal split in Bechtel-Bolivia case over corporate nationality of investor,
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In the latest development in a closely-watched international arbitration between a water services company and the Republic of Bolivia, a jurisdictional ruling handed down last month has been released to the public this week following the consent of the two parties.

While the decision by the tribunal to affirm its jurisdiction in the Aguas del Tunari v. Bolivia case had been reported earlier, the details of that ruling had remained unpublished until now. (For earlier coverage see: "Tribunal hands down jurisdictional ruling in Bechtel-Bolivia arbitration", Investment Treaty News, November 2, 2005, available at: http://www.iisd.org/pdf/2005/investment_investsd_nov2_2005.pdf)

What becomes clear following publication of the text of the ruling is that the decision of the three member tribunal was not a unanimous one

In a 2 to 1 majority ruling, arbitrators Henri C. Alvarez and David D. Caron dismissed all of Bolivia's jurisdictional objections. However, the third arbitrator, Jose Luis Alberro-Semerena, dissented from the majority view in certain key respects.

At the nub of the case was a debate amongst the parties – and ultimately among the arbitrators – as to whether the claimant Aguas del Tunari, a Bolivian company which entered a 40 year water concession with Cochabamba (Bolivia's third largest city), was "controlled directly or indirectly" by corporate nationals of the Netherlands, and as such deserving of protection under the Netherlands-Bolivia bilateral investment treaty.

Bolivia had argued strenuously before the tribunal that Aguas del Tunari was actually "controlled" by the US-based Bechtel Corporation – the owners of a 55% stake in AdT – and that the Netherlands companies used to hold Bechtel's shares in AdT were mere "shell" companies which did not exert any real "control" AdT's corporate destiny.

Indeed, Bolivia alleged that the Dutch companies had been set up in the autumn of 1999 in a post-facto attempt by Bechtel to bring its investments in Bolivia under the cover of a treaty umbrella, at a time when there was growing public opposition to the AdT water concession in Cochabamba. (In 1999 there was no bilateral investment treaty in force between Bolivia and the United States. As a consequence, Bechtel enjoyed no protection

through its own home territory).

Bolivia insisted in its arguments before the tribunal that AdT was not a Bolivian company "controlled" by a Dutch investor – a prerequisite for AdT to bring a claim under the Dutch BIT with Bolivia – and that the "real" or "actual" control lay with the US-based Bechtel Corporation.

In fact, Bolivia asked the tribunal to request documents from AdT so as to prove the company's assertions that it was "controlled" in actual fact by the Dutch companies.

For its part, AdT opposed the production of documents, insisting that the question of "control" flowed directly from the question of ownership. On this view, there was no need to inquire into the actual exercise of control by any of the intermediary companies in AdT's corporate family-tree; it was enough in AdT's view that the Dutch companies held the 55% stake in the Bolivian company, with this amounting to the "control" required by the investment treaty.

The claimant did express, however, "strong" disagreement with Bolivia's suggestion that the Dutch companies were "mere 'shells' created solely for the purpose of gaining ICSID jurisdiction." Lawyers for AdT argued that Bechtel's shares in AdT migrated from a Cayman Islands-based company to the Dutch companies in 1999, as part of a larger corporate restructuring motivated by tax considerations and the inauguration of a new joint venture with Italian firm Edison S.p.A. which bought into the AdT investment.

Ultimately, a majority of the tribunal would side with the claimant in ruling that "control" is a quality that flows from ownership. As such there was no need to apply a test so as to determine whether the owner exercised "actual" control over an investment in the day to day course of events. Indeed, the tribunal expressed doubts as to whether there was even a viable test which could determine when such "actual" control was being exercised by an owner. What's more, the tribunal added that the purpose of the Bolivia-Netherlands bilateral investment treaty – to stimulate investment - might be thwarted if such an uncertain standard were to be required:

"If an investor can not ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated."

In a dissenting opinion, Mr. Alberro-Semerena expressed the view that AdT should have had to produce documents so as to prove that the Dutch branches of AdT's corporate family tree exerted "actual" control over AdT. In taking this view, Mr. Alberro-Semerena also rejected the argument that majority shareholding and majority voting rights constituted per se control.

Mr. Alberro-Semerena also diverged from the majority on a second point. He held that Bolivia could not have consented to face arbitration from an unlimited "universe of beneficiaries" and that further inquiry should have been undertaken by the tribunal to

investigate “the motivations and the timing” of the decision by Bechtel to restructure the corporate ownership of AdT.

What is most notable about the majority ruling, however, may be its express confirmation that the definition of corporate “nationals” found in many BITs is a capacious one.

In particular, the majority noted that “national routing” of investment - i.e. organizing or structuring an investment through a third country so that it comes under the protective canopy of a BIT – is a legitimate exercise. Indeed, the majority observes that “bilateral” investment treaties may be something of a misnomer, insofar as such treaties “serve in many cases more broadly as portals” for investments emanating from a multitude of different countries, and targeted at some other country, but “routed” through an intermediary (third) country so as to enjoy treaty protection.

Although the tribunal did not expand on this discussion, it is a fact that a minority of investment treaties will impose more stringent definitions of corporate nationality, for example imposing requirements that those investors wishing to qualify as corporate “nationals” under a given treaty will need to have their corporate seat in the putative home state. No such requirement is imposed in Dutch bilateral investment treaties.

In terms of next steps in the Aguas del Tunari arbitration at ICSID, the tribunal will now turn to a consideration of the merits of AdT’s claim against Bolivia. Non-governmental organizations which earlier attempted to intervene in the arbitration – but were bade to wait until the jurisdictional phase had been completed – are widely expected to petition the tribunal once again to open the proceedings to public scrutiny and to permit amicus curiae (friend of the court) arguments in the case.

A copy of the Decision on Jurisdiction will shortly be available in ITN’s on-line documents centre at: http://www.iisd.org/investment/invest-sd/documents.asp

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