investment treaty news

Published by the International Institute for Sustainable Development

www.investmenttreatynews.org

November 2009

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NEWS: ICSID TRIBUNAL CONFIRMS THAT ALLEGATIONS OF CORRUPTION MUST BE SUBSTANTIATED BY "CLEAR AND CONVINCING EVIDENCE"

By Elizabeth Whitsitt

On October 8, 2009 an ICSID tribunal, composed of Professor Piero Bernardini, Mr. Arthur W. Rovine, and Mr. Yves Derains, confirmed that allegations of corruption against a state will not be taken lightly. In dismissing all claims by EDF (Services) Limited ("EDF") against Romania, the tribunal's decision affirms that allegations of corruption must be substantiated by "clear and convincing" evidence.

Seeking over US $130 million in damages, EDF commenced arbitration against Romania in the summer of 2005. EDF asserted that it was invited by Romania to invest in the country and to establish a sale of goods business (i.e. duty-free sales) in several of Romania's airports and also on board Romanian airplanes. To establish this business EDF entered into joint venture agreements with Romanian state-owned entities to form EDF ASRO S.R.L. and SKY SERVICES (ROMANIA) S.R.L. After its joint venture partners refused to renew those agreements, EDF contended that Romania had violated numerous provisions of the UK-Romania Bilateral Investment Treaty. In particular, EDF claimed that Romania had unlawfully expropriated its investment and had treated its investment unfairly, inequitably, arbitrarily and unreasonably.

The heart of EDF's case revolved around allegations of corruption. EDF asserted that its relationship with Romania began to sour in the summer of 2001 when it refused to comply with demands for bribes from senior Romanian government officials. After refusing to meet such demands, EDF alleged that numerous state entities, including its joint venture partners and Romania's judiciary, legislature, and taxing authorities, took concerted measures to destroy EDF's investment in Romania. EDF's evidence substantiating this allegation included testimony from an EDF Director and EDF's managing partner, as well as a tape-recording of a meeting between an EDF agent and a member of the Romanian Prime Minister's staff.

> *'Having concluded that the admissible evidence tendered by EDF in support of its corruption allegations was "far from clear-and-convincing", the tribunal unanimously went on to dismiss all of EDF's claims against Romania.'*

The tribunal rejected EDF's allegations of corruption after finding that EDF had failed to produce "clear and convincing evidence" that a bribe had been requested on behalf of the Romanian government. In so finding, the tribunal determined that testimony by EDF's director was of "doubtful value" given inconsistent

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NEWS: F-W OIL INTERESTS INC. V. REPUBLIC OF TRINIDAD & TOBAGO: A "RELATIVELY MUNDANE DISPUTE" AFTER ALL?

By Elizabeth Whitsitt

More than three years ago, on March 3, 2006, Texas-based energy company, F-W Oil Interests Inc. ("FWO") lost its fight against the Republic of Trinidad & Tobago ("T&T") arising out of alleged breaches of the 1996 US investment protection treaty with the Caribbean nation (the "USA/T&T BIT").

The decision, recently published, reveals that the American company failed to convince the presiding arbitral tribunal that it had an "investment" as defined under the terms of the relevant BIT.

Commencing arbitration against T&T in the fall of 2001, FWO's claim arose as a result of its alleged investment in the Soldado Fields, the site of an offshore oil and gas development and production project and a key development to T&T's economy.

The Soldado Fields were initially controlled by the state with Petrotrin, T&T's national oil company owning the rights to the oil, and Trinmar, a corporation controlled by T&T via Petrotrin having the responsibility to develop and exploit the offshore resource. In 1999, after operations at the Soldado Fields were shut-in due to problems with the structures used to extract oil and gas, the government sought to recommence resource production by soliciting the participation of foreign investors in the region. Accordingly, Trinmar commenced a public tender process inviting potential bidders to "participate in Trinmar's West and South West Soldado Fields." Despite some controversy over whether Trinmar could properly make such an invitation, FWO came away the successful bidder and was awarded the tender subject to its ability to conclude a "mutually agreeable operating agreement" with Trinmar.

Having learned that it would not attain a proprietary interest in either the Soldado Fields or the minerals obtained there from, but would instead operate the project as a "Service Contractor", remunerated by a rate per barrel of oil produced, FWO attempted to obtain certain guarantees from Trinmar. Specifically, it asked for a "guarantee or other form of security to secure payment to FWO under the anticipated contract" and "assurances that FWO would be compensated for work done in anticipation of an agreement to carry out the project, if in the event such an agreement was not concluded."

> *'The tribunal noted, "[a] relatively mundane…dispute about the existence of contractual rights…and about their relationship to a [BIT], was now to be the stage for a highly-coloured attack on officials, sufficiently senior for their conduct to be identified with that of the State."'*

Neither request received a positive response from Trinmar, and eventually FWO received a letter indicating that Trinmar was withdrawing from the negotiations. Following receipt of this letter, FWO made various attempts to have the decision reversed by Trinmar, or countermanded by the Government, but such attempts proved unsuccessful, frustrating FWO's ability to conclude the necessary operating agreement.

As a result, FWO commenced arbitral proceedings on the basis that it had established an investment in T&T by: (i) entering into an investment agreement with the State, (ii) acquiring rights under the laws of T&T, the BIT and international law in relation to an offshore oil and gas development and production project and (iii) contributing money and tangible and intellectual property to the project.

In addition, FWO later asserted corruption on the part of certain T&T officials as a basis for its claim. In response to its alleged refusal to pay a US$1.5 million bribe in connection with an oil and gas contract, FWO argued that "…senior officials of Petrotrin engaged in wrongful conduct that caused Trinmar to breach its contractual obligations to FWO." According to FWO those "… officials then commenced a campaign of disinformation designed to force FWO's removal as a successful bidder and abused their oversight positions in Petrotrin and the T&T government to block Trinmar proceeding with the award."

Naturally, the inclusion of such claims regarding the conduct of T&T state officials promised to alter the tenor of the arbitration. As the tribunal noted, "[a] relatively mundane…dispute about the existence of contractual rights…and about their relationship to a [BIT], was now to be the stage for a highly-coloured attack on officials, sufficiently senior for their conduct to be identified with that of the State."

Such an assault never came to fruition, however. FWO was forced to withdraw its allegations at the end of the arbitral proceedings, after the tribunal raised pointed questions as to whether there was sufficient evidence to sustain FWO's allegations. Apparently perplexed by the lack of evidence to substantiate claims regarding the alleged corruption of T&T officials, the tribunal was careful not to make any findings

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relating to – and even excluded an account of the documents and evidence devoted to – those allegations from its decision. Indeed, the tribunal noted that its function was not to "pass moral judgement on the behaviour of one or another Party, or indeed both Parties, but simply to decide on the validity of the claims brought, and on their legal consequences."

Having so stated, the tribunal focused its efforts on what it termed "the less dramatic, but intellectually more taxing" question of whether FWO had the benefit of a binding pre-contractual agreement, which constituted an investment in T&T, and which the State unfairly infringed.

For its part T&T made two submissions in response to FWO's claim. Characterizing the costs and expenditures incurred by FWO as "pre-contract expenditures", T&T first argued that there was no dispute arising out of (relating to) an "investment", as required by both the ICSID Convention and the BIT. Additionally, T&T argued that the dispute, if any, arose as a result of the actions of Trinmar, Petrotrin or their officials, for which it could not be found liable.

Reflecting on the first issue, the tribunal commented that such a vital question "...should not be approached in a narrow technical way, but rather in the context of the intention animating the BIT and in the light of its terms." Accordingly, the tribunal determined that "...the notion of an "investment"...[could] only realistically be understood as referring to something in the nature of a legal right or entitlement" and therefore found that FWO's claim must fail as it had not entered into a binding contract with Trinmar. Specifically, the tribunal determined that there was one aspect of the Parties' dealings which proved fatal to the existence of a contract: namely, the insistence by FWO and T&T that they would not be legally bound before the execution of a formal contract.

In a related analysis the tribunal also examined whether, even in the absence of an "investment", there nevertheless existed an "investment agreement" under the BIT sufficient to ground FWO's claim. The tribunal commented that a dispute of such an "extended kind" may also ground its jurisdiction even though "such a dispute may not arise out of an "investment" very "directly" at all." Noting the uniqueness of such a concept to BITs concluded by the USA and the lack of arbitral jurisprudence discussing how such a term should be interpreted and/or applied, the tribunal solicited arguments on this issue from both of the Parties.

FWO missed an opportunity to ground the tribunal's jurisdiction on such an "extended" basis, as its arguments on this point continued to focus on whether FWO had acquired contractual rights – assertions that were essentially the same as those already made in relation to whether FWO had made an "investment" in T&T. Dissatisfied with the arguments presented by FWO and T&T, the tribunal did not elaborate further on this issue except to say that "...it would not wholly exclude the possibility that circumstances might arise under which...a tribunal might conclude that an "investment agreement"...had come into being, and was sufficient to found a valid claim under a BIT, even in the absence of an actionable contract and thus an "investment"...in the strict sense of the term."

Sources:

Award in F-W Oil Interests Inc. v. Republic of Trinidad & Tobago is available at:

http://ita.law.uvic.ca/documents/FWOilAward.pdf

NEWS: ALBA MOVES FORWARD WITH PLAN TO CREATE REGIONAL INVESTMENT ARBITRATION ALTERNATIVE TO ICSID AT 7TH SUMMIT

By Fernando Cabrera Diaz

Members of the Bolivarian Alliance for the Peoples of Our America ("ALBA") are moving forward with a plan to create a regional arbitration centre intended to replace the often criticized International Centre for Settlement of Investment Disputes ("ICSID"). The final declaration of the 7th ALBA Summit, which took place between October 16th and 17th in Cochabamba, Bolivia, instructed a dispute resolution working group to advance its work on the issue and develop concrete proposals in the near term.

The move had been anticipated after statements by Bolivia's Vice-Minister for Legal Defence of the State, Javier Viscarra Osuna, who told reporters a week before the summit that a dispute resolution venue, as well as a centre for advice and training in matters of investment, would be considered at the summit. According to Agence France Presse, the Vice-Minister said that a working group had been tasked with advancing the creation of the arbitration venue, which was originally intended to deal solely with the claims from foreign investors, but had now been expanded to deal with other types of disputes.

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ALBA MOVES FORWARD WITH PLAN...

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Now, according to the 7th Summit's final declaration, ALBA heads of state have instructed the dispute resolution working group to further its work in order to be able to submit concrete proposals (presumably to the heads of state) in Caracas, Venezuela within 30 days (from October 17th). The declaration offers no details as to the content of the proposals though one would expect the proposals to deal with the creation of the arbitration centre.

ALBA is a Latin American organization comprising a number of states including Antigua and Barbuda (June 2009), Bolivia (April 2006), Cuba (December 2004), the Commonwealth of Dominica (January 2008), Ecuador (June 2009), Honduras (October 2008), Nicaragua (February 2007), Saint Vincent and the Grenadines (June 2009), and Venezuela (December 2004). The organization was established by Venezuela and Cuba as an alternative to the then proposed Free Trade Area of the Americas. Haiti, Iran and Uruguay are currently observer states.

As reported previously by Investment Treaty News, Bolivian president Evo Morales famously announced that ALBA members would be exiting ICSID at the 5th ALBA, but so far only Bolivia (2007) and Ecuador (2009) have formally denounced the World Bank's arbitration centre. At that summit a plan to create an investment arbitration centre to replace ICSID was first proposed, but the idea was not publicly discussed at the 6th Summit the following year.

While ALBA moves forward with its plans for an arbitration centre, other regional initiatives are also under way. The Energy Council for South America, which comprises all 11 sovereign nations in the region, approved working groups last year tasked with designing a legal mechanism to settle investor-state disputes related to the energy sector.

"The move had been anticipated after statements by Bolivia's Vice-Minister for Legal Defence of the State, Javier Viscarra Osuna, who told reporters a week before the summit that a dispute resolution venue, as well as a centre for advice and training in matters of investment, would be considered at the summit."

In June of this year Ecuador's Foreign Minister Fander Faconi officially proposed the creation of a centre for arbitration under the auspices of the Union of South American States at the 39th Session of the General Assembly of the Organization of American States in June, though no mention of such a centre was included in the summit's final declaration.

Notably, the 7th ALBA Summit also saw the signing of the Treaty Establishing the Unitary System for Regional Compensation of Payments which aims to replace the U.S. dollar as the international exchange currency between ALBA nations. The agreement will create a virtual currency, the Sucre, by early next year which will be converted to a hard currency in the future. According to the summit's final declaration, a technical meeting will be held by November to draft an implementation plan for that agreement.

Sources:

The Final Declaration of the 7th ALBA Summit is available in Spanish from the ALBA website at: http://www.alternativabolivariana.org/images/declaracionVIIcumbrealba-tcp.pdf

Read previous ITN reporting

"South American alternative to ICSID in the works as governments create an energy treaty", By Fernando Cabrera Diaz, Investment Treaty Newsletter, August 6, 2008, available at:

http://www.investmenttreatynews.org/cms/news/archive/2008/08/06/south-american-alternative-to-icsid-in-the-works-as-governments-create-an-energy-treaty.aspx

"Ecuador prepares for life after ICSID, while debate continues over effect of its exit from the Centre", By Fernando Cabrera Diaz, Investment Treaty Newsletter, September 7, 2009, available at:

http://www.investmenttreatynews.org/cms/news/archive/2009/08/28/ecuador-prepares-for-life-after-icsid-while-debate-continues-over-effect-of-its-exit-from-the-centre.aspx

Other Sources:

"Alba evalúa creación de arbitraje que reemplace al CIADI," September 2, 2009 (Agence France Presse)

NEWS: CONFUSION ABOUT SETTLEMENT AGREEMENT LEADS TO DISMISSAL OF CASE BETWEEN DUTCH COMPANIES AND AZERBAIJAN

By Elizabeth Whitsitt

After a disagreement regarding the existence of a settlement agreement, an ICSID tribunal has determined that it has no jurisdiction to hear a dispute initiated by three Dutch companies, Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. against the Republic of Azerbaijan.

The Dutch investors commenced arbitral proceedings on July 13, 2006 alleging that Azerbaijan's treatment of their investment in Azerbaijan violated various provisions of the Energy Charter Treaty ("ECT"). In response, Azerbaijan contested the jurisdiction of the Tribunal and a hearing on that issue was held in London at the end of June 2008. Shortly after its commencement, however, the hearing was adjourned after a director of the investors admitted to bribing officials in Azerbaijan in early 2006.

On December 19, 2008 the parties notified the Tribunal that they had reached "an in principle settlement" and sought an "immediate procedural standstill" of the case until December 31, 2008 in order to finalize their agreement. This notification came as a result of a series of conversations involving counsel for parties in this dispute and another dispute defended by Azerbaijan, *Fondel Metal Participations B.V. v. The Republic of Azerbaijan*. Subsequently, a disagreement arose between the parties regarding the nature of those settlement communications.

Specifically, the disagreement centred on the nature of emails exchanged between the parties in mid-December 2008. While the investors and Azerbaijan agreed that their correspondence gave rise to a legally binding agreement of some kind, they differed over its scope. Azerbaijan asserted that such communications resulted in an agreement to settle the case with a consequent agreement on a standstill, while the investors argued that it was merely a standstill agreement to allow time for the parties to negotiate a settlement.

Applying English law as agreed to by the parties, the tribunal, composed of Judge Florentino P. Feliciano, Judge Charles N. Brower, and Sir Christopher Greenwood, sided with Azerbaijan. Specifically, the tribunal found that the natural meaning of the language in the emails indicated that a binding settlement agreement between the parties had been reached. In so doing, the tribunal rejected a number arguments advanced by the Dutch investors, namely that there was no binding agreement because there was no intention to create legal relations, there was no meeting of the minds, and that the agreement was incomplete.

In addition, the tribunal rejected the investors' attempts to argue for a more limited interpretation of the relevant email exchange by relying on evidence of prior correspondence and subsequent practice between the parties. Wary of considering such extrinsic evidence, the tribunal reiterated the applicability of English versus international law to the dispute. It noted that while extrinsic evidence may be admissible under international law, this dispute was to be governed by English law which provides only very limited recourse to extrinsic evidence. Thus, the tribunal found that there was no "legal dispute" between the parties as required by Article 25(1) of the ICSID Convention, nor was there a "dispute" as required by Article 26(1) of the ECT. Therefore, it concluded that it did not have the jurisdiction to hear the claim.

Sources:

Award in Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan is available at:

http://ita.law.uvic.ca/documents/Azpetrolaward.pdf

NEWS: QUIBORAX CLAIM AGAINST BOLIVIA CONTINUES; MAY PROVIDE FIRST DECISION ON EFFECTS OF ICSID EXIT

By Fernando Cabrera Diaz

Chilean Química e Industrial del Bórax Ltd. ("Quiborax") will continue with its claim against Bolivia at the International Centre for Settlement of Investment Dispute ("ICSID"), despite reports of a settlement agreement and Bolivia's renunciation of the ICSID convention. The case will likely shed the first light as to the effects of renouncing the ICSID Convention, a controversial topic over which no tribunal has yet to rule.

As reported previously by Investment Treaty News, Quiborax filed for arbitration in October of 2005 alleging that Bolivia had expropriated its property, after Bolivia rescinded the company's mining concession in Salar de Uyuni (southern Bolivia) in 2004. The ulexite mineral concession was being exploited through Quiborax's majority owned subsidiary, Non Metallic Metals.

The company is seeking US$ 40 million in compensation for the alleged violations of the Bolivia-Chile Bilateral Investment Treaty. Bolivia contends that it rescinded the concession because

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NEWS: CEMENTOWNIA CLAIM AGAINST TURKEY FOUND TO BE "MANIFESTLY ILL-FOUNDED"

By Elizabeth Whitsitt

On September 17, 2009 an ICSID tribunal dismissed yet another claim initiated against the Republic of Turkey by an entity, Cementownia "Nowa Huta" S.A. ("Cementownia"), operated by the Uzan family. As previously reported*, the Uzans are a wealthy Turkish family whose members have been enmeshed in multiple disputes around the world related to allegations of fraud – and this case is no different.**

Seeking damages in amounts exceeding USD $4 billion, Cementownia commenced arbitral proceedings against Turkey in the fall of 2006 for alleged breaches of the Energy Charter Treaty ("ECT"). Similar to the facts in parallel proceedings against Turkey which involve entities operated by the Uzan family, Cementownia asserted its standing to commence international arbitration on the basis of its alleged shareholdings in two Turkish electricity corporations, Çukurova Elektrik A.S. ("CEAS") and Kepez Elektrik Türk A.S. ("Kepez"), which saw their concession agreements with the Turkish Ministry of Energy terminated in June 2003.

Crucial to the jurisdictional question facing the tribunal was whether Cementownia had in fact acquired an interest in the two Turkish electricity companies prior to the termination of their concession agreements.

As noted by the tribunal, "prior to the date of the alleged sale and purchase of the shares, the matters complained of involved the Turkish State and Turkish nationals, all operating exclusively within the framework of Turkish law. Being a Turkish national holding shares in CEAS and Kepez, under the [ECT], Mr. Kemal Uzan could not bring an international claim against his own State. This could only occur if a person holding foreign nationality owned or controlled the investment." Thus, Cementownia argued that it acquired Mr.Uzan's shareholdings in the two electricity companies 12 days prior to the termination of each corporation's concession agreements.

In the face of such arguments, however, Cementownia never adduced any concrete evidence substantiating the precise timing of its share acquisitions. Consequently, after numerous unsuccessful requests for the production of the original bearer share certificates, both parties sought dismissal of Cementownia's claims on grounds that the tribunal lacked jurisdiction, albeit with different reasoning.

Cementownia requested the tribunal to base its reasoning solely on its inability to produce the original share certificates. In contrast, Turkey requested the tribunal to render an award which scrutinized all aspects of Cementownia's standing to sue and to dismiss the claim with prejudice and with an award of damages and costs in its favour.

After considering the arguments of both Cementownia and Turkey, the tribunal sided with Turkey and decided to dismiss the claim with prejudice. In so doing, the tribunal made a number of findings that foreclosed Cementownia's ability to recommence arbitral proceedings against Turkey.

Given Cementownia's failure to produce original share certificates evidencing its shareholdings in CEAS and Kepez, the inconsistent evidence respecting the precise date of Cementownia's share acquisition, the circumstances in which the share transaction occurred (i.e. via telephone and with rudimentary contracts), and the fact that Cementownia did not record the share transaction in its own financial statements in 2003 and 2004, the tribunal decided that Cementownia "…had not produced any persuasive evidence that could prove either its shareholding in CEAS and Kepez at the relevant time or that it was an investor within the meaning of the ECT."

In addition, the tribunal found that Cementownia's claim was "manifestly ill-founded" and noted that Cementownia "…intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case…" and was "guilty of procedural misconduct: once the arbitration proceeding was commenced, it…caused excessive delays and thereby increased the costs of the arbitration."

In spite of this finding, the tribunal refused Turkey's request for damages reasoning that it was more appropriate to sanction Cementownia with respect to the allocation of costs. As such, Cementownia was ordered to pay Turkey US $5,304,822.06, which represented its legal fees and expenses and its contribution to the costs of the arbitral proceedings.

* "Tribunal dismisses claim by Europe Cement against Turkey; Claimant ordered to bear cost of the arbitration", by Damon Vis-Dunbar, September 2009, available here: http://www.investmenttreatynews.org/content/archives.aspx.

** For example: Europe Cement Investment & Trade S.A. v. Republic of Turkey (ICSID Case No. ARB(AF)/07/2); 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)

Award Cementownia "Nowa Huta" S.A. v. Republic of Turkey is available at: http://ita.law.uvic.ca/documents/CementowniaAward.pdf

NEWS: AN ICSID TRIBUNAL INTRODUCES INNOVATIVE STEPS INTO NON-DISPUTING PARTY PROCEDURE

By Elizabeth Whitsitt

In a high-profile arbitration involving mining interests owned by Piero Foresti, Laura de Carli and others versus the Republic of South Africa, an ICSID tribunal (the "Tribunal") has accepted two petitions for participation by Non-Disputing Parties ("NDPs") and imposed innovative procedural steps regarding document disclosure and participant feedback.

In this case, a group of European investors (the "Claimants"), who hold interests in granite quarrying companies in South Africa, argue that the South African government has effectively "extinguished" their mineral rights without providing adequate compensation. Specifically, the European claimants take issue with Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), legislation designed to ameliorate social conditions experienced by historically marginalized South Africans.

Under the MPRDA, private ownership of mineral rights was replaced with a system of licenses offered by the South African government. Thus, investors like the Claimants holding mineral rights under the old regime were given an opportunity to apply for licenses under the new regime provided they met certain criteria, including the achievement of certain Broad Based Black Economic Empowerment objectives. By so stipulating, the Claimants assert that their new-order mineral rights are not equivalent in value to the rights they enjoyed previously.

Not surprisingly, the dispute has attracted the concerns of numerous South African and international public interest groups and academics. Thus, in the summer of this year public interest groups sought to assist the Tribunal by addressing the public interest and international law issues raised by the dispute by filing petitions to participate in the arbitral proceedings as NDPs.

Seeking to reduce any potential burden on the Tribunal and to maximize the usefulness of their submission, the first successful petition was initiated by a coalition of four non-governmental organizations comprised of the Centre for Applied Legal Studies ("CALS"), the Center for International Environmental Law ("CIEL"), the International Centre for the Legal Protection of Human Rights ("INTERIGHTS"), and the Legal Resources Centre ("LRC") (collectively the "Coalition").

> *"...given the novelty of the NDP procedure, the Tribunal indicated that at the end of the arbitration it will invite the Parties and the NDPs to provide feedback concerning the procedure adopted for NDP participation in this case. In addition, the Tribunal has committed to discuss the comments of the parties and the NDPs in its final award."*

According to the Coalition's petition, their submissions are intended to provide a thorough understanding of South Africa's legal obligations – under its constitution and international law - to promote certain human and economic and social rights. Aimed at elaborating on the scope of rights such as the right to equality, development and a healthy environment, the coalition seeks to assist the Tribunal in placing South Africa's Bilateral Investment Treaty ("BIT") obligations in context. In so doing, the Coalition's submissions are meant to promote a coherent interpretive approach that would demonstrate the relevance of such rights in relation to the interpretation of South Africa's obligations under BITs.

Similarly, the second successful petition, put forward by the International Commission of Jurists ("ICJ"), is intended to address South Africa's international and constitutional obligations to promote equality and the bearing that such obligations should have on the Tribunal's assessment of the MPRDA.

The Tribunal granted both petitions on October 5, 2009. Permitting the Coalition and ICJ the opportunity to provide written submissions on those issues delineated above, the Tribunal also ordered the disclosure of the Parties' key filings to the NDPs prior to the submission of their written arguments despite objections from one of the parties to the dispute – an innovative step in the development of NDP procedure.*

Further, given the novelty of the NDP procedure, the Tribunal indicated that at the end of the arbitration it will invite the Parties and the NDPs to provide feedback concerning the procedure adopted for NDP participation in this case. In addition, the Tribunal has committed to discuss the comments of the parties and the NDPs in its final award.

This is the first time that any ICSID tribunal has expressed interest in obtaining comment from the disputing parties and the NDPs on its NDP procedure; a ground-breaking development that will no doubt be the catalyst for some useful discussion regarding the contentious question of NDP participation in ICSID arbitrations.

The Tribunal indicated that it did not "... envisage that the NDPs will be permitted to attend or to make oral submissions at the hearing." A decision on those questions is expected in March 2010, after the Parties to the dispute have responded to the NDP submissions.

Meanwhile, the Parties' redacted documents are expected be filed with ICSID November 16, 2009 so that these can be forwarded on to the NDPs.

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QUIBORAX CLAIM AGAINST BOLIVIA CONTINUES...

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the company withheld information from customs officials, including the volumes of the mineral ulexite it was exporting, in order to evade taxes. Quiborax disputes this and instead argues that its license was rescinded due to anti-Chilean sentiments which swelled in Bolivia in 2003. Bolivia and Chile have had troubled relations since Chile blocked Bolivia's access to the Pacific in 1879.

The proceeding was suspended in May of 2008 while the parties sought a negotiated settlement, but negotiations fell through and the arbitration was continued earlier this year with the tribunal's issuance of a procedural order that has yet to be made public.

On September 8, 2009 Bolivian newspaper La Prensa reported that the parties had reached an agreement under which the firm would withdraw its claim at ICSID and in return be allowed to participate in future national tenders (presumably for mineral concessions). The paper quoted the Minister for Legal Defence of the State Hector Arce Zaconeta as saying that "it is a mutual agreement that has been in the works, through which the company has to give up any financial compensation and the company, of course, will be empowered to participate as any other company on equal terms."

Yet the reports appear to have been premature as Quiborax filed its memorial on the merits of its claim with ICSID on September 14 and then filed a request for provisional measures the following day. A further request for provisional measures was filed by the company on October 2.

Bolivia renounced the ICSID Convention in 2007 and has argued that it is no longer subject to the centre's jurisdiction, though the Quiborax claim pre-dates Bolivia's renunciation. Bolivia's renunciation, along with Ecuador's more recent renunciation of the ICSID Convention, has attracted the attention of the arbitration community, in which there is disagreement regarding the implications of renouncing the Convention.

The Quiborax case could be the first to rule on the effects of renouncing the ICSID convention as no tribunal has yet to rule on the topic.

See previous reporting by ITN:

"Chilean chemical firm launches ICSID suit against Bolivia", By Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty Newsletter, March 14, 2006, available at:

http://www.iisd.org/pdf/2006/itn_mar14_2006.pdf

Other Sources:

"La empresa chilena Quiborax decide continuar con el arbitraje en contra de Bolivia," October 2, 2009 (Agencia EFE)

"Gobierno afirma que existe un acuerdo verbal con Quiborax," September 12, 2009 (La Prensa)

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Leaving the Coalition and ICJ with a little over a month to file their written legal submissions.

* See "NGOs permitted to intervene in South Africa mining case and – for second time at ICSID – tribunal orders would-be petitioners to be given access to case documents" By Luke Peterson, Investment Arbitration Reporter, 14 October 2009, in which the author indicates that access to pleadings has only been granted to an intervener in one other dispute, Electrabel v. Hungary. In that case arbitrators did provide the European Commission access to some of the pleadings so that it could frame its legal submissions in light of arguments made by the parties in the case. This article is available at: http://www.iareporter.com.

Sources:

Both Petitions and the Tribunal's decision can be downloaded from ITN's website at:

http://www.investmenttreatynews.org/cms/news/archive/2009/10/10/an-icsid-tribunal-introduces-innovative-steps-into-non-disputing-party-procedure.aspx

For further background on this dispute, see the ITN's previous reporting:

"In Brief: Suspension extended in Piero Foresti, Laura de Carli and others v. Republic of South Africa", By Damon Vis-Dunbar, Investment Treaty Newsletter, 8 June 2009, available here:

http://www.investmenttreatynews.org/cms/news/archive/2009/06/05/in-brief-suspension-extended-in-piero-foresti-laura-de-carli-and-others-v-republic-of-south-africa.aspx

"European miners and South Africa suspend proceedings", By Damon Vis-Dunbar, Investment Treaty Newsletter, 2 April 2009, available here:

http://www.investmenttreatynews.org/cms/news/archive/2009/04/02/european-miners-and-south-africa-suspend-proceedings-as-settlement-talks-continue.aspx

"South African court judgment bolsters expropriation charge over Black Economic Empowerment legislation in the mining sector", By Damon Vis-Dunbar, Investment Treaty Newsletter, 23 March 2009, available here:

http://www.investmenttreatynews.org/cms/news/archive/2009/03/23/south-african-court-judgment-bolsters-expropriation-charge-over-black-economic-empowerment-legislation.aspx

ICSID TRIBUNAL CONFIRMS THAT ALLEGATIONS OF CORRUPTION...

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factual statements by EDF's director about the alleged bribery solicitation.

The tribunal also declared EDF's tape-recording inadmissible. In a procedural order* the tribunal refused admission of the tape-recording because: (i) the circumstances surrounding its creation were uncertain, (ii) the tape-recording lacked authenticity, and (iii) it was obtained illegally.

In declining to admit the tape-recording as evidence, the tribunal seemed particularly troubled by EDF's conduct and the circumstances under which it submitted the tape-recording into evidence. Twelve days before the hearing of this case, EDF claimed that it learned of the tape-recording's existence and immediately applied to have the tape-recording admitted into evidence. However, based on evidence submitted to the tribunal by EDF, the tribunal found that EDF "was aware from the time the [tape]-recording was created of its existence." Addressing this contradiction, the tribunal concluded that EDF's behavior was "...contrary to the duty of fairness imposed upon the Parties to an international arbitration."

In addition, the tribunal noted that EDF never provided the original version of the tape-recording despite Romania's requests. As a result, the tape-recording could never be authenticated making it unreliable and inadmissible. The tribunal also found that the tape-recording "was obtained illegally according to Romanian law." Apparently, the tape-recording was created "in [a Romanian government official's] home without her consent in breach of her right to privacy." As a result, the tribunal held that admitting the evidence under these circumstances "would be contrary to the principles of good faith and fair dealing required in international arbitration." Accordingly, the tribunal unanimously refused to admit the tape-recording into evidence.

Having concluded that the admissible evidence tendered by EDF in support of its corruption allegations was "far from clear-and-convincing", the tribunal unanimously went on to dismiss all of EDF's claims against Romania. In so doing, the tribunal observed that there was no evidence to support EDF's claim that "...a kind of "concerted attack" was organized and designed to bring about the taking and destruction of its investment in Romania."

The majority of the tribunal also awarded Romania US$ 6 million in costs. In so doing, the majority noted that its preferred approach to costs reflected the "...principle that the losing party pays, but not necessarily all the costs of the arbitration or of the prevailing party." Arthur Rovine, the arbitrator appointed by EDF, dissented from this decision. In direct contrast to the majority, Mr. Rovine was of the opinion that one party should not bear a greater share of the costs unless aggravating circumstances are present suggesting bad faith or abuse of process. Accordingly, Mr. Rovine would have preferred to split costs between the parties evenly without consideration of which side prevailed.

Sources:

* Procedural Order No. 3 in EDF (Services) Limited v. Romania is available at:

http://ita.law.uvic.ca/documents/EDFPO3.pdf

Award and Dissenting Opinion in EDF (Services) Limited v. Romania is available at:

http://ita.law.uvic.ca/documents/EDFAwardandDissent.pdf

IN BRIEF: HAITI RATIFIES ICSID CONVENTION

Haiti has ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention").

Haiti deposited its instrument of ratification with the World Bank on October 27, 2009, making it the 145th state to ratify the ICSID Convention. In accordance with its Article 68(2), the ICSID Convention will enter into force for Haiti on November 26, 2009.

Haiti, an observer state in the Bolivarian Alliance for the Peoples of Our America ("ALBA") ratified the ICSID Convention approximately one and half weeks after ALBA concluded its 7th Summit in Cochabamba, Bolivia.*

* For details on the 7th Summit see article in this month's ITN "ALBA moves forward with plan to create regional investment arbitration alternative to ICSID at 7th Summit" By Fernando Cabrera Diaz.