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Editor's Note:

Several recent IISD publications can be found on the IISD website. As earlier noted, Investment Treaty News inaugural Year in Review edition, for the 2006 calendar year, is now available for download. This publication offers a synopsis of key developments during 2006, as well as the best-available figures on the volume of treaty-based investment arbitrations initiated in the 2006 calendar year.

In addition, IISD has also published documents and a meeting report from its inaugural Developing Countries Investment Negotiators Forum. This event brought together 30 negotiators from 25 countries to share perspectives and hear from a roster of experts in the field.

Finally, an IISD discussion paper on the ongoing revision of the UNCITRAL arbitration rules offers a series of targeted suggestions for bringing more transparency – as well as other improvements – to these arbitration rules commonly used in investor-state disputes. The paper is intended to inform discussions which will take place in New York City from February 4-8 at a meeting of the relevant UNCITRAL Working Group.

All of these publications can be found in the “What’s New” box at http://www.iisd.org/investment

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Arbitration Watch:
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1. Tanzania declares victory in contractual dispute with water services company,
By Damon Vis-Dunbar and Luke Eric Peterson

A tribunal delivered an award this week in a dispute between a subsidiary of the British water services company Biwater and a publicly-owned water and sewage agency in Tanzania.

The arbitration was one of two proceedings to arise after Tanzania severed its contract with City Water, a company incorporated in Tanzania and jointly owned by the UK-based Biwater and Gauff Ingenieure GmbH & Co. KG-JBG, a German company.

The contractual arbitration had been initiated by City Water, who alleged that the Dar es Salaam Water and Sewerage Authority (DAWASA) unfairly broke their contract for operating the Dar es Salaam water and sewage system. Meanwhile, DAWASA, and Tanzanian Government officials, accused the foreign-owned consortium of failing to make the investments in infrastructure that had been agreed to under the contract.

In the arbitration ruling handed down this week, a three member tribunal, constituted under the UNCITRAL rules of arbitration, unanimously dismissed City Water’s claims and upheld DAWASA’s counterclaims, according to the Government of Tanzania.

“The tribunal found that City Water’s performance was worse than DAWASA’s performance before the Lease Contract went into effect,” says a statement from the Government of Tanzania.

According to a Tanzanian Government press release, DAWASA was awarded 13.8 billion Tanzanian shillings (approx. $12 million USD) minus City Water’s performance bond, for a net award of some 7 million shillings (approx. $6 090 000 USD). Damages of 2 billion Tanzanian shillings (approx. $1 740 000 USD) was also awarded in costs.

Arbitrators in the UNCITRAL proceeding were Julian Lew QC, Michael Lee, and Chairman Laurence Craig.

Biwater was not immediately available for comment, and a copy of the award has not been released to the public.

ICSID ARBITRATION BETWEEN BIWATER AND TANZANIA STILL PENDING

Biwater entered Tanzania following a move by various development agencies,

including the World Bank and the European Development Agency to back a project to improve water and sewage services in and around Dar es Salaam. Foreign donor funding for the project was contingent upon a private company taking over from the state-owned corporation that had previously managed the services.

A second international arbitration involving Biwater and the Government of Tanzania remains ongoing. In that arbitration, which began in 2005 under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), Biwater alleges that Tanzania's treatment of Biwater breaches protections contained in the UK-Tanzania bilateral investment treaty.

Tanzania had pushed for the treaty arbitration and the contract arbitration to be merged into a single proceeding, however Biwater had rejected that offer.*

In 2006, the tribunal hearing the ICSID claim issued an Order imposing explicit confidentiality obligations on certain documents in the case, after Biwater had complained of the unilateral release by Tanzania of certain documents in the case.**

Sources:

* Various interested third-parties, including the International Institute for Sustainable Development, have made amicus curiae legal arguments to the tribunal in the ICSID case, including a bid for more information and disclosure of documents. See previous ITN reporting for more details: "Tribunal to permit NGO submission in Biwater-Tanzania water arbitration", By Luke Eric Peterson, Investment Treaty News, March 2, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_mar2_2007.pdf

** For more on the tribunal's Order see: "ICSID tribunal issues order on confidentiality in Tanzanian water concession dispute", By Luke Eric Peterson, Investment Treaty News, October 19, 2006 available on-line at: http://www.iisd.org/pdf/2006/itn_oct19_2006.pdf

2. Award in Berschader v. Russia BIT arbitration is finally made available to public, By Luke Eric Peterson

Some 18 months after having been rendered, an arbitral award has come to public light in a dispute between a pair of Belgian construction firm owners and the Russian Federation.

As earlier reported in ITN, Vladimir and Moishe Berschader had sued the Russian Government, alleging breach of the Belgium&Luxembourg-Russia bilateral investment treaty (BIT). (See: "Russia prevails in Stockholm arbitration with Belgian construction firm owners", Investment Treaty News, August 23, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_aug23_2006.pdf)

The Belgian pair accused the Russian Government of failing to pay for millions of Dollars in construction work performed on the Russian Supreme Court building,

ultimately driving the Berschader's Belgian company, Berschader International, into bankruptcy.

However, the majority of a three-member arbitration tribunal convened to hear the claim ruled in April of 2006 that they lacked jurisdiction over the dispute. Arbitrator Todd Weiler, a Canadian lawyer well-known for his string of NAFTA Chapter 11 claims against North American Governments, drafted a dissenting opinion in the case.

The two remaining members of the tribunal, Swedish lawyer Benjt Sjovall and Russian Professor Sergei Lebedev, determined that the Berschaders' indirect investments in Russia – via their Belgian-incorporated enterprise – were not owed protection under the terms of the Belgium-Russia BIT.

What's more, the same majority held that the dispute settlement provisions of the treaty restricted jurisdiction to those claims where there was a dispute over the amount of money owed in the event of expropriation; on this view, the tribunal lacked jurisdiction to examine whether an expropriation (or any other substantive breach of the treaty) had, in fact, occurred.

For their part, the claimants had sought to circumvent the latter jurisdictional obstacle by invoking the Most-Favoured Nation (MFN) treatment clause of the Belgium-Russia BIT, and insisting that they were owed the more generous arbitration provisions found in other BITs concluded by Russia with third parties.

However, the majority of the tribunal rejected this MFN argument. In so doing, the majority proffered the latest opinion in a growing body of diverging arbitral decisions touching upon the meaning and import of MFN clauses contained in BITs. (See article #2 below for a fuller discussion of the MFN angle)

INVESTMENTS NOT COVERED ACCORDING TO MAJORITY

The claimants maintained that they owned various investments entitled to protection under the Belgium-Russia BIT, including their shares in the now-bankrupted Belgian firm Berschader International, as well as the company's construction contract, property in Russia, and debts owed to the firm.

However, the majority ruled that the claimants had no "direct" investments in Russia. Their shareholdings in BI were not covered investments under the Belgium-Russia BIT, as they were investments in a Belgian (rather than a Russian) company; nor could the other assets – which were clearly in Russian territory - be characterized as direct investments, as they had been made via Berschader International, rather than by the claimants.

The tribunal was quick to note that Berschader International - as the direct owner of such assets - was fully entitled to bring an action under the Belgium-Russia BIT. However, as that firm was now bankrupt, Vladimir and Moishe Berschader lacked control over the company to bring such a claim. Thus, it remained for the tribunal to determine whether the two Belgian businessmen were entitled to bring a claim under the BIT for assets which they held indirectly.

Notably, the BIT explicitly extended protection to assets that were invested via a third intermediary country (for e.g. had the Berschaders elected to invest in Russia via a Dutch or Swiss company). At the same time, however, the treaty was silent on the question of whether Belgian shareholders in a Belgian enterprise could mount a BIT claim against Russia without having made any direct investments in Russia themselves.

The tribunal was left to interpret the silence of the treaty on this point. Ultimately, the majority would conclude that there was no reason to assume that Belgium and Russia had intended for the treaty to be read so as to protect indirect investments such as those in the present case. In so doing, the majority rejected the claimants' entreaties to read the BIT's preamble – which evinced a desire to promote investment between the two countries – as inviting an interpretation which would protect "all forms of investment – direct or indirect".

DISPUTE SETTLEMENT CLAUSE PRESENTS NARROW WINDOW

The majority identified another obstacle to the Berschaders' case: Article 10 of the Belgium-Russia BIT provided for investor-state arbitration only in case of disputes over the amount or mode of compensation owed in the event of an expropriation. As such, the majority added that it had no jurisdiction to hear disputes alleging breach of any other provision of the BIT, nor disputes concerning whether or not an act of expropriation actually occurred.

In other words, only where a domestic court or some other contractually-agreed forum had determined that an expropriation has occurred could the claimants then invoke the Belgium-Russia treaty in order to arbitrate over the amount of compensation owed for that expropriation.

In view of this jurisdictional roadblock, the claimants invoked the investment treaty's MFN clause in a bid to access more favourable arbitration options contained in other investment treaties concluded by Russia. However, that bid also proved unsuccessful (see next item).

Sources:

A copy of the award is available on-line here:
http://ita.law.uvic.ca/documents/BerschaderFinalAward.pdf

The award is also slated to be published, with a commentary, in a forthcoming issue of the Stockholm International Arbitration Review.

3. Majority frowns on using MFN clause to obtain wider arbitration options,
By Luke Eric Peterson

A recently-published arbitral award quashing a treaty-shopping bid is the latest addition to a long-line of investment arbitration rulings which have grappled with the meaning and import of the Most-Favoured Nation (MFN) clauses commonly found in

bilateral investment treaties.

MFN clauses differ from treaty, sometimes leaving considerable room for arbitrators to interpret their import – and to determine whether such clauses permit investors to access more favourable dispute settlement options contained in other international treaties. Some MFN clauses are silent as to whether they are meant to apply to all provisions in the treaty. Others may state explicitly that the MFN clause does or does not apply to all provisions of a treaty, including its dispute-settlement provisions.

In a somewhat puzzling fashion, the MFN clause at issue in the Berschader v. Russia arbitration (See previous item) provided that it applied to all matters covered by the treaty, however the treaty hastened to add that the clause applied "in particular in Articles 4, 5 and 6".

In view of the reference to "all matters", the Berschaders contended in their arbitration with Russia that the MFN clause entitled them to access more favourable arbitration options than those contained in Article 10 of the Belgium-Russia treaty. For instance, the arbitration provisions of the Denmark-Russia treaty – if applicable – provide for investor-state arbitration of any dispute "in connection with an investment".

The Russian Government retorted that the most-favoured nation treatment provided under the Russia-Belgium treaty was clearly limited to Articles 4, 5, and 6 of the treaty (i.e. fair and equitable treatment, expropriation, and free transfers).

Both parties, as well as the tribunal, recognized that a number of earlier arbitrations have grappled with the import of MFN clauses, and in particular their capacity to reach into the dispute settlement provisions of other treaties.

Indeed, the majority in the Berschader v. Russia case observed that significantly different approaches have been seen in past cases, with some tribunals permitting so-called treaty-shopping, and others cautioning as to the potential hazards of this "disruptive" tactic.

Generally speaking, one line of decisions follows the approach adopted in the oft-cited Maffezini v. Spain arbitration. In these cases, foreign investors have been permitted to "shop" for more favourable arbitration rules found in other investment treaties.

In the Maffezini case, an Argentine investor recognized that Spain gave more favourable treatment to investors from Chile - insofar as the Spain-Chile BIT did not require investors to spend 18 months in domestic courts prior to launching an international arbitration – and Mr. Maffezini convinced a tribunal that Spain's offer of MFN treatment to Argentine nationals should entitle those Argentine investors to the same more favourable procedural treatment offered to Chilean nationals under the Chile-Spain BIT.

A string of tribunals have since followed the gist of the Maffezini ruling, even if quibbling with elements of the tribunal's reasoning. For instance, in the 2006 ruling in the National Grid v. Argentine Republic, the tribunal smiled on a bid by the claimant

to detour around a duty to pursue its claims in the domestic courts for a period of 18 months before resorting to international arbitration; in that case, the tribunal held that a MFN clause which was silent as to whether it applied to dispute settlement could be assumed to apply to dispute settlement, thus permitting the claimant to access less time-consuming arbitration options available in other investment treaties.*

At the same time, at least three arbitral tribunals have taken the view that MFN clauses found in bilateral investment treaties – unless perfectly explicit on the point - do not provide foreign investors with license to shop for more favourable arbitration rules.

In the Salini v. Jordan arbitration at ICSID, the tribunal found no evidence that it was the common intention of Italy and Jordan to have dispute settlement matters covered by the MFN clause, and the tribunal declined to read the MFN clause so as to extend to dispute settlement.**

Several months later, in a February 8, 2005 ruling, the tribunal presiding in the Plama v. Bulgaria arbitration, would offer its own criticism of the reasoning employed in the Maffezini case, stating that "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."***

Some commentators, such as Prof. Lochnie Hsu of the National University of Singapore, writing in a 2006 law review article take the position that "(t)he smorgasbord of decisions in this area cannot be fully reconciled".****

Because there is no doctrine of precedent in international arbitration, Prof. Hsu adds that these diverging rulings "demonstrate one of the ongoing problems confronting international lawyers i.e. the lack of hierarchy among international tribunal decisions."

However, not everyone takes the view that the rulings of the various tribunals to interpret the meaning of MFN provisions are contradictory. For instance, some have argued that those tribunals casting a skeptical eye on the application of the MFN clause to matters of dispute settlement have been reacting to the scale of what certain foreign investors propose to "borrow" from other treaties - rather than issuing a blanket denial that MFN clauses might apply to dispute settlement in some cases.

On this line of thinking, a bid to detour around a mere "procedural" speedbump – such as the requirement in some treaties to pursue one's claim in domestic courts for a period of 18 months prior to pursuing international arbitration – can be clearly distinguished from a far more "radical" move to "borrow" or "transplant" a completely different consent-to-arbitration clause found in another treaty (as was at issue in the Salini v. Jordan or Plama v. Bulgaria cases).

However, such an argument looks somewhat strained given the rather sweeping statements made by several of the tribunals which have voiced concern over the Maffezini line of cases. For example, in the Salini v. Jordan case, the presiding tribunal stated flatly that the MFN clause of the Italy-Jordan BIT "does not apply

insofar as dispute settlement clauses are concerned."

Similarly, in the case of Plama v. Bulgaria, the tribunal declared that any intention on the part of states to incorporate dispute resolution provisions found in other treaties should be "clearly and unambiguously expressed".

Added to these skeptical voices are those of the majority in the Berschader v. Russia case, who held that MFN clauses will apply to the dispute-settlement provisions of a treaty only where the intention of the parties is clearly expressed.

MAJORITY IN BERSCHADER WANTS CLEAR SIGN OF MFN BREADTH

Ultimately, the majority in the Berschader case held that an MFN provision could only reach into the arbitration provisions of other treaties "where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties." In taking this view, the majority were quite explicit about diverging from the approach taken in the earlier Gas Natural v. Argentina arbitration – one of the cases in the Maffezini line of cases - where the presiding arbitrators had held that as "a matter of principle MFN provisions in BITs should be understood to be applicable to dispute settlement provisions unless it appears clearly that the parties intended otherwise."

When confronted with the text of the Belgium-Russia treaty, the majority in the Berschader case conceded that the BIT did indicate that the MFN clause applied to all matters covered by the treaty, but the majority added that it was clearly impossible to apply such a clause to all provisions of the treaty – for e.g. provisions on state-to-state dispute settlement - thus suggesting that the clause ought not be read too literally.

According to the majority, the parties to the treaty, anticipating this ambiguity, added the further clarification that the MFN clause would apply "particularly to Articles 4, 5 and 6" – provisions which the majority characterized as "the classic elements of material investment protection". Observing that investor-state dispute settlement was not mentioned in this clarification, the majority then asked whether the parties may have shared the view that investor-state arbitration was an essential element of investment protection nonetheless – and thus falling under the ambit of the MFN clause.

However, the majority could find no clear evidence that the parties intended this. What's more, the majority opined that when the treaty was concluded in 1989 "there was no generally accepted approach to the question of whether an arbitration clause is encompassed by an MFN provision."

In his dissenting opinion, arbitrator Todd Weiler countered that there was "no reason to suppose that – absent some specific treaty language – any given MFN provision should be more or less narrowly defined. In other words, MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement."

Sources:

* See: “Tribunal affirms jurisdiction and treaty-shopping in Argentine electricity case”, By Luke Eric Peterson, August 23, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_aug23_2006.pdf

** ITN’s earlier reporting on the Salini-Jordan jurisdictional ruling: “Tribunal rules in Jordan dispute; rejects extension of MFN to cover procedural issues”, By Luke Eric Peterson, January 21, 2005, available on-line at: “http://www.iisd.org/pdf/2005/investment_investsd_jan21_2005.pdf

*** ITN’s earlier reporting of the Plama-Bulgaria jurisdictional ruling: “Tribunal finds jurisdiction under Energy Charter, but reins in MFN shopping”, By Luke Eric Peterson, March 10, 2005, available on-line here: http://www.iisd.org/pdf/2005/investment_investsd_mar10_2005.pdf

**** Lochnie Hsu, “MFN and Dispute Settlement: When the Twain Meet”, Journal of World Investment & Trade, Vol.7, No. 1, February 2006, pp-25-37

4. CMS Energy urges Argentina to pay ICSID award,
By Luke Eric Peterson

The first foreign corporation to initiate an investment treaty arbitration in the aftermath of the Argentine financial crisis, US-based CMS Energy, is calling upon the Government of Argentina to make good on its obligations under the US-Argentina bilateral investment treaty.

In May of 2005, CMS Energy, an investor in Argentina’s natural gas transportation sector, prevailed in an arbitration with Argentina, with the presiding tribunal holding Argentina liable for several BIT breaches – and some $133 Million (US) in compensation.

CMS had alleged that Argentina breached contractual commitments, as well as provisions of the US-Argentina BIT, as a result of a freeze on contractually-agreed tariff adjustments and a series of emergency measures imposed on CMS’s investments in Transportadora de Gas del Norte (TGN) in response to the Argentine financial crisis.

Although Argentina sought to annul the 2005 award, in September of this year, a three-member ad-hoc committee selected by the ICSID upheld the operative portions of that award – while noting somewhat apologetically that its own limited powers of review prevented the committee from overturning certain legal errors identified in that award.*

Following this outcome CMS now points to the legally binding nature of the award and is urging the Argentine Government to pay the 2005 award. The company emphasizes that Argentina had committed in writing, in a letter to ICSID in 2006, to pay the award if its application for annulment proved unsuccessful. As earlier reported in ITN, on the basis of this letter from the country’s Attorney General, Argentina was

permitted to seek annulment of the CMS award without having to post a bond or financial guarantee for the amount owing.**

However, representatives of CMS say that they have not received payment on the award – despite some 4 months having elapsed since the annulment committee declined to overturn the award. Moreover, they say that requests for payment have been met with a request by Argentine Government officials that CMS pursue enforcement of the award in the Argentine courts – something which the US firm insists is legally unnecessary and fraught with uncertainty.

As of this writing, CMS has declined to pursue the matter in the Argentine courts, instead preferring to seek diplomatic support from US Government officials and to caution other prospective investors as to CMS's experiences in Argentina to date.

ARGENTINA FEELS LET DOWN BY ICSID PROCESS

For its part, the Government of Argentina has made no secret of its disappointment with the ICSID system which was set forth as a forum for resolving disputes arising under many of the country's bilateral investment treaties.

As has been reported in past editions of ITN, Argentina has criticized various facets of the ICSID system – including its handling of challenges to arbitrators (in cases of alleged conflict of interest or lack of impartiality) and the emergence in parallel ICSID cases of divergent or conflicting rulings on similar issues.

However, Argentina's frustration with the ICSID was stoked further in September when a 3 person ad-hoc annulment committee held that it lacked authority to overturn the CMS arbitration award, despite the committee's finding that certain legal errors may have had a "decisive impact on the operative part of the award".

In particular, the committee held that the original arbitration tribunal had failed to explore whether Article XI of the US-Argentina BIT (a provision which sets out several exceptions to the treaty) might have permitted Argentina to escape liability for treaty breaches suffered by CMS in the fall-out of the Argentine crisis.

Indeed, there had been certain rumblings as to Argentina's desire to pursue talks with the US government which might lead to a joint US-Argentina statement on the interpretation of Article XI of the US-Argentina bilateral investment treaty.

For its part, Argentina has insisted in various ongoing investment treaty arbitrations, that Article XI is a "self-judging" provision, which leaves to Argentina the discretion to determine under what circumstances it may act out of a state of necessity or emergency – a state wherein Argentina would not be liable for any breaches of the US-Argentina treaty.

Meanwhile, the US Government has long insisted that such exceptions clauses are self-judging, and as part of a recent exercise to revise its own draft model bilateral investment treaty stated this view expressly in its new model treaty.

However, arbitral tribunals have taken a different view when it comes to interpreting

the terms of the 1991 US-Argentina BIT – which does not expressly indicate that Article XI is meant to be self-judging. Arbitrators have held that they have the power to judge whether Argentina's actions during its financial crisis fall under this exceptions clause.

Although speculation has been rife that Argentina would explore an agreement with the US Government as to the "proper" interpretation of Article XI of the US-Argentina treaty, a CMS source says that the US government has denied the possibility of entering into such discussions. What's more, CMS says that it has had assurances from the US Government that it views the CMS-Argentina arbitration process as having run its course – resulting in a legal obligation for Argentina to pay CMS the amount ordered by the tribunal.

Tom Miller, a former Vice President with CMS, and a representative charged by CMS with collecting on the ICSID award, acknowledges that the recent comments of the CMS annulment committee – particularly that it lacked the full powers of an appeals court to overturn certain errors of law in the original award – have set off impassioned debate about the merits of the limited scope for review of awards available under the ICSID system. Still, Miller argues that observers should not lose sight of the fact that CMS spent $270 Million (US) investing in TGN. He stresses that the company lost that investment, but is now entitled under the ICSID system to collect on an award which has been rendered in its favour – and which now stands as a final and binding.

Mr. Miller said, "Argentina made a specific and irrevocable commitment to the Annulment Committee and to CMS (in 2006) that it would pay the award if it was not annulled. They need to keep that promise if they want to retain any credibility with future investors."

Sources:

* "Argentina must respect award despite ICSID finding that it has errors of law", By Luke Eric Peterson, Investment Treaty News, October 15, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_oct15_2007.pdf

** See: "Argentina permitted to challenge ICSID award without posting security", By Luke Eric Peterson, Investment Treaty News, September 20, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_sep20_2006.pdf

5. Activists lobby in support of Bolivia's withdrawal from ICSID,
By Damon Vis-Dunbar

Campaigners are lending their support to Bolivia after the country attempted to block the registration by ICSID of an arbitration claim lodged by Euro Telecom, a subsidiary of the Italian telecommunications firm Telecom Italia.

The non-profit Institute for Policy Studies (IPS) is circulating a letter for signatures, intended for the President of the World Bank, Robert Zoellick. The letter objects to the fact that the World Bank affiliated ICSID registered a claim by Euro Telecom,

despite Bolivia having argued that the Centre did not hold jurisdiction.

IPS cites three reasons why it is concerned about the Euro Telecom case proceeding to ICSID arbitration.

The first centers on the fact that Bolivia notified the ICSID Secretariat in May of 2007 that it wished to withdraw from the ICSID Convention. While arbitration specialists are divided as to the impact of the letter of withdrawal, Bolivia has argued that it does not give ICSID jurisdiction to hear the Euro Telecom claim.

"ICSID should respect the Bolivian government's decision to stop the ETI case from going forward. Failure to respect the Bolivian government's decision to withdraw from ICSID would only give further credence to the view that this is a system which undermines national sovereignty in favor of the interests of private corporations," states the IPS letter.

IPS also accuses ICSID of appearing "to make an example of Bolivia, at a time when other countries are questioning the investor-to-state arbitration system." IPS points to Ecuador, which recently notified ICSID that it is withdrawing jurisdiction for disputes involving non-renewable resources, as well as Venezuela, Argentina and Nicaragua, all of whom have publicly criticized the ICSID arbitration system.

Finally, the IPS letter says that the subject-matter of the Euro Telecom claim - namely telecommunication regulations - "is an issue with broad social implications that is inappropriate for an international commercial arbitration tribunal".

As ITN reported last November*, in response to Bolivia's request that ICSID not register the Euro Telecom claim, the Secretariat said the matter of determining whether the Centre held jurisdiction should, in this case, be left to a panel of ICSID arbitrators.

Sources:

*"ICSID registers arbitration claim in face of Bolivian objections", By Damon Vis-Dunbar, Fernando Cabrera Diaz and Luke Eric Peterson, Investment Treaty News, November 15, 2007

6. Argentina seeks to annul ruling in Vivendi water privatization dispute,
By Luke Eric Peterson

In keeping with a pattern established to date, the Republic of Argentina has moved to annul another ICSID award rendered in favour of a foreign investor.

A dispute with Vivendi Universal S.A., which dates to a 1990s privatization of the water supply in Tucuman province of Argentina, has been on the ICSID docket – in one fashion or another - for more than a decade.

Although the claim was dismissed by an ICSID tribunal in November of 2000, that ruling was later overturned by an ICSID annulment committee, thus paving the way

for a new hearing of Vivendi's claim.

Following resubmission of the claim, a new tribunal issued an award on August of 2007 in favour of Vivendi for some $105 Million (US). The presiding tribunal ruled that Argentina had failed to provide "Fair and Equitable Treatment" to Vivendi's local subsidiary, and that the French firm had suffered an expropriation contrary to the France-Argentina bilateral investment treaty.

(For a fuller accounting of the background to the case, and the August 2007 award see: http://www.iisd.org/pdf/2007/itn_aug30_2007.pdf)

Following the August 20, 2007 award, Argentina has exercised its right to seek annulment of the award. ICSID registered Argentina's request on December 19, 2007 and is currently in the process of selecting three individuals who will review the award on a set of limited grounds provided under the ICSID Convention.

7. German and Finnish investors prevail in banking dispute with Estonia, By Luke Eric Peterson

A consortium of German and Finnish banks have prevailed in an investment treaty arbitration with the Republic of Estonia.

The claim was brought against Estonia following non-payment of an approximately 15 Million Euro loan which had been made to a joint-venture Estonian company in the late 1980s – and which an Estonian State Ministry had allegedly vouchsafed would be paid.

Fuller details about the award have yet to come to public light. Although the award was rendered on November 19, 2007, it has yet to be released to the public. ITN understands that ICSID has been informed that Estonia has not agreed to the award being published by ICSID.

Under the ICSID rules, the consent of both parties is required before an award can be published by ICSID (for e.g. on the ICSID website or in ICSID publications); however either party enjoys a right to release and distribute the award on a unilateral basis. Indeed, in most ICSID cases, one or the other party releases an award on a unilateral basis, thus ensuring that it circulates widely and on the Internet.

Where one or both parties fails to consent to ICSID's publication of the award, it remains for ICSID to publish legal excerpts of the award – i.e. passages reflecting the key points of legal reasoning in the award - a possibility which has long been provided for under the ICSID arbitration rules.

In a recent statement to ITN, ICSID noted that this provision of the ICSID rules provides the Centre with the leeway to publish legal excerpts in cases where an award has not otherwise come to public light (e.g. where neither party has released the award to the public on a unilateral basis).

However, owing to presumed time-demands and pressures on ICSID staff, publication

of such legal excerpts has tended to lag. In several cases where neither party has released an award unilaterally, legal excerpts from those awards have yet to be published.

For example, an award rendered on October 7, 2003, in the investment treaty case of AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan has never been published – nor have legal excerpts appeared in any ICSID publications to date.

Likewise, awards rendered on February 9, 2004 in the investment treaty case of Patrick Mitchell v. Democratic Republic of Congo and on March of 2006, in the investment treaty case of F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago, remain unpublished in whole or in part.

However, in a statement to ITN, ICSID Deputy Secretary General Nassib Ziade emphasized that the Centre intends to publish promptly excerpts of those awards rendered under the new ICSID arbitration rules – and which otherwise have not been published.

Said Mr. Ziade, "Since its inception, ICSID has strongly promoted transparency, especially vis-à-vis the publication of decisions and awards rendered under its aegis, on the understanding that doing so would further the development of international investment law."

Apart from ICSID's authority to publish legal excerpts of those ICSID awards not otherwise published, it is the case that the overwhelming proportion of ICSID awards do circulate publicly – in contrast with investment arbitration awards rendered under other modes of arbitration, where lesser transparency prevails.

8. Claim against Venezuela dismissed amidst questions about authenticity of bonds, By Luke Eric Peterson

A US-based law firm representing the Republic of Venezuela is touting the dismissal of an ICSID claim, in a dispute over non-payment of promissory notes allegedly issued by a Venezuelan state-owned bank.

According to a press release issued by the law firm Arnold & Porter, an ICSID tribunal dismissed the claim by the Dutch company I&I Beheer after the company's law firm withdrew from the arbitration and the investor failed to file a reply to Veneuzuela's Counter-Memorial in the proceedings.

I&I Beheer accused Venezuela of violating the terms of the Netherlands-Venezuela bilateral investment treaty when it failed to pay the disputed promissory notes in question. For its part, Venezuela argued that the promissory notes were "entirely forged and part of an international criminal conspiracy to defraud the government."

According to Arnold & Porter, Venezuela has faced similar claims in other jurisdictions, and the firm is currently representing Venezuela in the defense of a similar claim in a U.S. federal court in the state of Ohio.

"Venezuela has contended in all these cases that the notes allegedly issued by BANDAGRO are fraudulent. Because the I&I Beheer ICSID arbitration is the first of the various BANDAGRO notes cases worldwide to reach resolution, this victory is an important one for Venezuela" says the firm.

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