Aguas del Tunari SA v. The Republic of Bolivia (ICSID Case No. ARB/03/2)

Introductory Note

The Decision on Jurisdiction reproduced hereunder was rendered on October 3, 2005, by a Tribunal comprised of Mr. Henri C. Alvarez, a Canadian national, appointed by the Claimant, Dr. José Luis Alberro-Semerena, a national of Mexico, appointed by the Respondent, and Professor David D. Caron, a U.S. national, appointed by the Centre pursuant to Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules.

The proceeding was commenced by Aguas del Tunari, S.A. (the Claimant), a company organized under the laws of Bolivia, and concerned a September 1999 Concession Contract for the provision of water and sewerage services to the City of Cochabamba, Bolivia. The Company claimed that the Republic of Bolivia (Bolivia) through various acts and omissions leading up to, and including, the rescission of the Concession in April 2000, breached various provisions of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia (the Netherlands-Bolivia BIT or BIT).

Bolivia raised objections to jurisdiction on two main grounds: First, on the ground that it did not consent to jurisdiction; and, second, on the ground that the Claimant was not a "national" of The Netherlands as defined in the BIT insofar as it was not "controlled directly or indirectly" by nationals of The Netherlands. In its Decision on Respondent's Objections to Jurisdiction, the Tribunal, by majority, concluded that the dispute was within the jurisdiction of the Centre and the competence of the Tribunal.

In asserting its objection that it did not consent to jurisdiction, Bolivia argued that the arbitration clause in the Concession Contract precluded ICSID jurisdiction; that Bolivia was not the proper party to the dispute; that all actions on which the Claimant based its claims, including the rescission of the Concession, were taken by the Water Superintendency of Bolivia; that the BIT's Article 2 recognizes the exclusive jurisdiction of Bolivian law over the dispute; that the transfer of the Claimant's stock from a Cayman Islands holding company to a Luxemburg company barred the jurisdiction of the Tribunal because the transfer should have been authorized by Bolivia; and that misrepresentation by the Claimant's representatives in regard to a proposed change of ownership barred the jurisdiction of the Tribunal.

The Tribunal concluded, *inter alia*, that the dispute settlement provision in the Concession Contract did not constitute an explicit waiver of ICSID jurisdiction; and there was no basis for implying such a waiver; that the proceeding was properly instituted against Bolivia instead of the Water Superintendency; and that it was premature to deal with the issue of attribution to the State of actions of the Water Superintendency, which would be determined in the merits phase. The Tribunal rejected the interpretation of the reference to Bolivian Law in Article 2 of the BIT as extending to aspects of Bolivian law that in turn would assert exclusive jurisdiction over disputes under the BIT. In regard to the alleged misrepresentations by the Claimants' representatives concerning a proposed change of ownership, the Tribunal observed that the proposed transaction never took place, and that it therefore did not need to determine the precise content of the representations complained of. With regard to the transfer of the Claimant's stock from a Cayman Islands holding company to a Luxemburg company, the Tribunal held that the migration of the holding company did not constitute a breach of the Concession Contract. The majority of the Tribunal rejected the argument that Bolivia had limited the scope of its consent to ICSID jurisdiction by way of Article 2 of the BIT and the structuring of the Concession.

With regard to the objection that the Claimant was not a Bolivian entity "controlled directly or indirectly" by nationals of The Netherlands as required by the BIT, Bolivia alleged that "control" refered to the ultimate controller, in this instance Bechtel, a U.S. company. This objection required the Tribunal to engage in a careful analysis of the upstream ownership and control of the Claimant. The Tribunal also looked to the negotiating history of the BIT; to the holdings of other arbitral tribunals concerning "control"; and to BIT practice generally of Bolivia and The Netherlands. In conclusion, the majority of the Tribunal found that the Dutch entities relied upon for ownership of the Claimant were not corporate shells set up for the purpose of obtaining ICSID jurisdiction, and that the control requirement under the BIT was met. Arbitrator Alberro's separate Declaration is incorporated in and also published with the Decision hereunder.

Aside from the substantive issues addressed by the Tribunal in the Decision on Jurisdiction, the Tribunal was confronted with numerous issues of procedure. For example, this was the first case under the ICSID Convention in which the Tribunal was faced with an application for third party participation in the proceeding. The Tribunal also sought and obtained a submission from the non-disputing State Party to the BIT, and addressed the issue of a late request for postponement of a hearing by a party.

Third Party Participation

Shortly after the constitution of the Tribunal, certain individuals and environmental non-governmental organizations filed a joint petition requesting the Tribunal to grant them standing to participate as parties in the proceeding, or if party status were to be denied that they be granted the right to participate in proceedings as *amici curiae*, by making submissions and having access to submissions of the parties and sessions in the proceeding.

The Tribunal having obtained the views of the parties and discussed the application at its First Session concluded that the "interplay of the ICSID Convention and the BIT, and the consensual nature of arbitration" placed the control of the issues raised in the petition with the parties; and that the agreement of both parties being absent in this case, the Tribunal lacked the power to join a non-party to the proceedings; to provide access to hearings to non-parties and, *a fortiori*, to the public generally; or to make the documents of the proceedings public.

The decision of the Tribunal on this petition was to be followed by the decisions in two separate cases, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/03/19) and Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17).[1] In both decisions, the tribunals, which were similarly constituted in both cases, noted that under ICSID Arbitration Rule 32(2), no other persons, except the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of a tribunal may attend hearings, in the absence of the agreement of the parties to the dispute. With regard to *amicus curiae* submissions, the Tribunal in each case concluded that Article 44 of the ICSID Convention grants it the power to admit *amicus curiae* submissions from suitable non-parties in appropriate cases; and that based on a review of amicus practices in other jurisdictions and fora, the exercise of that power should depend on: a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case, and c) the procedure by which the amicus submission is made and considered.

The differences between the present and the above-discussed, subsequent, decisions highlight the need that led to the amendments of ICSID Arbitration Rules 32 and 37, which came into effect on April 10, 2006. The amended Rule

---

[1] Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005, available at http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf; and

Order in Response to a Petition for Participation as Amicus Curiae of March 17, 2006, available at http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf.

32(2) provides that "[u]nless either party objects," the Tribunal may allow other persons to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. This amendment would suggest that an unequivocal affirmative consent of both parties is no longer necessary for the Tribunal to allow third parties to have access to hearings. With regard to *amicus curiae* submissions, ICSID Arbitration Rule 37(2), as amended, provides that "[a]fter consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute … to file a written submission with the Tribunal regarding a matter within the scope of the dispute." This amendment makes it clear that the decision whether or not to allow such submissions is at the discretion of the Tribunal concerned, although certain considerations specified by the rule will have to be taken into account in the decision making.

The Postponement of the Hearing on Respondent's Objections to Jurisdiction

Also of procedural interest is the Tribunal's determination with regard to the Respondent's request for the postponement of the hearing on jurisdiction, less than a month from the scheduled commencement of the hearing, an issue that has been coming up increasingly in ICSID cases. The Respondent in its application cited "certain events in Bolivia over the past several weeks [that] have required the priority attention of the Bolivian Government," and which would continue to do so for some time. The Claimants in their objection stated that the request was "unnecessary and unreasonable" (para. 30). In its decision which was communicated to the parties in its Procedural Order No. 2, the Tribunal concluded that, as a general matter, a request for postponement of a hearing by only one of the parties is not to be granted without sufficient cause, especially if the request is made on short notice. According to the Tribunal, the ability of counsel to consult with its client can be a sufficient cause to postpone a hearing only in extraordinary circumstances. The Tribunal emphasized that, in this case, the possibility that Bolivia's counsel did not have adequate opportunity for final consultations with necessary Bolivian officials constituted sufficient cause to postpone the hearing. While acknowledging that requests for extensions and postponements may be employed as dilatory tactics the Tribunal noted that up to the point of the application in this case, each party had fully met all the requests of the Tribunal including those for written submissions.

The Tribunal's Post-Hearing Inquiry to The Netherlands, the Non-Disputing State Party to the BIT

Another significant procedural aspect of the jurisdictional phase of this case is the fact that the Tribunal, acting under the general provisions of ICSID Arbitration Rule 34, sought the views of the non-disputing State Party to the

BIT being interpreted. A copy of the Tribunal's letter to the Dutch Government in this regard is annexed and published with the Decision. Under Article 1128 of the NAFTA, it is a matter of course for Tribunals to receive submissions from NAFTA States non-parties to the dispute. It is, however, uncommon in BIT proceedings, generally. Following the decision in SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), the Swiss Government issued a note on the interpretation of the relevant article in the Pakistan/Switzerland BIT. Being *ex post facto*, the note was of course not a factor in that tribunal's decision.[2]

In this case, the Tribunal's inquiries related to public statements made by officials of the Government of The Netherlands regarding various provisions of its BIT with Bolivia, which the parties had raised in the course of the proceeding in evidence and arguments. The Tribunal received a response from the Government and provided the parties with an opportunity to provide comments thereon. More recent treaties that provide for investor-State arbitration, contain provisions similar to NAFTA Article 1128. Further, in providing for submissions by an "entity that is not a party to the dispute," ICSID Arbitration Rule 37(2), as amended, now makes it all the more possible for non-disputing State Parties to treaties to be able to provide submissions to tribunals that are interpreting those treaties.

Following the Decision on the Respondent's Objections to Jurisdiction, the parties in the present case agreed on the settlement of their dispute and the proceeding was discontinued pursuant to ICSID Arbitration Rule 44 on March 28, 2006. With the consent of the parties, the Decision is also published in English and Spanish on the ICSID website at http://www.worldbank.org/icsid/.

Ucheora Onwuamaegbu
Senior Counsel, ICSID

[2] The note is published as an attachment to *ICSID's Tribunal's Interpretation of BIT Article 11 Worries Swiss*, Vol. 19, No. 2 Maeley's Int'l Arb. Rep. 1 (2004).