EMBAJADA DE BOLIVIA

Washington DC, October 29th of 2007

Ms.
Dr. Ana Palacio
Secretary General
International Centre for Settlement
of Investment Disputes (CIADI – ICSID)
1818 H Street N.W.
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Phone No. (202) 458-1534
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Re: *Request for Arbitration filed by ETI Euro Telecom International, N.V.*

C.c. Robert B. Zoellick
President of the World Bank
Washington, DC 20433 USA
Phone No (202) 473-1000
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Dear Ms. Secretary General,

I am writing to express the position of my government with regard to the Request for Arbitration (the "Request") filed with the International Centre for Settlement of Investment Disputes (ICSID or the "Center") by the company ETI Euro Telecom International, N.V. (the "Company") and sent by you on the past October 15th, which we consider to be manifestly outside the jurisdiction of the Centre and which, therefore, should not be registered.

I. Manifest Lack of Consent

The Request should not be registered because it is manifestly clear, from the content of the Request itself, that the consent needed to submit the alleged dispute to the Centre was never perfected.

A. The Letter Sent by the Company on April 30th of 2007

The lack of consent is evident and recognized by the Company itself, which thus presents two untenable theories about the date when it supposedly gave its consent for submitting the case to

the Centre. First, the Company claims that it gave its consent on April 30th of 2007, in a letter bearing that date, attached to the Request as Annex C. However, this letter, which is an integral part of the Request, says absolutely nothing about the Centre, about the arbitration or about the consent to submit this or any other dispute to the Centre; this conclusion can be confirmed by simply reading the letter. At no point does the Company explicitly express its consent to submit the dispute to the Centre. According to Professor Schreuer, in order to be valid, consent must be in writing and explicit: "Consent in writing must be explicit and not merely construed"[1] [*p. 94. par. 248; (a)*].

The mere existence of a provision in a treaty about the resolution of controversies, which includes the possibility to submit disputes to the Centre, does not suffice to establish the investor's consent. According to Professor Schreuer: "The treaty provision cannot replace the need for consent by the foreign investor"[2] [*p. 218, par. 302, (a)*]. Although the letter dated April 30th mentions the Bilateral Investment Treaty between Bolivia and the Netherlands, it makes no reference to the Centre, or to the arbitration, or to the treaty provision about the Centre.

Consequently, it is manifestly clear, from the Request itself, that the letter dated April 30th of 2007 does not constitute any expression of the consent required to submit this dispute to the Centre. And, it should be repeated, this is so recognized by the claimant.

This is why the Company presents a second theory about the date of consent, which is its true argument: that it gave its consent to submit the dispute to the Centre on October 12th of 2007, the date when the Request for Arbitration was filed. It is clear that the Request for Arbitration dated October 12th is the first written and explicit expression of the consent by the Company to submit its claims against Bolivia to the Centre.

B. The Denunciation of the Convention made on May 2nd

By October 12th of 2007, the Company was the only party to give its consent to submit the dispute to the Centre, since, by that date, consent on the part of Bolivia no longer existed, it being manifestly clear, from the information contained in the Request, that Bolivia withdrew its consent to submit disputes of any kind to the Centre on May 2nd of 2007. As admitted by the Company: "On May 2, 2007, the World Bank, the depositary of the Convention, received the Respondent's notice of denunciation of the Convention".[3] [*p. 2, par. 7, (a)*]. The denunciation was communicated to the President of the World Bank through a letter sent by the Honorable Minister of Foreign Affairs and Cult, who said: "I am writing in order to inform you that, under article 71 of the Convention on Settlement of Investment Disputes between States and Nationals

[1] [T.N.: in the original, this footnote contains the quotation in English, which is translated into Spanish in the body of the text.]

[2] [T.N.: in the original, this footnote contains the quotation in English, which is translated into Spanish in the body of the text.]

[3] [T.N.: in the original, this footnote contains the quotation in English, which is translated into Spanish in the body of the text.]

of Other States, the Republic of Bolivia denounces this Convention, which it joined on May 3rd of 1991 and that came into force for Bolivia on July 23rd of 1995".

While the text of Article 71 states that "The denunciation shall take effect six months after receipt of such notice" and, therefore, the denouncing State remains a party of the convention and bound to its obligations for a term of six months after the receipt of its denunciation, in no way does this text imply that consent by the denouncing State to submit disputes to the Centre remains in force after its denunciation.

This is confirmed by Professor Schreuer in his masterly work about the Convention, where, in his comments to Article 72[4], he points out:

> *4. In order to benefit from the continued validity under Art. 72,* ***consent must have been given before the denunciation of the Convention*** *or exclusion of a territory. Consent is only perfected after it has been accepted by both parties. Therefore, a unilateral offer of consent by the host State through legislation or a treaty under Arts. 70 or 71 would not suffice.* ***The effect of the continued validity of consent under Art. 72 would only arise if the offer was accepted in writing by the investor before the notice of denunciation*** *or exclusion.*
>
> *5. The provision in Art. 71 that the denunciation of the Convention by a State party will take effect only six months after notice has been give,* ***does not afford an opportunity to perfect consent before the expiry of this time limit. In particular, an investor's attempt to accept a standing offer of consent by the host State that may exist under legislation or a treaty during this period will not succeed.*** *In order to be preserved by Art. 72 consent must have been perfected* ***before the notice of denunciation*** *or exclusion* ***was received.*** *" (p. 1286, (a))*[5]

Professor Schreuer's conclusions are evidently logic and correct, since they are based on the recognition of two indisputable points: that a sovereign state cannot be forced to submit a dispute to arbitration without its consent, and that a denunciation of the convention is necessarily [T.N.: prose unclear] and is, for that reason, a withdrawal of its consent to submit disputes to the Centre. It would not be reasonable to adopt a position to the contrary, since it is undeniable that the State has a right, not only to denounce the Convention, [T.N.: prose unclear], pursuant to Article 25, "notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre", with immediate effect, once it has ratified the Convention, "at any time thereafter".

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[4] "Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."

[5] 4. [T.N.: in the original, this footnote contains the quotation in English, which is translated into Spanish in the body of the text.]

Of course, Article 25 states that "When the parties have given their consent, no party may withdraw its consent unilaterally", that is, once consent has been perfected, neither of the parties can withdraw it unilaterally. However, as we have seen, by May 2nd of 2007, consent had not been perfected because the Company had not consented explicitly to submit the alleged dispute to the Centre. Therefore, by such date, no impediment existed for Bolivia to withdraw its consent. On the contrary, according to the Convention, Bolivia had full right to withdraw its consent at any time before the [T.N.:unclear prose] expressed its consent to submit this dispute to the Centre explicitly and in writing, which did not occur until the Request for Arbitration was filed on October 12th.

The Executive Directors of the Centre stated in the Report about the Convention that "Consent by the parties is the cornerstone on which the Centre jurisdiction rests" [*par. 23*] and added that, for the Centre to have jurisdiction on a dispute, "consent must exist at the time when the request is submitted to the Centre". [*par. 24*]. It is important to highlight that, in order to support the latter phrase, the Executive Directors quoted articles 28(3) and 36(3) of the Convention, the same articles stating that a Request for Arbitration must not be registered if the dispute is "manifestly outside the jurisdiction of the Centre". In other words, if consent by both parties does not exist at the time when the Request is submitted, the dispute is necessarily outside the jurisdiction of the Centre. Thus concludes Dr. Amerisinghe, who quotes Articles 28 and 36 to say: "consent by both parties must exist at the time of the submittal of a request for conciliation and arbitration to the Secretary General. If the request fails to show that both parties have given their consent, the Secretary General must reject it" [(a)][6].

C. The Request Submitted on October 12th of 2007 Did Not Perfect Consent

It is manifest that the first explicit expression of the required consent by the claimant is the Request for Arbitration dated October 12th of 2007, which was submitted more than five months after the denunciation and the withdrawal of consent by Bolivia. Schreuer's words are worth highlighting [*par. about the obligations of the Contracting State during the six months after the denunciation of the Convention*]: "***An investor's attempt to accept a standing offer of consent by the host State that may exist under legislation or a treaty during this period will not succeed. In order to be preserved by Art. 72, consent must have been perfected before the notice of denunciation*** *or exclusion* ***was received.***" [*p. 1286, (a)*][7].

For this reason, precisely, the alleged dispute submitted by the Company in its Request for Arbitration cannot be registered. According to the information contained in the Request itself, no consent by both parties existed at the time when the Request was submitted, on October 12th of 2007. Since Bolivia had denounced the Convention on May 2nd of 2007 and, therefore, the withdrawal of its consent on the same date, more than five months before the Request for

[6] Amerishinghe, C.F., "The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation, 9 Vanderbilt J. of Transitional Law, 793, 810 (1979)

[7] [T.N.: in the original, this footnote contains the quotation in English, which is translated into Spanish in the body of the text]

Arbitration was submitted, it can be asserted that, by October 12th, only ETI had expressed its consent. The required perfection of consent did not exist then and it does not exist at present.

This is why the company desperately advances the previously discussed theory that it gave its consent to submit the dispute to the Centre on April 30th of 2007, that is, two days before the denunciation by Bolivia. This effort by the Company to argue that the date of its consent was April 30th clearly implies its recognition that, no consent having been perfected by that date, that is, before May 2nd, the possibility to perfect such consent no longer exists. Given the foregoing, it has been clearly demonstrated that the letter dated April 30th is not, and cannot be, an instance of consent to submit the dispute to the Centre. And, after May 2nd, it is impossible to perfect the consent required for the Centre to have the power to exercise its jurisdiction.

It is indisputable that no consent by the company existed before the denunciation by Bolivia on May 2nd of 2007. Any expression of consent by the company after that date was necessarily untimely and insufficient to perfect the consent required for the Centre to register the Request. As a result, the information contained in the Request clearly establishes that the consent required for the Centre to exercise its jurisdiction does not exist and that, therefore, the dispute is manifestly out of its jurisdiction and cannot be registered.

II. The Lack of a Real Dispute

It is clear, by reading the Request for Arbitration, that this is a dispute contrived by the Company, not based on the real measures taken by the Government of Bolivia. In fact, the Bolivian State did not take any measure against the investment by ETI Euro Telecom International, N.V., nor did it fail to comply with its international commitments.

A. No Expropriation Occurred

According to the Company, Supreme Decree No. 29087, dated March 28th of 2007, was part of a process of expropriation of its interests; however, it is evident that this allegation is false and that, from the information contained in the request itself, the requirement necessary to submit to the Centre a legal dispute about an investment is not met.

As part of a new State policy, reflected in a successful process of renegotiation of oil contracts that had also been subscribed in the capitalization process, the Bolivian government ordered, by Supreme Decree N° 29087, dated March 28th of 2007, the creation of an Ad Hoc Committee in charge of the negotiations with the Euro Telecom International N.V. (ETI) corporation, in order to recover the Empresa Nacional de Telecomunicaciones Sociedad Anónima –ENTEL S.A.– for the State, in a legitimate action which is absolutely normal in business, especially because these negotiations were carried out "(...) with the sole purpose of defining the conditions to recover the Company". It should be remembered that the Bolivian government successfully recognized 44 oil contracts, exercising its legitimate right as a partner and without violating any international agreements and commitments. It is absolutely unjustified for the Company to consider this legitimate administrative and commercial act as a threat to its investment.

This assertion is recognized by the Company, since, in section 36 of the note it submitted to the ICSID, it acknowledges that the Bolivian government "published a national development plan that provided the renationalization of several formerly state-owned companies that had been privatized under the capitalization program under Act No 1544, enacted on March 2nd of 1994" [*(a)*] and that this plan "(...) provided that the renationalization would be carried out through administrative actions through the return to the State, where applicable, of the shares managed by the pension fund administration companies on behalf of the elderly citizens, and through the purchase of the additional shares necessary to give the State at least 51% of the shares in each company" [*(a)*].

The order to start negotiations cannot be interpreted as an expropriation. It is exactly the opposite. It is evidently an indication of the policy of the State to acquire the interests only through an agreement with the owner, that is, with the consent by the partner. Negotiating an agreement cannot be mistakenly equated with an expropriation. If this was so, the oil companies would have announced actions aimed at filing for arbitration and this did not happen and is not happening at present, so we consider that there exists extreme susceptibility on the part of the company, which should not move it to file a request before an international arbitration body.

Regarding Supreme Decree N°29101, whose main aim is "to transfer to the Bolivian State, for no consideration, the shares of stock of the Bolivian citizens", this only affects the stock that always belonged and belong to the Bolivian people, not affecting, either directly or indirectly, the shares of stock held by ETI partners; therefore, there are no grounds for the assertion by the Company, in section 49, that this Supreme Decree "is directly detrimental to the security of the investments of the Complainant in Bolivia" [*(a)*]. It must be clarified that the Bolivian Government is not interested in the depreciation of the shares of stock of a company in which, together with its Bolivian citizens, has a 50% stake.

B. The Failure to Attach the Supreme Decrees which Allegedly Affected the Investment

It is objectionable that the Company should not attach the Supreme Decrees or any of the documents it mentions in the grounds presented regarding the alleged "measures against the investment", a fact which results in a request for the registration of a defective arbitration demand, given that the lack of such documents, according to Rule 2, subsection 1(e), which states that "it is mandatory (...) to attach information about the matters which constitute the object of the dispute, indicating that the parties have dispute of a legal nature directly arising from an investment", allows the company to depict unreal situations of unfair treatment based on the distortion of measures of an internal administrative kind which do not imply any legal consequences against it. As a result of all this, the failure by the Company to attach to its request the Supreme Decrees and other documents which supposedly constitute the base for their claims is one more reason why the Centre should reject the Request.

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C. The Lack of Damage to the Rights of the Investor

Regarding the abovementioned Supreme Decree N°29100, which implies the abrogation of Supreme Decree N°28172, dated May 19th of 2005, and the Ministerial Decision N°194, dated August 12th of 2005, and any other decision based on the abrogated Decree, the Company makes the false assertion that the Bolivian government "intends to declare Supreme Decree 29172 unconstitutional and illegal" [*(a)*], since the Bolivian government does not have the power or the jurisdiction to do so. Besides, the Bolivian State intention to signal some facts as "punishable in accordance with the national order, as a result of which they must be processed through the appropriate procedure" [*(a)*] indicates a legitimate interest to investigate facts which were unclear in the administration of the state, and the investigation of irregularities committed by previous government administrations is a state obligation in the framework of the struggle against corruption, and should not be a matter for arbitration between the Bolivian State and any of its investors.

Regarding the tax inspections that the National Revenue Service is reportedly performing in ENTEL S.A., it should be pointed out that these are applied to both national and foreign companies and do not constitute discriminatory treatment; in addition, the Company, like any other company, has the unimpeded possibility to defend itself with all its argument, as it is doing at present. In no way can legitimate tax inspection actions started against national and foreign companies in the entire territory of Bolivia be construed as being "in order to coerce the Complainant into waiving its actions without compensation of any kind" [*(a)*] as the Company states.

These actions of internal administrative nature related to the stake of the Bolivian State in its capitalized companies cannot be considered as an expropriation or as unfair or discriminatory treatment, since they have in no way modified its ability to operate, administer, maintain, use, enjoy or dispose of the Empresa Nacional de Telecomunicaciones (ENTEL S.A.).

III. Conclusions

In brief, there is no doubt that the request by the company is manifestly outside the jurisdiction of ICSID. As we indicated above, in the first part of this letter, there is no consent. As we indicated in the second part, no real dispute exists. The alleged dispute does not exist; it has been totally invented because there was no expropriation or any other measure taken by the Bolivian government that could have affected the rights of the investor.

In denouncing the Convention, exercising nothing more than its sovereign rights, Bolivia does not waive the arbitration, but chooses to exit a system that, according to its experience and deeply considered point of view, suffers of serious defects. It is no secret that Contracting States, eminent legal authorities and even arbiters are expressing observations about and questioning the equity, consistence and economy of the Centre arbitration procedures. Bolivia offers and will offer arbitral remedies to the Company and to all investors, in the framework of its national regulations and of international regulations.

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As we stated above, the cornerstone of arbitration is consent by the parties. For a system based in consent by the parties to be fair, consistent and effective, it is essential that such consent be consolidated free of perceived or actual coercion. If consent is defective, it can only contribute to an increasing delegitimation.

Given the evident lack of jurisdiction, the Secretary General should not hesitate to reject the request for registration of arbitration submitted by ETI.

Very respectfully yours,

Gustavo Guzmán
Ambassador of Bolivia in the United States

(a) *Translator's Note: here, in the original in Spanish, the author states that he has translated the quotation into Spanish himself.*