

Investment Law and Policy Weekly News Bulletin, April 11, 2003

Published by the International Institute for Sustainable Development:
www.iisd.org

Contents at a Glance:

Negotiations Watch

1. WTO Working Group on Trade and Investment to Meet Next Week
2. Asia-Pacific Region Investment Negotiations Round-Up

Arbitration Watch

3. Methanex Arbitration Under NAFTA to be Opened to Public
4. Investors Emboldened by Arbitral Verdict Against Czech Republic
5. ICSID Sees Two New Treaty Arbitrations

Negotiations Watch:

1. WTO Working Group on Trade and Investment to Meet Next Week
By Luke Eric Peterson

Next week the WTO working Group on Trade and Investment will convene in Geneva for its first session of 2003.

Previous meetings of the group have tackled various issues set out in the 2001 Doha declaration and which need to be clarified in advance of the next Ministerial Conference of the WTO in September of 2003. The working group last met in December of 2002, and the report of that session is now publicly available from the WTO web site.

Several discussion documents have been tabled by member states in advance of next week's meeting. Canada has introduced two short submissions on transparency and on the inter-relationship between the various proposed elements of any WTO agreement on investment. Meanwhile,

Japan has put forward a document which addresses the relationship between any proposed WTO agreement and the WTO's General Agreement on Trade in Services (GATS), which contains certain investment disciplines related to the services sector. Finally, the European Commission has also tabled a concept paper on "policy space for development". All of these documents are available through the WTO's on-line documents service.

The EC's submission on "policy space for development" looks to be particularly controversial, as it challenges developing countries to provide evidence that a proposed multilateral agreement on investment would jeopardize the ability of developing countries to regulate foreign investment in a flexible manner.

According to the EC, a number of developing countries contend that existing bilateral investment treaties accord more flexibility because they rarely offer foreign investors a right to market access. As such, host governments retain control over the admission of investment to their territory, and may exclude those investments which may be deleterious to domestic economic development policies.

The EC discussion paper counters that developing countries would retain the ability to make admission decisions under current proposals being mooted at the WTO. Although a proposed agreement might grant investors rights of admission, nevertheless, the EC maintains that host governments could choose which sectors of the economy would be shielded from any such undertaking, along the same lines as the WTO's existing General Agreement on Trade in Services.

Notably absent from the EC's paper, and from the WTO working group's broader discussions on investment has been an analysis of what lessons other (non-WTO) investment agreements may hold for negotiators of a multilateral agreement. As is routinely noted in the INVEST-SD Bulletin, arbitration under the numerous bilateral investment treaties has surged in the last several years. The bulk of these cases are still ongoing before Tribunals, and can be expected to flesh out the actual content of standard investment treaty provisions such as: National Treatment, Most-Favored Nation Treatment and Guarantees against Expropriation.

A number of cases are known to implicate sensitive domestic policy areas such as water & sewage service regulation or environmental policy-making. It remains to be seen how these cases might affect the ability of developing countries to regulate the activities of foreign investors. To date, the reports of the WTO Working Group on Trade & Investment indicate that WTO member states are paying very scant attention to the usage of existing investment treaties.

Nor has the Working Group determined how the existing bilateral and regional treaties would relate to any prospective multilateral agreement. In its annual report on the Working Group's activities for 2002, the WTO Secretariat noted that this question still has yet to be "examined and clarified".

It might be presumed from comments made by various Western nations that there are currently no plans for these existing treaties - whose commitments often go beyond those mooted in the WTO context - to be decommissioned or phased out. Indeed, in one of its two submissions to the Working Group this month, Canada adverts to its "keen appreciation of the value of these (bilateral) agreements."

Sources:

All WTO WGTI documents can be obtained through the WTO website:
www.wto.org

2. Asia-Pacific Region Investment Negotiations Round-Up By Luke Eric Peterson

Singapore and Australia have concluded a broad-based free trade agreement which includes a chapter on investment rules. The agreement will grant national treatment to investors from the other territory, with the exception of industries which have been specifically excluded.

No changes were made to Australia's foreign investment screening processes. These processes have occasioned some debate within US Trade policy circles, as the US and Australia look to negotiate their own FTA. US industry has expressed a desire for Australia to dispense with the screening mechanism. (See " ")

The so-called SAFTA was signed in February of 2003 and is now headed for parliamentary approval. It is expected that the agreement could enter into force by mid-2003.

In other developments in the Asia-Pacific region, Japan and Vietnam recently announced that they have come to terms on the outlines of a bilateral investment treaty. The two sides launched negotiations in March of 2002. Although Vietnam has expressed interest in a broader free trade agreement with Japan, the latter has indicated that an FTA should be part of a broader effort on the part of Japan and the Association of South East Asian Nations (ASEAN) to negotiate a free trade pact.

ASEAN is also engaged in negotiations with the European Union on trade & investment. Last week, EU trade commissioner Pascal Lamy announced plans for a Trans-Regional EU-ASEAN Trade initiative (TREATI) on his visit to Laos. Under the plan, the various states will pave the way for a free-trade pact by first agreeing to address certain regulatory barriers in areas such as: investment, services and technical barriers to trade, such as health and safety standards.

Sources:

"Europe Wins over S.E. Asia With Free Trade Scheme", By Dominic Whiting, Reuters, April 4, 2003

"Japan, Vietnam concur on Investment Accord", By Junko Takahashi, The Japan Times, April 8, 2003

For more information on the Singapore-Australia FTA see:

http://www.dfat.gov.au/trade/negotiations/australia_singapore_agreement.html

Arbitration Watch:

3. Methanex Arbitration Under NAFTA to be Opened to Public By Luke Eric Peterson

According to sources, the Tribunal hearing the dispute between the Canadian-based Methanex Corporation and the United States has ruled that future substantive hearings of the Tribunal will be open to the public. Legal Counsel for the International Institute for Sustainable Development (publishers of INVEST-SD Bulletin) have petitioned for a right to intervene in that case in order to bring to bear arguments about the investor's challenge to California environmental regulations. The Tribunal had earlier indicated that it was "minded" to allow written interventions in the case.

However, because the UNCITRAL rules of arbitration provide that hearings will be held in-camera, the Tribunal held that it lacked the power to open the proceedings themselves to the public, unless the two parties to the arbitration desired otherwise. At a hearing last week, sources indicate that the parties to the arbitration gave their consent to override the in-camera nature of the substantive proceedings. It is understood that hearings on procedural matters relating to the

arbitration will remain in-camera.

Further developments will be notified in future issues of INVEST-SD Bulletin.

4. Investors Emboldened by Arbitral Verdict Against Czech Republic By Luke Eric Peterson

Following on the heels of last month's whopping arbitral award in favour of Centreal European Media (CME), (see "Czech Republic Hit With Massive Compensation Bill in Investment Treaty Dispute", INVEST-SD Bulletin March 21, 2003) more than half a dozen other foreign investors are now threatening international arbitration against the Czech Republic.

Czech media outlets report that investors are brandishing these hitherto-obscure investment protection agreements in an effort to obtain leverage in their commercial disputes with the Czech Government.

Earlier this month, the Czech Government deposited some 360 million US dollars in a Swedish bank, in an agreement reached with CME. Under the terms of the agreement, the Czech Republic will not be liable for further interest of some 60,000 USD per day on the damages award, while it awaits the result of an appeal mounted in the Swedish courts.

Should the Swedish court fail to overturn the arbitral award, the Czech Republic will then hand over the deposited sum to CME. A decision is expected by the Swedish Courts on May. 15.

Meanwhile, a growing number of arbitrations loom on the horizon.

In the largest, the Japanese-based Nomura Bank is seeking upwards of 1 billion US dollars in damages in relation to the collapse of a Czech bank in which Nomura had invested. The case is already pending before a Stockholm arbitration tribunal.

An Italian firm, Invesmart, has also mooted arbitration in relation to its stake in a much smaller Czech bank which has gone bankrupt. The investor accuses the Czech Finance Ministry and the Czech National Bank of thwarting its restructuring plans for the troubled Union Banka.

Several other media-related cases are in the works, with another broadcaster, European Media Ventures looking to recoup losses related to its efforts to secure a private broadcasting license for its TV3 station. Luixembourg-based EMV is seeking 1 million US dollars in compensation, and its dispute is being closely monitored by the European

Commission which is preparing a report on the Czech Republic's investment climate ahead of that nation's accession to the European Union.

A second media firm, Mediaprint & Kapa (MKP) is threatening arbitration unless competition authorities break up an alleged newspaper publishing cartel which is starving the MKP press distribution company of business.

Other threatened arbitrations include:

- A claim by a Canadian firm, Frontier Petroleum Services, that its investment in an airplane manufacturer has not led to promised share rights in the Czech firm;
- An Israeli firm which has had its contract for a motorway construction terminated by the Czech Government;
- A claim by a British investor, William Nagel, arising out of an unsuccessful bid for a mobile phone network license;
- And a challenge by the Fischer Travel Agency to the seizure of one of its jets by customs authorities in lieu of back taxes owed by the firm.

Taken as a whole, these threatened arbitrations pose a concern for Czech politicians as they grapple with a spiralling national debt. A recent calculation by a Czech news agency noted that if investors were successful in all of these outstanding claims, the combined damages would amount to some 800 US dollars per Czech household.

However, even where investors are successful in their claims, it is unusual for them to be awarded the full costs which they seek. In the CME case, the investor was ultimately awarded less than half the compensation which it had claimed. Nevertheless, this amount constituted a whopping 1/3rd of a billion dollars (US) once interest was added to the sum.

Sources:

INVEST-SD Interviews

"Arbitration Time", By Petra Pasternak and Zuzana Kawaciukova, the Prague Post, April 10, 2003

"Czechs Also in Dispute Over Mobiles With British Investor", CTK Business News Wire, April 4, 2003

"Lost Arbitrations Would Cost Average Czech household KC 25,000", CTK Business News Wire, April 3, 2003

"EC Criticizes Czech Rep for its TV Market", CTK Business News Wire, March 16, 2003

5. ICSID Sees Two New Treaty Arbitrations By Luke Eric Peterson

The Washington-based International Center for the Settlement of Investment Disputes has seen two new arbitrations registered by investors this week. Both cases come against South American states, with one pitting a US investor against the Government of Ecuador and the other involving a Chilean investor operating in Argentina.

The case of Metalpar S.A. and Buen Aire S.A. arises out of an investment in an Argentine business which manufactures public transport vehicles. Sources indicate that the case is one of a number to emerge following the Argentine government's emergency economic measures. It marks the second time in as many months that two Latin American nations have become embroiled in bilateral investment treaty-based disputes.

In the other new case at ICSID, M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador, a US-based investor is using the US-Ecuador bilateral investment treaty to challenge the Government's treatment of a power plant investment.

Sources:

INVEST-SD Interviews

For a list of all pending cases at ICSID see: www.worldbank.org/icsid

INVEST-SD Bulletin is produced By Luke Eric Peterson in Boston, Massachusetts for IISD.

Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to lpeterson@iisd.ca

The opinions distributed in the INVEST-SD Bulletin do not necessarily

represent the views of the International Institute for Sustainable Development (IISD) or its funders.