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Negotiation Watch:

1. India-Singapore FTA inked, investment provisions include important innovations,
By Luke Eric Peterson

On June 29th, India and Singapore signed a Comprehensive Economic Cooperation Agreement, a broad-based bilateral agreement covering trade, investment, and services – the first of its kind for India.

The agreement provides for investment liberalization commitments on the part of India on a positive list basis (i.e. in sectors expressly listed by India). Notably, investor-state arbitration is not open to investors for disputes relating to establishment, acquisition or expansion of investments; in an annex to the agreement, India undertakes that if it should conclude a future agreement which does extend investor-state dispute settlement to the pre-establishment phase of investments, it will move to grant such privileges to Singapore.

In terms of protections for foreign investments at the post-establishment phase (i.e. once investments have been established in accordance with local law), the agreement includes guarantees of National Treatment for investors and investments alike. However, the agreement does not include any provisions for Most-Favored Nation treatment. Nor does the agreement provide for “Fair and Equitable Treatment” or “Full Protection and Security” – a notable omission at a time when an increasing number of investment treaty disputes are hinging on the host state’s duty to provide “Fair and Equitable Treatment” in particular.

According to Devashish Krishan, an Indian advocate working with the London office of law firm Vinson & Elkins, the agreement diverges notably from earlier Indian bilateral investment treaties in a number of respects, including with the decision to omit provisions on MFN and Fair and Equitable Treatment. He notes that the two parties have closed the door on potentially expansive interpretations of these provisions – as have been seen in a number of recent investor-state arbitrations - while, at the same time, providing quite high levels of investor protection by virtue of the commitment to accord foreign investors with National Treatment.

In terms of its other features, the India-Singapore pact includes protection against direct and indirect expropriation. Notably, the agreement also incorporates an exception similar to that found in recent US and Canadian agreements, which is designed to give further shelter to legitimate public welfare measures (for e.g. health, environment or safety regulations). In addition to this clarification lodged in an annex to the agreement, the main text also incorporates an exception for “public interest” measures in the body of the agreement at Article 6.10.

Also, the investment chapter adds general exceptions in a host of areas, including for legitimate measures necessary to protect public morals, public order, “human, animal or plant life or health”, safety, “national treasures of artistic, historic, or archaeological value”, or for the “conservation of exhaustible natural resources”.

Given India’s decision to supplement the agreement’s expropriation provisions with language designed to safeguard public welfare measures (for e.g. health and environment), it remains unclear whether the Government views its earlier treaties – which often omit such safeguards – as sub-standard or problematic. An inquiry with an economic official at India’s Mission to Canada, was unanswered at press time.

Several other novel features of the agreement are its decision to incorporate the provisions of the WTO Trade-Related Investment Measures (TRIMs) Agreement – including any future amendments – as part of the India-Singapore pact.

Also of interest is a provision which provides that India will consider “on a case-by-case basis requests from Singapore investors for exemptions from customs duties for import of capital goods, excluding consumables for the purposes of infrastructure projects in India.”

Investor-state arbitration is available under the agreement, giving investors the choice of arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID) or the UN Centre for International Trade Law (UNCITRAL).

The Agreement is slated to enter into force on August 1st of this year.

Sources:

India-Singapore pact: http://app.fta.gov.sg/asp/fta/ceca_text.asp

2. Cultural protection treaty drafted, relationship to trade and investment pacts indicated,
By Luke Eric Peterson

Negotiations have concluded on an international Convention for the promotion and protection of cultural diversity at the United Nations Educational, Scientific and Cultural Organization (UNESCO).

The Convention - which may harbour implications for the use and application of international economic treaties - is slated to be considered at a meeting of Ministers from UNESCO member-governments in October of this year.

A final draft of the Convention seen by this newsletter incorporates provisions for reconciling the agreement with other international instruments.

Article 20 of the draft text stipulates that Parties to the Convention will not subordinate its provisions to those of other treaties to which they may be party. In addition, such Parties are obliged to foster “mutual supportiveness between this Convention and the other treaties to which they are parties; and when interpreting and applying the other treaties to which they are parties of when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.”

Article 20(2) of the Convention hastens to add, however, that “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”

The decision to include specific language addressing the relationship of the treaty to other international instruments is a marked divergence from the course taken by member-governments of the World Health Organization during recent negotiations of an international Convention for Tobacco Control.

The question loomed over the WHO negotiations, with concerns raised as to the priority to be given to health and economic imperatives when the two came into friction. The US Government had pushed for language which would subordinate the WHO agreement to trade and economic agreements, while other governments had sought affirmations of the priority of the Tobacco Control obligations over other commitments. Ultimately, negotiators opted for silence on the central question of the Convention's relationship to other international economic agreements.

3. Canada seeks input on environmental impact of proposed pact with Europe

The Government of Canada is inviting comment on the potential environmental impacts upon Canada of a proposed Trade and Investment Enhancement Agreement with the European Union. This negotiation was highlighted in an earlier edition of this news bulletin (See: "Canada-European Union conclude first round of investment enhancement talks", INVEST-SD: Investment Law and Policy News Bulletin, June 30, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_june30_2005.pdf)

For further information about the Government's call for input, visit this website: <http://www.dfait-maeci.gc.ca/tna-nac/IYT/consult-regbil-en.asp#tiea>

Arbitration Watch:

4. GE/Bechtel cases against India reportedly resolved, By Luke Eric Peterson

According to Indian press reports, General Electric and Bechtel Enterprises have agreed to withdraw all pending arbitrations against India and various state-bodies, related to the Dabhol Power Plant.

Following a break-down between the foreign investors and Indian authorities over payments for power generated by the Dabhol facility, a series of international arbitrations were mounted by the US-based companies and their foreign subsidiaries in an effort to recoup lost investments and lost profits.

In April of this year, an International Chamber of Commerce arbitration tribunal awarded some \$125 Million US to a Bechtel subsidiary for breaches by the Indian state of Maharashtra, and by its state electricity board, of a shareholders agreement governing the Dabhol project.

At the same time, GE and Bechtel had been pursuing much larger arbitrations pursuant to investment protection treaties in order to recoup billions in alleged damages from the Indian state. Mauritius-based subsidiaries of the two US firms had filed a claim under the India-Mauritius bilateral investment treaty. Meanwhile, GE and Bechtel had also mounted an arbitration on behalf of Dutch-based companies once owned by the Enron Corporation (the one-time lead partner in the Dabhol project), and which are now controlled by GE and Bechtel. The Dutch arbitration was brought pursuant to a bilateral investment treaty between India and the Netherlands.

In the case of the Mauritius arbitration, a settlement award was issued by the tribunal (comprising Rosalyn Higgins, Lord Cooke, and Martin Hunter) signaling the termination of the arbitration. That award is not public. The Dutch arbitration is understood to have been at a less advanced stage than the Mauritian arbitration, and may not have had its tribunal fully constituted by the time of the settlement.

In another legal action related to the Dabhol project, the Government of the United States has been pursuing a separate state-to-state arbitration against India. That claim sees the US seeking to recover some \$110 Million (US) which was awarded to GE and Bechtel subsidiaries in an arbitration over an insurance contract issued by the US-based Overseas Private Investment Corporation (OPIC) and backed by the US Government. It was unclear at press time if the settlement agreement reached between India, GE and Bechtel encompassed this dispute between the US and India.

Sources:

“GE, Bechtel withdraw all Dabhol-related legal proceedings”, The Press Trust of India, July 19, 2005

“Bechtel subsidiary wins arbitrations with Indian state of Maharashtra”, Investment Law and Policy News Bulletin, May 5, 2005, available on-line at:
http://www.iisd.org/pdf/2005/investment_investsd_may5_2005.pdf

5. Italian firm takes Bangladesh to ICSID in fight over frustrated ICC arbitration,
By Luke Eric Peterson

An Italian firm, Saipem S.p.A., has turned to the International Centre for Settlement of Investment Disputes (ICSID) in an effort to hold Bangladesh responsible for alleged violations of the Italy-Bangladesh bilateral investment treaty (BIT).

In 1990, Saipem entered into a contract with Petrobangla, a state energy firm, for construction of a natural gas pipeline. Following disputes over performance under the contract, Saipem initiated arbitration under the rules of the International Chamber of Commerce (ICC).

That arbitration was challenged by Petrobangla in various ways, including through periodic recourse to Bangladesh courts in an effort to suspend the arbitration. The tribunal (consisting of Dr. Werner Melis, Prof. Riccardo Luzzatto, and Prof. Ian Brownlie) proceeded despite rulings by Bangladesh courts which bade the tribunal to halt its proceedings.

In 2003, the tribunal issued a final award, awarding compensation to Saipem; Petrobangla turned to local courts once again, this time in an effort to have the ICC award annulled.

While the Bangladesh courts review this request, Saipem has turned to arbitration under the Italy-Bangladesh BIT in an effort to construe the actions of Petrobangla, the Bangladeshi judiciary, and the Bangladeshi government, to be contrary to the protections provided in the BIT.

The Italian firm saw its request for arbitration registered by ICSID in late April of this year. The parties must now appoint a tribunal to arbitrate the dispute.

The dispute is not the first effort by a foreign investor to argue that a failure on the part of a host government to enforce an arbitral award is contrary to an investment protection treaty concluded by that same government. In 2004, ICSID registered a claim by the US firm Western NIS Enterprise Fund against the government of Ukraine. As was reported in this News Bulletin, the US firm argues that Ukraine has violated the protections found in the US-Ukraine BIT by virtue of its failure to enforce an arbitral award rendered in an earlier commercial arbitration. (See “US firm mounts BIT claim against Ukraine for failure to enforce arbitral award”, Investment Law and Policy News Bulletin, Feb.23, 2004, see: http://www.iisd.org/pdf/2004/investment_investsd_feb23_2004.pdf)

6. NAFTA's constitutionality upheld by Canadian court, appeal in works, Luke Eric Peterson

The Ontario Superior Court of Justice, in a ruling dated July 8, 2005, has dismissed an application by two Canadian groups to challenge the constitutionality of the investor-state arbitration provisions of the North American Free Trade Agreement (NAFTA).

One of the two applicants, the Council of Canadians, a citizens' advocacy group, has signaled in its public statements that it will appeal the Court's ruling to a higher Court

The Council, along with the Canadian Union of Postal Workers (CUPW), insists that NAFTA investor-state arbitration serve to undermine the role of the Canadian court system, as well as rights guaranteed in the Canadian Charter of Rights and Freedoms.

The head of the Council's trade campaigning activities, Jean-Yves Lefort, says that "Investment provisions like Chapter 11 should be removed from NAFTA and all other trade agreements signed by Canada. The willingness of our government to submit to these rules reflects an overwhelming concern for the commercial interest of foreign corporations at the expense of the public interest."

For its part, CUPW mounted the constitutional battle following a NAFTA Chapter 11 arbitration brought by US courier firm United Parcel Service (UPS) against the government of Canada. In that case, which is still ongoing, UPS is challenging allegedly anti-competitive practices by Canada's public postal monopoly in relation to courier and express delivery activities.

CUPW national president Deborah Bourque has warned that "A win for UPS would cost taxpayers millions and undermine our public postal service."

In the ruling handed down by the Ontario Court this month on the constitutional challenge to the NAFTA investor-state provisions, Madam Justice Pepall did find fault with the process of arbitration – observing that it lacked full transparency and predictability – however she noted that her role was to assess the constitutionality of that system, not its relative merits. And, on that basis, she went on to dismiss the various arguments put forward by the claimants.

Notably, one set of arguments – that the arbitration process may violate provisions of Canada's Charter of Rights and Freedoms (which prescribes various rights and liberties enjoyed by Canadian citizens) – was dismissed by the Court on the grounds that such arguments were "premature". Madame Justice Pepall noted that NAFTA arbitrations to date have not affected the constitutional rights invoked by the claimants Council of Canadians and CUPW (for e.g. constitutional rights protecting equality and a right to fundamental justice).

Sources:

Ontario Superior Court of Justice, Reasons for Decision, Council of Canadians, et.al. v. Attorney-General, Court File No. 01-CV-208141, July 8, 2005, available on-line at: <http://www.dfait-maeci.gc.ca/tna-nac/documents/CoucilofCanadians.pdf>

Canadian Government press backgrounder on the dispute:
<http://www.dfait-maeci.gc.ca/tna-nac/disp/backgrounder-en.asp>

7. FT: Second Bolivian water dispute creeping towards ICSID

The Financial Times newspaper reports that Aguas del Illimani “has signalled it may take” Bolivia to international arbitration over disputed concessions to provide water services in two regions of the country.

The company, which is a subsidiary of the French firm, Suez, encountered protests in January of this year over its allegedly out-sized connection fees charged for water services. Although the Government has signaled that it will revoke the investors’ contract, which had been concluded in 1997, the two sides remain locked in negotiations over the amount of compensation to be paid to the firm in the event of such a cancellation.

The FT quotes Nigel Blackaby of the law firm Freshfields, which represents Aguas del Illimani, as indicating that international arbitration remains an option, and that the investor’s case is a strong one: "Without proper compensation, if this isn't expropriation it's difficult to see what is."

An earlier water arbitration, by Aguas Del Tunari, related to a controversial investment in the Cochabamba region of Bolivia, is still pending at the International Centre for Settlement of Investment Disputes (ICSID). Remarkably, the presiding tribunal in that case heard jurisdictional arguments more than 17 months ago, but has yet to issue a ruling on its jurisdiction over the dispute.

As was reported in the last edition of this news bulletin, Bolivia has also been served with notices of potential arbitrations by various foreign investors in relation to that country’s new hydrocarbons law which imposes new costs on energy firms. (See: “Energy firms serve Bolivia with notice of investment treaty disputes”, INVEST-SD: Investment Law and Policy News Bulletin, July 13, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_july13_2005.pdf)

Sources:

“Foreign investor discovers the risks of testing the waters in Bolivia”, By Hal Weitzman, July 26, 2005, The Financial Times, available on-line at: <http://news.ft.com/cms/s/509d09f0-fd71-11d9-b224-00000e2511c8.html>

8. New IISD papers explore global investment governance and “rush to regionalism”

Three recent papers prepared by consultants to the International Institute for Sustainable Development (IISD) examine different facets of the proliferation of international agreements on investment protection:

“The Rush to Regionalism: Sustainable Development and Regional/Bilateral Approaches to Trade and Investment Liberalization”, is a paper prepared for the International Development Research Centre (Canada) by IISD Associate Aaron Cosbey, in collaboration with colleagues from the Singapore Institute for International Affairs. The paper explores the growth in regional and bilateral economic agreements, and examines how these agreements address a number of key issues of importance to sustainable development.

<http://www.iisd.org/publications/pub.aspx?pno=670>

“The Global Governance of Foreign Direct Investment: Madly Off in All Directions”, is a contribution by Luke Eric Peterson (Editor of this News Bulletin) to the Dialogue on Globalization series produced by the German foundation Frederick Ebert Stiftung. The paper examines the evolution of bilateral investment treaties, and highlights a handful of unforeseen policy implications of such agreements.

<http://library.fes.de/pdf-files/iez/global/50084.pdf>

“Sober Reflection: Considering the Rush to Regionalism”, a paper written by Aaron Cosbey for the Sustainable Development Policy Institute’s seventh annual Sustainable Development Conference, makes a strong argument for developing countries to reconsider the current direction in regional/bilateral negotiations, urging a focus on lowering trade costs, and a move away from lowering tariffs and limiting policy space.

<http://www.iisd.org/publications/pub.aspx?id=700>

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