

INVEST-SD: Investment Law and Policy Weekly News Bulletin, February 6, 2004

Published by the International Institute for Sustainable Development
(www.iisd.org/investment)

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Editor's Note:

1. On-line archive of INVEST-SD News Bulletins redesigned

Following a redesign of the on-line archive for INVEST-SD back issues, readers can now locate previous editions by browsing weekly tables of contents. Currently, issues dating back to September 2, 2003 are available for viewing at www.iisd.org/investment/invest-sd/archive.asp. In the coming weeks, issues from the remainder of 2003 and 2002 will be converted into this user-friendly format.

Negotiation Watch:

2. US-Central America FTA draft text published; contains MFN limitations,
By Luke Eric Peterson

Following resolution of several outstanding concerns, the Government of Costa Rica announced late last month that it would sign on to a US Free Trade Agreement with four Central American nations: El Salvador, Guatemala, Honduras and Nicaragua.

Costa Rica assented to US requests that it commit to gradual opening of key portions of its telecommunications sector - private network services, Internet services, and wireless services - to foreign investment.

Costa Rica also pledged to fully open its insurance sector - although the bulk of liberalization is slated to take place between 2008 and 2011.

The US-Central America FTA follows recent US FTAs with Chile and Singapore insofar as it contains a stand-alone investment chapter, with various procedural differences from standard bilateral investment treaties. Among the notable features is the provision of greater transparency in the investor-state dispute settlement mechanism, including with respect to disclosure of documents and opening of the proceedings to public view.

One novel feature introduced into the agreement is a footnote which indicates that the most-favored-nation clause is intended to be narrower than in other investment treaties. The parties note the decision of an arbitral tribunal in an earlier investment treaty arbitration, *Maffezini v. Spain*, which had allowed an Argentine investor to use the MFN clause of the Spain-Argentina BIT to claim more favorable procedural rights contained in another Spanish investment treaty signed with a third nation.

By contrast, a footnote in the US-Central America agreement expressly limits the reach of the MFN clause to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' Meanwhile, the note adds that the MFN clause "does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case." Although this footnote is slated for deletion from the final treaty text, the parties agree that the footnote's contents will remain part of the agreement's "negotiating history".

In another development related to the Central American FTA, a Washington-based newsletter, *Inside U.S. Trade*, reports that the agreement could run into difficulties in the US Congress unless the Office of the U.S. Trade Representative makes good on plans to elaborate an appeals mechanism for investor-state disputes under the agreement.

According to the legislation which granted US President George W. Bush so-called Trade Promotion Authority (and which permits him to submit trade agreements for an up-or-down vote in the US Congress), the administration must hew to a variety of negotiating guidelines set out by Congress. One of those guidelines ordered the administration to develop provisions permitting appeals of investor-state arbitrations in future US trade agreements.

However, recent trade agreements with Chile and Singapore punted this issue through the inclusion of provisions which pledged to consult in future on the development of such an appellate mechanism or to consider adherence to any such mechanism which is developed under a broader

regional or multilateral investment agreement (such as at the WTO or in the Americas).

Inside U.S. Trade has cited U.S. Congressional sources who indicate a lack of patience for such a solution in the US-Central America FTA (which is expected to come up for a Congressional vote later this year).

Sources:

A copy of the FTA text is available on-line at:
<http://www.ustr.gov/new/fta/Cafta/text/index.htm>

Decision on Jurisdiction in Maffezini v. Spain is available at:
http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf

"Senate aides criticize USTR on possible procedural moves for CAFTA",
Inside U.S. Trade, Feb. 6, 2004

Arbitration Watch:

3. Cement firm launches arbitration against Indonesia under contract,
ASEAN Treaty,
By Luke Eric Peterson

A Singapore-based subsidiary of the Mexican cement company, Cemex, has lodged a dispute at the Washington-based International Centre for Settlement of Investment Disputes (ICSID)

In 1998, Cemex Asia Holdings Ltd. took a minority stake in a state-owned Indonesian cement firm, Semen Gresik, with an option to buy a 51% stake by 2001. However, that option lapsed while the government declined to privatize in the face of opposition for workers and local politicians.

Negotiations had been under way which would have seen Cemex acquire a majority stake or sell its current 25% stake back to the government - however when these negotiations stalled, Cemex elected for arbitration.

A lawyer for Cemex, Marco Schnabl of the law firm Skadden Arps confirms to INVEST-SD News Bulletin that the arbitral claim alleges "breach of contract", as well as "de-facto expropriation" under the 1987 ASEAN Agreement for the Promotion and Protection of Investments. He declined to provide further details of the alleged contract and treaty violations. The arbitration was officially registered by ICSID on Jan. 27, 2004 and a tribunal is now in the process of being selected.

Sources:

INVEST-SD Interviews
www.worldbank.org/icsid

Flow-chart of Cemex holdings: http://www.cemex.com/ic/ic_bs_cs.asp

"Cemex Asia files international arbitration suit against Indonesian

govt", Agence France Presse, Dec.11, 2003

"Indonesia urges Cemex to refrain from arbitration on Semen Gresik sale", AFX-Asia news service, Dec.4, 2003

4. French water and energy firms mount treaty arbitrations against Argentina at ICSID,
By Luke Eric Peterson

Two investment treaty claims by French multinational firms were registered late last month at the ICSID facility in Washington.

SAUR International has lodged a claim under the France-Argentina bilateral investment treaty alleging various violations related to its minority stake in a water & sewage concession in the Mendoza province of Argentina. This case follows on the heels of an earlier arbitration mounted by the US-based Azurix Corporation, the majority stakeholder in the company, Obras Sanitarias Mendoza, holding the Mendoza concession.

The law firm of Sherman & Sterling will represent SAUR in the arbitration. While a lawyer with the firm declined to comment on specifics of the case, he did allege that SAUR's local subsidiary has been the victim of interference by provincial authorities. He added that the measures adopted during the Argentine financial crisis have also exacerbated the problems facing SAUR's Argentine subsidiary.

Given that two parallel arbitrations are proceeding at ICSID by separate shareholders in the investment, counsel for SAUR expressed an intention to nominate the same arbitrator as has been selected by Azurix in its arbitration.

Meanwhile, ICSID has also seen another claim mounted against Argentina, this one by the French oil giant, Total S.A... According to sources familiar with that claim, Total alleges violations of the France-Argentina bilateral investment treaty in relation to three investments: upstream contracts; its participation in gas transporter TGN; and interests in two power generation companies: Central Puerto and Hidroelectrica Piedra del Aguilar. Counsel for the firm indicated that it could not disclose information about the claim as Total has a policy of not discussing pending claims.

Sources:

INVEST-SD interviews

"La Saur depose un recours contre l'Argentine", Le Figaro, Feb.4, 2004

"Les groupes francais souffrent des difficultes economiques de Buenos Aires; Plusieurs entreprises piegees", By Olivier Auguste and Feryel Gadhoul, Le Figaro, Sept. 10, 2003

www.worldbank.org/icsid

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