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Negotiation Watch:  
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1. BIICL, IISD and RIIA to discuss model investment treaty for sustainable development

The Investment Treaty Forum at the British Institute of International and Comparative Law is hosting a discussion in conjunction with the International Institute for Sustainable Development (IISD) and Chatham House, entitled “Investment and Sustainable Development: Towards a New Model International Investment Agreement”. The event will take place on Friday January 14th in London at the headquarters of the BIICL.

The International Institute for Sustainable Development (IISD), publishers of the INVEST-SD News Bulletin, have drafted a model international agreement governing investment—with the explicit goal of achieving sustainable development. The work arose

out of a sense that existing investment treaties provide too narrow a focus. A draft of IISD's model agreement, along with further background information, can be found at [http://www.iisd.org/investment/model\\_agreement.asp](http://www.iisd.org/investment/model_agreement.asp).

The London seminar will take place at the Institute from 9.00AM-12.15PM, to be followed by lunch. There will be two main panels in the discussion: "Towards 'Six Areas' of Rights and Obligations" and "Modernizing the Process: Dispute Settlement and Beyond". The Forum's newly appointed director, Dr Federico Ortino, will lead the discussion.

If you are interested in attending this event, please contact Hugo Warner by email ([h.warner@biicl.org](mailto:h.warner@biicl.org)) or by telephone: 0044 20 7862 5167. More information on the Investment Treaty Forum can be found at [www.biicl.org/itf](http://www.biicl.org/itf).

## 2. China reportedly postpones trilateral investment deal with Japan and South Korea

A local press report indicates that China has postponed negotiations on a trilateral investment treaty with Japan and South Korea. Officials from the three countries met during a series of recent meetings of the Association of South East Asian Nations (ASEAN), and voiced interest in such a deal. However a subsequent news report suggests that talks will be put on hold for the time being.

Korean and Chinese officials did meet separately following the ASEAN summit, and a report in the South Korean press suggests that officials reiterated their desire to build upon the 1992 bilateral investment treaty between Korea and China. Korean investors are seeking enhanced market access to China, including in the power and natural resources sectors.

China has also concluded an earlier bilateral investment treaty with Japan, however Japanese businesses also are reportedly unhappy about the quality of the commitments made in that agreement, and have sought a more up-to-date agreement with China.

A copy of the 1989 China-Japan BIT is available here:  
[http://www.unctad.org/sections/dite/ia/docs/bits/china\\_japan.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_japan.pdf)

A copy of the 1992 China-Korea BIT is available here:  
[http://www.unctad.org/sections/dite/ia/docs/bits/korea\\_china.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/korea_china.pdf)

Japan and Korea have recently concluded a separate bilateral investment treaty of their own. A copy of that treaty, which entered into force on January 1, 2003, is available here:

[http://61.72.226.18/inter\\_treaty\\_real.nsf/0/711D4DB980CA71A449256B85000CB9B7?OpenDocument](http://61.72.226.18/inter_treaty_real.nsf/0/711D4DB980CA71A449256B85000CB9B7?OpenDocument)

Sources:

Summary of Trilateral meeting, Nov.29, 2004, available on website of Japan's Ministry of Foreign Affairs, <http://www.mofa.go.jp/region/asia-paci/asean/pmv0411/summary.html>

"Chinese reservations nix investment pact talks with Japan, Korea", Asia Pulse, Dec. 1, 2004

"S.Korea, China hold meeting to improve investment environment", Asia Pulse, Dec. 20, 2004

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Arbitration Watch:  
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### 3. Canadian court to hear constitutional challenge to NAFTA Chapter 11

Canada's Ontario Superior court of Justice will hear arguments later this month in a case which seeks to challenge the constitutionality of the investor-state arbitration provisions of the North American Free Trade Agreement (NAFTA).

The case, which was launched in 2001 by The Council of Canadians (a well-known Canadian advocacy organization) and the Canadian Union of Postal Workers (CUPW), is to be heard on January 24th and 25th at the Superior Court in Toronto.

Central to the claimant's argument is the contention that the investor-state arbitration process is unconstitutional because it undermines the role of the Canadian judiciary, and inappropriately delegates to "ad-hoc arbitrators" the jurisdiction to resolve sensitive regulatory, administrative and other disputes. In addition, the claimants contend that Canada's accession to NAFTA's Chapter 11 exceeds the government's treaty making powers.

Further information about the case and affidavits by three expert witnesses, including law professor M. Sornarajah, author of the International Law of Foreign Investment, are available online at:

[http://www.dfait-maeci.gc.ca/tna-nac/disp/cupw\\_archive-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/disp/cupw_archive-en.asp)

or

[http://www.canadians.org/browse\\_categories.htm?COC\\_token=23@@f33abd47f85ca071dd947089e4d34815&step=2&catid=211&iscat=1](http://www.canadians.org/browse_categories.htm?COC_token=23@@f33abd47f85ca071dd947089e4d34815&step=2&catid=211&iscat=1)

#### 4. Stockholm Arbitration Institute planning conference on Energy Charter Treaty

The Arbitration Institute of the Stockholm Chamber of Commerce, in conjunction with the secretariat of the Energy Charter, is planning a two day conference for June of 2005 on "Investment Arbitration and the Energy Charter Treaty". Conference planning is still under way, but proposed topics include "the concept of expropriation", "treaty claims and contractual claims", "state responsibility", "and investments and investors covered by the Treaty".

The Energy Charter Treaty is a plurilateral trade and investment treaty governing the energy sector, and contains investment protection provisions similar to those found in modern bilateral investment treaties.

The Energy Charter secretariat is not necessarily notified of all instances where investors invoke the provisions of the treaty in dispute settlement. However, in recent years, at least five known investment arbitrations have come to light. These include a 2001 claim by the UK subsidiary of the US-based AES Corporation against Hungary at the International Centre for Settlement of Investment Disputes (ICSID). This claim was settled several months after a tribunal was constituted, and before any decision was reached on jurisdiction or the merits.

The ICSID facility has seen two further ECT claims, which are still pending before the Centre: *Plama Consortium Ltd. v. Bulgaria*, and *Alstom Power Italia SpA and Alstom SpA v. Mongolia*.

In addition, the Stockholm Arbitration Institute has resolved one ECT claim between Swedish based Nykomb Synergetics and Latvia. The award in the Nykomb case has yet to be published, however a case commentary on the award has just been published by the chief counsel for the investor in that case (see next story below).

The Stockholm Institute is also presiding over a second ECT claim between Gibraltar-based Petrobart Ltd v. Kyrgyzstan. A 2003 arbitral award from an earlier arbitration between Petrobart and Kyrgyzstan under the Kyrgyz Foreign Investment Law has yet to be published.

For further information about the June conference at the Stockholm Arbitration Institute, contact Clarisse Ribeiro at [Clarisse.Ribeiro@encharter.org](mailto:Clarisse.Ribeiro@encharter.org) or Caroline Statham at [Caroline.Statham@chamber.se](mailto:Caroline.Statham@chamber.se)

#### Sources:

"Swedish firm wins Energy Charter Treaty case against Republic of Latvia", INVEST-SD News Bulletin, Dec.19, 2003, available at:

[http://www.iisd.org/pdf/2003/investment\\_investsd\\_dec19\\_2003.pdf](http://www.iisd.org/pdf/2003/investment_investsd_dec19_2003.pdf)

ICSID list of arbitrations:

<http://www.worldbank.org/icsid/cases/cases.htm>

INVEST-SD files

#### 5. Case commentary published by chief counsel in first Energy Charter Treaty case

A case commentary on the Energy Charter Treaty arbitration between Nykomb Synergetics and Latvia has been published by the chief counsel to Swedish firm Nykomb Synergetics. The case was the first Energy Charter Treaty arbitration to yield an award.

The award has yet to be published, however the case comment by Jonas Wetterfors undertakes to offer the investor's side of the case – setting forth its major arguments before the tribunal – as well as a summary of the tribunal's award.

The case is of note not only because it saw the first ECT award rendered, but also because of what Mr. Wetterfors describes as an environmental dimension. The Swedish firm, Nykomb, invested in Latvia under the terms of a Latvian government policy which was designed to encourage new investment in smaller, more-efficient co-generation power facilities. By setting forth an incentive scheme whereby investors would enjoy a double-tariff during the first 8 years of power generation, the Latvian authorities sweetened the pot for investors who could borrow on more favorable terms, and expect to pay the loans back on an accelerated timetable.

However, thanks to a later change in government policy, which had the effect of altering the incentive scheme, the Latvian state power company, Latvenergo, refused to pay the double-tariffs to Nykomb's local subsidiary upon start-up of its first co-generation facility. While the facility operated at a loss, the two sides grappled over the level of tariffs due; the investor eventually turned to arbitration in December of 2001 at the Stockholm Arbitration Institute, invoking the dispute settlement provisions of the ECT.

A number of legal issues (expropriation, national treatment, umbrella clause, fair and equitable treatment, attribution of state responsibility, level of damages owed to foreign parent of a local subsidiary) were mooted in the proceedings. Each of these is described in varying degrees in the case comment.

The comment is available on-line at:

[http://www.iln.com/2004\\_newsletter/dec/Nykomb%20v%20Latvia.pdf](http://www.iln.com/2004_newsletter/dec/Nykomb%20v%20Latvia.pdf)

#### 6. Mexican firm, Cemex, reportedly settles ICSID case with Indonesia

According to Asian news reports, a Singaporean subsidiary of the Mexican cement company, Cemex, has agreed to settle a claim against the Indonesian government in relation to a disputed option to purchase a majority stake in an Indonesian firm.

As earlier reported in INVEST-SD Cemex Asia Holdings Ltd. took a minority stake in a state-owned Indonesian cement firm, Semen Gresik, in 1998, and held an option to buy a 51% stake by 2001. This option lapsed thanks to local opposition to a foreign-takeover of Semen Gresik. Cemex sought to pressure the government to make good on its commitment, or to purchase back Cemex's minority share in Semen Gresik. When talks reached a stalemate, the investor lodged a claim at the International Centre for Settlement of Investment Disputes (ICSID) for breach of contract and "de-facto expropriation" under the 1987 ASEAN Agreement for the Promotion and Protection of Investments.

An ICSID arbitration tribunal consisting of Yves Fortier, Robert Von Mehren, and Brigitte Stern received written jurisdictional objections from Indonesia in December of 2004, but a decision on jurisdiction had yet to be reached in the case.

The details of the settlement arrangement have not been made public, however the AFX news service has reported that the arrangement may involve the sale of other cement assets to Cemex in return for its abandoning its arbitral claim.

Sources:

"Mexico's Cemex agrees to settle dispute with Indonesian Govt", Dec. 28, 2004, Asia Pulse

"Indonesia govt says Cemex agrees to drop arbitration case – report", Dec. 27, 2004, AFX

"Cement firm launches arbitration against Indonesia under contract, ASEAN Treaty", February 6, 2004, INVEST-SD News Bulletin, available at:  
[http://www.iisd.org/pdf/2004/investment\\_investsd\\_feb6\\_2004.pdf](http://www.iisd.org/pdf/2004/investment_investsd_feb6_2004.pdf)

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