Investment Law and Sustainable Development Weekly News Bulletin, Jan.3, 2003

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

---
Contents at a Glance:

Editor's Note:
---

1. Seeking Reader Testimonials

In order to maintain the INVEST-SD Bulletin as a free service past March 2003, IISD is applying to our funders for renewed funding. Those readers who have found the bulletin especially useful and who would be willing to offer a brief testimonial in support of our funds renewal application, are encouraged to contact the editor (at lpeterson@iisd.ca). Testimonials from a range of readers, including practicing lawyers, NGO campaigners, academics and concerned citizens are welcome.

Arbitration Watch:
---

2. Nestle Expropriation Claim Against Ethiopia Leads to PR Nightmare

Following a series of damaging revelations in the UK media, the Nestle Corporation has changed course in its legal fight with the government of Ethiopia. The Swiss-based multinational was caught unprepared for the controversy generated by revelations that it is seeking $6 million US in compensation from the Ethiopian government for investments nationalized by Ethiopia's former military government during the mid-1970s.

Development campaigners reacted angrily to the news that Nestle was targeting the world's poorest country - with a per capita income of $100 a year - which also faces a widespread famine, and a collapse in the price of its primary export, coffee.

In a press release dated Dec.23, the Nestle corporation insisted upon the importance "for the long-term welfare of the people of Africa that their governments demonstrate a capacity to comply with international law". However, the company promised to donate any compensation received to private and public efforts to combat the famine in Ethiopia.

Meanwhile, the London Guardian reports that Nestle's claims are part of a much larger set of claims, totaling some $ 500 million. The paper notes that the largest are being brought by a London-based lawyer, acting on behalf of a Greek investor, and by a Geneva-based British Businessman. According to the Guardian, the former investor has rebuffed offers of partial compensation, and has lobbied the US Congress and international organizations to cut off aid and loans to Ethiopia unless full compensation (43 million) is paid by Ethiopia.

No formal legal disputes are known to have been launched at the international level. Ethiopia has negotiated a mere three bilateral investment treaties, none of which were ratified as of 2000. The current spate of claims against Ethiopia are being negotiated informally through the World Bank.

(Sources: "Nestle and Ethiopia: A Statement By Nestle CEO Peter Brabeck", Dec.23, 2002, www.press.nestle.com ;

"Ethiopia faces pounds 330m claims: Britons lead demands on world's poorest country", By Charlotte Denny and Damian Zane in Addis Ababa, Dec. 24, 2002, www.guardian.co.uk/international/story/0,3604,865079,00.html ;

"Ethiopia Urges Creditors to Agree to its Terms", by Charlotte Denny, Dec.30, 2002, www.guardian.co.uk/international/story/0,3604,866337,00.html)

3. Canadian Group Fears Provincial Legislation Opens Door to NAFTA Water Exports

A report by the Canadian Press news agency warns that a recent move by the Alberta legislature could force Canada to export water to its NAFTA partners under the terms of the NAFTA's investment chapter. See link below.

(Source: "Water at risk, Council warns: NAFTA could force exports to U.S.", Dec.28, 2002, Darcy Henton, The Canadian Press)

The full article is available free on-line at:
http://cnews.canoe.ca/CNEWS/Canada/2002/12/27/8478-cp.html)

NEGOTIATIONS WATCH:
---

4. US-Korea BIT Still Hung up by Hollywood

Despite rising tensions between the United States and North Korea over nuclear weapons, and a promise of increased red-tape for South Koreans looking to visit the United States, the head of the American Chamber of Commerce in (South) Korea remains sanguine about the prospects for the stalled bilateral investment treaty between South Korea and the United States.

According to reports in the Korean media, William Oberlin, is promising to work with government and non-governmental organizations to champion the BIT, which he sees as a first-step to a Korea-US Free Trade Agreement.

A BIT has been held up for months because of objections from the US film industry which demands greater changes to Korea's quota system for protecting Korean films. This past summer, some US business groups, including the US-Korea Business Council and the US Chamber of Commerce called for the treaty to be concluded despite Hollywood's misgivings.

(Sources: "US May Require Interviews for Visas", Korea Times, January 4, 2003, "AmCham to Work for Korea-U.S. trade relations", By Kim Mi-hui, The Korea Herald, January 4, 2003; "ROK, US Urged to Sign BIT", Korea Times, September 3, 2002)

5. China Marks WTO Accession Anniversary with Record Investment Flows

On the first anniversary of its accession to the World Trade Organization, China has trumpeted figures which show that foreign direct investment into the country continues to grow in spite of a precipitous decline overall in global FDI flows for the past two years. Chinese Government figures for the period from January to November 2002, show that inward FDI increased 14.6% over the same period in 2001. China now heralds itself as the largest recipient of FDI worldwide.

Accession to the WTO is credited with opening up new sectors of the Chinese economy, including telecoms and services - to FDI. As a consequence, the Government claims that foreign investment is no longer focused upon the production of consumer goods, but includes a larger number of mergers & acquisitions, as well as the production of raw materials and parts for domestic manufacturing industries. Investments in research & development capacity are also on the increase.

Although China has concluded dozens of bilateral investment treaties in the last two decades, it has yet to enter into one with the United States, its largest source of FDI. The country has, however, acceded to the ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

(Sources: "Overseas Investment Surges in Red-Hot China", Agence France Presse, Dec.27, 2002; "China Expects to Draw $174b of Foreign Investment a Year", by Goh Sui Noi, The Straits Times (Singapore), January 3, 2003; "Transnationals Shift Investment Plans Post WTO", China Daily, December 26, 2002)

READERS' NOTE: Subscribers to INVEST-SD News Bulletin are encouraged to submit news articles, notices of events, press releases, analyses, questions and requests for information to invest-sd@lists.iisd.ca.

Compiled and edited by Luke Eric Peterson for IISD.

Investment Law and Sustainable Development Weekly News Bulletin, Jan.10, 2003

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

---
Contents at a Glance:

Negotiations Watch:

Arbitration Watch:

NEGOTIATIONS WATCH:
---

1. US to Negotiate Trade & Investment Pact With Five Central American Nations

The US Administration has set itself a deadline of year's end for sewing up a Free Trade Agreement (FTA) with Guatemala, El Salvador, Honduras, Nicarauga and Costa Rica.

Negotiations were formally launched this month in Washington, and are expected to include talks on investment protections. The US has already signed bilateral investment treaties with El Salvador, Honduras and Nicarauga, however a State Department website suggests that none of these treaties have yet to come into force.

Along with the Central American FTA, the Bush Administration is also involved in negotiations with Morocco, the South African Customs Union, and Australia. A complete FTA with Chile is expected to be notified to Congress later this month, while a similar pact negotiated with Singapore is still held up on a single unresolved issue: Singapore's desire to protect its ability to impose emergency capital controls.

The US remains involved in the ongoing negotiations on a Free Trade Area of the Americas (FTAA). A deadline of Feb.15 has been set for the tabling of initial negotiating positions in all areas (including investment). A further four months are set aside for negotiators to request further concessions from their counterparts.

The US is also understood to be involved in a number of ongoing negotiations on bilateral investment treaties.

Despite being engaged in investment talks on so many fronts, the US Administration has closely guarded its negotiating positions and documents (see next story below)

Sources:
"US, five Central American nations, launch free trade talks", Agence France Presse, Jan.8, 2003;
"U.S. Gears up for Bilateral FTAs; Central America Talks Start in January", Inside U.S. Trade, Jan.3, 2003;
"Failure to Agree on Capital Controls Could Lead to Removal of Investment from Singapore-US Free Trade Agreement", INVEST-SD Bulletin, Dec.6, 2002

2. US Court Upholds Secrecy of Bush Administration's Investment Negotiating Positions

A recent ruling by a US Court ordering the Bush Administration to make public all but a few documents pertaining to the recently concluded US-Chile free trade agreement did not require the release of key papers on investment rules.

The plaintiffs, non-profit monitoring groups Centre for International Environmental Law (CIEL), Friends of the Earth, and Public Citizen had filed suit against the Office of the US Trade Representative to obtain information regarding the free trade agreement. On Dec.17, 2002, the US District Court of Washington DC ordered the disclosure of the vast majority of documents, rejecting the USTR's attempt to protect documents as 'inter-agency documents' under Exemption 5 of the Freedom of Information Act (FOIA).

The USTR has moved to pre-empt the January 17 deadline set by the Court, by filing a stay on the release of the trade negotiation documents - raising doubts as to whether they will be released any time soon.

While the court's initial decision was hailed by the Claimants as a move towards openness and transparency - one that will "finally provide an entry point for meaningful public participation in trade negotiations" - the Court did not force the US government to release key documents relating to investment rules.

Of the 280 documents at issue, 5 were completely exempted from the Freedom of Information Act. These included Documents 211-213, the Trade Policy Review Group (TPRG) papers that determined the US negotiating position on the rules and procedures governing foreign investment. The Court essentially accepted USTR arguments that these papers should be exempted under a provision which allows for the protection of records in the 'interest of national defence or foreign policy.'

Assistant USTR Joseph Popovich has claimed that disclosure of these papers "would... undermine the US government's ability to debate and resolve... complex issues at stake in the negotiations..." and by making the dynamics behind the forming of their positions public knowledge, would make it "considerably more difficult for US negotiators to conclude a free trade agreements [sic] with other governments that fully secure US economic interests."

The Government of Canada has been equally guarded with respect to its negotiating positions on international investment rules. Despite entering into negotiations with a number of trading partners, the Department of Foreign Affairs and International Trade has refused to reveal its investment template.

However, as reported in a recent edition of INVEST-SD bulletin, the department has drafted a secret memo to the Canadian Cabinet which sets out a host of proposed changes to existing and future foreign investment protection agreements. The contents of this memo were summarized in the Dec.13, 2002 edition of INVEST-SD.

Sources:
Dow Jones, 'US Court: Trade Negotiators Must Disclose More on Chile Pact';

Press Release from Earthjustice, Public Citizen, FOE, and CIEL, December 19, 2002;
'Civil Action No. 01-2350 (PLF), CIEL et. Al., Plaintiffs, vs. Office of the United States Trade Representative, et. Al., Defendants, United States District Court for the District of Columbia, December 17, 2002;
"Memo to Canadian Cabinet Sets Out Proposed Changes to Canadian BITs", INVEST-SD Bulletin, Dec.13, 2002

Arbitration Watch:
---

3. NAFTA Chapter 11 Tribunal Issues Award in Marvin Feldman v. Mexico

An ICSID Tribunal has issued an Award in this case which centered upon claims for tax rebates on cigarette exports. While the Tribunal rejected the claimant's argument that an expropriation had occurred, it upheld claims of a violation of Article 1102 (National treatment). A copy of the Award is available on the website of Canada's Department of Foreign Affairs and International Trade, which offers an archive of NAFTA Chapter 11 dispute materials.

Because the arbitration occurred under the Additional Facility (AF) rules of the ICSID, both parties enjoys the further ability to challenge the Award in the courts of the jurisdiction where the arbitration was legally sited (in this case, Ottawa, Ontario, Canada). Readers may recall that the Mexican Government successfully overturned portions of an earlier ICSID AF arbitration in the Metalclad case under NAFTA. That dispute was heard in British Columbia, Canada, where the Metalclad tribunal had been legally sited.

By contrast, arbitrations under ICSID's standard arbitration rules are only subjected to limited forms of internal review by ICSID (for eg annulment proceedings). In other words, such Awards will not be reviewed by domestic courts.

Because Mexico and Canada have yet to endorse the ICSID Convention, however, NAFTA disputes involving one of these parties, or one of their nationals, have tended to occur under the ICSID's Additional Facility, which was expressly designed to accommodate disputes where only one party is an ICSID Convention signatory (or national). And a further consequence has been that these Additional Facility cases have been open to limited forms of subsequent review by domestic courts.

At press time, there was no word as to whether either party will pursue a review of the Award in domestic courts. INVEST-SD News Bulletin will monitor any further developments in the dispute.

See: http://www.dfait-maeci.gc.ca/tna-nac/marvin_roy-en.asp

4. Reminder of Event (UK): Workshop on Arbitration of Investment Disputes

The London-based British Institute for International and Comparative Law is holding a practitioner workshop on Arbitration of Investment Disputes on Tuesday, January 28th.

The session will run from 5:30 to 7:30pm, and will feature presentations by Nigel Blackaby, of Freshfileds, Paris; Robert Volterra, of Herbert Smith; and Nina Hall, of Vinson & Elkins.

For more information see: www.biicl.org

READERS' NOTE: Subscribers to INVEST-SD News Bulletin are encouraged to submit news articles, notices of events, press releases, analyses, questions and requests for information to invest-sd@lists.iisd.ca.

All content composed by Luke Eric Peterson IISD-Boston, except Article 2, written by Trineesh Biswas, IISD-Geneva.

Investment Law and Sustainable Development Weekly News Bulletin, Jan.17, 2003

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

---
Contents at a Glance:

Arbitration Watch:
---

1. Vivendi-Argentina Water Dispute Heading Back to BIT Arbitration?

Following a decision by an annulment committee of the International Center for the Settlement of Investment disputes (ICSID) to overturn an Award in the arbitration between Vivendi/Compagnie General des Eaux and the Argentine Republic, the two sides could be back to square one in their ongoing tussle over a water privatization gone sour.

In 1996, Vivendi/CGE brought a dispute under the France-Argentina Bilateral Investment Treaty (BIT), arising out of an investment in water & sewage services provision in the Tucuman province of Argentina. Among its claims, Vivendi/CGE alleged violations of the BIT's provisions on fair & equitable treatment and against expropriation. While the investor complained of obstruction and harassment from various branches of the Tucuman provincial government, the Argentine Republic countered that the investor was responsible for various failures under the concession contract.

The Tribunal noted that Vivendi/CGE and the Tucuman authorities had differed over a number of sensitive questions, including "the method for measuring water consumption, the level of tariffs for customers, the timing and percentage of any increase in tariffs, the remedy for non-payment of tariffs, the right of CGE to pass-through to customers certain taxes and the quality of the water delivered."

In a disappointing setback for the claimants, however, the ICSID Tribunal had ruled in November of 2000, that the nature of the claims in this dispute were so closely intertwined with the

interpretation of the provisions of the concession agreement between the two parties, that the Tribunal could not assess alleged violations of the bilateral investment treaty, without first having to interpret the Concession Agreement itself. And the Tribunal noted that the Concession Agreement had explicitly assigned such an interpretive task exclusively to the administrative courts of Tucuman province.

Thus, despite holding that it had jurisdiction to hear this BITs dispute, the Tribunal dismissed the claims and insisted that the claimants ought to first pursue their case in the Tucuman courts.

Vivendi/CGE responded by challenging this ruling of the Tribunal, and requesting that ICSID annul the decision on several grounds. In the summer of 2002, an ICSID ad-hoc committee, chaired by Yves Fortier, a prominent Canadian lawyer and arbitrator, issued a decision which effectively overturned part of the Tribunal's decision of 2000. The annulment committee ruled that the earlier tribunal had "manifestly exceeded its powers", albeit (in a counter-intuitive twist), by not fully exercising its powers in the Vivendi/CGE case.

According to the annulment committee, the tribunal's finding of jurisdiction in the case, should have compelled it to consider further the alleged violations of the BIT and international law - quite apart from any separate claims for violation of the concession agreement provisions, which the investor could have pursued in the local administrative courts.

According to ICSID's rules on annulled awards, either party may now submit the dispute to a new arbitration tribunal. In an interview with INVEST-SD bulletin, a member of Vivendi/CGE's legal team was reluctant to state on the record that the investor will launch a new arbitration, however he expressed the view "that it would make no sense" for Vivendi/CGE to seek annulment of the Tribunal's decision, and to not pursue the dispute to its conclusion.

Any new arbitration in the case will likely have to wait until the ad-hoc committee resolves a further application by the Argentine Republic for a rectification of the committee's decision. Under the rectification process, spelled out in Article 49(2) of the ICSID Convention, parties may request the committee to "decide any question which it had omitted to decide," and to "rectify any clerical, arithmetical or similar error" contained in the decision. A member of Vivendi/CGE's legal team suggests that any move to mount a new arbitration, will likely wait until the Committee resolves the Argentine Republic's rectification request.

(Sources: Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Case No. ARB/97/3) award available at http://www.worldbank.org/icsid/cases/awards.htm ;Compania de Aguas Del Aconquija S.A. and Vivendi Universal (formerly Compagnie Des Eaux) v. Argentine Republic, Decision on Annulment, reproduced in: International Legal Materials, Volume 41, Number 5, September, 2002, pg. 1135; INVEST-SD interviews)

2. Tribunal Issues Award in ADF V. United States NAFTA dispute

On January 9th, a tribunal issued its final award in the NAFTA chapter 11 dispute between the Canadian-based ADF Group and the United States. The claim arose out of ADF's challenge to the "Buy America" rules on government procurement. These rules required that all steel used in US government construction projects be produced in the United States. Although ADF was willing to use American-produced steel, it had long argued that further processing and fabrication of the steel could be done outside of the United States. US authorities rejected this view and ADF mounted a claim under NAFTA in 2000.

The recent award of the Tribunal rejects all claims by ADF. However, because the ADF dispute had been brought under the ICSID Additional Facility rules, which provide for limited review in the court system where the arbitration was legally sited, the investor enjoys the ability to challenge

the award in the United States court system. ADF's counsel could not be reached before press time, however recent press reports have indicated that the firm has not yet made a decision to challenge the award.

(Sources: ADF v. United States Award available at: http://www.state.gov/documents/organization/16586.pdf)

3. ICSID Registers New BITs Dispute; Sets Record for Number of Claims in a Year

A dispute under the Lithuania-Ukraine Bilateral Investment Treaty (BIT) was registered on Dec.20, 2002 at ICSID and added to the center's on-line registry in January of this year. The case arises out of an investment in a printing enterprise by a Lithuanian investor, Tokios Tokeles, in the Ukraine. Few details about the case have been publicized. This dispute brings the number of cases lodged with ICSID in 2002, to 19, thus establishing a new record for the arbitral institution. Of these 19 investor-states disputes, 15 arise out of consents to arbitration contained in BITs (with the remaining 4 having been brought under national investment laws, NAFTA Chapter 11 and a loan agreement)

Negotiations Watch:
---

4. Singapore-US Agree on Capital Controls; FTA to be tabled to Congress in Secret

A long-standing obstacle to the conclusion of a Free Trade Agreement with Singapore was removed last week when the United States agreed to a compromise over permissible controls on capital under the Agreement's investment rules. Singapore had been holding out for the ability to impose capital controls in emergency situations, however US investors remained opposed to any such controls. Under the compromise agreed, investors will retain the ability to sue for compensation where capital controls "substantially impede" capital flows. However, the agreement will impose different waiting periods before suits may be brought, depending upon whether the flows relate to short-term or long-term investments.

The office of the US Trade Representative (USTR) will now table the Agreement's text to Congress along side the recently completed US-Chile Free Trade Agreement. However, the USTR has indicated that it will keep the text of the Agreements secret during Congress's three-month review period. In a curious twist, elected representatives will be required by the USTR to keep the documents confidential, thereby preventing disclosure of the texts to the public until they are signed and finalized. The USTR has indicated that confidentiality will decrease the likelihood of requested changes to the text.

Congressional members are not the only individuals who will see the confidential texts, as industry advisors on the Advisory Committee on Trade Policy and Negotiations have also been cleared to view them. Members of environmental and labor groups have yet to be appointed to this advisory committee of the Bush Administration, a move which the US union AFL-CIO has vowed to challenge in the courts.

Sources: "Singapore US Agree Pact", the Financial Times, Jan.16, 2003; "U.S. completes Deal with Singapore on Capital Controls, Freeing FTA", Inside US Trade, Jan.17, 2003; "Keep Chile, Singapore Deals Confidential After Notification", Inside US Trade, Jan.10, 2003;

5. US Government Gets Stay on Court Order for Release of Trade and Investment Documents

A US District Court has granted the US Government's request for a stay order on the disclosure of a number of documents related to the recently concluded US-Chile free trade agreement. As reported in last week's INVEST-SD Bulletin, the Office of the US Trade Representatives seeks to appeal a recent court decision ordering the release of crucial negotiating documents related to the trade agreement. The lawsuit under the US Freedom of Information Act had been brought by the non-profit monitoring groups Centre for International Environmental Law (CIEL), Friends of the Earth, and Public Citizen.

Although the original court's disclosure ruling was a great victory for transparency, that ruling was notable for not including several key documents related to USTR consultations with its Trade Policy Review Group on investment rules. These documents detail how the US developed its internal positions on investment rules, and in consultation with whom. Nevertheless, other investment documents, including the actual negotiating texts tabled by Chile and the US were marked for disclosure under the terms of the original court order. A story in last week's INVEST-SD Bulletin was unclear about this distinction.

However, all disclosure of documents is now postponed by the current stay in proceedings, which will allow the USTR to refrain from disclosing the documents while it mounts an appeal of the disclosure order.

Although imposing a stay in proceedings this week, the US District Court recognized that the stay was potentially harmful to the plaintiffs and the public interest. "Release of the documents," the court wrote "... will enable informed participation in legislative review of the agreement, which is likely to take place within the coming months..."

Thus, the stay was granted subject to one crucial proviso: it will be for a limited time - until January 30, 2003 - and on the condition that the USTR seek 'expedited consideration' from the court of appeals. Should the USTR fail to seek expedited consideration by this deadline, the court's stay will expire, and the documents will have to be released no later than January 31.

Disclosure of the documents would shed light on Congress's confidential review of the Chile and Singapore Free Trade Agreements which is now beginning. As noted elsewhere in this week's INVEST-SD Bulletin (see article 4 above) members of Congress reviewing the Chile and Singapore FTAs are being supplied the texts on a confidential basis, so as to prevent the texts from falling into public hands.

(Sources: INVEST-SD interviews; US District Court for the District of Columbia Civil Action No. 01-2350 (PLF), CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, et. al., Plaintiffs, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et. al., Defendants. http://www.dcd.uscourts.gov/01-2350a.pdf)

6. Japan Wants Investment on Agenda of February's WTO Conference in Tokyo

While agricultural talks continue to look like the make-or-break issue in the WTO's Doha Development Agenda of trade negotiations, the Government of Japan is keen to boost the profile of investment at an informal ministerial meeting it will host in February. Japan's Trade Minister, Takeo Hiranuma, has indicated that he hopes the Tokyo meetings will make progress on a decision whether to launch full-fledged negotiations on investment rules at the next Ministerial

Conference of the WTO, slated for Cancun, Mexico later this year. The WTO's Working Group on Trade and Investment has been working on the possible modalities (i.e. scope and framework) of such negotiations in its regular sessions in Geneva. A Report of the Working Group's activities for 2002 has been drafted by the WTO's permanent secretariat and is available for download on the WTO documents site (see link below).

(Sources: "Japan wants WTO ministers to take up 'new' issues", Kyodo News International, Jan.17, 2003; WTO Documents available at: http://docsonline.wto.org/gen_search.asp - type "WGTI" into the "document symbol" line of the search form)

READERS' NOTE: Subscribers to INVEST-SD News Bulletin are encouraged to submit news articles, notices of events, press releases, analyses, questions and requests for information to invest-sd@lists.iisd.ca.

All content composed by Luke Eric Peterson IISD-Boston, except Article 5 written by Trineesh Biswas and Luke Eric Peterson.

The opinions distributed in the INVEST-SD Bulletin do not necessarily represent the views of the International Institute for Sustainable Development (IISD).

Investment Law and Sustainable Development Weekly News Bulletin, January 24, 2003

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

Contents at a Glance:

Arbitration Watch:
---

1. Peru Closes Chilean Factory in Environmental Reserve; Triggers Investment Treaty Dispute

A Chilean pasta company, Luchetti, has lodged a claim for arbitration against the Government of Peru challenging an order to close a factory which had been operating in an environmentally protected area near the Peruvian capital of Lima.

Luchetti filed the claim at the Washington-based International Center for the Settlement of Investment Disputes (ICSID) under the terms of a recently-concluded bilateral investment treaty between Chile and Peru.

In 1998, Luchetti had constructed a manufacturing plant in the Pantanos de Villa area of Southern Lima, after receiving construction permits from local authorities. However, the enterprise was long opposed by the then Mayor of Lima, Alberto Andrade, who objected to the factory's location on the border of a 690 acre wetland reserve.

After several years of wrangling, and an attempted boycott of Luchetti's products orchestrated by Mayor Andrade, the Chilean firm was ordered to dismantle its factory last year. On December 23, the firm initiated arbitration proceedings at ICSID, seeking $156 million dollars for its lost investment in Peru.

Critics of the treatment meted out to Luchetti, have observed that other international firms, including US firms 3M Co. and Kimberley-Clark Corp., have operated in the area without objection from Peruvian authorities, raising the spectre of discrimination contrary to the terms of the Chile-Peru bilateral investment treaty. The Chilean government has thrown its support behind Luchetti, indicating that it believes the firm will be successful in its quest for compensation from Peru.

(Sources: "Chilean Company Triggers Peru-Chile Rift", United Press International, Jan.6, 2003; "Chile Supports Arbitration For Threatened Pasta Plant", Dow Jones, Jan.7, 2003; "Luchetti Begins Peruvian Assets Sale", United Press International, Jan.23, 2003)

2. Asian Investment Treaties Profiled by Law Firm

A commentary article by John Savage, a law partner at Shearman and Sterling, and head of the firm's Asian arbitration practice, offers an overview of different methods for resolving investment disputes with Asian nations. Particular attention is given to cataloguing some of the bilateral and multilateral investment treaties entered into by Asian nations.

The article, "New Opportunities for Resolving Disputes Involving Asian States", is available free on-line at:

www.financeasia.com/articles/1DAB6692-017B-11D7-81E70090277E174B.cfm

---
Negotiations Watch:
---

3. Mexico City Workshop to Examine NAFTA Chapter 11's Environmental Impact

A one-day public workshop on NAFTA Chapter 11 is being organized as part of the NAFTA Commission on Environmental Cooperation's week-long symposium on trade & environment, slated for Mexico City in late March. The March 24 workshop is being organized by the CEC's Joint Public Advisory Committee (JPAC), a committee of public advisors from the three NAFTA states.

The Chapter 11 workshop will explore various themes including expropriation, dispute settlement and environmental, health & safety exceptions. A discussion paper by IISD Associate Aaron Cosbey will provide the basis for the day's proceedings.

A provisional agenda for the workshop is available at:

www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=978

4. BP Pipeline Investment and Stabilization Contract Worries Critics

Critics of British Petroleum's (BP) plans to construct a $3.5 billion pipeline to bring landlocked Caspian oil to world markets have accused the company of not living up to its self-styled reputation as an environmentally responsible company. The 1740 km (1090 mile) pipeline would transport crude from Baku, Azerbaijan, through Georgia, to Ceyhan on Turkey's Mediterranean coast. (For a map of the region and possible routes for Caspian oil, please see: http://csmweb2.emcweb.com/durable/2001/03/02/csmimg/0302p8.jpg)

Opponents of the pipeline object to the Host-Government Agreements signed by the countries involved. By requiring governments to compensate consortium members for additional costs incurred while meeting the requirements of new social and environmental laws, campaigners say that these agreements restrict future legislation and discourage higher standards. In effect, the

HGA operates in a manner similar to an investment treaty insofar as it accords various legal protections and a consent to binding international arbitration.

The investment has already proven controversial. In Turkey, the pipeline will pass through areas that have been marked by conflict between the state and Kurdish guerillas; human rights groups have expressed concern that the unrestricted land rights along the pipeline granted to BP's consortium could be abused to prevent Kurdish refugees from returning to their homes. The integrity of the public consultation and compensation process required of BP by Turkish law has also come under fire from campaigners. A representative of the Kurdish Human Rights Project, writing in the UK-based Observer newspaper, noted that its auditing of BP's local consultations found various anomalies including that "one village, HaËibayram, listed by BP as consulted by telephone, was an abandoned wreck of shattered walls."

Meanwhile, in Georgia, the pipeline will pass through the Borjomi valley, the location of the famed mineral water plants that generate a tenth of Georgia's exports. Ecologists warn that a single leak from the pipeline could spell disaster for the mineral water; an environmental impact assessment recommended that an alternate route be found. However, the Georgian government abandoned its environmental restrictions on the project late last year, following a visit from a US special envoy to the region and promises of American military aid.

BP has dismissed objections to the project on human rights and environmental grounds. However, the firm requires interest-free public money to complete the project, and is still awaiting funding decisions from the European Bank for Reconstruction and Development (EBRD) and the International Finance Corporation (IFC). The company warns that any further funding delays are expected to lead to major cost over-runs.

(Sources:

'High-stakes lure of bringing Caspian oil to consumers,' Christian Science Monitor, March 2, 2001, available online at http://csmweb2.emcweb.com/durable/2001/03/02/p7s2.htm

Nick Mathiason, 'BP risks its reputation on Caspian pipeline: Opposition is mounting to US-inspired plans to bring oil through Georgia and Turkey,' The Observer, December 1, 2002, available online at http://www.observer.co.uk/business/story/0,6903,851192,00.html

Anders Lustgarten, 'Why campaigners oppose the pipeline,' Online comment, The Observer, December 1, 2002, available online at http://www.observer.co.uk/worldview/story/0,11581,851001,00.html

'Oil companies colonise turkey: corporate accountability - not!,' Friends of the Earth International press release, August 30, 2002, available online at http://www.foei.org/media/2002/0830.html

'US to train Georgians to guard new pipeline,' Agence France Presse, January 4, 2002

Sevindzh Abdullayeva, Viktor Shulman, 'Construction of Baku-Tbilisi-Ceyhan pipeline to start in 2003,' ITAR-TASS News Agency, December 26, 2002

'BP-led consortium hits snag with BTC pipeline finance,' Agence France Presse, December 13, 2002

Nikolai Topouria, 'Mineral water producer in Georgia fears oil pipeline will wreak havoc,' Agence France Presse, December 5, 2002

'Controversy over the environmental effects of BTC heats up,' Turkish Daily News, December 3, 2002)

READERS' NOTE: Subscribers to INVEST-SD News Bulletin are encouraged to submit news articles, notices of events, press releases, analyses, questions and requests for information to invest-sd@lists.iisd.ca.

All content composed by Luke Eric Peterson IISD-Boston, except Article 4 written by Trineesh Biswas, IISD-Geneva.

Investment Law and Sustainable Development Weekly, Jan.31, 2003

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

---

Contents at a Glance:

Negotiations Watch:

---

1. US Government Declines to Appeal Court Order Mandating Greater Transparency

The US Government has decided not to appeal a December 19 US district court ruling ordering the release of negotiating documents relating to the recently concluded US-Chile free trade agreement.

US Government trade officials had received a temporary stay order from the Washington, DC District Court, to allow them the opportunity to file an appeal (see earlier story in January 17, 2003 edition of Invest-SD Bulletin). However, recognizing that the documents are most useful during the period when the US Congress is reviewing the US-Chile Free Trade Agreement, the Court provided only a two week window in which the US Government could file an appeal.

Having declined to lodge such an appeal, the Office of the US Trade Representative (USTR) has now complied with the Court ruling and released these documents. However, any negotiating documents drafted after the Freedom of Information lawsuit was launched need not be made public, as they were not listed in the original suit. Of the some 275 documents to be released, several pertain to investment matters, including documents which set out the original positions tabled by the US and Chilean governments. Attorneys for the plaintiffs (the Center for International Environmental Law, Friends of the Earth, and Public Citizen) received the documents on Monday and have been reviewing their contents.

Attorneys involved in the case, believe that other more recent documents are also likely to be made public in future, following further Access to Information requests. Martin Wagner, Managing Attorney for Earthjustice's International Program suggests that "under the precedent established by the court, all documents shared with other governments during this kind of negotiation (unless they fall within a limited category of documents

the government is permitted to classify to protect national security interests) must be produced in response to a request under the Freedom of Information Act."

Notably, several of the documents originally requested by the plaintiff organizations fell outside the scope of the Jan.17 Court ruling, and remain protected on national security grounds. As reported in an earlier edition of INVEST-SD News Bulletin (see "US Court Upholds Secrecy of Bush Administration's Investment Negotiating Positions", Jan.10, 2003) several of these documents relate to the development of internal US positions on investment rules. For instance, records of USTR consultations with its external Trade Policy Review Group on investment rules have fallen outside the scope of the Court's disclosure order. In this case, the court had accepted the USTR's claim that the release of such documents would be harmful to national security.

At press time it was unclear how public access to the disclosed documents will be facilitated. The Office of the USTR can be contacted in Washington DC at: 1 (888) 473-8787 (Public Information Line) and 1 (202) 395-3230 (Press Office)

2. EU-US Discuss Changes to BITs negotiated between US and EU Accession Candidates

United States and European Union (EU) officials have set a deadline of May 1 to reach an agreement in an ongoing dispute over BITs signed between the US and several candidates for EU accession. The European Commission claims that US BITs signed with countries including Poland, Slovakia and the Czech Republic are not consistent with European Union Law, and could allow American investors to circumvent EU investment rules.

Controversy over the treaties first arose in early 2002, when the EU demanded that candidates for EU accession would have to terminate or modify their BITs with the US as a condition of accession to the EU. The European Commission had initially suggested that canceling the agreements would be the simplest way of ensuring that they did not conflict with EU law, but subsequently backed away from this demand, in hopes of reaching an accommodation with the US

While the US has been reluctant to amend the treaties – a move which would draw heat from business groups and also require the approval of the US Senate – talks are now underway between the US and the EU to identify possible changes to these BITs.

The European Commission has expressed specific concerns about BITs provisions prohibiting local content requirements; guaranteeing protections for capital transfers; and liberalizing trade and investment in some sectors (such as audiovisual services, air and road transport services, and the marketing of air transport services). These latter services were carved out of the EU's commitments in the WTO General Agreement on Trade and Services (GATS). Accordingly, EU officials worry that any BITs obligations entered into by new EU member countries with the United States, would expose these sensitive EU industries to further liberalization.

Sources also express concern that some EU programs, including those in the agricultural sector, could come into conflict with the BITs ban on local content requirements. US BITs also protect the rights of investors to transfer capital related to their investments, but the EU retains the right to restrict capital flows under certain circumstances. Provisions

providing for the transfer of capital have also proven controversial in recent US investment negotiations with Singapore and Chile.

The US had argued that Poland, Slovakia and the Czech Republic should not be forced to modify the existing treaties simply because their investor protections are stronger than those accorded under EU law. US officials also argued that the demand for modification represented a double standard, because some current member states had 'friendship, commerce, and navigation' agreements – commercial agreements that were precursors to BITs – with the US, and did not have to change these in order to join the EU. An initial suggestion by the US, that a written understanding be agreed with the EU regarding the appropriate interpretation of the controversial BITs provisions, had been rejected by the European Commission on the grounds that it would not provide for sufficient legal certainty.

Both parties now appear determined that the treaties can be altered to meet some of the EU demands. However, the two sides have set a deadline of May 1 - one year before the date of accession of Poland, Slovakia, and the Czech Republic; under the terms of the relevant BITs, a minimum of one year's notice would be necessary if the Eastern European nations were required by the EU to abrogate their BITs with the United States.

Sources: INVEST-SD interviews; Inside US Trade; June 21, 2002; June 28, 2002; October 11, 2002; January 10, 2003

3. Canadian Government Publishes External Consultants' Papers on Investment

A series of papers have been commissioned by the Department of Foreign Affairs and International Trade (DFAIT) for its Ad-Hoc Experts Group on Investment Rules. Several of these documents have now been published on DFAIT's web site, including one written by IISD Associate Howard Mann (see below). These papers do not, however, represent the Government of Canada's position on investment issues.

The papers available on-line include:

"Untangling the Expropriation and Regulation Relationship: Is There a Way Forward?",

Dr. Howard Mann and Dr. Julie A. Soloway

"Essential Disciplines of the National Treatment Obligation under NAFTA Chapter Eleven", Jon R. Johnson

"The Participation of Amici Curiae in NAFTA Chapter Eleven Cases", Andrea K. Bjorklund

See: www.dfait-maeci.gc.ca/tna-nac/background-en.asp

Arbitration Watch:
---

4. Conference to Examine Annulled Arbitration Decisions, Washington, April, 2003

Following on the heels of several recent ICSID decisions challenging investment arbitration awards, a one-day conference is slated to examine the current state-of-play of these so-called annulment decisions. Under normal ICSID arbitration rules, investors do not enjoy the ability to challenge the awards of arbitration tribunals in domestic courts.

However, they may challenge these awards on certain narrow grounds before a specially-convened ad-hoc committee.

One recent such annulment proceeding, in a bilateral investment treaty dispute between a multinational water services company and the Argentine Republic, was highlighted in a recent edition of INVEST-SD Bulletin (see: "Vivendi-Argentina Water Dispute Heading Back to BIT Arbitration?", Jan.17, 2003).

A conference to examine the handful of annulment proceedings before ICSID is scheduled for April 1, 2003 in Washington DC. The event is co-sponsored by the International Arbitration Institute and the American Society of International Law. In addition to the ICSID awards, speakers are expected to discuss developments in the well-known Metalclad case under NAFTA.

This case arose out of a controversial investment in a Mexican hazardous waste facility. Although the Tribunal found that the Mexican Government had violated its NAFTA commitments, the Mexican Government was able to appeal the Tribunal's decision in the domestic courts. Because the arbitration had proceeded under the ICSID's less-often-invoked Additional Facility rules, it was reviewable by domestic courts. In the Metalclad case, a Canadian court charged with reviewing the case, partially overturned the tribunal's ruling.

In addition to addressing the implications of this development, speakers are also expected to touch upon last year's United State Trade Act which calls for a standardized appellate mechanism for investment treaty arbitration rulings. As indicated herein, the current appeal options differ significantly depending upon the particular arbitration rules invoked by the investor.

For further information:

"Awards - The Impact of Recent Decisions" Washington, DC (April 1, 2003)

Organizers: International Arbitration Institute/American Society of International Law
Contact: Emmanuel Gaillard or Nanou Leleu-Knobil
International Arbitration Institute c/o Shearman & Sterling
114, avenue des Champs-Elysees
75008 Paris FRANCE
Phone: 33-1-53-89-70-0; Fax: 33-1-53-89-70-70; Email: nleleuknobil@shearman.com

---

READERS' NOTE: Subscribers to INVEST-SD News Bulletin are encouraged to submit news articles, notices of events, press releases, analyses, questions and requests for information to invest-sd@lists.iisd.ca.

All content composed by Luke Eric Peterson IISD-Boston and Trineesh Biswas IISD-Geneva