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Contents at a Glance:

Editor's Note:
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1. INVEST-SD Moving North

This issue of INVEST-SD News Bulletin marks the last to be produced from Boston, Massachusetts. The editor will be repatriating himself to Canada at the end of July, and publication of the Bulletin will resume in mid-August from Ottawa, Ontario.

In the two years that the News Bulletin was produced from Boston, the readership base grew from 250 subscribers to 950, and the service also reached new readers through the creation of a web-based archive (http://www.iisd.org/investment/invest-sd/archive.asp), as well as thru regular forwarding of the publication to other Internet-based discussion groups.

The editor offers best wishes to all INVEST-SD's readers, and looks forward to resuming coverage of the international investment regime again in mid-August.

Arbitration Watch:
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2. NAFTA Parties Release Draft Negotiating Texts of Investment Chapter, By Luke Eric Peterson

The three NAFTA parties, Canada, the US and Mexico, have released draft negotiating texts from 1991 thru 1993 which chronicle the various iterations which negotiators went through before finalizing the investment rules written into the agreement.

In a July 16 news release, the Canadian Government noted that the release of the Chapter 11 negotiating texts will "benefit businesses, workers and consumers."

One lawyer involved in arbitrating several claims under the NAFTA investment chapter told INVEST-SD that the release of the texts was a "positive sign", albeit "long overdue".

Todd Weiler, who has worked on early NAFTA arbitrations such as Pope & Talbot vs. Canada, as well as more recent ones including International Thunderbird Gaming Corporation v. Mexico, said that the documents are informal travaux prepatoires, which could limit their legal value. Nevertheless, Weiler was quick to add that even informal texts could be of use to foreign investors seeking to refute claims by one or another NAFTA government about the intent of a particular NAFTA provision.

However, the texts might be difficult to interpret in the absence of further contextual materials which indicate the meaning attributed to a particular draft provision by one or more parties to the negotiation.

Rather, the released materials constitute some 40 iterations of the

draft text, without commentary or supporting materials.

Whatever, their ultimate utility to investment arbitration, Weiler did hail the public release of the texts, noting that some portion of them had been released to investors on a piecemeal basis in certain NAFTA arbitrations - a comment echoed by J. Christopher Thomas, an occasional arbitrator and counsel to Mexico in a number of NAFTA arbitrations.

Thomas told INVEST-SD that the release was "necessary and appropriate because the negotiating history had been dribbling out at different speeds in different proceedings."

"Whether it will prove to be of much assistance to disputing parties remains to be seen.", he noted, "... the records can be extremely difficult to unscramble in some instances due to the pace of the negotiations in the last few months, the underlying questions of the treaty's structure, the fact that different positions were taken on particular clauses that depended on positions relating to other clauses, and so on."

He also cautioned that: "The reasons for deleting or modifying text or for why a State moved off a particular position is rarely stated." As such, Thomas noted that their usefulness to future arbitral proceedings can be difficult to predict.

"They may be of great assistance in clarifying an issue; they may be of little help at all."

Sources:

INVEST-SD Interviews

NAFTA Chapter 11 - Trilateral Negotiating Draft Texts available online at:
http://www.dfait-maeci.gc.ca/tna-nac/disp/trilateral_neg-en.asp

3. IISD and Earth Justice submit Post-Hearing brief following Methanex Hearings,
By Luke Eric Peterson

The International Institute for Sustainable Development (publisher of the INVEST-SD News Bulletin), in concert with another organization which obtained amicus curiae status in the NAFTA arbitration, Methanex v.

United States, has filed a post-hearing submission with the tribunal.

The latest submission, filed on the heels of hearings which took place in Washington DC in June of this year, takes issue with the US Government's defence of California's ban on the controversial gasoline additive MTBE. The amicus curiae argue that the US's characterization of the ban as a public health measure overlooked the opportunity to clarify that it is also an environmental measure. In particular, the submission argues that the so-called "police powers" exclusion under international law, should provide harbour not only to bona fide public health measures, but also to bona fide environmental measures

The submission drafted by Howard Mann, counsel for IISD in the Methanex case, and Martin Wagner, counsel for EarthJustice, can be found online at:

http://www.iisd.org/publications/publication.asp?pno=641

4. Canadian Mining Firm Launches Arbitration Against Venezuela,
By Luke Eric Peterson

Calgary-based Vannessa Ventures has filed a request for arbitration with the International Center for Settlement of Investment Disputes (ICSID). The Canadian mining company alleges that it has been the victim of an expropriation under the Canada-Venezuela bilateral investment treaty and is seeking either restitution of its control of the gold mining joint-venture MINCA and some $50 million in damages, or full compensation amounting to more than $1 billion for the loss of its investment and its projected profits.

According to Company President John Morgan, Vannessa acquired rights to the vast Las Cristanas area when the multinational company Placer Dome sought to unload its Venezualan claims during a period of low global gold prices in the late 1990s.

In an interview with INVEST-SD Morgan alleged that his firm has since been the victim of two expropriations: one by the Ministry of Energy and Mines, and a second Presidential decree by President Hugo Chavez.

The firm has retained the Toronto office of Tory LLPs to represent it in the arbitration, should its request be registered by ICSID. In the interim, the firm has suspended a spate of domestic litigation ongoing in Venezuelan courts, citing the requirement under the Canada-Venezuela treaty to suspend domestic litigation in order to pursue international

arbitration.

Sources:

INVEST-SD Interviews

"Vannessa commences International Arbitration process", July 9, 2004, Canada NewsWire

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Negotiation Watch:
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5. NGOs Call for World Bank Moratorium on Natural Resources Financing, By Luke Eric Peterson

The Financial Times reports that more than 30 development and environmental groups have asked the World Bank to invest only in those energy projects which are certain to reduce poverty in the target country - and to impose a temporary moratorium on the financing of all new projects until a variety of policy changes have been put into place by the Bank.

The appeal comes as the Bank's Board of Directors prepare to meet next month to determine its response to an external review of the Bank's financing of extractive sectors investments. That review, by former Indonesian Environment Minister Emil Salim, called for the Bank to overhaul its lending practices and to abandon financing of some types of projects, such as coal and oil.

In public comments, Salim has lamented that a number of Bank projects - particularly those in the coal and oil sectors - have failed to contribute to poverty alleviation in resource-rich developing countries thanks to poor governance and mismanagement.

This week's call from a coalition of development and environment groups, including Oxfam America, Environmental Defense and the Center for International Environmental Law, comes on the heels of a response by World Bank managers to Mr. Salim's report (see "World Bank management responds to external review of WB role in extractives sector", INVEST-SD News Bulletin, June 21, 2004).

Andrea Durbin, a Washington-based coordinator for the NGO coalition,

told INVEST-SD that the management response has been unsatisfactory, with some of Minister Salim's proposals ignored, and others met with "rhetorical" rather substantive responses.

Sources:

"World Bank Faces Calls for Poverty Test on Energy Projects", By Andrew Balls, Financial Times, July 20, 2004

INVEST-SD Interviews

Joint Civil Society Analysis of the World Bank's Response to the Extractive Industries Review, July 2004, available online at: http://eireview.info/doc/Civil%20Society%20Analysis%20of%20Mgmt%20Response%20July%2019.doc

6. US- Southern Africa Negotiations Stall; Race-based Affirmative Action an Obstacle?,
By Luke Eric Peterson

Negotiations on a Free Trade and Investment Agreement between the US and the Southern Africa Customs Union (SACU) have stumbled amidst reports that one obstacle has been the thorny issue of South Africa's Black Economic Empowerment Programme.

According to reports in Inside U.S. Trade, a Washington-based trade newsletter, a round of SACU talks that had been slated for August has been delayed, with an unnamed US trade official insisting that the delay was due to a scheduling conflict.

That official denied reports in the South African media that substantive disagreements in areas such as investment and services lay behind the delay.

Whatever the reason for the delay, it is clear that negotiators face a dilemma in how to accommodate investment rules to the BEE programme, a race-based system of affirmative action which is slowly remaking the complexion of post-Apartheid South African business.

Under the BEE programme, selected economic sectors have been handed targets for improving diversity, including duties to divest minority equity stakes to encourage greater ownership by black businesspersons, as well as to encourage ethnic diversity in appointments to senior

management and board of directors, and to establish greater relationships with black and minority suppliers.

In investment treaty parlance, these policy measures could come into tension with treaty rules against indirect expropriation and the imposition of so-called performance requirements (i.e. prohibitions against requiring foreign investors to source locally, or promote locals to senior management or board positions).

Indeed, as reported last year, in INVEST-SD some US businesses have expressed concern that BEE criteria might dissuade US investors from investing in South Africa.

One South African commentator has also noted that US negotiators confront a dilemma in the US-SACU talks insofar as they could put US investors at a disadvantage relative to European investors if the US were to capitulate to any demand from South Africa that the SACU investment rules provide an exception for BEE policies.

Writing in South Africa's Business Day publication, Peter Leon, a partner with law firm Webber Wentzel Bowens, observes that South Africa failed to include such exceptions in earlier investment treaties concluded with a raft of European countries. Leon characterizes the US-SACU dilemma as one of most-favored nation treatment - with US investors likely to demand treatment at least as favorable as that accorded to European investors in their treaties with South Africa.

Foreign investors have not been shy about alluding to their treaty rights in the face of certain BEE policy proposals. In 2002, the Economist magazine reported that foreign-owned resource firms alluded to the possibility that a BEE-inspired minerals law might "contravene a 1994 law guaranteeing British investment against expropriation." Further inquiries by INVEST-SD revealed that this "law" was indeed the 1994 UK-South Africa bilateral investment treaty.

The minerals law in question, the Minerals and Petroleum Resources Development Act (MPRDA) of 2002 is now in the process of being implemented in South Africa, and will require the transfer of all privately-owned mineral rights to the South African state - with businesses then eligible to apply for licenses to exploit the state-owned mineral rights.

In a media release issued on May 3 of this year, the South African Department of Minerals and Energy acknowledged that it was taking outside legal advice as to the implications of the new Act on its international treaty commitments.

INVEST-SD will continue to monitor the US-SACU talks, as well as the debate over the new South African mining law.

Sources:

"August Round of SACU Talks Delayed, USTR Says No New Date Set", Inside U.S. Trade, July 9, 2004

"US-SACU Trade Talks: From Empowerment to Growth", Peter Leon, Business Day (South Africa), June 21, 2004

"Implimentation (Sic) Of The Minerals And Petroleum Resources Development Act, Act No. 28 Of 2002 Kicks Off", Ministry of Minerals and Energy, Media Release, May 3, 2004, available online at: http://www.dme.gov.za/newscentre/media_rel/media0_03_may_04.pdf

"South Africa's Black Economic Empowerment Plans an Obstacle to a US FTA?", By Luke Eric Peterson, INVEST-SD News Bulletin, July 8, 2003

"South African Mining: the Diggers are Restless", June 22-28, 2002, The Economist

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