

Investment Law and Policy Weekly News Bulletin, May 23, 2003

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

Contents at a Glance:

Editor's Note

1. Web Address for INVEST-SD Bulletin Archive

Arbitration Watch

2. Human Rights Body Intercedes to Protect Indigenous Group Opposed to Oil Exploration

3. Amnesty International Calling for Changes to Turkish Pipeline Agreement

4. Texas Conference on "Private Investments Abroad" and Mock Arbitration

Negotiation Watch

5. Key Business Group Wary of WTO Investment Talks

6. Oxfam International Releases Briefing Paper on Investment and WTO

Editor's Note

1. Web Address for INVEST-SD Bulletin Archive

Last week's announcement of the INVEST-SD News Bulletin's new Internet archive neglected to provide an address for the archive. Monthly volumes of back issues can be found at: <http://www.iisd.org/investment/invest-sd/>

Arbitration Watch:

2. Human Rights Body Intercedes to Protect Indigenous Group Opposed to Oil Exploration,

By Luke Eric Peterson

The Washington-based Inter-American Commission on Human Rights has issued a series of precautionary measures which oblige the Ecuadorian government to protect a threatened indigenous community which opposes oil exploration on its territory.

According to documents filed with the Inter-American Commission, the Kichwa people of Sarayacu, have come under threats of violence because of their opposition to exploration in their territory in the Central Ecuadorian Amazon. Lawyers representing the Sarayacu have warned that the community of 1100 persons and its leaders have suffered "serious threats caused by conflicts with the Argentine oil company CGC (Compañía General de Combustibles)."

In 1996, the Ecuadorian Government signed an exploration agreement for a 200,000 hectare area with the Argentine-based firm. Earlier this year, US-based Burlington Resources became a part-owner of this concession, known as Block 23. Under the terms of the 1999 Ecuadorian Constitution, concession holders are obliged to consult with indigenous groups in a concession area before mounting explorations for natural resources.

A spokesperson for Burlington Resources indicates that his firm and its Argentine partner have been engaged in such consultations with indigenous communities in Ecuador. According to James Bartlett, Burlington's presence in the region has been very minimal - having only acquired its stake in the concession earlier this year - and its Argentine partner, CGC, has been leading the consultation efforts.

The contested area is proving something of a headache for Texas-based newcomer Burlington. Earlier this month, a group of indigenous peoples from Ecuador and Peru traveled to Burlington's headquarters to present the company with an "eviction notice" which called upon the firm to abandon all oil activities in the two countries.

US-based campaign group, EarthRights International, is also pressing the firm to abandon its exploration plans, citing the continued opposition of the Sarayacu community to the proposed explorations.

As consultation efforts drag on, CGC and Burlington have had to invoke a force majeure clause in their contract with the Ecuadorian government, which entitles the investors to derogate from certain commitments under the contract due to circumstances beyond its control (in this case domestic opposition to its plans). The investors have had to postpone plans for seismic testing and other initial exploratory efforts.

In a series of interviews with INVEST-SD Bulletin, lawyers acting for the Sarayacu

community, based in Quito, Ecuador and Washington, D.C. indicate that they will keep up pressure on the Ecuadorian Government to respect the community's opposition to oil exploration in its territory.

Marie-Sol Blanchard a lawyer with The Centre for Justice and International Law, an organization which specializes in litigation before the Inter-American Human Rights system, says that the recent precautionary measures imposed by the Inter-American Commission on Human Rights require that the Ecuadorian government ensure the safety of the Sarayacu community in the face of threats from individuals who favor exploration in the contested region.

The Commission has also ordered the Ecuadorian Government to investigate earlier threats which have been made against individuals in the community, and to investigate the circumstances surrounding the forcible disappearance of community members for a period of several weeks. Blanchard notes that the Ecuadorian military has stepped up its presence in the contested area, and that members of the Sarayacu community fear for their safety.

Plans are also under way by lawyers for the Sarayacu to mount a further claim before the Inter-American Court of Human Rights based in San Jose, Costa Rica, which will seek to hold the Ecuadorian government liable for violations of the 1969 American Convention on Human Rights, for its alleged failure to protect the Sarayacu community from interference with its way of life which is rooted in its communal lands.

Blanchard adds that the precautionary measures ordered by the Inter-American Commission are notable for their express requirement that the Ecuadorian Government "protect the special relation the Sarayacu Community has with its territory". She says that this signals a growing recognition on the part of the regional human rights system that the culture and way of life of indigenous communities are inextricably tied up with their relationship to the land, and the need for legal protection for this relationship.

In a recent case before the Inter-American Court of Human Rights, the Court held the Government of Nicaragua liable for violations of the communal property rights of the Awas Tingni indigenous community, by virtue of the Government's failure to provide the community with legal title and recognition for their communal lands.

The Court found that a forestry concession negotiated between the Nicaraguan government and a subsidiary of a Korean investor posed a threat to the Awas Tingni community which lives in part of the concession area. In its reasoning, the Court noted:

"Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival".

In addition to finding that the Nicaraguan government had violated the American

Convention's Right to Property, by its failure to protect the Awas Tingni people, the Court also ordered the Government to cease and desist from all activities - including the granting of natural resource concessions - which would jeopardize the Awas Tingni people's use and enjoyment of their territory, until such a time as a system was put into place which could guarantee the integrity of the Awas Tingni community.

Should a similar case be mounted against the Ecuadorian Government at the Inter-American Court, in an effort to halt the proposed activities of the US and Argentine investors, there is some possibility that the affected investors might also enjoy recourse to defend their own property interests (in the form of their concession contract) through arbitration against the Ecuadorian government under the terms of bilateral investment treaties which Ecuador has concluded with the United States and Argentina in the early 1990s.

In such a case, the Ecuadorian Government could find itself caught between competing international legal obligations to indigenous groups on the one hand, and foreign investors on the other.

In a little-noticed irony, a parallel system of property protection for foreign investors has grown up in a piecemeal fashion alongside the Inter-American Human Rights system over the past several decades. While a spokesperson for Burlington Resources insists that his company is committed to ongoing consultations with affected communities in an effort to reach an amicable solution to their concerns, the prospect of an investor-mounted expropriation claim remains a real one for the Ecuadorian government. The Government already faces international arbitrations mounted or threatened by multinational oil companies in relation to Ecuador's tax treatment of oil investors.

Although plans are also afoot for a hemispheric-wide Free Trade Area of the Americas (FTAA), encompassing North, Central and South America, there appear to be no plans to reconcile the foreign investor protection provisions contained in any such FTAA with the pre-existing Inter-American Human Rights System, which also endeavors to protect property rights - as well as a constellation of other human rights - in the region. Indeed, neither Canada nor the United States, two of the leading proponents of a hemispheric pact for foreign investor protection, have yet to ratify the decades-old American Convention on Human Rights, nor have they recognized the jurisdiction of the Inter-American Court of Human Rights over claims mounted by US or Canadian citizens.

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Inter-American Court of Human Rights, The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, available on website of the Court at: <http://www.corteidh.or.cr>

3. Amnesty International Calling for Changes to Turkish Pipeline Agreement, By Trineesh Biswas

In a report issued this past week, Amnesty International has warned that British Petroleum's \$2.9 billion Caspian pipeline project could endanger the human rights of thousands of people living in the affected areas.

The Baku-Tbilisi-Ceyhan (BTC) pipeline will bring oil from the landlocked Caspian Sea to the Mediterranean coast, and to world markets, but critics have long expressed concerns about the social and environmental impact of the project. (See "BP Pipeline Investment and Stabilization Contract Worries Critics," Invest-SD News Bulletin, January 24, 2003)

Fears have been raised about the prospect for 'regulatory chill' arising out of the Host-Government Agreements signed by the Consortium with the Governments of Turkey, Georgia and Azerbaijan. For example, the Turkish Government is obliged to compensate consortium members* for any disruption in the 'economic equilibrium' of the project, including the effects of any new environmental and social standards, even those which aim at compliance with European or international norms.

According to Amnesty International, the HGAs also create "disincentives for Turkey to become more integrated into international human rights norms." Amnesty fears that the Turkish state's inability to apply new laws to the project could result in weaker legal protection for those living and working in the pipeline zone - in effect rendering them second-class citizens, and running afoul of Turkish commitments under the European Convention on Human Rights.

Amnesty warns that the HGA subcontracts out all responsibility for the security of the pipeline to the Turkish authorities. Much of the pipeline runs through Kurdish areas that saw widespread violence during the conflict between the Turkish security forces (Kurdistan Workers' Party) and the PKK through the 1990s. Given the Turkish military and police's past record of violent suppression of protest activities, Amnesty has expressed concern that the pipeline might serve as a pretext for further human rights

abuses.

Amnesty is calling for the incorporation of basic rights as a 'central operational feature of the project.' Such proposals would modify the HGA to ensure that it could not be interpreted or applied in a manner which would make it more difficult for Turkey to satisfy its international human rights obligations. Other steps would also need to be undertaken to make sure that workers' and human rights comply with relevant international minimum standards.

In an effort to promote such changes, Amnesty has called on the British government to refuse BP's application for taxpayers' money in the form of export credit guarantees unless the HGA is reformed. According to a report in the Guardian newspaper, BP concedes that it will require such interest-free public loans to complete the pipeline scheme.

Sources:

*According to information from the BTC consortium cited in the Amnesty International report, the partners are BP (UK), SOCAR (the state oil company of Azerbaijan), TPAO (Turkey), Statoil (Norway), Unocal (USA), Itochu (Japan), Amerada Hess (Saudi Arabia), Eni (Italy), TotalFinaElf (France), INPEX (Japan) and ConocoPhillips (USA).

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Terry Macalister, "Amnesty calls for action on Caspian," The Guardian, May 20, 2003

Nick Mathiason, "Opposition mounts to US-inspired plans to bring oil through Georgia and Turkey," The Guardian Weekly, December 5, 2002

4. Texas Conference on "Private Investments Abroad" and Mock Arbitration

From June 17-19, the Dallas-based Center for American and International Law is hosting two events which will bring together experts on private investment in the developing

world. The first of these events will see a two-day symposium entitled "Coping With Governments as Regulators and Partners".

The symposium will see a number of sessions including ones on "Foreign Investment Laws and Host country Agreements" (with a particular focus on China and Afghanistan) and "Regulating a Fallen Economy: The Good, the Bad and the Ugly" (with a particular focus on Argentina and Venezuela). Speakers for the latter session will explore the implications of recent regulations handed down in Argentina and Venezuela in order to mitigate the economic crises facing these two nations.

On June 19th, a mock arbitration proceeding will be held under the title: "Arbitration and the Courts: A Case Study from Latin America". The "cast" for this workshop will consist of a number of experienced international arbitrators and arbitration lawyers, many of whom are involved in actual investment arbitrations in the region.

Sources:

For more information about the Symposium, see:
http://www.cailaw.org/brochures/0603_symposium.pdf

For more information about the Mock Arbitration Workshop, see:
http://www.cailaw.org/brochures/0603_ita_workshop.pdf

Negotiations Watch:

5. Key Business Group Wary of WTO Investment Talks, By Luke Eric Peterson

In a policy paper released this month, the Business Roundtable (BRT) suggests that the lack of consensus over how the World Trade Organization should tackle the topic of investment "is likely to derail the negotiation of any meaningful WTO investment agreement".

The group is calling on parties to the WTO to restrict their efforts to the creation of a framework wherein members can discuss policy differences and reforms. They warn that the moment is not propitious for a more ambitious WTO agreement, and that disagreements over investment could infect other elements of the WTO's Doha Trade Round.

The Roundtable, which is comprised of the CEOs of some 150 US-based multinational companies, views a multilateral investment agreement as a "long-term objective, rather than a short-term priority", and warns that any full-scale agreement to emerge in the

short-term would be unlikely to offer the levels of protection currently found in bilateral and regional investment treaties.

"A multilateral agreement that offers less protection to investors," the BRT cautions, "would not be useful to members who enjoy greater protections through their respective bilateral and regional agreements."

Indeed, the Roundtable expresses fears that contentious negotiations on investment at the WTO might simply siphon off energy and resources from ongoing bilateral and regional trade negotiations, "which are proving to be especially successful in the comprehensive liberalization of investment regimes."

In recent months, other business lobby groups have weighed into the debate over a possible WTO investment agreement. The Paris-based International Chamber of Commerce (ICC) has issued a paper seeking to bridge the gap between bilateral investment treaties and a proposed WTO agreement, by calling for any new multilateral agreement to incorporate all of the key protections offered in modern BITs.

These would include: provisions for protection against expropriation and "creeping expropriation"; commitments for entry of investment to be scheduled on a "negative list" approach; and the provision for investor-state dispute arbitration.

Despite differences of opinion amongst business groups about whether the WTO should proceed with investment negotiations, there is general agreement that existing investment treaties should remain sacrosanct unless the WTO were to negotiate an agreement which exceeded these BITs in the protections which it afforded to global business.

Recently, the US Administration has signaled that it will not countenance any WTO Agreement on Investment which would undermine the strong investor protections written into its 37 bilateral investment treaties (BITs), and a handful of free trade agreements.

Sources:

"How the WTO Can Promote The Benefits of International Investment", Business Roundtable WTO Policy Paper, May 2003, available at:
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"US Administration Warns WTO on Inviolability of its Bilateral Investment Treaties", By Luke Eric Peterson, INVEST-SD News Bulletin, May 9, 2003

"Int'l Chamber of Commerce Issues Expectations for WTO Investment Agreement", By Luke Eric Peterson, INVEST-SD News Bulletin, April 25 & May 2, 2003

6. Oxfam International Releases Briefing Paper on Investment and WTO

A new briefing paper published by Oxfam International seeks to challenge the wisdom of launching negotiations on investment at the World Trade Organization. In the report, "The Emperor's New Clothes: Why Rich Countries Want a WTO Investment Agreement", Oxfam argues that there is no evidence to show that existing investment treaties have yielded developmental benefits for poor countries.

Also raising concerns about the unanticipated uses of existing bilateral and regional investment treaties, Oxfam cautions against concluding further "investor rights" without serious consideration of the needs of developing countries to regulate foreign direct investment in their own national interests.

In recognizing some of the benefits which can flow from foreign direct investment (FDI), the organization calls for international efforts to negotiate a "pro-poor" investment treaty at the multilateral level - but not at the Geneva-based World Trade Organization, which Oxfam holds to be "the wrong forum" for the governance of global FDI flows..

The full 43 page report is available on-line at:

http://www.oxfam.org/eng/pr030429_wto.htm

INVEST-SD Bulletin is edited in Boston, Massachusetts by Luke Eric Peterson for IISD.

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