
Contents at a Glance:

Negotiations Watch

1. EU insists investment issue is not off the WTO agenda
2. NAFTA Ministers issue statements, guidance on several aspects of arbitration
3. Transparency International ranks host governments on perceived corruption
4. ASEAN bloc pursues deeper economic integration in order to compete with China on FDI

Arbitration Watch

5. US oil company won damages in previously unreported 1999 investment treaty claim against Kazakhstan

Negotiations Watch:

1. EU insists investment issue is not off the WTO agenda,
By Trineesh Biswas in Geneva

Key demandeurs of a WTO investment agreement say that more time is needed before the place of investment in the Doha Development Round will be clarified. At last month's Ministerial Conference in Cancun, the European Union had signaled a willingness to drop its demands for a WTO agreement on investment at the 11th hour of negotiations.

However, in a more recent statement, the EU has reiterated its long-standing interest in the issue.

A September 25 statement released by the European Commission notes that: "Although the Commission indicated its willingness to reduce the [Singapore issues] agenda at Cancun, this offer was not accepted and therefore does not constitute any formal or informal commitment on behalf of the EU."

The Commission warns that "the four Singapore issues are undisputedly part of the Doha Development Agenda and of the Single Undertaking" and that it is "a serious breach of faith to reject the pursuit of these

negotiations."

However, the Commission has opened the door to a two-track negotiating process on investment, suggesting that on such an approach, "negotiations would take place only between those who have a positive interest in their pursuit."

Indeed, in light of the WTO's failed Cancun Conference, the EU has mooted a radical idea of creating a "WTO II," in which a coalition of the willing would negotiate additional rules on an optional, plurilateral basis, while "reluctant" members limited their commitments to those covered by the current organization, "WTO I."

Meanwhile, work at the Geneva-based WTO is at a standstill. Working groups - including that on Trade and Investment - are officially suspended until the General Council's meeting on December 15.

However, a WTO official told Invest-SD that an informal meeting of heads of delegations will be held on Oct 14, and that Director-General Dr. Supachai Panitchpakdi and General Council Chair Carlos Perez del Castillo will discuss future work issues including the Singapore issues. When the WTO's General Council meets the following week, work could resume on issues including the Singapore issues.

In a personal comment - made in advance of his government's own position on the question - Tae Yong Lee, a Counsellor at the Republic of Korea's Permanent Mission in Geneva, did not rule out the possibility that plurilateral investment disciplines might be pursued by willing WTO member-states.

Lee professed surprise at the EC's apparent last-minute change of heart at the Cancun Conference: "I am still perplexed by the sudden, unexpected move by (EU Trade Commissioner) Lamy." "I also understand," he noted, "that some European Members do not support the dropping of the investment issue."

Mr. Lee argued that the "clarification (process) should continue... I don't think it's reasonable to drop the investment issue from the table."

Speaking, of course, in his personal capacity, he felt that Korea's "fundamental position has not changed, but we need to pay more attention to developing countries' concerns, putting all cards on the table... including alternative options such as an opt-in opt-out (plurilateral approach)."

Lee also noted that another possibility might be "a step-by-step approach, dealing first with less controversial investment-related issues like transparency... agree[ing] on the areas where convergence is possible."

Officials at the Canadian Mission indicated that Canada was in an "assessment mode", and that more time would be necessary before the place of investment could be determined. The Indian Mission, when contacted by INVEST-SD, was unable to comment.

Sources:

INVEST-SD Interviews

"The Doha Development Agenda (DDA) After Cancun", Statement of the European Commission, Sept. 25, 2003

2. NAFTA Ministers issue statements, guidance on several aspects of arbitration

Last week's meeting of NAFTA trade ministers in Canada this past week saw the adoption of several ministerial statements bearing upon the NAFTA Chapter 11 investment arbitration process. Ottawa lawyer Howard Mann, senior international law advisor to the IISD, has produced a commentary on these developments. It is attached in Microsoft Word format.

The text of the NAFTA Ministers statements can be found at:
www.dfait-maeci.gc.ca/nafta-alena/celeb2-2n.asp

3. Transparency International ranks host governments on perceived corruption,
By Luke Eric Peterson

A report by Transparency International (TI), a leading non-governmental organization devoted to fighting corruption, has found a high proportion of developing countries continue to score poorly on corruption indices.

This week, TI launched its Corruption Perception Index (CPI) reflecting polls of business people, academics and risk analysts about the corruption levels in 133 selected countries.

According to TI Chairman Peter Eigen, "nine out of ten developing countries score less than 5 against a clean score of 10 in the TI CPI 2003." In particular, Bangladesh, Nigeria, Haiti, Paraguay, Burma, Tajikstan, Georgia, Cameroon, Kenya, Angola, Azerbaijan and Indonesia were found to have "pervasive" levels of corruption.

TI Chair Eigen calls upon rich nations to "provide practical support to developing country governments that demonstrate the political will to curb corruption." He also notes that developing countries would be well-served by the launch of negotiations on a proposed World Trade Organization agreement on transparency in government procurement, which, along with investment, is one of the 4 so-called Singapore Issues at the WTO:

"For less developed countries, it is in their own interests to introduce transparency measures in public procurement because the waste of their own scarce resources is at stake. If corruption is not contained, poverty will grow."

Transparency International has also called upon western governments to live up to commitments made in the OECD Anti-Bribery Convention, which outlaws bribery of foreign public officials. A 2002 survey by TI found

that companies from a number of top exporting countries, including Russia, China, Taiwan and South Korea, exhibited high levels of bribes paid to officials in emerging markets. Furthermore, companies from Italy, Hong Kong, USA, Japan, Malaysia and France were also flagged for above-average recourse to bribery.

Further information about the 2003 Corruption Perceptions Index and the 2002 Bribe Payers Index are available from TI's website:
www.transparency.org

4. ASEAN bloc pursues deeper economic integration in order to compete with China on FDI,
By Trineesh Biswas

South-East Asian leaders pledged this week to create a common market by 2020, with complete liberalization of trade in goods, services, investment, and skilled labour.

At their October 5-7 summit in Bali, the ten members of the 36-year old Association of South-East Asian Nations (ASEAN) laid out a long-term plan to transform the region into a single economic entity.

In recent months, ASEAN has signaled the importance of economic integration as it competes with China to attract inward foreign direct investment into the region.

The scope of an ASEAN Economic Community would extend far beyond the organisation's economic efforts thus far, which have consisted largely of lowering intra-regional tariffs on manufactured goods. Following the model pursued by the European Union, it would extend to non-tariff barriers and services sector liberalization. The Financial Times reports that ASEAN members agreed to integrate the region's services sector by 2020, with "accelerated vertical integration" in some services industries, including healthcare. Member-states also resolved to start monitoring one another's compliance with their commitments under the free trade agreement they signed on to in 1992, and to create a binding dispute settlement mechanism.

Notably, not all ASEAN members can agree on the pace of liberalization - Singapore's prime minister Goh Chok Tong has publicly complained that while he and his Thai counterpart want to tango, ASEAN was moving in a "slow waltz."

The recent ASEAN summit also broadened ASEAN's ties with India and Japan, following last year's signing of a framework to establish a free trade area with China by 2010. India and ASEAN's members agreed to create an Indo-Asean free trade area by 2012. Japan and ASEAN agreed to start negotiations in 2005 for an agreement that would liberalise trade in goods, services, and investment flows, according to reports from the Financial Times.

During the summit, several South-East Asian academics and rights activists warned that moves to deepen economic integration and attract investment were unlikely to meet with success unless they were

accompanied by greater political openness and a strong commitment to basic principles of human rights and the rule of law.

Sources:

"Asean widens India and Japan links," by Shawn Donnan and Amy Kazmin, Financial Times, October 9, 2003

" Nations set deadline of 2020 for single market," by Shawn Donnan and Amy Kazmin, Financial Times, October 8, 2003

"Activists seek commitment to rule of law," by Amy Kazmin, Financial Times, October 7, 2003

"A holiday in Bali," The Economist, October 9, 2003

"Noodle soup," The Economist, October 8, 2003

Arbitration Watch

5. US oil company won damages in 1999 investment treaty claim against Kazakhstan,
By Luke Eric Peterson

An investigation by INVEST-SD News Bulletin has determined that a California-based Oil company, Biedermann International, successfully claimed for expropriation against the Republic of Kazakhstan in 1999 under the terms of the US-Kazakh Bilateral Investment Treaty.

The case is thought to mark the first instance where the US-Kazakh BIT has been successfully wielded by a foreign investor in an investor-state arbitration - although it is possible that other arbitrations have taken place without any public disclosure.

Biedermann's case arose out of its treatment at the hands of Kazakh authorities in relation to the firm's 25 year joint venture agreement to explore the Kenbai oil field.

According to attorney Charles H. Camp, who represented Biedermann through the law offices of Patton Boggs in the case, a tribunal operating under the Stockholm arbitration rules found that Kazakhstan had taken measures tantamount to expropriation when it withdrew a land-use permit, a mere 6 weeks after having finally granted Biedermann the necessary drilling permits.

The tribunal held that the 6 week window from April 30, 1992 to June 15, 1992, was "clearly insufficient" as a basis for Biedermann to exercise its legitimate expectations of long-term profits from the oil exploration deal.

In an award handed down on Aug.2, 1999, Biedermann International won a damage claim for its sunk costs and interest. A much larger claim for

lost profits was not upheld in the case.

A notice on the website of Washington law firm Akin Gump Strauss Hauer and Feld, which represented Kazakhstan in the arbitration, confirms that the arbitration yielded "less than 3% of the claimed amount" of \$600 million for Biedermann. Efforts to contact the Moscow-based counsel representing Kazakhstan in the arbitration were unsuccessful at press time.

Mr. Camp, now of the law offices of Charles H. Camp, notes that the award cannot be published under a deal reached with the government of Kazakhstan which cooperated fully in paying compensation provided that the award would not be publicized.

The tribunal consisted of Hans Danelius, a sitting justice of the Swedish Supreme Court, as the Chairperson, along with Per Runeland and Robert Romlov as the party-appointed arbitrators of Biedermann and Kazakhstan respectively.

INVEST-SD Bulletin is produced By Luke Eric Peterson in Boston, Massachusetts for IISD.

Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to lpeterson@iisd.ca

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