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Contents at a Glance:

Negotiation Watch
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1. UNCTAD world investment report 2003 charts another decline in FDI flows,
By Luke Eric Peterson

Yesterday saw the official release of the United Nation's annual World Investment Report.
The report, prepared by the United Nations Conference on Trade and Development (UNCTAD), offers downbeat news about global investment flows in 2002 - with most regions of the world recording significant declines in inflows of FDI. With the exception of central and eastern Europe - which saw a sharp rise, in anticipation of further enlargement of the European Union - developing regions all experienced a decline in inward flows.

Latin America and the Caribbean region appeared hardest hit, as the ongoing Argentine crisis and "economic and political uncertainty" in other nations (for eg Venezuela) have conspired to push inflows downward for the third year in a row. Particularly hard hit, has been the services sector. Indeed, although the UNCTAD report does not note this, a significant number of foreign investors in public utilities (gas, water, electricity, etc.) have grown disillusioned with the Argentine market, and are pursuing damages claims under international investment treaties, in an effort to compensate for losses incurred during the Argentine Crisis (see related story in this issue).

Africa also has seen a sharp decline in 2002 from the previous year. The drop from 19 billion (US) to 11 billion can be partly attributed to unusually strong mergers & acquisition activity in 2001. However, investment in Africa remains poorly distributed, with a handful of resource-rich nations - Angola, Algeria, Chad, Nigeria and Tunisia - accounting for more than 50% of African inflows.

While UNCTAD expects investment flows to stabilize this year, an upturn is not expected until 2004 at the earliest, with the tourism and telecom sectors singled out as industries which may be in the vanguard of any new upsurge.

As countries chase dwindling investment flows, UNCTAD reports a greater use of financial incentives and bidding wars, as countries compete for a piece of a shrinking investment pie.

In addition to liberalizing their investment policies, UNCTAD also notes that many nations are taking further steps to target and promote inward investment, including the conclusion of investment protection agreements. As reported in INVEST-SD News bulletin last week, 82 bilateral investment treaties (BITs) were concluded in 2002, bringing the worldwide total to 2,181.

Along with the onward march of BITs negotiations, UNCTAD also points to another rising trend: the negotiation of trade agreements containing extensive investment rules. Given the continued popularity of investment and trade agreements, a considerable portion of this year's World Investment Report is given over to a discussion of how developing countries may attract and capitalize on investment, without sacrificing too much of their ability to regulate that investment in the public interest by signing such agreements.
While setting out a number of other areas wherein developing countries might eke out further flexibility for development in investment treaty language, the UNCTAD report also makes implicit many hundreds of bilateral investment treaties have already been concluded without such flexibility having been built into the treaty.

Nevertheless, despite the fact that many developing countries have acceded to investment rules with various developed country partners, it remains the case that most international investment flows remain uncovered by such rules. Indeed, because most FDI flows are between industrialized nations - and such nations rarely conclude investment treaties between themselves (the NAFTA's investment provisions being one exception) - only a mere 7% of world FDI flows are governed by an investment treaty. However, the percentage of FDI into developing and transition economies which is currently governed by an investment treaty is closer to 22%.

A full copy of this year's report, individual chapters and a 48-page overview, are all available for free download at UNCTAD's website: www.unctad.org

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Arbitration Watch

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2. New ICSID cases registered against Argentina and Bulgaria,
By Luke Eric Peterson

Three new investment treaty arbitrations were registered at the Washington-based International Center for Settlement of Investment Disputes (ICSID) during the month of August.

These claims bring to a total of 24, the number of investment treaty arbitrations registered by the Center in 2003. ICSID has seen a steady rise in treaty-based arbitration in recent years. Last year the Center saw 15 such claims, while in 2001, only 12 were registered.

Two of the most recent claims have been brought by subsidiaries of French electricity giant EDF and arise out of alleged violations of investment treaty commitments by the Argentine Government during its financial crisis. EDF investments in the Argentine electricity sector include a controlling stake in Buenos Aires-based Edenor.

Earlier this summer, a French parliamentary committee criticized management of the state-owned EDF for what it called "a complete failure to take into account the risks" involved in its Argentine investments.

Following significant losses, EDF is pursuing a well-trodden path to ICSID for recompense. In common with other firms operating in Argentina, EDF insists that the devaluation of the peso, along with the refusal of the Argentine government to ratchet up rates for public services such as electricity and water, has rendered the investor's operations unprofitable. As many foreign firms in Argentina carry US-dollar denominated debts, they are finding it increasingly difficult to make payments while typically collecting (significantly devalued) peso-based tariffs from their Argentine customers.

As such, the EDF cases are only the latest in a daunting number of claims directed against Argentina, with 15 such claims having already been registered this year against the Argentine Republic at ICSID. Conversations with arbitral lawyers also indicate that an indeterminate number of other treaty-based claims are being pursued using other arbitration rules (which do not require disclosure of claims).

Meanwhile, the third claim brought to ICSID last month, pertains to a long-running dispute between the owners of a oil refinery in northern Bulgaria and the Bulgarian authorities. The claim is notable for alleging violations of the Energy Charter Treaty, a pluri-lateral trade and investment treaty concluded in the mid-1990s.

The Nova Plama refinery has been plagued by controversy since its privatization in 1996. The successful bidders for the refinery failed to finance production at the facility, and the operation soon fell into bankruptcy. In 1998, new owners were found. Although the plant was brought out of bankruptcy proceedings, production failed to resume.

The Nova Plama consortium and the authorities failed to see eye-to-eye on a number of financial issues, including those related to outstanding debts of the company. The consortium now alleges that its treatment at the hands of the Bulgarian authorities constitutes a series of breaches

of the Energy Charter Treaty.

Disagreement has also surrounded Bulgaria's new Environmental Protection Act which was passed by the Bulgarian Parliament in July of 2002, and would have absolved the Bulgarian government of any liability for environmental pollution related to companies which had been privatized prior to 1999.

According to local press reports, the Nova Plama consortium had urged the President of Bulgaria to veto this environmental legislation, which would have imposed liability on the consortium itself.

At press time, lawyers for the investor were unable to comment on the arguments being made at ICSID, without the permission of their client.

Further investigation of the Plama claim will appear in a future issue of INVEST-SD News
Bulletin.

Sources:

INVEST-SD interviews

"EDF launches Argentine offensive" La Tribune, July 22, 2003

"Nova Plama investor sues Bulgaria in Washington D.C.", By Svetoslava Bacheva, PARI Daily, June 17, 2003

"Another energy charter treaty case sent to ICSID", By Luke Eric Peterson, INVEST-SD News Bulletin, April 25 & May 2, 2003

Events
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3. Reminder: Cancun Workshop to discuss investment and sustainable development

As noted in last week's INVEST-SD News Bulletin, the International Institute for Sustainable Development (IISD) and partners are organizing an event in conjunction with the WTO's Cancun Ministerial Conference.

The half-day event, "Investment as if Sustainable Development Really Mattered", will take place on September 12, 2003, at the Hotel Gran Melia, Cancun, from 9:00 - 1:30.
The workshop is convened by the IISD and the Royal Institute of International Affairs, in collaboration with:

- Center for International Environmental Law
- Global Development and Environment Institute, Tufts University
- International Centre for Trade and Sustainable Development
- Research and Information Service for the Non-Aligned and Other Developing Countries
- World Resources Institute

Presentations and discussion will start with the linkages between FDI and development, working through the lessons from existing agreements and sectors, and finally to an effort to think about making investment work for sustainable development. IISD and RIIA will be basing their work on a joint project that comprised a Chatham House experts' meeting and briefing sessions in Geneva and Brussels.

The agenda and background papers are available at http://www.iisd.org/pdf/2003/trade_cancun_agenda_sept_12.pdf.

For a full list of IISD's Cancun activities, see http://www.iisd.org/trade/wto/cancun.asp

4. International Bar Association conference includes various investment workshops

The annual meeting of the International Bar Association in San Francisco will see a number of workshops devoted to investment-related themes.

These sessions include ones devoted to: investment disputes in central and eastern Europe; developments under the New York Convention governing the enforcement and recognition of international arbitral awards; the World Bank's cultural and natural heritage guidelines applicable to investment projects; and strategies for coping with the political risks involved in investments in Latin America.

Information about these sessions is available from the following links:

Investment Disputes in Central and Eastern Europe:
http://www.ibanet.org/SanFrancisco/SessionDetails.asp?SessionID=2726&ID=644&Section=GEN&Committee=

New York Convention:
http://www.ibanet.org/SanFrancisco/SessionDetails.asp?SessionID=2584&ID=644&Section=GEN&Committee=

World Bank guidelines:
http://www.ibanet.org/SanFrancisco/SessionDetails.asp?SessionID=2709&ID=644&Section=GEN&Committee=

Latin America:
http://www.ibanet.org/SanFrancisco/SessionDetails.asp?SessionID=2727&ID=644&Section=GEN&Committee=

INVEST-SD Bulletin is edited in Boston, Massachusetts, by Luke Eric Peterson for IISD. Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to lpeterson@iisd.ca

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