

## Investment Treaty News, March 16, 2007

Published by the International Institute for Sustainable Development  
([www.iisd.org/investment/itn](http://www.iisd.org/investment/itn))

---

### Contents at a Glance:

---

#### Negotiation Watch

1. Canada encountering static from negotiating partners over transparency demands
2. European Govts remain split over extent of investment provisions in EU FTAs
3. EU trade negotiations with India stumble over human rights, proliferation issues

#### Arbitration Watch

4. European Governments defend BITs in lawsuit brought by EU Executive Branch
5. US Gold mining company alleges corruption & breach of BIT by Armenia
6. US investors in Guatemalan rail privatization give notice of CAFTA arbitration
7. Italian Gov't distancing itself from dispute between Italian miners and South Africa

#### Briefly Noted

8. American University in DC to host investment law and human rights workshop

---

### Negotiation Watch:

---

1. Canada encountering static from negotiating partners over transparency demands,  
By Luke Eric Peterson

Canada has announced its intention to wrap up negotiations on a Foreign Investment Protection and Promotion Agreement (FIPA) with India by the end of 2007. Negotiations between the two countries have been under way since 2004.

At the same time, ITN has learned that some negotiating partners are expressing unease over the extensive transparency provisions demanded by Canadian investment treaty negotiators.

As part of a 2003 re-think of its model negotiating template, Canada introduced a series of measures designed to ensure that investor-disputes are arbitrated with a high degree of publicity. The model FIPA provides that all documents will be publicly disclosed, and that arbitral hearings will be publicly registered and open to the interested public.

The FIPA negotiating template followed a path taken by Canada and the United States under the North American Free Trade Agreement (NAFTA), where public outcry over the secretive investor-state arbitration process led to a pledge by Canada and the US to push for more transparency in future arbitrations mounted by investors under the NAFTA agreement.

ITN can confirm that some countries have expressed discomfort with the transparency provisions found in Canada's model FIPA. Critics note that the obligations go beyond recent amendments to the ICSID arbitration rules, not to mention the current version of the UNCITRAL arbitration rules (which are presently being reviewed by UNCITRAL member-governments).

Unless a given investment treaty imposes higher transparency obligations, the ICSID and UNCITRAL procedural rules do not provide for mandatory disclosure of documents, nor for the mandatory opening of arbitral hearings. Indeed, the UNCITRAL rules do not provide for any mandatory requirement to publicly register or acknowledge the very existence of investment treaty arbitrations conducted under such auspices. For this reason, some unknown number of BIT arbitrations are launched under the UNCITRAL rules without publicity.

While Canada has been in the vanguard of efforts to bring greater transparency to investment treaty disputes, what remains unclear is whether the Canadian Government is prepared to compromise on those transparency demands in order to secure the conclusion of investment agreements with certain partners.

One senior official with Canada's International Trade Department told ITN that the Department's negotiating stance in ongoing negotiations with China, India and Singapore is based on the 2003 model FIPA (which includes extensive transparency obligations).

However, this official declined to state whether Canada would insist that all future investment agreements contain the types of transparency provisions found in that model template. This official replied that such a question referred to "outcomes" which lay in the future, and that the Government could not discuss details of ongoing investment negotiations.

Notably, however, this same official did concede that certain obligations found in the

model FIPA such as an investor-state arbitration clause would be essential parts of any future agreements. When asked to confirm that there would be no flexibility on Canada's part when it came to the inclusion of an investor-state arbitration clause in future investment agreements, this official noted that this was "correct".

At the same time as Canada signals its intention to fast-track negotiations with India, Canadian officials have also announced the beginning of FIPA negotiations with Jordan. A spokesperson for Canada's Trade Department says that a first round of talks were held with Jordanian officials last month.

(With reporting by Fernando Cabrera Diaz)

## 2. European Govts remain split over extent of investment provisions in EU FTAs, By Damon Vis-Dunbar

Following discussions initiated by the European Commission last year with a view to "upgrading" EU investment policy, European member states remain divided on how to treat foreign investment in the EU's future free trade agreements.

The internal EU process culminated in a negotiating template billed as a "minimum platform". It featured market access provisions for foreign investment loosely modeled after the World Trade Organization's General Agreement on Trade in Services (GATS) – a multilateral agreement encompassing investments in the services sector. Essentially, it adopted the GATS-style market access provisions as they apply to investment in the services sector, and broadened these obligations so as to provide market-access for services and non-services investments alike.

The EC's template gained approval from EU member governments, although it disappointed some countries that sought a more ambitious negotiating text. While the template is aggressive in terms of investment liberalization (i.e. opening foreign markets up to investments from EU companies) it does not include extensive investor protections similar to those found in bilateral investment treaties.

For example, the EC template did not include protection against expropriation, or an investor-state dispute resolution mechanism, both common staples of bilateral investment treaties.

Some overlap does exist between the EC template and BITs in the national treatment provision, where EU investors would be granted the same standard of treatment as domestic investors both pre and post-establishment. Many BITs earlier concluded by European Governments offer national treatment at the post-establishment phase (i.e. once an investment has been approved by the relevant authorities it must not suffer discrimination during the operational stages of its activities). Most-favoured nation treatment, however, is only granted pre-establishment (i.e., at the market access stage) in

the EU's new model template - not after an investment has been set up for operation in a host country.

Currently rules on investment protection – and the accompanying investor-state dispute settlement mechanism - fall under the legal competency of the individual EU member states, not the European Union. For decades, individual European governments have negotiated their own bilateral investment protection treaties.

At their core, these BITs provided protection for those investments which had been established in foreign jurisdictions; however, these BITs did not oblige other countries to grant entry to any given European investments. Access and entry decisions would continue to be made solely at the discretion of the host country.

Lately, however, some member states have pushed for European Union-negotiated agreements which would incorporate investment liberalization obligations, as well as the investor rights and protections typically found in the BITs negotiated by individual member-governments. These proponents argue that the EU's executive arm, the European Commission, is better-placed to gain greater concessions when it comes to foreign investment matters, given the more formidable size of the 27-member negotiating body.

Accordingly, some EU member-governments have advocated for a negotiating template modeled after the investment chapter of the North American Free Trade Agreement (NAFTA), an agreement that blends both market access/liberalization provisions alongside robust investor protections.

Yet some European governments are hesitant to embrace such a template. “These member states are afraid that (including investor rights and protections) will erode the national competence so that the EC will permanently have authority over this area”, says one official with a European national government.

For its part, the EC has down-played such concerns. Last autumn, the Legal Services branch of the EC Secretariat told member states that it would be possible to include investor rights and protections in the EU's trade deals without compromising the legal competence of individual member-governments to continue negotiating their own investment protection treaties in future. The EC stressed that any EU-negotiated agreement incorporating BIT-like investor protections would require the express approval of national-level EU governments.

Indeed, the EC Secretariat has emphasized that some existing EU trade deals are essentially “mixed agreements”, containing some trade provisions that fall under the legal domain of member states – and which, therefore, require the sign-off of national-level governments – and other provisions which are within the exclusive competence of the European Commission.

On this line of thinking, mixed-investment agreements (combining liberalization and

protection) would merely continue the precedent set by mixed-trade agreements requiring the joint sign-off of EU-level and national-level officials.

Nonetheless, some EU member-governments remain wary of proposals to include investment protection provisions (such as provisions on expropriation) in future EU FTAs.

Following agreement on the “minimum platform” negotiating template presented by the European Commission last year, discussions on the investment issue have been placed on the back burner, according to sources involved in the discussions.

As such, standard investment protections are not on the agenda in the EU’s most ambitious trade deal – those over an Economic Partnership Agreement (EPA) between the EU and 75 of its former colonies in Africa, the Caribbean and the Pacific (ACP). Rather, the EC has tabled a proposal similar to the model template agreed to last year – one which seeks to liberalize investment rather than create extensive international law protections for EU investors - according to one knowledgeable source.

Nonetheless, the ambitious market liberalization embodied in that “minimum platform” has proven contentious, particularly among African Union trade ministers who have rejected to the inclusion of the so-called Singapore issues (i.e. issues such as investment and competition which have long since been dropped from multilateral trade talks at the WTO). While fourteen Pacific Island countries have been more open to engaging with the EU on investment rules, this regional negotiating bloc has resisted adopting the extensive investment liberalization commitments featured in the EC proposal.

Meanwhile, pressure in Europe has mounted against the EC’s insistence that opening up new sectors to foreign investment in ACP countries will promote development,. A letter to the Financial Times earlier this week by members of the European Parliament cautioned the EC not to pressure the ACP countries to negotiate on investment.

“The Commission has sought to widen the EPA agenda to cover negotiations on services, intellectual property and the "Singapore issues", such as competition policy and investment, and is pressing for EU interests in these areas,” wrote the EU parliamentarians. “All ACP countries must have a clear right to choose whether to extend the negotiations beyond trade in goods: the additional issues must be taken off the table if ACP countries wish.”

A resolution adopted last winter by an ACP-EU joint parliamentary assembly asked that the EC respect the position of those countries who do not want to negotiate investment rules.

However, like EU member-governments, the politically diverse European Parliament is far from unified. “I am not very happy about this resolution, but I could live with it” said Astrid Lulling, Vice-Chairwoman of the ACP-EU joint parliamentary assembly, in an interview with ITN shortly after the resolution was adopted. “I think that Mandelson is

right,” she said. Clear rules on investment would benefit the investment climate in ACP countries and attract foreign capital, she says.

But not all of her colleagues share that view. “The European Parliament is divided,” admits Ms. Lulling.

Sources:

ITN Interviews

EU Governments Debate Euro Commission’s Investment Negotiating Ideas”, By Damon Vis-Dunbar and Luke Eric Peterson, Investment Treaty News, November 15, 2006

3. EU trade negotiations with India stumble over human rights, proliferation issues, By Fernando Cabrera Diaz

Trade negotiations between the European Union and India have stumbled over the potential inclusion of EU-proposed clauses on human rights and nuclear non-proliferation. India has stated that the negotiations with the EU are focused solely on trade. Indian officials have said that they will refuse to include clauses dealing with other issues.

The Financial Times reported last week that the India-EU negotiations had hit a stumbling block due to the EU practice of including so called ‘essential elements’ clauses in its bilateral agreements. Since 1992 the EU has included these standard clauses in its bilateral agreements which now apply to over 120 countries.

According to an official European Commission communication these ‘essential elements’ clauses “stipulate that respect for fundamental human rights and democratic principles as laid down in the Universal Declaration on Human Rights (UDHR) underpin the internal and external policies of the parties and constitute an ‘essential element’ of the agreement.”

Likewise, following a European Council of Ministers decision in 2003, a non-proliferation clause has been added as one of the essential elements to be included in any new EU agreements with other countries.

However, Peter Power, spokesman for EU Trade Commissioner Peter Mandelson tells Investment Treaty News (ITN) that the European Commission’s view is that the trade agreement with India is purely a trade agreement and should be confined to trade issues. It is the Commission’s opinion, that in light of the many bilateral treaties between the EU and India, issues of human rights and proliferation should be dealt with in other agreements (which could be referenced in the current trade agreement).

This view is shared by European Commissioner for Agriculture and Rural Development, Mariann Fischer Boel, who last week was quoted as saying in Indian media that the EU would not seek a human rights clause in its agreement with India, and that instead the agreement would be confined to trade issues.

But the issue is far from decided at the EU level, and has been the subject of lively debate within the European Council of Ministers (an EU body consisting of ministers from all EU member-governments) – a body which must sign off on trade agreements negotiated by the European Commission.

A source close to the debate tells ITN that several member-governments have objected to leaving the ‘essential elements’ clauses out of the trade agreement with India.

In particular the United Kingdom, France and the Netherlands are said to have voiced opposition to leaving out the essential elements clauses. The same source points out that the inclusion of a non-proliferation clause as an “essential element” could kill any trade agreement due to India’s ongoing nuclear activities.

Sources:

ITN Interviews

-----  
**Arbitration Watch:**  
-----

4. European Governments defend BITs in lawsuit brought by EU Executive Branch,  
By Damon Vis-Dunbar

The governments of Finland, Austria and Sweden have dug in their heels against a lawsuit filed by the European Commission (EC) charging that certain of their bilateral investment treaties (BITs) infringe on European Union legal territory.

In 2004, the EC - the EU’s Executive Branch – had notified Denmark, Austria, Finland and Sweden that provisions in certain of their BITs guaranteeing the free movement of investment-related transfers were in conflict with EU rules.

Under the European Communities Treaty, restrictions on capital-movements can be introduced when serious financial or security difficulties arise. By contrast, certain BITs concluded by the aforementioned EU member-governments omit similar safeguards. As a result, the European Commission has pressured these governments to revise their BITs accordingly.

ITN has learned that Austria, Finland and Sweden have refused to revise or annul the treaties in question. A government official from one of these countries explained that, in his government’s opinion, it is not enough that certain BITs have the potential to clash

with EU law. Rather, the European Commission needs to show that the member-governments have broken EU rules on the movement on capital.

“The Commission should demonstrate when and where we have been in breach of the articles,” said this person. “This has not been done.”

For its part, the European Commission has made good on its threat of legal action, taking three of the four governments to the European Court of Justice in an effort to force a change of heart. In response to this move, Austria and Sweden have filed written response with the ECJ, and await a date for oral proceedings. Meanwhile, Finland has until April 16 to file its own written response to the European Commission’s legal action.

Notably, Denmark has taken a more conciliatory posture. The EC had complained that Denmark’s 1968 investment treaty with Indonesia conflicted with Denmark’s EU legal obligations. In response, Denmark annulled that treaty and began work on a new one. Negotiations on the new investment treaty concluded in January of this year, and the agreement now awaits ratification by Indonesia before it comes into force. (Denmark does not require parliamentary assent before its investment treaties come into force).

So far, the EC has limited its legal action to those BITs signed prior to the accession of individual governments to the European Union. This explains why treaties belonging to long-standing EU members such as Germany and France - who joined the EU in the late 1950s before they began negotiating BITs - have yet to face similar legal pressure.

According to statements from the Commission’s secretariat, the EC has based its ECJ lawsuits on Article 307 of the European Communities Treaty, which demands that EU governments eliminate any conflicts that exist between their pre-accession treaties and the European Communities Treaty.

Literally hundreds of bilateral investment treaties have been entered into by European governments following the accession of those countries to the EU. Many of these post-accession treaties also contain provisions that guarantee the free movement of capital, without accompanying provisions which mandate capital controls in cases of financial or balance of payments difficulty. European government sources tell ITN that they remain unsure whether the EC will push for revisions to this much larger body of treaties.

So far, the EC has not signaled that it will challenge post-accession BITs, say European government sources.

“It is not clear what will happen next,” says an official from one European national government. “If the Commission wants to blow up the whole thing, then it will have to tackle hundreds of agreements.”

Sources:

ITN interviews

“Euro Commission takes three states to Euro Court of Justice over BITs”, By Luke Eric Peterson, Investment Treaty News, October 26, 2005

“EU Executive Branch Looking at Possible Incompatibilities of Some European BITs”, By Luke Eric Peterson, INVEST-SD, May 24, 2004

5. US Gold mining company alleges corruption & breach of BIT by Armenia,  
By Luke Eric Peterson

US-owned Global Gold Ltd. has had an arbitration demand registered against Armenia at the International Centre for Settlement of Investment Disputes (ICSID).

The US firm accuses Armenian authorities of hobbling various gold mining investments, through a refusal to renew and grant appropriate mining licenses. In addition, Global Gold alleges that it confronted a demand from a senior government minister for a \$3 Million (US) bribe.

Global Gold alleges that its licensing woes were aggravated after the firm refused the bribe request.

Scrutiny of the company’s August 10, 2006 10-K filing with the US Securities and Exchange Commission reveals that Global Gold warned that it has “experienced delays in the bureaucratic process and has experienced dealings with corrupt officials at the Ministry of Environment and Natural Resources.”

The company went on to add that it “practices a zero tolerance program on corruption, has brought its experiences to the attention of the relevant government authorities, and anticipates that the government will enforce the applicable laws.”

A call placed to the Armenian Embassy in Washington DC was not returned at press time. Armenian press reports suggest that the Government official alleged to have requested a bribe has denied such allegations.

Global Gold contends that the Armenian Government has breached various obligations under Armenian law, as well as various terms of the US-Armenia Bilateral Investment Treaty. The ICSID arbitration has been brought pursuant to the consent to arbitration found in the US-Armenia BIT.

Sources

ITN Interviews

Radio Free Europe/Radio Liberty, “Armenian Prime Minister Defends Embattled Minister”, Sept. 14, 2006

<http://www.rferl.org/newsline/2006/09/2-TCA/tca-140906.asp>

Global Gold Corp, SEC Form 10KSB/A, Filing Date: August 10, 2006

#### 6. US investors in Guatemalan rail privatization give notice of CAFTA arbitration, By Luke Eric Peterson

In what may be the first arbitration to arise under the investment chapter of the US-Central America Free Trade Agreement (CAFTA), a US-based investor has filed a notice of intent to sue Guatemala for alleged breach of the CAFTA rules.

Pennsylvania-based Railroad Development Corporation (RDC) filed its notice on March 13, setting in motion a 3-month waiting period before a formal arbitration request can be made. RDC accuses the Guatemalan Government of indirectly expropriating the US firm’s investments in a privatized railway in Guatemala. RDC invested in Guatemala in 1997; following a later change in Government, the US firm complains of interference with contractual rights contained in a 50 year concession agreement

In a statement, RDC Chairman Henry Posner III said that “Recent actions by the Government of Guatemala have amounted to an indirect expropriation of our company’s assets and direct interference with its contractual rights. Further, we believe that these actions were taken on behalf of private Guatemalan companies interested in selected assets contained in the ‘usufruct’ (50-year concession) we won through a bid process in 1997.”

RDC has retained the international law firm of Greenberg Taurig LLP, and, in particular, Regina Vargo, a former US Government trade official involved in the negotiation of the CAFTA.

An official with Guatemala’s Embassy in Washington DC told ITN that they had no comment on the case at the present time. Calls placed to Guatemala’s Ministry of Economy went unanswered at press time.

The potential arbitration between RDC and Guatemala is not the first investment treaty claim to be brought by RDC against a government in relation to a railway privatization.

In 2006, a consortium of foreign investors, including RDC, mounted a claim against Estonia for alleged breach of investment treaty protections in relation to that country’s handling of a privatized rail concession held by RDC and its consortium partners.

The Estonian dispute was settled earlier this year, when Estonia agreed to pay

compensation following the re-nationalization of its national railway (See: “Arbitration claims withdrawn after Estonia pays to renationalize railway”, ITN, Feb.1, 2007, available on-line at: [http://www.iisd.org/pdf/2007/itn\\_feb1\\_2007.pdf](http://www.iisd.org/pdf/2007/itn_feb1_2007.pdf))

#### 7. Italian Gov't distancing itself from dispute between Italian miners and South Africa, By Luke Eric Peterson

According to a report in the South African business press, The Italian Government is now taking a hands-off approach to a long-running dispute between a group of Italian mining companies and the South African Government. The dispute has been submitted to arbitration at the World Bank's ICSID facility (See: “European Mining investors mount arbitration over South African Black Empowerment”, Investment Treaty News, February 14, 2007, [http://www.iisd.org/investment/itn/euro\\_mining\\_arb.asp](http://www.iisd.org/investment/itn/euro_mining_arb.asp))

As was earlier reported in ITN, the Italian Government had warned South Africa in written diplomatic correspondence that the Minerals and Petroleum Resources Development Act “might produce a breach” of the 1997 SA-Italy bilateral investment treaty. Among the potential breaches, the Italian Government had opined that Black Economic Empowerment (BEE) provisions of South Africa's new mining regime might breach the National Treatment provisions of the SA-Italy BIT, by virtue of offering “historically-disadvantaged” South African individuals better treatment than that which is accorded to Italian investors in South Africa.

According to a new report in the SA publication Mining Weekly, a high-level delegation of Italian Government officials has recently concluded a visit to South Africa. Following four days of meetings, Italy's Ambassador to South Africa has “stressed that the Italian government was now standing back from the (arbitration) case and that the dispute had not influenced its overall position on South Africa as a safe investment risk for current and future Italian investors.”

Mining Weekly adds that Italian Ambassador Alessandro Cevese has indicated that the case was no longer one which operated on the government-to-government plane, adding “that it was the responsibility of the South African government to decide whether it is ‘more convenient’ to face an international legal dispute, or come to some sort of compensation settlement”.

Mr. Cavese noted, however, that foreign investors in the South African mining sector were seeking greater clarity as to how to meet their new obligations under the Black Economic Empowerment programme.

For its part, Mining Weekly reports that “South Africa's Minerals and Energy Minister Buyelwa Sonjica has promised some reform to the legislation in a bid to reverse perceptions that South Africa's mining environment had turned unfriendly.”

However, Mining Weekly speculates that the SA Government will “vigorously defend the (pending arbitration) case, given its broader implications for its policy of black economic empowerment (BEE), which is a core policy for redressing the iniquities of the past apartheid economic system.”

ITN can report that the South African Government has retained the international law firm Freshfields to defend against the pending ICSID arbitration. The parties to that arbitration are now in the process of appointing the arbitrators to hear that case.

Sources:

“Italy raises concerns about SA’s mine law, but takes hands-off position in granite dispute”, By Terence Creamer, Mining Weekly, March 15, 2007, available on-line at: [http://www.miningweekly.co.za/article.php?a\\_id=105736](http://www.miningweekly.co.za/article.php?a_id=105736)

-----  
**Briefly Noted:**  
-----

8. American University in DC to host investment law and human rights workshop

As interest grows in the potential overlap and intersection between international investment law and human rights law, a US-based University is to host a workshop to discuss related issues.

DC-based American University, in partnership with the Center for International Environmental Law, is hosting the half-day event on March 21, 2007. For more information visit: [http://www.wcl.american.edu/arbitration/investment\\_human\\_rights.cfm](http://www.wcl.american.edu/arbitration/investment_human_rights.cfm)

---

To subscribe to Investment Treaty News, email the editor at: [lpeterson@iisd.ca](mailto:lpeterson@iisd.ca)

Past editions are available on-line at: <http://www.iisd.org/investment/itn>

Subscribers are encouraged to submit news tips, reports and press releases to: [lpeterson@iisd.ca](mailto:lpeterson@iisd.ca)

The views expressed in Investment Treaty News are factual and analytical in nature; they do not necessarily reflect the views of the International Institute for Sustainable Development, its partners or its funders. Nor does the service purport to offer legal advice of any kind.