

Investment Law and Policy Weekly News Bulletin, June 1, 2003

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

Contents at a Glance:

Negotiations Watch

1. Brazil Remains Wary of International Investment Rules,
2. "Publish What You Pay" Campaign Receives Shot in the Arm
3. India-based Research Organization Releases Paper on WTO Investment Agreement
4. Report Ponders the Future of US Overseas Private Investment Corporation

Arbitration Watch

5. Canadian Think-Tank Issues Updated List of NAFTA Chapter 11 Disputes

Negotiations Watch:

1. Brazil Remains Wary of International Investment Rules,
By Luke Eric Peterson

The Brazilian government appears uncommitted to international investment rules modeled on those included in the common run of bilateral investment treaties. Earlier this year, Brazil missed a deadline for the tabling of "initial offers" on investment in the context of ongoing negotiations of a Free Trade Area of the Americas (FTAA), and still has yet to tip its hand on the issue.

In comments last week, Brazilian President Luiz Inacio Lula da Silva

said that he will ask leaders of the G-8 industrialized nations to establish an international investment fund to finance infrastructure development in the developing world. Mr. Lula da Silva noted that funds to finance the building of roads, bridges and other basic public goods would be necessary before Brazil could discuss commitments under a proposed FTAA. In an exclusive interview with the Financial Times of London, Mr Lula da Silva asked how "impoverished" countries can be expected to integrate into the global economy, when they lack basic infrastructure to support investment.

In a press conference last week, Brazilian foreign minister Celso Amorim is reported to have expressed a preference for the thorny issue of investment to be dealt with at the multilateral level through the World Trade Organization, rather than at the regional or bilateral level.

Brazil stands out amongst developing countries by virtue of not being bound by bilateral or regional investment treaties. Although the South American nation negotiated 14 such treaties, including with the United Kingdom, Germany, Switzerland and Portugal, during the mid-1990s, none of these have gone into effect. Despite growing pressure from developed countries, including the European Union, for Brazil to ratify these agreements, they remain held up by concerns about their constitutional implications. Brazil, along with many other countries in the region, had long resisted offering foreign investors greater rights than those accorded to domestic firms. In particular, Brazil remains wary of permitting investment disputes to go to international investor-state arbitration. And unlike many of its neighbors, Brazil still has yet to accede to the 1965 Washington Convention which established the International Center for Settlement of Investment Disputes (ICSID).

Although the nation has weathered some financial difficulties in recent years, foreign investors unhappy with their experience in Brazil lack recourse to arbitration under the terms of international investment treaties. The experience of neighboring nations, including Argentina, which faces over a dozen investor claims at ICSID alone, offers a stark contrast with that of Brazil's.

Sources:

"Lula Set to Pose an Investment challenge to G8", By Raymond Colitt, Financial Times, May 28, 2003

"US, Brazil Begin Process that Could Scale Back Scope of FTAA", INSIDE U.S. Trade, May 30, 2003

Arbitration - Brazil: Bilateral Investment Treaties and International

Arbitration", By Carvalho de Freitas e Ferreira, International Law Office Legal Newsletter, May 15, 2003

2. "Publish What You Pay" Campaign Receives Shot in the Arm, By Luke Eric Peterson

An international campaign to encourage multinational companies to disclose the full slate of royalties, taxes and fees which they pay to developing country governments, received a boost when seven leading investment groups - accounting for some \$750 Billion (US) in assets - came out in support of the initiative.

The UK Government has also signaled that it will raise the issue at next week's G-8 Summit in Evian, France. Prime Minister Tony Blair has been pushing industry to sign up to his voluntary Extractive Industries Transparency Initiative (EITI) which he unveiled at last year's UN World Summit on Sustainable Development in Johannesburg, South Africa. The EITI would encourage companies engaged in the extractive industries (oil, gas, and mining) to follow the lead of British Petroleum (BP) which angered its host government- but pleased campaigners - when it published the royalties which the firm disbursed to the government of Angola.

Although western governments often negotiate foreign investment protection agreements (bilateral investment treaties) which safeguard the property interests of multinational investors in the extractive and other industries, these treaties contain no binding requirements that investors engaged in such investments disclose details of their financial relationship with host governments.

More than 100 Non-Governmental Organizations have thrown their weight behind the "Publish What You Pay" campaign. The rationale for the initiative stems from the widespread conviction that corruption and graft in many developing countries robs the public of much of the benefits of natural resource extraction by foreign investors.

In recent weeks, campaigners have also called for companies poised to take a stake in the Iraqi oil sector to disclose the payments which will be paid into the Iraqi treasury. Last month, International Financier George Soros announced that his Open Society Institute is launching a new initiative called Iraq Revenue Watch, in order to ensure that the benefits of Iraq's oil wealth flow to its people.

Sources:

Publish What You Pay Campaign: www.publishwhatyoupay.org

Background on UK's Extractive Industries Transparency Initiative:
http://www.dfid.gov.uk/News/News/files/eiti_statement.htm

The Open Society Institute's Iraq Revenue Watch press release:
http://www.soros.org/dc/iraq_revenue_watch.htm

"Transparency International Challenges Multinational Oil Companies Planning to Operate in Iraq to 'Publish What You Pay'", Press Release, Transparency International, April 30, 2003, www.transparency.org

"Call for companies to disclose payments G8 SUMMIT", By Hugh Williamson, The Financial Times, May 23, 2003

"Come clean, oil and mining firms told", By Terry Macalister, The Guardian, May 21, 2003

3. India-based Research Organization Releases Paper on WTO Investment Agreement

In a paper entitled "Putting our Fears on the Table", researchers with the Trade, Economics and Environment unit of the India-based Consumer Unity and Trust Society, have set out their fears in relation to a proposed agreement on investment at the World Trade Organization (WTO).

The paper's title stems from a challenge issued by Rubens Ricupero, Secretary General of the UN Conference on Trade and Development for India to articulate its fears about the so-called Singapore issues (including investment and competition) which are being discussed as part of the WTO's ongoing Doha Round of trade talks.

In their paper, the authors question whether developing countries are in agreement about the importance of foreign direct investment in their economies, and how a legal instrument would govern such flows. Doubts are raised as to the timeliness of a launch of full-fledged negotiations at the WTO in the short term. And the authors stress that any multilateral agreement on investment should also address the thorny issue of corporate accountability and liability, as well as setting out the rights of developing countries which play host to foreign direct investment.

A copy of the paper is available for download at:

http://cuts.org/Putting_our_fears.doc

4. Report Ponders the Future of US Overseas Private Investment Corporation

A Washington-based think-tank has issued an arms-length paper commissioned by the Overseas Private Investment Insurance Corporation (OPIC), which examines OPIC's mission and future. According to the report's author Theodore Moran, a Professor at Georgetown University's School of Foreign Service, the rationale for the work of the US government agency remains strong.

OPIC was created in 1971 in order to facilitate US investments into the developing world. The agency undertakes its mission through several means: providing insurance against certain forms of political risks; offering loans and loan guarantees; and "providing credits to private investment funds that make equity investments in businesses in underdeveloped countries and regions."

Prof. Moran's report, *Reforming OPIC For the 21st Century*, published by the Institute for International Economics (IIE), argues that several reforms would strengthen the work of the agency, including changes to its statutes which would permit OPIC services to be extended to foreign-owned firms with "significant US presence". Moran notes that encouraging the foreign investments of such US-based firms can be "in the US national interest to the extent that these firms use US materials and equipment, employ US labor, contribute to the US technology base, and/or repatriate profits to the US economy."

Other proposed reforms to OPIC include a recommendation that the agency be more transparent about those projects which are declined support on environmental grounds. Currently, OPIC offers informal environmental assessments of projects before investors apply for formal support. Moran criticizes OPIC's policy of not publicizing those investments which fail to meet its environmental criteria, in order not to jeopardize the project's application for other forms of external financing. "(I)f a project does not meet OPIC's standards-and its sponsors cannot or will not bring it up to OPIC's requirements-this should not be deliberately concealed." Moran write.

The full report is available for download on the website of the IIE at:

<http://www.iie.com/publications/pb/pb03-5.pdf>

Arbitration Watch:

5. Canadian Think-Tank Issues Updated List of NAFTA Chapter 11 Disputes

The Canadian Centre for Policy Alternatives (CCPA) has published a matrix charting all known investor-state disputes mounted under Chapter 11 of the North American free Trade Agreement (NAFTA). The document prepared by Senior Researcher Scott Sinclair, offers details about cases up to March of 2003.

The document is available under the "Trade and Investment Papers" link on the "Quick Clicks" menu of the organization's home page:
www.policyalternatives.ca

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

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.