

Investment Law and Policy Weekly News Bulletin, July 11, 2003

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

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Negotiations Watch:

1. UN Human Development Report Highlights Investment Needs of Poorest Nations,
By Luke Eric Peterson

In its annual Human Development Report, the United Nations Development Program (UNDP) offers some insight into the investments needed by developing nations mired in poverty.

The 2003 report, released earlier this week, assesses the progress to date in achieving the Millennium Development Goals set by UN members in 2000.

In many respects, the report offers sober reading: some 54 nations are poorer now than in 1990 and slipping ever further away from achieving various of the Millennium benchmarks set out by the UN for accomplishment by the year 2015.

These Millennium Development Goals include: halving the proportion of people living on less than a dollar a day; ensuring universal primary education; reducing by two-thirds the mortality rate of children under 5; and halving the proportion of people without sustainable access to drinking water.

Other goals set a variety of targets related to disease, maternal and gender issues, and environmental sustainability.

The report's authors urge a need to "change course" if the Millennium goals are to be achieved - warning that, on current trends, some will not be met for more than a 150 years or more.

The report is particularly notable for its identification of various obstacles to the development of dozens of the very poorest nations. It is these nations which require urgent attention from the international community, specifically: "greatly expanded donor financing to invest much more heavily in health, education, agriculture, water and sanitation and other key infrastructure even before economic growth occurs."

Indeed, such investments are seen as prerequisites in order for countries to reach "certain critical thresholds - of health, education, infrastructure and governance" needed for sustainable economic growth to take hold.

The report remains skeptical that such needs can be met by the influx of private foreign investment, but instead takes the view that private investment will play a more critical role down the road, after the poorest countries develop the domestic institutions to host, manage, and harness such investment. In time, these nations would wean themselves from donor financing, as they prove capable of financing their own basic public services and infrastructure.

Notably, the UNDP report is more sanguine about the scope for private foreign investment to make an immediate impact on countries at "medium levels of human development, but which may still have pockets of deep

poverty (for e.g. Brazil, Malaysia, Mexico, etc.).

These nations "should be able to finance most or all of their development needs through domestic resources or non-concessional foreign resources (including private flows and official loans from multilateral development banks and bilateral agencies)", the report argues.

Also of note, the authors suggest that provision of key services such as health, education and water -while sometimes amenable to private provision - might be better established on a public footing, prior to experimenting with "more targeted interventions" from the private sector. This is said to be the development path adopted by most Western governments including those in Canada, Western Europe and the United States, where such services only become universal when governments intervened.

At present, the capacity for effective government regulation and intervention is sorely lacking in many developing countries, according to the report.

The UNDP report should offer useful lessons for nations contemplating the negotiation of a multilateral agreement on investment, perhaps as part of the WTO's Doha Trade Round, insofar as it highlights the challenges and needs which must be met before all nations could be expected to benefit from some flows of foreign direct investment.

The full report is available online at: <http://www.undp.org/hdr2003/>

2. Japan Pursuing a Bevy of Bilateral Trade & Investment Agreements, By Luke Eric Peterson

In its own flurry of bilateralism, the Japanese Government is forging ahead on multiple fronts to conclude bilateral and regional trade and investment agreements with its trading partners.

Although Japan has been a vocal proponent for the launch of negotiations on investment at the World Trade Organization, it has also mimicked efforts by the remainder of the Quad countries (Canada, European Union and the United States) to pursue negotiations on several levels simultaneously.

This week, Mexican Economy Minister Fernando Canales announced that a trade & investment agreement with Japan is nearing completion, and may be ready for signature in October of this year.

Japan has already concluded a free trade and investment agreement with Singapore. In recent years, a variety of negotiations have been mounted with regional neighbours including: the Philippines, Thailand, South Korea, Malaysia, and the 10 nation Association of Southeast Asian Nations (ASEAN).

Plans were also unveiled earlier this year for a possible tripartite trading bloc between Japan, China and South Korea, modeled upon the North American Free Trade Agreement (NAFTA). At the moment, a study of such a trading bloc is being undertaken by the three prospective partners.

Also this week, Japanese officials have asked Malaysia to support Japan's attempts to champion negotiations on investment at the World Trade Organization (WTO).

Unlike most western nations, Japan has been slow to conclude bilateral investment treaties; Japan's recent enthusiasm for prospective WTO rules, and for a parallel system of bilateral and regional agreements, appear to be an effort to make up for perceived lost ground.

However, Japanese officials have poured cold water on the aspirations of one neighbour for a trade & investment agreement.

The Australian newspaper reports that officials in Japan and Australia confirm that a Japan-Australia trade and investment agreement is unlikely to be pursued in the short term. Japan's protected agriculture sector has been particularly opposed to any agreement which provide greater market penetration to Australian farmers.

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"Japanese Free Trade Pact on Backburner, By Steve Lewis, Dennis Shanahan, Stephen Lunn, The Australian, July 10, 2003

"Malaysia, Japan Working Out Details on Proposed Free Trade Pact", AFX

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"Hiranuma Asks Malaysia to Agree on Setting WTO Investment Rules", Jiji Press Ticker Service, July 10, 2003

Japan, S. Korea to Hold Preparatory Meetings for FTA, jiji Press Ticker Service, July 10, 2003

3. Int'l Chamber of Commerce Responds to Criticism of WTO Investment Pact

In a reply to a column published in the Financial Times by Kavaljit Singh (and reported in last week's INVEST-SD Bulletin), the International Chamber of Commerce argues that a WTO investment pact would be in the interests of developing countries.

In a letter published on July 9, the Paris-based business organization notes that the current patchwork of bilateral and regional investment treaties does not provide for a "level playing field", and thus permits the strong to dictate to the weak.

The ICC insists that a WTO investment pact would "contribute to transparent, stable and predictable conditions for long-term cross-border investment.

Moreover, any such pact should "balance the interests of home and host countries, and take due account of the development policies and objectives of host governments, as well as their right to regulate in the public interest, without discriminating against foreign investors."

Notably, the ICC advocates extrapolating from the "high standards for market access and investment protection" found in some bilateral treaties, and using them to set a common bar for all 146 WTO members.

Earlier this year, the ICC issued a policy brief setting out its position on a multilateral agreement on investment.

In a number of respects, this document set out more ambitious proposals than those currently being discussed in the WTO's Working Group on Trade and Investment; these included provisions against expropriation, and recourse for investors to international arbitration (see "Int'l Chamber of Commerce Issues Expectations for WTO Investment Agreement", INVEST-SD News Bulletin, April 25 & May 2)

Arbitration Watch:

4. Reisman Lecture on "International Law on Foreign Investment" Now Available,
By Luke Eric Peterson

A copy of a special lecture given by Professor M. Sornarajah of the Singapore National University last autumn in Canada is now available on-line.

Sornarajah delivered the Simon Reisman Lecture in International Trade Policy on Sept 12, 2002 at Carleton University's Center for Trade Policy and Law.

Sornarajah used his lecture to argue that a clash between neo-liberalism and people-driven globalization is playing itself out in the emerging international investment regime, as arbitrators are called upon to interpret the extent to which property rights may be circumscribed for social purposes.

In his comments, Sornarajah, author of the "International Law of Foreign Investment", identifies efforts at the international level to enshrine "a theory of absolute protection of foreign investment that sits uneasily with the constitutional systems that are recognised in the different parts of the world."

"These trends are clearly based on a neo-liberal vision of property that undermines the competing vision that all individual property exists only to the extent that the interests of the society as a whole will permit it. This latter view is the one that has dominated the thinking both of the Commonwealth and the European systems of law", he argued.

Accordingly, Sornarajah predicted that investment treaty arbitration will see a clash of globalizations come to a head, as the treaties begin to circumscribe the policy space of governments playing host to foreign investment.

"The proliferation of investment treaties with the protection of an absolute concept of individual property rights, especially that of a foreign investor to the exclusion of similar rights in citizens will provoke internal controversies and lead to the assertion of sovereignty centred arguments. It will raise the issue as to whether these treaties

made largely by bureaucrats do not constrain the democratic wishes of the people of the state"

While critical of the reasoning in a number of recent investor-state arbitrations, Sornarajah cautioned that most standard investment treaty clauses have yet to be fleshed out by arbitral tribunals. As such, he warned, "the nature of the control that has been surrendered through the treaty process still remains undetermined. (But) Arbitrators have generally interpreted these standards expansively."

In the interim, he expressed concerns that wildly creative legal arguments mooted in the North American context may be transplanted to the developing world and wielded against developing countries which have concluded investment treaties - often with little forethought for their implications, and with little appreciation of the cost involved in defending against such claims.

Indeed, Sornarajah was blistering in his comments on the process of investor-state arbitration, and its seeming incapacity for interpreting investment treaties in light of other competing social and environmental considerations:

"Tribunals such as ICSID and NAFTA tribunals are undemocratic tribunals incapable of assessing the competing social and ethical interests. They pay attention, as commercial arbitral tribunals are wont to do, only to the commercial considerations that are involved in the dispute."

"They are manned by commercial arbitrators whose concern for the values of the international community is weaker than their concern for contractual sanctity and the securing of their next appointment to an tribunal on the basis of their display of commercial probity and their loyalty to the values of multinational business. There is a need to evolve a doctrine that requires considerations such as environmental and human rights issues involving higher values than those of the preservation of business interests of the few."

The full text of Sornarajah's lecture, "The Clash of Globalisations and the International Law of Foreign Investment" is available on-line at: <http://www.carleton.ca/ctpl/papers/sornarajah.doc>

The Editor of INVEST-SD Bulletin will gladly consider commentaries on the lecture, and the arguments it raises, for possible publication in a future issue of this Bulletin.

5. Lawyer Moots Investment Arbitration as Potential Window for Making WTO Claims

In an article in the latest issue of the *Journal of International Economic Law*, lawyer Gaetan Verhoosel explores whether foreign investors may use international investment treaties to challenge breaches of World Trade Organization rules.

Arguing that the right to investor-state arbitration found in most modern investment treaties might be used by investors to seek individual relief from breaches of WTO law - something which the WTO's state-to-state dispute settlement mechanism does not allow - Verhoosel sets out two ways in which investment tribunals might take on board WTO requirements.

First, Verhoosel argues that common investment treaty provisions which set out certain standards of treatment "in accordance with international law" might arguably provide for the importation of WTO law, as part of this international law. The author concedes that such arguments have been largely rejected by investment tribunals hearing claims under the North American Free Trade Agreement - particularly, following the issuance of a binding interpretive statement in 2001 by the three NAFTA parties which sought to preclude such claims. However, Verhoosel speculates that tribunals asked to interpret other bilateral investment treaties, which have been inked by non-NAFTA parties, might still entertain such arguments.

Failing this approach, Verhoosel further suggests that WTO law might at least be useful for tribunals, insofar as it would provide background or "interpretive context", as tribunals seek to interpret the meaning of vague investment treaty commitments, for example, those prescribing "fair & equitable treatment". On this example, an investment tribunal would not be applying WTO rules per se, but would look to relevant rules (such as those in WTO agreements on services or intellectual property) for guidance as to what constitutes fair and equitable treatment of foreign investors engaged in service or intellectual property-type investments.

Mr. Verhoosel is a practicing lawyer in New York City and a former employee of the legal Affairs Division at the WTO in Geneva. The full article is available in the June 2003 issue of the *Journal*, published by Oxford University Press and available at most law libraries.

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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