

Investment Law and Policy Weekly News Bulletin, May 9, 2003

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

Contents at a Glance:

Negotiations Watch

1. US Administration Warns WTO on Inviolability of its Bilateral Investment Treaties
2. Carnegie Endowment to Host One-Day Forum on WTO Investment Talks

Arbitration Watch

3. Camuzzi Files Second Investment Treaty Claim Against Argentina
4. South Africa's Plans for Black Economic Empowerment Confronting Foreign Investor Rights

Negotiations Watch:

1. US Administration Warns WTO on Inviolability of its Bilateral Investment Treaties,
By Luke Eric Peterson

US trade officials are indicating that any prospective WTO agreement should accord the United States the flexibility to negotiate "more advanced" investment agreements on a bilateral basis.

Discussions on investment in the context of the ongoing WTO Doha Round have been notable for the lack of clarity surrounding the relationship between any proposed WTO agreement on investment, and the more than two thousand existing bilateral investment treaties (BITs) worldwide.

The US currently has 37 BITs in force, and a further 6 which have yet to enter into force. (These figures do not include broader trade agreements which may include investment provisions - such as the North American Free Trade Agreement - and which would already be grandfathered under WTO rules on regional trade agreements).

The US is also engaged in a number of negotiations with other trading partners on new BITs, or broader free-trade agreements with investment provisions. Just this week, the Bush Administration announced an ambitious plan to bring the Middle East into a free-trade zone with the US by 2013. As a prelude to this plan, the US will seek to negotiate bilateral investment treaties with more than a dozen Arab nations.

With so much tied up in its investment treaty program, US trade officials have stressed in comments to Inside U.S. Trade (a Washington-based trade policy newsletter), that US support for a WTO agreement is conditional upon the US being able to carve out protection for its existing bilateral treaty program.

World Trade ministers are expected to take a decision at the WTO's Cancun Ministerial conference in September as to whether to launch formal negotiations on a multilateral agreement on investment.

However, one US official recently told Inside US Trade, that a launch of WTO negotiations on investment in Cancun may not be forthcoming, as the US is simply not willing to "go to the mat" for the issue.

US bilateral investment treaties, in common with many of those promoted by other Western countries, contain far-reaching protections: typically providing for guarantees against expropriation without compensation, and dispute settlement provisions allowing international investor-state arbitration. Neither of these two issues are part of the mandate on investment which was handed to the WTO's Working Group on Trade and Investment by Trade Ministers in November of 2001, for further analysis and discussion.

Sources:

The President's 2002 Annual Report on the Trade Agreements Program, Office of the US Trade Representative, available at: <http://www.ustr.gov/reports/2003.html> (this document lists all existing US BITs)

"U.S. Negotiator Sees Singapore Issues Moving Forward Selectively", Inside US Trade, May 2, 2003

"WTO Members Consider Two Mini-Ministerials Before Cancun Meeting",
Inside US Trade, May 9, 2003

"US Sees Egypt as Key Link in New Trade Pact", By Guy de Jonquieres and
Edward Alden, The Financial Times, May 10-11, 2003

"Mideast Trade Plan a Leap of Faith for Bush", By Edward Alden and Roula
Khalaf, The Financial Times, May 10-11, 2003

WTO Doha Declaration, paragraphs 20-22 (on investment), available at
www.wto.org

2. Carnegie Endowment to Host One-Day Forum on WTO Investment Talks

On May 22nd, the Washington-based Carnegie Endowment for International Peace is hosting a one-day public symposium entitled "Investment, Sustainable Development and the WTO: Allies or Antagonists?". The event will see more than a dozen speakers address various dimensions of the international debate on investment rules and sustainable development. Speakers from government, non-governmental organizations and academia will discuss lessons gleaned from existing investment agreements, and will survey the suitability of the WTO as a forum for a proposed multilateral agreement on investment.

The event will take place from 8:30AM- 5PM. Symposium sponsors include: Friends of the Earth, Oxfam America, National Wildlife Federation, Heinrich Boell Foundation, and the Center for International Environmental Law. For a copy of the latest agenda and information about attendance, please contact: L. Watkins at lwatkins@foe.org

Arbitration Watch:

3. Camuzzi Files Second Investment Treaty Claim Against Argentina, By Luke Eric Peterson

The International Center for Settlement of Investment Disputes (ICSID) has seen a second bilateral investment treaty claim lodged by Camuzzi International against the Argentine Republic.

Earlier this year, Camuzzi filed a claim with ICSID in relation to its embattled investment in the Argentine natural gas supply business. (See

"Latest Arbitration Against Argentine Emergency Financial Measures", INVEST-SD Bulletin, March 7, 2003). Camuzzi's latest claim arises out of its investments in the Argentine electricity market.

Investors in both the natural gas and electricity sectors have been squeezed by the Argentine Government's decision last year to end the decade-long peg of the Argentine Peso to the US Dollar. At the same time, the Argentine Government also converted all tariffs for utilities into Pesos, from their US Dollar equivalent. Over the course of 2002, the Peso would go on to lose nearly 70% of its value against the US dollar, but utilities were forbidden to raise the tariffs which they charge customers, in order to compensate for their mounting losses. Many firms had outstanding debts which were denominated in US dollars, and which proved increasingly onerous to bear as their Argentine revenues dwindled.

Under heavy pressure from investors and from the International Monetary Fund (IMF), the Argentine Government agreed to a hike in tariffs for electricity and natural gas customers of 10% and 7% respectively, in December of 2002. However, these figures fell well short of the electricity industry's demands for a 36% rate hike. Indeed, the electricity tariff hikes only applied in Argentina's largest city of Buenos Aires.

Consumers groups have challenged even these increases, as the public has suffered through a financial crisis and has seen a precipitous drop in standards of living. Meanwhile, investors in Argentina's utilities sector are turning to arbitration under investment treaties concluded between their home states and Argentina, in an effort to recoup losses.

The second arbitration by Camuzzi brings to a total of eleven the number of claims which are currently pending against Argentina at the Washington-based ICSID. It is unclear, how many other BIT claims may be pending under other sets of arbitration rules. The ICSID is the only institution offering treaty-based arbitration which publicizes a register of such disputes.

Sources:

International Center for Settlement of Investment Disputes:
www.worldbank.org/icsid

INVEST-SD Interviews

"Latest Arbitration Against Argentine Emergency Financial Measures", INVEST-SD Bulletin, March 7, 2003

"Argentina Hikes Buenos Aires Power Rates 10%; Legal Challenges Follow",
Electric Utility Week (published by McGraw-Hill Inc.), Dec. 9, 2003

4. South Africa's Plans for Black Economic Empowerment Confronting Foreign Investor Rights, By Luke Eric Peterson

There are continued rumblings coming out of South Africa that legislation designed to promote black economic empowerment in the economy, runs afoul of international investment treaties concluded by South Africa with western nations such as the United Kingdom and Belgium.

Last year the governing African National Congress party unveiled plans designed to place 15% of the mining sector under black ownership in 5 years, and 26% after a decade. At the time, mining stocks were battered by analysts and investors, who wiped 8.9 billion US dollars off of the sector's market capitalization.

Later this year, the South African Parliament is expected to pass legislation which will force mining companies to transfer their common-law mineral rights to the government, which will then re-issue licenses to these firms for "new-order" mining rights. The move is designed to ensure state ownership and stewardship of natural resources. Licenses to exploit "new-order" mining rights will be predicated upon corporate compliance with a range of policy objectives, including employment equity, human resources development, rural development, and housing and living conditions.

Recently, the Department of Minerals and Energy released a scorecard which the Government will use to assess industry's compliance with these and other criteria. Firms which do not meet the requirements set out in the scorecard could face the loss of their licenses.

The imposition of targets for participation of black and minority involvement in management and ownership of the mining sector, have attracted criticism from some industry quarters. In an email interview in July of last year, the Executive Director of Anglo-American, a major mining firm operating in South Africa told the editor of INVEST-SD Bulletin that some proposals emanating from the South African Government might run into conflict with foreign investor rights contained in bilateral investment treaties.

However, Michael Spicer also alluded to political considerations which

would gravitate against a formal international legal challenge:

"We are fully aware of the 1994 Investment Protection and Promotion Agreement (IPPA) between the UK and SA governments. It is the view of some of the protagonists in the minerals debates here that the Minerals Bill flouts key provisions of the Agreement. In weighing up whether to invoke the Agreement the impact on UK-SA relations and on relations between the mining industry and the SA government of such a case are a material consideration. Suffice it to say the industry is not pursuing this route."

Indeed, after talks with industry, the South African Government moderated its earlier plans for more ambitious benchmarks for racial diversity in the industry.

More recently, the looming transfer of ownership of mining rights to the state has also come under fire from some critics. In a commentary published in several South African news publications, Peter Leon, a partner with law firm Webber Wentzel and Bowens, has warned that "the expropriation of 'old-order' mining rights" contemplated by the South African Government may amount to a violation of investment treaties concluded by South Africa with the United Kingdom or Belgium and Luxembourg.

For its part, the ruling ANC party insists that the new mining regime offers a template for changes which are needed across the entire economy. Plans are afoot to create a scorecard which will measure commitments to diversity by any foreign firms which seek to bid for government contracts, apply for licenses and concessions, or to bid for stakes in privatizations.

In an interview with the Times of London, Lindiwe Hendricks, South Africa's Deputy Minister for Trade and Industry, indicated that Government was in consultations with employers and unions over plans to introduce a framework for economy-wide black economic empowerment. Hendricks noted, "We believe that equity in South Africa is a moral requirement. Anyone who knows the history of South Africa, knows it would be untenable; there would be social problems if the Government did not intervene."

Sources:

Scorecard for the SA mining sector:
<http://www.dme.gov.za/minerals/pdf/scorecard.pdf>

E-mail Interview with Michael Spicer, July 2, 2002, on file with Luke Eric Peterson

"South Africa; Mining Legislation Should Put Pragmatism over Ideology", Africa News, May 7, 2003, By Peter Leon

"South Africa; Companies Rush to Find Black Partners", Africa News, April 29, 2003

"South African Mining Companies Face Controversial 'Royalties Tax'", Agence France Presse, April 27, 2003, By Stuart Graham

"Black Empowerment Hurdle for Government Contracts", Carl Mortished, The Times, April 26, 2003

"Mining Charter Scorecard is Lacking in Clarity", John Botha, Business Day (South Africa), April 14, 2003

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.