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Editor's Note

1. Reader feedback still sought

Many readers have responded to our request for basic information about themselves. However, many more have yet to do so.

We are still seeking the names, occupation/sector, country of residence, and any comments about our service, from most of our subscribers. Responses can be mailed directly to the editor at lpeterson@iisd.ca. Your responses will help us to better target our audience and to fund-raise successfully for the continuation of this information service.

Arbitration Watch:

2. India faces 6 new investment treaty claims in relation to Dabhol investment,

By Luke Eric Peterson

The Government of India faces six potential new investment treaty claims in relation to the failed Dabhol Power Company, India's largest foreign

investment.

Overseas banks which provided financing for the Enron-led deal have signaled their intent to arbitrate under a string of bilateral investment treaties which India has signed with various European home countries in which the banks are incorporated.

Several of the banks involved in this latest legal action include ABN Amro, Citigroup, Bank of America and Credit Suisse First Boston. Press reports also indicate that the Overseas Private Corporation (OPIC) is supporting these latest claims against India. However, a call placed to OPIC earlier this week, was not returned at press time.

As noted in an earlier edition of INVEST-SD, the dispute over the Dabhol project has generated a spate of litigation, including an arbitration at OPIC by minority-investors General Electric and Bechtel under the terms of an investment insurance contract, and a much larger arbitration which has been launched by GE and Bechtel against India for further damages of some 1.2 billion dollars (US).

Because India and the United States have not concluded a bilateral investment treaty, the two US-based firms have filed their claim through their Mauritius-based subsidiaries, under the terms of the India-Mauritius bilateral investment treaty.

Meanwhile, in the new investment treaty claims filed last week, foreign banks involved in the financing of the failed deal are seeking to recoup losses associated with the project.

The investment finally collapsed in 2001, due to a failure by the local government to pay for power generated by the Dabhol project and amidst allegations of corruption involved in brokering the allegedly excessive terms of the power purchase agreement.

International human rights organizations, including Amnesty International and Human Rights Watch, have criticized the Indian Government and the Dabhol consortium (Enron, GE and Bechtel), but particularly Enron (the lead-player in the project), for the handling of public protests which dogged the project almost from its inception in the early 1990s.

Amnesty International has highlighted the conclusions of a fact-finding inquiry headed by Justice S M Daud, a former judge of the Bombay High Court, which found credible allegations of human rights violations against local protestors by police and security forces contracted by the Dabhol Power Company.

Of course, even where alleged human rights violations may plague a particular foreign investment, it is unclear to what extent human rights issues would be considered by an arbitral tribunal which has been convened to examine a much narrower set of legal questions relating to alleged violations of a foreign investor's rights by the host government under an investment treaty.

A research paper prepared by the International Institute for Sustainable Development (IISD) examines some of the interesting tensions which may

arise between a state's international obligations to protect human rights and to uphold its commitments to foreign investors under investment treaties.

This paper is available at:
www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf

Sources:

"Banks sue over loans to Indian Enron unit", by Khozem Merchant, Nov.7, 2003, The Financial Times

"Enron: History of human rights abuses in India", Human Rights Watch, press release, January 23, 2002, available at:
http://hrw.org/press/2002/01/enron_012302.htm

"The Enron Project in Maharashtra - protests suppressed in the name of development", Amnesty International, July 1997, available on-line at:
<http://web.amnesty.org/library/Index/engASA200311997>

Negotiation Watch:

3. On eve of FTAA summit, place for investment rules still unclear,
By Luke Eric Peterson

With only a few days left before Trade Ministers convene in Miami to discuss progress on a Pan-American trade pact, the place of investment in that agreement remains up in the air.

This much is clear: Brazil remains adamant that it must enjoy the flexibility to opt out of commitments which go beyond existing WTO disciplines in areas like foreign investment, services, intellectual property rights (IPR) protection, and government procurement.

Insisting that these issues are better governed at the multilateral level, Brazil has called for any regional treatment of these issues to occur in so-called pluri-lateral agreements (i.e. agreements which would not require the participation of all countries in the Americas).

It remains less clear, however, what US trade officials make of this position.

A request for further information was submitted by INVEST-SD to the Office of the US Trade Representative on Wednesday. At press time, no comment was forthcoming.

Until now, the US has insisted that topics such as investment and IPR must be included in any Free Trade Area of the Americas (FTAA) - and, for several years, negotiating groups have slowly worked to elaborate

draft texts in these areas.

However, with Brazil standing firm in its opposition to several issues, and with the US itself insisting that other matters (including key aspects of agricultural trade) are not fit for inclusion in the FTAA, it appears that, after a mini-ministerial meeting last weekend in Washington, the two sides may cobble together a compromise which would allow for a two-track FTAA process.

US business groups have voiced concerns about such a two-track approach. In comments to Reuters, the US Chamber of Commerce criticizes what it calls "an a la carte approach to the FTAA", which would narrow the scope and ambition of the proposed agreement.

A pluri-lateral approach to some issues has also been criticized by some officials from nations which have already acceded to the US's far-reaching investment template - either in bilateral investment treaties or free trade agreements - and resent the possibility that other countries in the hemisphere might be in a position to obtain greater market access to the US market through a proposed FTAA, without needing to make far-reaching concessions to US business interests in areas like foreign investment and (IPR) protection.

Thus, one possibility which is under consideration by US trade officials would be to penalize any countries which elect to opt out of pluri-lateral agreements (for eg on investment) by reducing the market access which they would gain under the broader FTAA.

Meanwhile, in a telling development, trade officials with Peru and Colombia have signaled that the US will announce shortly negotiations on bilateral free trade agreements with these two countries. Other reports indicate that the US also plans to launch negotiations with Panama.

Some weeks ago, INVEST-SD made a request to the Office of the US Trade Representative for information about active investment negotiations. This request did not yield a response. However, it is known that US negotiations are under way with at least 6 other nations in the hemisphere on free trade agreements (which would cover investment).

And in terms of existing commitments, the US already has concluded bilateral investment treaties with 12 nations in the region; 7 of these treaties are currently in force. Investment rules are also written into free trade agreements with Chile, Mexico, and Canada.

By pursuing negotiations with so many individual players in the hemisphere, the United States would appear to be in a strong position - should the FTAA fail - to achieve most of its objectives on investment through a multitude of sub-regional negotiations.

Sources:

INVEST-SD Interviews

"Brazil Rejects New US Proposal on Scope of FTAA Negotiations", Inside US Trade, Nov. 14, 2003

"Peru says US to announce free-trade talks Tuesday, Nov. 13, Dow Jones

"Colombia Gov't: Free-trade talks with US to start soon", Nov. 13, 2003, Dow Jones

"US business Group Says no to narrow Americas pact", Nov.13, 2003, Reuters

"Brazil wins on FTAA", Nov. 10, 2003, Latinnews Daily

4. Risk consultancy looks at challenges to FDI in Post-September 11th security climate,
By Trineesh Biswas

The post-September 11 security environment will pose significant challenges to international investors, concludes a new report from Control Risks, a UK-based firm specializing in international business risk consultancy. The firm does note, however, that foreign direct investment (FDI) flows will continue to be determined by a broad range of factors.

Control Risks' 'Risk Map 2004' report identifies global and regional political, security and business risks which investors should be aware of when making decisions in the upcoming year.

The report takes note of the 21 percent decline in global inflows of FDI in 2002, and points to heightened risk and uncertainty resulting from political and security concerns as factors hindering FDI flows to developing countries in particular

One important theme sounded by the report is that governments have a significant role to play in making countries attractive to foreign investors, since "a stable political and economic environment, the rule of law and sound infrastructure" are prerequisites for significant inflows of investment.

The report's authors note that China's extraordinary success at attracting FDI can be attributed not only to its cheap labour costs, but also to the "high-level political will" to encourage more FDI. China's political stability and stable security environment are 'clinching' factors for investors. Intellectual property rights abuse, however, is seen to diminish the incentive to invest in certain sectors.

Notably, the Control Risks study gives an approving nod to the use of fiscal incentives as a means of attracting foreign investment, referring to Peru's use of incentives to attract labour-intensive assembly plants to export to the American market. This is in direct contrast to a recent survey by the McKinsey Global Institute that found that such measures have little utility. (Please see "McKinsey consulting firm issues report on FDI's impact on developing countries," Investment Law and Policy Weekly News Bulletin, November 7, 2003)

The report also points to recent international legal cases to indicate

that foreign investors may well find themselves held liable for corrupt practices by their host-country-based commercial intermediaries. It concludes that in light of this 'decisive' change in the formal and informal rules of international business, investors must forbid their employees from paying bribes, and that fees charged by local partners ought to be in reasonable proportion to services provided so as to preempt allegations of bribery.

Control Risks counsels multinational companies to remain cautious of the fact that increasingly disaggregated supply chains can be subject to disruption by political events, local business practices or natural disasters and disease. For example, the July 2001 bombing of Colombo airport in 2001 had a major impact on companies sourcing out of Sri Lanka. Companies' reputations may suffer if their suppliers are found to follow exploitative labour practices. Most disruptively, natural disruptions and diseases like SARS have the potential to cause great damage to supply chains - so much so that the report suggests that companies maintain production lines in various regions in order to provide protection against unforeseeable developments of this nature.

Source:

Information provided by Control Risks Group (<https://www.crg.com>)

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