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Editor's Note  
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1. INVEST-SD News Bulletin Archive

Back issues of the INVEST-SD News Bulletin are available on the IISD's website at: [www.iisd.org/invest-sd/archive.asp](http://www.iisd.org/invest-sd/archive.asp)

The archive is up to date through July 31, 2003, with the August and September issues to be added shortly.

Readers are advised that they can search the archive of back issues by using the search bar located in the upper right hand corner of the archive home page.

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Negotiations Watch  
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## 2. Iraq's New Investment Law Opens Most of Economy to Foreign Investment, By Luke Eric Peterson and Trineesh Biswas

A new foreign investment law for Iraq has been announced this week by the Coalition Provisional Authority (CPA) overseeing the territory.

The law's primary purpose is to liberalize the Iraqi economy to foreign investment, in all sectors except for natural resources, banking and insurance (which are expected to be the subject of future orders).

In some respects, the law follows national investment laws adopted by various countries - with provisions on issues such as non-discrimination and transfer of funds - but is notable for extending the right to national treatment to all foreign investors, and for placing no restrictions on the percentage-stake which a foreign investor may take in a local enterprise.

The law also covers both portfolio and foreign direct investment, and does not appear to carve out any sensitive sectors such as health, education, water services, telecommunications, media/broadcasting from its purview. As such, the new law appears to pave a pathway for the privatization of such services.

Under the terms of the new law, foreign investors may establish trade representation branches and offices in Iraq, as well as a commercial presence for retail purposes - provided that a cash bond is posted with the relevant authorities.

In terms of its protective functions, the law does not incorporate a dispute settlement mechanism per se; rather it decrees that investors will have recourse to any provisions written into contracts between the parties. This could include avenues such as investor-state arbitration or recourse to local arbitration or courts, depending upon the will of the parties.

Notably, the law does place restrictions upon the ownership of real property - permitting foreign investors to be licensed to use such property, but forbidding them from "purchase (of) the rights of disposal or usufruct of private real property."

The Order supplants all earlier Iraqi investment laws, but contemplates that it might, in turn, be supplanted by a future order of "an internationally recognized, representative government established by the people of Iraq".

Although banking and insurance companies were explicitly excluded from the foreign investment law, the Authority this week issued an additional law opening the Iraqi banking sector to participation by foreign banks (see link below).

And in a third Order, the Coalition Provisional Authority (CPA) has also decreed that income tax rates - both for corporations and individuals - shall not exceed 15% in 2004, and in subsequent years.

According to George Wolfe, Director of Economic Policy for the CPA, "the

adoption of the foreign investment Order is one of the best things we can do to bring capital, training, jobs and investment to this country ... one of the best things we can do to bring a sustained economic recovery to the people of this country."

Some investment experts were more skeptical that the foreign investment law will, on its own, do much to stimulate new investment into Iraq.

Thomas Walde, Professor at the Center for Energy, Petroleum and Natural Resources Law at the University of Dundee, hailed the new law for sweeping away what he termed "bureaucratic" obstacles to foreign investment, but he was under no illusions that investors will now rush into Iraq.

"Whatever law you do, I don't think there will be any investment until the security situation is cleared up," Walde told INVEST-SD bulletin.

Walde added that investment in the oil and gas sector - which is not covered by the new investment law - is the area most likely to see significant investment. He doubts, however, that any major oil corporations would seek to invest on a mid- or longer-term basis in Iraq given the current uncertainty about security and future governance of Iraq.

Based on his conversations with major players in the oil industry, Walde cautions that, "Nobody in any of the big oil companies would invest on the basis of a title with an occupation government of uncertain legitimacy and staying power, because the title would have difficulty in surviving a change in regime"

Sources:

Coalition Provisional Authority Order Number 37, "Tax Strategy for 2003" (available online at [http://www.cpa-iraq.org/regulations/20030921\\_CPAORD37.pdf](http://www.cpa-iraq.org/regulations/20030921_CPAORD37.pdf))

--- Order Number 39, "Foreign Investment" (available online at [http://www.cpa-iraq.org/regulations/20030921\\_CPAORD39.pdf](http://www.cpa-iraq.org/regulations/20030921_CPAORD39.pdf))

--- Order Number 40, "Bank Law" and Annex A, "Iraq Banking Law" (available online at [http://www.cpa-iraq.org/regulations/20030924\\_CPAORD40.pdf](http://www.cpa-iraq.org/regulations/20030924_CPAORD40.pdf) and [http://www.cpa-iraq.org/regulations/20030924\\_CPAORD40ANNEX.pdf](http://www.cpa-iraq.org/regulations/20030924_CPAORD40ANNEX.pdf))

INVEST-SD Interviews with Thomas Walde and George Wolfe

3 Report on Canada's NAFTA Chapter 11 consultations available

The Canadian Government has released the results of a consultation meeting held earlier this year to discuss the implementation and operation of the North American Free Trade Agreement's rules on investment (NAFTA's Chapter 11). The consultations with a variety of stakeholders will provide input into for a meeting of NAFTA trade

ministers from Mexico, Canada and the United States scheduled for later this autumn.

For more details about the consultations see:

<http://www.dfait-maeci.gc.ca/tna-nac/consult4-en.asp>

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Arbitration Watch  
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#### 4. Bechtel and GE mount billion dollar investment treaty claim against India,

By Luke Eric Peterson

Two minority investors in India's largest foreign investment, the ill-starred Dabhol Power Plant, have launched a bilateral investment treaty (BIT) claim against India in an effort to recoup their losses related to the plant.

Bechtel Enterprises Holdings Inc. and General Electric each held 10% shares in the Dabhol plant through Mauritius-based affiliates, thus paving the way for the US firms to mount their claims under a BIT between Mauritius and India.

A spokesperson for Bechtel told INVEST-SD News Bulletin that it is commonplace for foreign direct investment into India to be channeled via Mauritius.

The US government has never concluded a BIT with India.

The investor-state arbitration against India will use the rules of the UN Commission for International Trade Law (UNCITRAL), which means that the arbitration will not be supervised by an institution. As such, any disclosure of legal arguments, decisions of the tribunal or access to the proceedings, will be at the sole discretion of the parties.

Although Bechtel and GE have nominated an arbitrator who will sit as part of a three member tribunal to hear the claim, Bechtel's spokesperson declined to disclose the arbitrator's name, until the tribunal has been successfully established.

According to a press release, the parties will seek damages of up to \$600 million (US) each from the Indian Government. Earlier this month, the two parties saw a smaller award in their favor in an arbitration mounted against the Overseas Private Investment corporation (OPIC), a US government agency which had insured the investment against political risk.

In the OPIC claim, a tribunal ordered payments of \$28.5 million (US) to each company by OPIC, which may, in turn, pave the way for the US Government to seek to recoup this amount from the government of India.

The Dabhol project has been mired in controversy virtually from its inception, with allegations of corruption surrounding the contract

arrangements between the investors and local Indian authorities. Two leading international human rights groups, Amnesty International and Human Rights Watch, also accused the Indian authorities of heavy-handed treatment of critics of the Dabhol power project. (See Enron's investment in Indian power plant still embroiled in legal battles", INVEST-SD News Bulletin, June 20, 2003)

When the Maharashtra State Electricity Board (MSEB) defaulted on scheduled payments for power produced by Dabhol Power Consortium in December 2000 - complaining of the excessive rates charged by the consortium - this led, in May 2001, to a termination of the power purchase agreement between the parties. Since then, Enron, GE and Bechtel have been locked in a series of negotiations, lawsuits and arbitrations related to the mothballed project.

Sources:

"Bechtel and GE file arbitration", Sept 22, 2003, Bechtel Press Release

INVEST-SD Interviews

"Claim makes Enron power plant revamp 'more difficult'", by Khozem Merchant, The Financial Times, Sept. 24, 2003

5. Tribunal chosen to hear dispute over Peruvian environmental preserve,

By Luke Eric Peterson

A tribunal has been selected to hear a claim brought by a Chilean investor against Peru at the International Center for Settlement of Investment Disputes (ICSID).

The dispute arises under the Chile-Peru bilateral investment treaty and was registered earlier this year, when Chilean pasta-maker Lucchetti was ordered to dismantle a Peruvian factory which had been built adjacent to an environmental preserve.

As earlier reported in INVEST-SD Bulletin, Lucchetti has alleged that it is the victim of discriminatory treatment - arguing that other foreign investors have not suffered the same fate at the hands of Peruvian authorities. (See "Peru closes Chilean factory in environmental reserve; triggers investment dispute", INVEST-SD News Bulletin, January 24, 2003)

The tribunal convened to examine Lucchetti's claim will be presided over by Judge Thomas Buergenthal, a current member of the International Court of Justice, and former President of the Inter-American Court of Human Rights.

The other two arbitrators, Jan Paulsson, and Bernardo Cremades, both work in private practice as arbitration lawyers and as arbitrators.

The ICSID tribunal's work could be short-lived.

Earlier this year, the Peruvian government responded to Lucchetti's arbitration claim, by mounting its own state-to-state claim under the Chile-Peru bilateral investment treaty.

At the time, sources indicated that any ICSID tribunal convened to hear Lucchetti's claim might consider postponing such proceedings, in deference to the state-to-state dispute between Chile and Peru. (See "Peru launches unprecedented state to state arbitration in dispute with Chile", INVEST-SD News Bulletin, March 28, 2003)

Failure to do so, could lead to separate tribunals handing down divergent or conflicting arbitral awards related to the same issues.

INVEST-SD News Bulletin will continue to monitor developments in both arbitrations.

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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](mailto:lpeterson@iisd.ca)

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