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Negotiations Watch:

1. Int'l Chamber of Commerce Issues Expectations for WTO Investment Agreement,
By Luke Eric Peterson

A recent policy statement by the Paris-based International Chamber of Commerce sets out the ICC's support for a "legally binding, comprehensive multilateral framework of rules for investment" under the auspices of the World Trade Organization.

The ICC, which represents business interests at the global level, had been a key advocate of the proposed OECD Multilateral Agreement on Investment, which was aborted in 1998. In a March 7, 2003 policy statement, the organization argues that a WTO agreement on investment could enhance the "predictability of the policy environment", which might yield additional investment flows.

This view was not unanimously held by all members of the ICC's Commission on Trade and Investment Policy. Representatives from ICC India dissented from this view, countering that "there is no evidence that the pattern and flow of investment will change in any significant way with multilateral rules on investment."

The ICC sets out various provisions which global business would like to see in any future multilateral agreement. In a number of respects, the ICC wish-list goes beyond those commitments proposed in the WTO's 2001 Doha Declaration, which have formed the basis for discussions in the WTO's Working Group on Trade and Investment.

Areas where the ICC charts new territory include: provisions for protection against expropriation and "creeping expropriation"; commitments for entry of investment to be scheduled on a "negative list" approach; and the provision for investor-state dispute arbitration.

Expropriation provisions were not mentioned in Article 20 of the Doha Declaration and have been opposed by a number of WTO member-states. Meanwhile, the Doha Declaration called for exploration of a positive-list approach to granting establishment rights for investors. On such an approach, countries would only need to list those sectors of the economy where commitments would apply. Conversely, the ICC proposal prefers for commitments to apply across the board, but to permit countries to carve-out certain exceptions.

The ICC has also called for inclusion of provisions for "roll-back" and "stand-still" in any new multilateral agreement; the former would mean that exceptions would be gradually rolled-back over time, whereas the latter would mean that no new exceptions could be lodged by individual countries at a later date.

The proposal to include investor-state arbitration would permit

investors to make use of various existing sets of arbitration rules which are included in many bilateral investment treaties. Among these rules are those of ICSID, UNCITRAL and the ICC's own International Court of Arbitration.

Sources:

"ICC's Expectations regarding a WTO Investment Agreement", Commission on Trade and Investment Policy, March 7, 2003, available online at: http://www.iccwbo.org/home/statements_rules/statements/2003/wto_investment_agreement.asp

World Trade Organization, Doha Declaration, articles 20-22, available online at:

http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#trade_investment

2. US-Chile FTA Text Released; Signature Delayed by Chile's Opposition to War,
by Luke Eric Peterson

The Office of the US Trade Representative has released a provisional text of the Free Trade Agreement negotiated with Chile. However, officials in the Bush Administration have hinted that the implementation of the agreement could be delayed as a result of Chile's failure to support the US war on Iraq.

Unlike its sister pact with Singapore, the US-Chile FTA has not been notified to Congress, where it must undergo a 90-day review before it can be signed into law by President Bush. In recent weeks, conflicting signals have come out of Washington, as some officials suggest that Chile's failure to use its seat on the UN Security Council to back the Iraq war, could underlay the Bush Administration's reluctance to table the US-Chile pact in Congress.

Some congressmen are also expected to vote against the US-Chile deal in order to penalize Chile for its foreign policy. One Senate aide told Inside U.S. Trade, that some Republican Senators viewed "support for U.S. foreign policies as a must for countries that sign FTAs with the U.S."

Although the trade deal's short-term future remains cloudy, there is much greater clarity about the contents of the agreement since the USTR released a copy of the text to the public earlier this month.

The agreement features many of the same substantive and procedural innovations in its investment provisions, as have been seen in the US-Singapore agreement which was released last month. These innovations include changes to the expropriation provisions in order to clarify that environmental or health regulations would very rarely constitute compensable takings. As well, the agreement introduces a number of procedural changes designed to open the controversial investor-state dispute settlement process to public scrutiny. All disputes will need to be publicly notified, and all related documents and proceedings will be open to the public, subject to certain safeguards to protect confidential business information.

Non-parties who may wish to intervene in investor-state disputes will take heart that the treaty provides expressly for the authority of Tribunals to consider amicus curiae submissions. However, would-be-interveners should brush up on their Spanish, as any such interventions will need to be submitted in both English and Spanish.

Provisions for the consolidation of related investment arbitrations have been included in the investment chapter, which represents an improvement from the norm under bilateral investment treaties, where similar disputes can be arbitrated simultaneously before an array of parallel tribunals. While the agreement does not include provision for appellate review of tribunal decisions (beyond those permitted under the specific arbitration rules), the parties do pledge to consider the creation of such a bilateral appellate body within the next three years, as well as to consider allowing recourse to any future multilateral body which might be created in future.

In terms of the range of disputes which might be brought to arbitration, the US-Chile FTA (along with the US-Singapore FTA) is broader than the North American Free Trade Agreement. The new agreements follow the established practice in many US BITs whereby claims may relate to violations of the substantive rights in the treaty, or to the violation of any other investment contract or authorization concluded with the host state.

US investors in Chile are subjected to a fork-in-the-road provision whereby they must elect to pursue their claims in local courts or tribunals or via international arbitration. Recourse to one avenue will preclude turning to the other at a later date.

As well, special dispute settlement procedures are set out for claims alleging violations of the provisions guaranteeing free transfers and payments. These provisions require that would-be claimants wait at least

one year before lodging their claim. Moreover, Chile will incur no liability provided that short-term restrictive measures imposed on the flow of capital, do not "substantially impede transfers". The text of the agreement does not further define this term. The special provisions on capital controls represent a political compromise, in the face of considerable reluctance of both Chile and Singapore to surrender their ability to impose certain forms of capital controls where financially necessary.

Sources:

US-Chile FTA, available online at:

<http://www.ustr.gov/new/fta/Chile/text/index.htm>

"Administration Silent on US-Chile FTA, Democrats Push for Signing", Inside US Trade, April 18, 2003

"US Backs Curbs on Capital Controls", the Financial Times, April 2, 2003, By Edward Alden

"US-Singapore FTA Text Released; Investment Provisions Reveal Many Changes", By Luke Eric Peterson, INVEST-SD Bulletin, March 14, 2003

3. German Conference to Discuss Alternatives to WTO Investment Agreement

A one-day conference slated for Monday, April 28, in Bonn Germany will explore alternatives to a WTO Agreement on Investment. The event is being organized by the German NGO Forum on Environment & Development and the Protestant Church Development Service.

For further information, please contact: Antje Schultheis; tel: +49-228-3681010; e-mail: handelsprojekt@forumue.de; <http://www.forumue.de/themenundags/handel/index.html>.

Arbitration Watch:

4. Firm Embroiled in Bolivia Water Dispute Wins Major Iraq Contract, By Luke Eric Peterson

A US-construction company embroiled in a water privatization dispute with the government of Bolivia has been awarded a major contract by the

US government to rehabilitate Iraq. The San Francisco-based Bechtel Corporation, one of the world's largest construction firms was selected by the US Agency for International Development as the lead contractor to repair water & sewage systems, power facilities and other key infrastructure in Iraq.

Bechtel was the lead investor in the consortium which was contracted to run the water system of Cochabamba, Bolivia's third largest city. Public protests in Bolivia over steeply increased water tariffs and expropriation by the consortium of community water resources quickly escalated to the point where government officials had to impose martial law. Ultimately, the consortium's position in Cochabamba became untenable, and authorities warned that they could not guarantee the safety of company employees and executives.

Following its pull-out from Bolivia, Bechtel subsidiary Aguas Del Tunari mounted a compensation claim under a bilateral investment treaty at the Washington-based ICSID. Although ICSID's initial claim is for \$25 million dollars, a recent statement by a Bechtel spokesperson indicates that this figure does not include lost profits, which the consortium may claim at a later stage of the arbitration proceeding.

An ICSID tribunal chaired by University of California at Berkeley Law Professor David Caron is hearing the claim, which is currently at the jurisdictional phase. In February of this year, the Tribunal indicated that it had no authority to join a number of petitioning groups and citizens to the dispute, or to open the proceedings to the public. The Tribunal noted that the rules of arbitration leave it to the two parties to the dispute to determine whether such participation may occur. However, the Tribunal did not prejudge its ability to consult with experts or entertain written submissions from would-be interveners at some future stage of the proceedings.

Sources:

"Bechtel Wins Big Iraq Contract", By the Associated Press, The Globe and Mail, April.18, 2003

"Business Entanglements: Governments in Latin America face Growing Wave of big-Dollar Arbitration Claims From Foreign Corporations", By Stephen Seidenberg, Broward Daily Business Review, March 26, 2003

Letter to petitioners in Aguas del Tunari case, from David D. Caron, January 29, 2003, available online at:

<http://www.earthjustice.org/news/documents/2-03/ICSIDResponse.pdf>

"Leasing the Rain", By William Finnegan, The New Yorker, April 8, 2002

5. Another Energy Charter Treaty Case Sent to ICSID,
By Luke Eric Peterson

An arbitration request against the government of Bulgaria has been forwarded to the International Centre for Settlement of Investment Disputes (ICSID). The dispute relates to an investment in an oil refinery in northern Bulgaria.

In 1996, the Bulgarian government privatized the refinery and sold it to Euroenergy Holding, however, the new owners failed to finance production at the facility, and soon ran the operation into bankruptcy. New owners were found in 1998 in the persons of the Nova Plama consortium which included Swiss and Norwegian investors.

Although the plant was brought out of bankruptcy proceedings, production did not resume. A disagreement arose in relation to the outstanding debts of the company, and talks with the government reached a stalemate. In addition, the Bulgarian parliament passed a new Environmental Protection Act in July of 2002, which would have absolved the government of any liability for environmental pollution related to companies which had been privatized prior to 1999.

The Nova Plama consortium had urged the President of Bulgaria to veto this environmental legislation, which would have imposed liability on the consortium. After company officials met with authorities in July of 2002, the Bulgarian Economy Minister Nikolai Vassilev said that if the consortium would resume production at the idle refinery, then the government would consider a new bill to address the consortium's environmental concerns.

A spokesperson with the Bulgarian embassy in Washington DC declined to comment on the case, on the grounds that the dispute has not been officially registered at ICSID. Written queries about the dispute - and the specific claims which the Nova Plama consortium has alleged under the Energy Charter Treaty - have been forwarded on by embassy officials to the Bulgarian Finance Ministry for consideration. Further information may follow in future issues of INVEST-SD Bulletin.

Sources:

"Nova Plama Sues Bulgaria in Washington", April 11, 2003, PARI Daily (Bulgaria)

"Nova Plama Insists on Presidential Veto on Environment Act", Capital Weekly (Bulgaria), available online at:

<http://www.capital.bg/weekly/02-31/11-31.htm>

"Plama Owners Threaten With Letter to Nato", July 16, 2002, PARI Daily (Bulgaria)

6. Overview of NAFTA Case Law on Regulatory Measures

A recent analysis of the emerging case law under NAFTA Chapter 11, undertaken by arbitration lawyer Mark Feldman is available on the website of Garvey Schubert and Barer. Mr. Feldman's paper was presented as part of a symposium of the D.C. Bar's International Law Section in January of 2003.

Particular focus is given to NAFTA cases dealing with regulatory measures. Feldman's survey of the cases suggests that "most NAFTA tribunals have been conservative in addressing jurisdictional issues, and in most cases, have been deferential to the state's right to regulate business activity in its territory."

Source:

State Responsibility for Regulatory Measures Under International Law: Recent NAFTA Arbitration Cases, A presentation by Mark B. Feldman, available online at:

http://www.gsblaw.com/resource/pub_result.asp?ID=1524251242003

7. NYU Conference on Regulatory Expropriations Video Now Available Online

A webcast of the April 2002 conference organized by New York University on "Regulatory Expropriations Under International Law" is available for viewing on NYU's website. The various panel discussions held over two days can be viewed using Realplayer software (available free from www.real.com).

The conference brought together representatives from government, academic, private practice, and civil society to discuss issues arising out of expropriation claims mounted under the North American Free Trade Agreement.

Many of the presenters at the conference contributed papers to a subsequent special issue of the New York University Environmental Law Journal. Copies of the journal can be purchased by contacting the

editors of the journal at: law.elj@nyu.edu

Video files of the Conference sessions are available on-line at:

<http://www.nyu.edu/pages/elc/regexprop/video/2001/index.html>

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