Investment Law and Sustainable Development Weekly News Bulletin, Dec.6, 2002

A publication of the International Institute for Sustainable Development: www.iisd.org

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NEGOTIATIONS WATCH:
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1. Failure to Agree on Capital Controls Could Lead to Removal of Investment from Singapore-US Free Trade Agreement

Negotiations on the Singapore-US Free Trade Agreement continue to snag upon one final disagreement. The US Treasury Department has long insisted that Singapore agree to relinquish its ability to impose capital controls in the event of a financial crisis (see related story in INVEST-SD Bulletin, Nov.29, 2002).

The US Trade Representative had hoped to finalize the text of the treaty in the coming weeks and notify it to Congress in early January, however Singapore's intransigence on the question of capital controls has thrown this timeline into question. According to reports in Inside US Trade, the USTR is urging US business groups to decide what, if anything, they are prepared to surrender in the treaty, in order to negotiate a change in Singapore's position. Another option mooted by USTR officials would be to remove the investment chapter from the proposed treaty, and to negotiate the issue of capital controls separately under the auspices of a US-Singapore bilateral investment treaty.

(Sources: "USTR Hopes to Notify US-Singapore FTA to Congress in Early January", Inside US Trade, Dec.6, 2002, available by subscription only)

2. New Developments at WTO Working Group on Trade & Investment

The WTO Working Group on Trade & Investment continues to move forward with the work program set out in last year's Doha Ministerial Declaration. Paragraphs 20-22 of the Declaration urged the Working Group on T&I to continue to work on clarifying a number of provisions which might make their way into an eventual WTO Agreement on Investment (should WTO members agree to launch formal negotiations at the 2003 Ministerial Conference). Recently, a handful of new papers have been submitted by member-states and the WTO Secretariat to the Working Group on T&I. Note that all declassified documents are available by searching the WTO Documents Online site at: http://docsonline.wto.org/gen_home.asp?language=1&_=1

Recent submissions include:

a. European Union Discussion Paper on Balance of Payments (BOP) Safeguards, Nov. 28, 2002 While not purporting to be the official negotiating position of the EU, this EU paper moots a possible safeguards clause to be included in what it like to call a potential WTO Investment for Development Framework (IDF). The safeguard clause would be designed "to preserve members in case of serious BOP difficulties." In the EU's view, "This provision should allow temporary restrictions on the outflows of current and capital transfers related to those investments covered in the IDF."

(Source: WTO Document number: WT/WGTI/W/153)

b. Communication from a Group of Six Developing Countries on Investor and Home Country Obligations, Nov.19, 2002 This document representing the views of China, Cuba, India, Kenya, Pakistan and Zimbabwe, argues that legally binding norms need to be included in any multilateral agreement on investment, in order to ensure corporate responsibility and accountability. In addition to articulating a number of obligations which might be imposed upon investors, the paper also sets out number of duties to which the home countries of these investors ought to adhere.

(Source: WT/WGTI/W/152)

c. WTO Secretariat Note on Technical Assistance Activities in 2002 Pursuant to Paragraph 21 of the Doha Ministerial Declaration, Oct. 29, 2002

This document prepared by the WTO's permanent staff sketches out the various activities which have ought to assist developing countries in their efforts to clarify the relationship of trade & investment. Technical activities have included national and regional seminars, training courses and other workshops.

(Source WT/WGTI/W/151)

d. Three Separate Submissions by India on Various Substantive Provisions, Oct.7, 2002

These submissions treat several different issues which were identified as future work areas by the 2001 Doha Declaration: Non-Discrimination; Development Provisions; and Modalities for Pre-establishment Rights.

The latter paper refers to the ongoing debate as to whether a multilateral agreement on investment should extend protections to investors prior to their establishment in the host state. Whereas most bilateral investment treaties only extend protections to investments once they have been established (and presumably after they have passed muster with domestic authorities and screening agencies), some BITs, including most of those negotiated by the United States and Canada, go further and extend protections to investors prior to their entry into the host state's territory.

(Sources: WT/WGTI/W/150, WT/WGTI/W/149, WT/WGTI/W/148)

Arbitration Watch:
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3. "Do International Trade Agreements Threaten System of Medicare?", By Paul Knox, The Toronto Globe and Mail, Dec.6, 2002

A correspondent for Canada's National Newspaper explores whether changes to Canada's health care system designed to allow greater private sector involvement, would trigger new trade & investment treaty commitments.

(Source:

http://www.globeandmail.com/servlet/GIS.Servlets.HTMLTemplate?current_ro
w=2&tf=tgam/search/tgam/SearchFullStory.html&cf=tgam/search/tgam/SearchF
ullStory.cfg&configFileLoc=tgam/config&encoded_keywords=knox&option=&sta
rt_row=2&start_row_offset1=&num_rows=1&search_results_start=1&query=knox
)

(clicking on the above link may not work. Instead, cut & paste the entire link into your Internet Browser window, and then hit enter)

4. "Door Open to Foreign Firms: Health Care System Is Too Valuable to Risk on Roll of Some NAFTA Dice", By Licia Corbella, Calgary Sun, Dec. 1, 2002

This op-ed column argues that Canada's reservations under the NAFTA are not sufficient to protect its publicly-funded health care system, and that recent moves by two provinces to allow greater private-sector involvement in health care, mean that there is now a "hole in the roof" which Canada must fix or risk full-scale involvement of private-sector investment in health care.

(Source: www.calgarysun.com)

5. "NAFTA's Chapter 11 'Frontier Justice' Needs Reform", By Charles M. Gastle, The Lawyers Weekly, Vol. 22, No. 30, Dec.6, 2002

In an article for the Lawyers Weekly publication, trade lawyer Charles M. Gastle argues that international investor-state arbitration frequently amounts to frontier-justice. Gastle suggests that, not only is this form of dispute settlement on the "frontiers" of international law, but it also dispenses a sometimes "rough and ready" body of interpretation more suited to the American frontier of old.

Gastle takes particular issue with the lack of appellate review of arbitral awards rendered under international trade & investment treaties. He also raises concerns about "whether private investors should be able to select arbitrators who will rule on matters that involve aspects of public policy." Indeed, he argues that "the panel determinations to date have demonstrated an inconsistency that is material and tends to discredit the mechanism."

Rather than tinkering on the margins, Gastle proposes that arbitrations should be jettisoned as the dispute-settlement mechanism of choice, or at the very least, severely restricted in its scope. He proposes, in its stead, a "standing panel of jurists" which would handle cases under the auspices of more traditional court proceedings, or which would review arbitral decisions "employing an "error of law" appellate standard.".

Mr. Gastle is a partner at Shibley Righton LLP and an associate of the Estey Centre for Law and Economics in International Trade.

(Source: http://www.lawyersweekly.com, subscription required; also available via lexis-nexis legal news search)

Investment Law and Sustainable Development Weekly News Bulletin, Dec.13, 2002

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Contents at a Glance:

NEGOTIATIONS WATCH:
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1. Memo to Canadian Cabinet Sets Out Proposed Changes to Canadian Foreign Investment Protection Agreements (FIPAs)

A confidential memo prepared by Canadian trade bureaucrats for the Canadian Cabinet and seen by the editor of INVEST-SD Bulletin sets out a proposed overhaul of Canada's investment negotiating position for future agreements. The memo diverges sharply from the public position of Canada's trade department, insofar as it acknowledges various specific shortcomings with the current negotiating template. This template currently underpins the NAFTA, as well as some 18 bilateral investment treaties - so-called Foreign Investment Protection and Promotion Agreements (FIPAs) - negotiated with various trading partners.

In addition to advising that Cabinet approve a new investment negotiating template, the memo also advocates that treaties "already in force or signed ... be reviewed and amended" so as to conform with the new negotiating template. While acknowledging various concerns with the treaty model currently in force, the document nevertheless strongly endorses the long-standing twin rationales for negotiating so-called bilateral investment treaties: that they provide protections for Canadian investors, and they aid developing countries by serving "as a means of attracting foreign direct investment, vital to their economic growth." Lately, the efficacy of these BITs has come into question, however, as critics have challenged the alleged relationship between treaty-accession and inward investment flows.

The memo to Cabinet proposes a number of changes to the substantive provisions of future FIPAs, including the following: clarification of the minimum standards of international law provision, in line with an agreement reached by the Three NAFTA trade ministers in 2001; greater clarification that a finding of expropriation "requires a substantial deprivation of an investment; mere economic injury, including that which results from regulatory action, does not amount to

expropriation."; greater clarity about the territorial scope of the test for National Treatment and Most Favored-Nation Treatment (which was an issue in the SD Myers arbitration under NAFTA); use of a finite, rather than an open-ended, definition of "investment".

The memo also recommends a number of changes to the controversial investor-state arbitration mechanism included in modern FIPAs. Some notable recommendations include: open arbitral proceedings (except for when dealing with confidential business information); prompt release of all documents related to a dispute; institutionalization of a process for amicus-curiae interventions; further formalization of timetables for disputes, including filing deadlines and provision for the dismissal of stale claims.

Notably, the memo does not propose the creation of an appellate mechanism for arbitral decisions rendered under a FIPA, as has been discussed in relation to the proposed Free Trade Area of the Americas (FTAA). However, the memo suggests that such a mechanism might be of "value in the medium to long term". Also absent from the memo is any discussion of the legitimacy of culling arbitrators from the ranks of practicing arbitration lawyers (who may prosecute other cases, thereby having a business interest in seeing broad, expansive interpretations of treaty provisions). The memo is also silent on the practice of allowing each of the parties to a dispute to choose one arbitrator who will sit as part o a three member Tribunal.

Also not addressed by trade officials is the problem of parallel or multiple arbitrations arising out of essentially the same facts, and the broader question of the role of precedent from one arbitral decision to another. As noted in a recent edition of INVEST-SD Bulletin, two parallel bilateral investment treaty arbitrations against the Czech Republic have yielded wholly contradictory decisions, leaving commentators to puzzle over how future arbitral tribunals shall reconcile these divergent interpretations.

Canada is currently involved in investment negotiations with its proposed FTAA partners, Singapore, and four Central American nations. The memo also notes that Canadian business interests have been lobbying hard for FIPAs with India, Indonesia, Brazil and China. As well, officials claim to have been courted by a number of developing countries interested in concluding FIPAs, including Peru, Guyana, Cuba, Paraguay, Bolivia and several unnamed francophone African nations.

(Sources: Memorandum to Cabinet: Revised Model Foreign Investment Protection Agreement, Minister of Foreign Affairs, Minister for International Trade, Draft 3, Oct. 28, 2002; re: parallel arbitrations under BITs see "Well-Known Arbitrator Warns of "Crisis of Legitimacy" in International Arbitration", Nov. 22, 2002, INVEST-SD Bulletin)

2. New Research Paper Surveys Shortcomings of Bilateral Investment Treaty (BIT) Arbitration

The Nautilus Institute for Security and Sustainable Development has published a paper by Luke Eric Peterson, IISD Associate, entitled, "All Roads Lead Out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties, <http://www.nautilus.org/enviro/PetersonFinalFormatted_2_2.PDF> " This paper surveys the six most common sets of arbitral rules offered under the investor-state dispute settlement provisions of modern BITs. The paper highlights various ways in which these rules, which were designed for the arbitration of commercial matters, are proving inadequate when confronted with sensitive public policy disputes involving foreign investors and host-states. It should be noted that this paper was written prior to the release of the memo discussed in the lead article of this week's Bulletin.

Paper available at: www.nautilus.org

3. Developing Countries Take 'Wait And See' Attitude Towards WTO Talks on Investment, By Daniel Pruzin, International Trade Daily, December 6, 2002

This article notes that many developing countries, with the exception of India and Malaysia, remain undecided about the need to negotiate a WTO agreement on investment. Meanwhile, the author notes that the United States, and other developed countries have "blasted" a proposal from a handful of developing countries (covered in last week's INVEST-SD Bulletin) which would impose various duties on investors and home states.

The full article from International Trade Daily is reprinted below.

GENEVA--Developing countries remain generally noncommittal to the idea of launching World Trade Organization negotiations on multilateral rules for cross-border investment, despite efforts by the European Union and Japan to convince them otherwise, a senior Japanese official admitted Dec. 5. Yoshihiko Sumi, deputy director-general at Japan's Ministry of Economy, Trade and Industry, said it remained to be seen whether WTO members would agree to the launch of investment talks at the organization's next

ministerial conference in Cancun, Mexico next September.

"It's hard to predict how it will go," said Sumi, who was in Geneva attending a Dec. 4-5 meeting of the WTO's working group on trade and investment. "But my observations so far are that a majority of developing countries...are

waiting to see how others react, what the issues are, and what the implications of a multilateral investment agreement would be on their policies."

Sumi said that only two countries--India and Malaysia--are steadfastly opposed to the idea of WTO talks on investment. India played a key role in blocking an agreement to include investment in the Doha Round negotiating mandate when trade ministers launched the round in the Qatari capital a little over a year ago.

Instead, ministers agreed that a decision to launch negotiations on investment would be made at the Cancun ministerial, with an agreement to

proceed to be based on "explicit consensus" of the entire membership.

India, Malaysia Argue Against

Sumi said India and Malaysia continue to argue that the WTO is not the right forum for such negotiations and that bilateral arrangements were the best way to meet a country's investment needs. "We just agree to disagree," he said. "I cannot be very optimistic as far as those two countries are concerned." The EU and Japan have tried to placate India and Malaysia as

well as other wavering developing countries by advocating a negotiating approach similar to that taken under the WTO's General Agreement on Trade in Services. Under GATS, countries pick and choose the areas in which they wish to make commitments. Adopting this approach to investment would allow governments to open up areas where they want to attract foreign

investors and exclude those considered too sensitive for political, economic, or developmental reasons.

Sumi said Japan preferred this approach rather than allowing members to "opt-out" from the negotiations. The idea of an opt-out was first floated in the run-up to the Doha ministerial, when it became evident that members were

not going to reach consensus on the launch of WTO investment talks.

Sumi also admitted that Japan was "a little bit surprised" by China's decision to sign on to a paper calling for multilateral rules on corporate responsibility and corporate accountability.

The paper, presented to the Dec. 4-5 working group meeting, would oblige

multinational enterprises (MNEs) to take on commitments in areas such as

preventing restrictive business practices, ensuring technology transfer,

providing sufficient autonomy to foreign subsidiaries, respecting consumer and environmental protection standards abroad, and ensuring transparency in financial transactions and accounting. Countries home to MNEs would also

be obliged to institute measures requiring MNEs to behave and operate with full corporate responsibility and accountability in their operations in countries where they operate.

Other sponsors of the proposal are Cuba, India, Kenya, Pakistan, and Zimbabwe.

"The recent disclosures of corporate fraud and other malpractices have only underlined the need for greater disciplines on MNEs to bring about greater corporate responsibility and accountability," the group argued, citing the cases of Enron and WorldCom in the United States. Governments in countries where MNEs establish operations "must have sufficient regulatory powers and adequate policy space in relation to foreign investment" while home governments "should undertake obligations to ensure the responsible

behavior of their corporations."

Developing Countries Blast MNE Proposal

Developed countries at the working group meeting blasted the proposal. U.S. trade diplomats said the ideas set out in the paper would turn private companies into tools of industrial policy and put a "chill" on investment in countries imposing such obligations, according to officials who attended the meeting. The U.S. officials also cited serious concern about extending WTO jurisdiction to private corporations and home governments. Japan said the proposal paper raised serious legal questions on extraterritoriality and that countries home to MNEs are in no position to constantly monitor and control their overseas activities. The European Union warned that some developing countries would soon exporters of investments themselves and would this be subject to the proposed disciplines.

Why China, which one U.N. agency recently predicted would top the United

States as the biggest recipient of foreign direct investment in 2002, would sign on to the paper "is a little bit of a mystery," said Sumi. He noted, however, that China told the working group it did not want members to interpret Beijing's co-sponsorship of the proposal as meaning that China was hostile to foreign investment.

Arbitration Watch:
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4. Encana loses tax case; mulls BITs challenge

EnCana, North America's top independent oil and gas company, lost a lawsuit it had filed against Ecuador's tax agency, possibly setting a precedent for similar cases by oil companies in the Andean country.

A November 8 decision by a Quito court ruled that the Ecuadorian tax authority, the SRI - (Servicio de Rentas Internas) did not have to refund a 12 percent value added tax to EnCana, the country's biggest private foreign investor.

The case had been at the heart of a two-year long, $150 million industry-wide tax dispute. EnCana had claimed that under a mechanism aimed at encouraging oil exports, it was owed a rebate of $70 million for money it had paid in value-added taxes. SRI, however, contended that this money was already included in the firm's contracts to drill for crude in the country's Amazon jungle - and had thus already been paid.

The court ruled that EnCana deserved a refund of two percent - EnCana had signed its contract based on a 10 percent VAT; the tax had subsequently been raised by two percent, thus changing the terms of the deal. The decision is nonetheless largely a victory for the tax agency, since the court's verdict essentially accepted the principle of their argument.

The court's decision is a blow to the eleven other oil companies that have also filed for VAT refunds in local courts; US group Occidental is trying to settle its claim through international arbitration.

Foreign investors had expressed wariness of making new exploration and production expenditures as a result of the $150 million industry-wide tax dispute, which had dragged on for two years. Encana had wanted the dispute resolved since it is moving to increase production in anticipation of the opening of a major pipeline next year. During the case, EnCana had not said that it was reconsidering its investment in the pipeline, but the project, three quarters complete, is coming under increasing fire from international environmental and human-rights groups. They point to the potential social and environmental impacts of constructing and operating a large pipeline in the region, a biodiversity hotspot linked to several river systems; the influx of construction workers along the route of the pipeline could devastate the local communities of indigenous people. Their campaign has been likened to the one that eventually generated enough public pressure to force Talisman Energy, Inc. to sell its interests in Sudan.

The court's decision can be appealed before Ecuador's Supreme Court; EnCana said that it was considering an appeal. According to a confidential memo prepared for the Canadian Federal Cabinet by the Department of Foreign Affairs and International Trade, and seen by the Editor of INVEST-SD Bulletin, Encana is also thought to have threatened the Ecuador Government with a claim under the Ecuador-Canada Bilateral Investment Treaty. However, any such challenge to a

tax measure under the treaty, would first need to be submitted to the two Governments for an initial determination, pursuant to Article XII of the treaty, before a dispute could be launched.

Sources:
"Encana loses case in Ecuador," by Nicholas Moss, Financial Times (London), November 12, 2002 "Ecuador tax agency wins lawsuit with EnCana," by Carlos Andrade Garcia, Reuters, November 11, 2002. http://www.forbes.com/markets/newswire/2002/11/08/rtr789833.html
"EnCana says it is owed $70m in Ecuador tax dispute," Reuters, August 23, 2002.
http://investor.cnet.com/investor/news/newsitem/0-9900-1028-20332680-0.html
"Activists move to block EnCana's Ecuador pipeline: Campaign to
escalate: Has similarities to one mounted against Talisman," Financial Post, December 5, 2002
"The New Heavy Crude Pipeline in Ecuador," Amazon Watch Mega-Project Alert,
http://www.amazonwatch.org; http://www.amazonwatch.org/megaprojects/OCP_English.Web.pdf

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All features compiled and edited by Luke Eric Peterson, unless otherwise noted. Encana article written by Trineesh Biswas, IISD Geneva.

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NEGOTIATIONS WATCH:
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1. World Bank questions ability of investment treaties to attract new investment flows

In its 2003 Report on Global Economic Prospects, the World Bank casts doubt on the value to be gained by negotiating a multilateral agreement on investment. The report also cites recent research casting doubt on the efficacy of existing bilateral investment treaties in assisting developing countries in attracting new investment flows. Instead, the report advises that "unilateral reforms to liberalize foreign direct investment (FDI) are likely to have the greatest and most direct benefit for the reforming country".

The report notes that 80-85% of the remaining barriers to international investment are in the area of services, and there is already a multilateral agreement which aims to progressively liberalize the global services sector: the WTO General Agreement on Trade in Services (GATS). Accordingly, the Bank casts doubt on the view that a multilateral agreement on investment would bring about significant further liberalization and market access.

As for the view commonly propounded by many OECD countries, that investment protection treaties will assist developing countries in attracting new investment flows, the World Bank report expresses considerable skepticism. The authors point to a 2002 research paper by Mary Hallward- Driemeier which found that "creating new protections was not strongly associated with increased investment flows". Indeed, Hallward-Driemeier's study of 20 years of data, indicates that "Countries that had concluded a BIT were no more likely to receive additional FDI than were countries without such a pact." And even in those countries with strong domestic investment climates, her work found only a "weak" impact of the treaties on additional new flows.

The full Report is available from the World Bank's web site at:

www.worldbank.org/prospects/gep2003/

2. Reader replies to US Council for International Business's defense of investor-state arbitration

The following comment was submitted by INVEST-SD subscriber, Angus van Harten, London, UK, in response to an earlier comment piece by Adam B. Greene of the US Council for International Business (see "US Council for International Business Rejects Claims made in San Francisco Chronicle Article", in INVEST-SD Bulletin, Nov. 29, 2002)

Angus Van Harten writes:

"Mr. Greene offers three reasons in support of investor-state arbitration:

1) First, he says that remedies in investment disputes, unlike in trade disputes, must be backward-looking in order to be effective. But surely trade measures can cause serious and irreparable harm to industries and countries in the same way that other measures can harm investments? In theory, they also call for remedies designed to compensate for past actions. The fact that the main remedy in trade disputes is a sanction, rather than a damage award, reflects the sensitivity that surrounds international awards of damages against states, especially where there is no requirement for a government's breach of an investment standard to be intentional. Even in the European Union, fines or damage awards by the European Court of Justice against governments for failure to implement European law are much more limited.

2) Mr. Greene's second point is that investor-state arbitration is needed to remove political considerations from the arbitration process. But in some cases the public interest may lie in addressing an investor's grievances in ways other than through international arbitration. Investors are not in a position to consider the wider public interest. Further, governments have to consider the implications of themselves being the target of investor-state claims. These disputes often go beyond commercial issues to engage matters of broad public concern. In such cases, it does little for the 'democratic deficit' of international institutions to shift the decision to initiate an international arbitration from elected governments to private firms.

3) Third, Mr. Greene says that investor-state arbitration reflects the same principles and processes of U.S. takings law. There is a good deal of truth in this. But a fundamental difference is that U.S. takings law is the product of U.S. legal and political traditions and, as such, its application and interpretation lies ultimately

with U.S. courts. Under Chapter 11 of the NAFTA and other investment agreements, a damage award against the United States for a regulatory taking, arrived at by an international arbitration panel, could very well undergo final appeal before a domestic court in Canada or Mexico."

Arbitration Watch:
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3. Half-Day conference on arbitration of investment disputes set for January in London, UK

The London-based British Institute for International and Comparative Law is organizing a half-day conference on "arbitration of investment disputes". The event will be held on Tuesday January 28th, from 2pm-7pm.

For more information contact the BIICL via their web site: www.biicl.org

4. US news article focuses on investment treaties and water privatization

Recently, the Sunday Gazette-Mail, a West Virginian newspaper, took an extensive look at the relationship between the United States' international investment treaty commitments and the growing trend of water privatization by foreign investors. The full 2200 word article is available on-line at: http://sundaygazettemail.com/news/News/2002120726/

Source:
"Will state have a say about its own water?", The Sunday Gazette-Mail,
Dec. 8, 2002, By Tara Tuckwiller, Staff writer

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Contents at a Glance:

Arbitration Watch:
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1. NAFTA Environmental Fact-Finding Inquiry Quashed in Deference to Ongoing Investor Dispute

A recent decision by the three NAFTA parties (Canada, USA and Mexico) has raised questions about the priority of the NAFTA's investment chapter and its so-called environmental side-agreements. On December 10, the three countries voted unanimously against a fact-finding mission under the terms of the environmental side-agreement.
The proposal to examine allegations made by a Mexican NGO against a Mexican hazardous waste had been supported by the Secretariat of the North American Commission for Environmental Cooperation (CEC). However, the NAFTA parties dismissed the need for an inquiry, on the grounds that the waste site in question was already at the center of an ongoing arbitral dispute under NAFTA's investment chapter.

In their February 2001 petition requesting the CEC Secretariat to further investigate the case, the NGO, Academia Sonorense de Derechos Humanos, accused the Cytrar site, located near Hermosillo, Sonora, of being in violation of several laws. The petitioners alleged that Cytrar had operated without an environmental impact authorization, and had illegally deposited hazardous waste from a maquiladora company prior to the closing of the dumpsite in 1999. They further argued that the Mexican state was not effectively enforcing its environmental laws by virtue of its failure to make available environmental information about the landfill.

The CEC Secretariat determined that the complaint did indeed warrant the development of a factual record about the case, and in April 2001, as per its procedures, requested a response from the Mexican government. The Mexican government moved for the process to be stopped forthwith - on the grounds that the matter was already subject to a pending international dispute resolution proceeding before ICSID.

According to Article 14.3 (a) of the North American Agreement on Environmental Cooperation [NAAEC], the CEC Secretariat is supposed to stop investigations into citizen submissions if the government in question advises it that 'the matter is the subject of a pending judicial or administrative proceeding.'

However, the CEC Secretariat did not share the Mexican government's interpretation of the clause. It observed that the investment arbitration (Técnicas Medioambientales Tecmed, S.A. v. United Mexican States [Case No. ARB(AF)/00/2]) centered 'on the denied renewal of the authorization to operate the Cytrar landfill' - Tecmed's Mexican subsidiary lost business when this happened - whereas the NGO submission centers on 'alleged failures to effectively enforce environmental laws.' Since 'the matter' was not identical in both cases, the simple existence of an investment dispute case involving the same landfill was insufficient grounds for dismissing the case. Furthermore, the Secretariat contended that the ICSID arbitration was unlikely to either address or resolve the issues raised by the citizens' complaint to the CEC.

On July 29, 2002 the Secretariat informed the CEC Council, composed of the environment ministers (or equivalent) of the three member countries, that 'the development of a factual record' was warranted. However, on December 10, 2002, the Council voted unanimously to ignore the Secretariat's recommendation, and instructed the Secretariat to not prepare a factual record.

The Council accepted the Mexican government's assertion that 'the matter at issue in the submission is the subject of a pending international dispute resolution proceeding before the ICSID,' and used it to order the Secretariat to 'proceed no further.' Their resolution mentioned no other reason to halt the process. Accordingly, the proposed public inquiry into the facts of the CYTRAR case will not proceed. Instead, the Mexican Government and the foreign investor will see their dispute arbitrated in-camera pursuant to the NAFTA's investment chapter. Little is known about the state of this ongoing investment dispute, or the particular legal and factual claims being asserted.

(Sources:

Commission for Environmental Cooperation (SEM-01-001/Cytrar II): A14/SEM/01-001/13/14(3), C/C.01/02-06/02-13/RES/Final, A14/SEM/01-001/41/ADV North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America

Talli Nauman, 'CYTRAR Parent Firm Files World Bank Complaint Against Mexico,' Borderlines, October 24, 2000, http://www.us-mex.org/borderlines/updater/2000/oct24CYTRAR.html

Anna Ochoa O'Leary, 'Women and Environmental Protest in a Northern Mexican City,' The Arizona Report 6(1), University of Arizona, Spring 2002)

2. Recent investor-state arbitrations registered at ICSID

The Washington-based International Center for the Settlement of Investment Disputes (ICSID) continues to see new arbitrations brought by investors under the terms of investment contracts or bilateral investment treaties. ICSID saw five new cases registered in November and December, bringing the year's total to seventeen arbitrations. This total marks a new record for ICSID, which has seen a steady increase in the number of disputes entrusted to the Center in recent years.

Little is known about the five most recent disputes, however sources at ICSID indicate that the two disputes are bilateral investment treaty disputes against the Argentine Republic arising out of emergency financial measures taken in relation to the Argentine financial crisis. A number of other disputes are known to remain at a stage of informal negotiation between the embattled nation and its foreign investors. One of the two recent disputes lodged at ICSID, has been

brought by an arm of the AES Corporation, an energy company. In 2001, AES lodged a dispute against the Government of Hungary under the investment provisions of the Energy Charter Treaty. This dispute, which was said to have related to a power purchase agreement with the Hungarian Government, was settled by the two parties long before the arbitration concluded. AES has also courted controversy over its investment in the Bujagali Dam hydroelectric project in Uganda. This investment has been at the center of disputes between environmentalists and other critics who question the environmental and cost implications of the project.

The five new ICSID cases are:

Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan (Case No. ARB/02/13), Subject Matter: Construction project;

CDC Group plc v. Republic of the Seychelles (Case No. ARB/02/14), Subject Matter: Debt instruments;

Ahmonseto, Inc. and others v. Arab Republic of Egypt (ICSID Case No. ARB/02/15), Subject Matter: Textile companies;

Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Subject Matter: Gas supply and distribution enterprise;

AES Corporation v. Argentine Republic (ICSID Case No. ARB/02/17), Subject Matter: Electricity generation and distribution operations

(Sources: www.worldbank.org/icsid/cases/pending.htm ;

"AES says $550 million Nile dam lacks financing, faces delay", by Emily Schwartz, Bloomberg, February 21, 2002, at:
http://www.probeinternational.org/pi/wb/index.cfm?DSP=content&ContentID=3285)

NEGOTIATIONS WATCH:
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3. New Scholarly Publication on Regulatory Takings Under NAFTA

A soon to be published article by New York University Law Professor Vicki Been tackles the contentious debate over so-called regulatory takings under NAFTA. Prof. Been's article, "The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine", will be published in April 2003 in the New York University Law Review. An earlier draft of the article can be downloaded from the Social Science Research Network (SSRN) website:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=337480.

Readers may contact the author directly (vicki.been@nyu.edu) to request a revised version when it is completed.

A three-paragraph abstract follows:

"The article addresses two issues central to the increasingly heated debate over NAFTA's expropriation provision. First, it examines the relationship between the NAFTA tribunals'

decisions on expropriation claims and U.S. domestic law on regulatory takings. Although many have argued that NAFTA "exports" the U.S. regulatory takings standard into international law, the article demonstrates that, in fact, the tribunals' decisions significantly exceed U.S. Fifth Amendment takings protections in several respects. The tribunal decisions broaden the definition of compensable property interests, extend the compensation requirement to "judicial" takings, and bypass the ripeness and exhaustion requirements of U.S. takings doctrine.

Second, the article asks whether this expansion of compensation for regulatory takings under international investment agreements such as NAFTA is justified under the leading rationales for a compensation requirement: the internalization of the costs of government regulation; the extension of fair treatment to regulated investors; the provision of ex post insurance to regulated investors; and the need to attract foreign investment to developing countries. The analysis shows that none of these arguments supports the expansion compensation requirements to embrace "regulatory takings" in the international investment context.

While there is no viable case to be made for expanding international compensation requirements, such expansion involves a number of significant costs: It gives foreign investors a competitive advantage over domestic firms, redistributes wealth between domestic taxpayers and foreign firms, and may deter efficient regulation. In light of the tenuous benefits and potentially serious costs of an international "regulatory takings" doctrine, the paper concludes that the United States and other sponsors of international investment agreements should eschew the expansion of compensation requirements, instead limiting expropriation provisions to the traditional concerns of investor protections: physical invasions and seizures, direct nationalization, and governmental assumption or transfer of control of foreign property."

4. Third World Network Accuses Quad Countries of "burying" review of WTO's Trade Related Investment Measures (TRIMs) Agreement

The Quad countries (the US, the EC, Japan, and Canada) have tried to 'bury' the mandated review of the Agreement on Trade-Related Investment Measures (TRIMs), according to a recent editorial-article published by the editors Third World Economics (TWE), a fortnightly publication produced by the Third World Network, an Asia-based NGO.

In submissions to the WTO TRIMs committee, several developing countries have argued that the TRIMs agreement prevents new players in the global market from industrializing. Brazil and India further suggest that the agreement privileges transnational corporations over national governments, ignores structural inequalities among countries, and fails to offer developing countries special and differential treatment apart from extended transitional periods. The two countries argue that the mandated review of the Agreement's operation (provided in Article 9 of the Agreement itself) represents an opportunity to amend the agreement in ways that would open up policy space for governments to use certain investment measures in pursuit of development objectives.

To speed this process, Brazil and India had called for the review to be part of the Doha-mandated 'implementation exercise' with a deadline of December 2002. Their submission proposed that developing countries be permitted to use TRIMs to promote domestic manufacturing capabilities in high value-added sectors, to stimulate the transfer or indigenous development of technology, and pursue regional and sustainable development goals.

The editors of TWE contend that the major industrial nations' response has been to argue that TRIMs have been reviewed, and that nothing further need be done. The TWE also alluded to reports of heavy pressure applied on developing countries not to support the Brazil-India proposal, on pain of losing some of their existing privileges.

Countries supporting amendments to the TRIMs agreement cite new research that suggests that TRIMs may not have the negative results previously attributed to them; they point to examples where investment measures were successfully used to address developmental objectives, and observe that by increasing the number of investors competing in the domestic market, properly implemented TRIMs can actually benefit the competitive environment. Brazil and India observed that export-related TRIMs would be less disruptive than deflationary policies as a means of increasing exports relative to imports. The US and the EU, on the other hand, have opposed any 'watering-down' of TRIMs disciplines. Canada and Switzerland have suggested that TRIMs could be 'costly' and 'inefficient.'

The editors of TWE cast their lot with Brazil and India's position, concluding that there is a need to amend the TRIMs Agreement so that performance requirements may be used by developing countries to promote development objectives.

Sources:

Third World Economics available online at: www.twnside.org.sg/twe.htm

"TRIMs Review Discusses Brazil-India Proposal On Spaces for Development Policy", Bridges Weekly, Vol. 6 No. 42, Dec 12, 2002 http://www.ictsd.org/weekly/02-12-12/story5.htm

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Compiled and edited by Luke Eric Peterson for IISD, except articles 1 and 4 written by Trineesh Biswas