Investment Law and Sustainable Development Weekly News Bulletin, Feb 7 & 14, 2003

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Contents at a Glance:

Editor's Note:
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1. Double Issue Devotes Extended Coverage to Emerging Arbitrations of Public Interest

This special double issue of INVEST-SD News Bulletin devotes extended coverage to a round-up of recent arbitrations under international investment treaties. As many readers will be aware, most modern investment treaties (including the North American Free Trade Agreement, the Energy Charter Treaty and countless Bilateral Investment Treaties (BITs)) offer foreign investors the unprecedented ability to launch claims against host states, without any need for the intermediation of the investor's home government, or (in most cases) to exhaust legal remedies at the domestic level.

As investors have awoken to the opportunities afforded by this new method of dispute settlement, the number of arbitrations launched has grown substantially in recent years. A number of these cases - including several profiled below - implicate very sensitive issues of public

concern: everything from investor challenges to public health and environmental regulations to the question of how host governments may regulate privatized public services. These cases also raise pressing questions about the inter-relationship of competing international policy objectives, including: investment protection, environmental protection, economic development, and the promotion and protection of human rights.

Regrettably, the rules under which these investment arbitrations proceed are poorly suited to the increasingly public nature of such disputes. Typically, the rules have been designed for private arbitrations of a purely commercial nature, and as such provide for considerable confidentiality of the proceedings.

Nevertheless, information about some arbitrations can be gleaned. And in recent weeks, several new cases have appeared on the horizon, while important new developments have occurred in other cases already under way. Articles 2 & 3 below offer an update on two different attempts by citizens' groups and non-governmental organizations to gain greater access to two ongoing arbitration proceedings. Articles 4, 5 & 6 highlight new investment disputes on the horizon which implicate environmental concerns, debt-relief for poor nations, or call into question the legitimacy of tax measures imposed upon foreign investors by host states.

In the coming weeks, a special research note will be forwarded to all INVEST-SD Bulletin readers. This note will attempt to enumerate all known investment arbitrations which appear to touch upon important sustainable development concerns. As always readers are encouraged to contribute to the effort to shed further light upon new developments in this area of international dispute settlement.

Arbitration Watch:
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2. Bolivian Water Privatization Dispute Will Continue Behind Closed Doors

In a setback for greater transparency in international investment arbitrations, the Tribunal charged with arbitrating an investment dispute between the government of Bolivia and a subsidiary of the US-based Bechtel corporation, has ruled that it has no authority to open the proceedings to the public, to disclose documents related to the dispute, or to join other interested parties to the proceedings.

The dispute arises out of a highly controversial water privatization in Cochabamba, Bolivia's third largest city. Following significant hikes in water rates, and wide-spread public protests, the investor, Aguas Del Tunari was forced to flee the country. Accounts differ as to whether the company left voluntarily or was forced out of the country. In either case, the re-nationalization of the local water supply had been hailed by some media commentators as a triumph for "people power", however shortly thereafter the investor signaled its intent to seek compensation through a bilateral investment treaty negotiated between the Bolivian government and the Netherlands. The investor invoked this particular Dutch treaty, having earlier moved its corporate headquarters to the Netherlands.

The case is being heard before a Tribunal operating under the World Bank's International Center for the Settlement of Investment Disputes
(ICSID) arbitration rules. In a letter to the various individuals and organizations seeking to intervene in the dispute, the President of the Tribunal, Prof. David D. Caron wrote that the "core requests" of the would-be interveners "are beyond the power or the authority of the Tribunal to grant".

Prof. Caron noted that the relevant rules and the consensual nature of arbitration mean that the power to allow participation of other actors, and the opening of the proceedings, lies not with the Tribunal, but with the two parties to the dispute (Bolivia and Aguas Del Tunari). And in his letter, the Tribunal President indicated that the consent of the parties to promote greater openness "is not present".

This determination was met with disappointment from one of the lawyers representing the prospective interveners. In a press release, Martin Wagner an attorney for the US-based organization, Earth Justice, was critical of the decision:

"The panel explicitly rejected all of our requests for public participation in this closed-door process. It is inexcusable that a panel considering an issue as fundamental as the right to water should be able to exclude the very people whose rights will be affected by the case."

While, third-party participation has been squelched in the absence of the consent of the two disputing parties, there remains some ambiguity as to whether the Tribunal enjoys the authority to seek oral testimony or written arguments from other interested parties at some later date. Prof. Caron merely noted in his letter that "the Tribunal is of the view that there is not at present a need to call witnesses or seek supplementary non-party submissions at the jurisdictional phase of its work", leaving to one side the question of whether the Tribunal enjoys such a power.

For the latest developments in a similar amicus intervention in a NAFTA dispute implicating important environmental issues see the next story below.

Sources:

INVEST-SD Interviews

"Citizens Excluded From $25 Million Suit Against Bolivia for Company's Failed Water Privatization Scheme", Press Release of Center for International Environmental Law (CIEL), Feb. 12, 2003, available at: www.ciel.org/Ifi/Bechtel_Lawsuit_12Feb03.html

Letter from Prof. David D. Caron, President of Tribunal to Martin Wagner, Earth Justice, Jan.29, 2003, available at:
www.earthjustice.org/news/documents/2-03/ICSIDResponse.pdf

3. Potential Interveners Submit Motions to NAFTA Tribunal in Methanex Case

Two petitioners for Amicus curiae status in the ongoing NAFTA arbitration between the Methanex Corporation and the United States, have submitted a Joint Motion to the Tribunal calling for express permission to submit written interventions in the case.

The International Institute for Sustainable Development (IISD) and a coalition of other groups (Communities for a Better Environment, Bluewater Network, and the Center for International Environmental Law) seeking to submit separate legal arguments, submitted this Joint Motion to the Tribunal. The Methanex dispute arises out of the Canadian-based Methanex Corporation's challenge of a California ban on the gasoline additive MTBE. As a major producer of Methanol, a key ingredient of MTBE, Methanex had alleged that the California move violated several commitments made by the US Government under the NAFTA investment Chapter.

Early in 2001, the Methanex Tribunal had signaled that it was minded to allow amicus interventions from the IISD and the triad of other environmental groups, however the Tribunal preferred to wait until a later time in the dispute to make a firm decision, and to set out the precise process for such interventions.

In their Joint Motion to the Tribunal, dated Jan.29, 2003, the two prospective amici have called upon the Tribunal to rule on these questions. Following the issuing of a preliminary Award by the Tribunal in August of 2002 - which significantly narrowed the scope of Methanex's potential claims - and Methanex's subsequent submission of an amended claim, the two prospective interveners now seek to weigh into the substantive debate facing the Tribunal.

Accordingly, the interveners have requested the Tribunal to issue a formal decision accepting them as separate groups of amici, who would then be invited to make two sets of written submissions to the Tribunal, according to a procedure and timeline set out by the Tribunal. As well, the interveners have again requested that the oral proceedings of the arbitration be opened to the public.

Under the governing UNCITRAL arbitration rules, the two parties to the arbitration must consent to waive the in-camera nature of the proceedings. In one recent NAFTA dispute involving the UPS company and the Government of Canada, the parties gave their consent to the Tribunal to open the proceedings to the public. IISD and the other petitioners hope that this lead will be followed in the Methanex case.

Further Information about IISD's involvement in the case can be found at:

www.iisd.org/trade/investment_regime.htm

Other Sources:

Joint Amicus Motion, Jan. 31, 2003 available on-line at: www.state.gov/s/l/c5818.htm

4. Energy Charter Treaty Suit Threatened Over Slovenian Nuclear Plant

A Croatian power company, HEP, has signaled that it may take a long-running dispute with Slovenia to binding arbitration under the investment provisions of the Energy Charter Treaty. The dispute arises out of a nuclear power plant built jointly in the 1980s when Slovenia and Croatia were part of the then Yugoslavia. In 1998, the Slovenian government reduced Croatian access to electricity from the Krsko plant due to a disagreement over outstanding payments.

Since then, the two nations have quarreled over a Slovenian plan to bring the plant under public ownership, with Croatian officials denouncing this as an expropriation and an effort to reduce the Croatian investor, HEP, to "a mere power buyer". Despite this, the two sides have drafted an inter-state agreement which could pave the way for making Krsko a public enterprise - subject to subsequent agreement on compensation owed to HEP. This inter-state agreement has now been submitted to the Slovenian Parliament for ratification.

The Slovenian debate over ratification has been complicated by public concern over the long-term storage of nuclear waste from the facility, and the costs associated with the eventual decommissioning of the plant. Municipalities bordering the plant oppose Slovenian ratification of the inter-state agreement, and the British Broadcasting Corporation reports that local citizens have threatened to force a referendum challenging what they view as the agreement's unacceptable plans for waste disposal.

Meanwhile, the Croatia firm, HEP, has turned up the heat by imposing a deadline for ratification of the inter-state agreement. On February 3rd, the firm submitted a so-called pre-arbitration request to Slovenia, demanding compensation amounting to some $900 million US for its lost interest in the Krsko facility. HEP insists that this figure covers the cost of building a replacement facility, interest on capital invested in the Krsko plant, and compensation for the non-supply of electricity. However, the Slovenian government has warned that it will not discuss this figure until

the inter-state agreement has been ratified, which would then pave the way for negotiations on the level of compensation owing. However, if the Slovenian Government does not resolve all outstanding issues within the next 3 months, HEP has given notice that it will take the dispute to binding arbitration under the Energy Charter Treaty (ECT).

The ECT is a plurilateral treaty negotiated in the 1990s, to set the rules for trade & investment in the energy sector, primarily in Europe (west & east) and the former Soviet Bloc nations. The investment provisions of the ECT are relatively state of the art, and follow the practice of the North American Free Trade Agreement and most modern Bilateral Investment Treaties (BITs) in offering investors the ability to launch international arbitration claims.

Investors may choose from several different sets of arbitral rules. Only those of the World Bank's International Center for the Settlement of Investment Disputes (ICSID) would require that the arbitration be publicly registered; in no case, however, would the actual proceedings and working documents of such an arbitration be open to the public or interested parties, unless the parties so desired.

Sources:

"Three Months to Settle the NEK Issue Out of Court", Slovenia Business Week, Feb. 10, 2003

"Slovene Premier Urges Solution for Krsko Nuclear Power Plant", BBC Monitoring International Reports, Jan.31, 2003

"Slovenia Insists on Ratification of Nuclear Plant Accord - Environment Minister", BBC Monitoring International Reports, Jan. 28, 2003

5. Development Campaigners Decry Investment Arbitration Against Guyana

Following on the heels of public outcry over the efforts of the Nestle Corporation to extract compensation from the Ethiopian government for assets seized in the 1970s, another multinational firm has come under fire for disinterring decades-old legal claims.

A subsidiary of the British based Big Food Group, Booker PLC, is currently embroiled in an investment treaty arbitration with the government of Guyana, arising out of that country's nationalization of the firm's sugar industry interests in 1976. At the time, the parties agreed that compensation would be paid, and for more than a decade Guyana had paid down the debt owing. In 1988, the Booker company agreed to suspend repayments, as Guyana considered a re-privatization of the sugar industry. After a period of exploration, however, the government resolved to keep the industry in public hands. The two sides then entered into protracted negotiations over the remaining debt owed to Booker PLC.

In 2001, the company decided to launch an arbitration at the World Bank's ICSID facility, pursuant to Guyana's consent to arbitration of investment disputes contained in the 1990 UK-Guyana bilateral investment treaty. The firm is claiming some $10 million (US) in compensation, along with a further $8 million (US) for interest and legal fees.

In an unfortunate twist, debt campaigners have warned that the arbitration will further complicate Guyana's efforts to qualify for debt-relief under the IMF's Highly-Indebted Poor Countries (HIPC) program. Jubilee Research, a UK-based debt-relief organization, notes that Guyana spends almost half of its government revenue servicing its external debt. In view of such an unsustainable debt-load, the IMF has considered Guyana for a so-called Enhanced HIPC process. Among the requirements of this special process is that Guyana must negotiate "comparable" (i.e. non-preferential) debt-relief concessions from all of its external creditors.

According to Jubilee Research, this places the tiny nation in a Catch-22 situation, whereby Guyana may not offer favorable treatment to a single creditor, and thus "cannot accede to Booker's demands for repayment of debt without prejudicing its application for relief under Enhanced HIPC." Booker PLC counters that the nature of the debt owed - arising out of a nationalization - means that it does not fall within the category of debts which must be paid on comparable terms under the Enhanced HIPC program.

Recently, the Booker arbitration has attracted the attention of the mainstream media in the UK, where Booker has extensive business interests and sponsors the prestigious Man Booker literary prize. A spokesperson for the campaign group Oxfam has denounced Booker's arbitration claim as "counter-productive" at a time when debt-relief for the world's poorest nations is an international priority.

Sources: "Food Giant Demands Pounds 13M From Impoverished Nations", By David Jones, the Liverpool Post, Feb 5, 2003

"Retreat by Nestle on Ethiopia's $6M Debt", by Charlotte Denny, the Guardian, Dec.20, 2002

"Contradictions Within HIPC - ICSID Arbitration Sought Against Guyana", by Susanna Mitchell, Oct. 7 ,2002

6. US Firm Launches NAFTA Challenge to Mexican Tax

Corn Products International, a US based company has signaled its intent to file an arbitration claim under NAFTA's Chapter 11, alleging that taxes imposed by the Government of Mexico on the High Fructose Corn Syrup used by its Mexican operations are discriminatory and expropriative. The two parties now have 90 days in which to consult on the issues, before the dispute will go to an arbitration tribunal.

Although the NAFTA allows investors to challenge tax measures as being forms of expropriation, the agreement does offer the tax authorities of the host state and the investor's home state the opportunity to jointly ""veto" such challenges, by determining that a tax measure is not an expropriation. Under the NAFTA's terms, if the two states do not agree unanimously within a six month period, the claim of expropriation may proceed to the Tribunal.

A spokesperson for Corn Products International indicated that the company had been in negotiations with the government of Mexico for over a year, before deciding to lodge a notice of intent to arbitrate.

Sources:

INVEST-SD interviews

"US HFCS Producer Launches NAFTA Suit Against Mexico Over Tax", Inside US Trade, Feb.7, 2003 "Corn Products International, Inc. Announces Notice of Intent to Submit a Claim to Arbitration Under the NAFTA", PR Newswire, Jan.28, 2003 "NAFTA Chapter 11: Arbitration and the Fisc: NAFTA's Tax Veto", William W. Park, 2 Chicago Journal of International Law 231, Spring 2001

Negotiations Watch

7. African Trade Act Drawing New Investment to the Region

Recent data suggests that the Africa Growth and Opportunity Act (AGOA), a preferential trade agreement between the US and several African nations, has led to a significant increase in exports from some sub-Saharan African countries to the United States, and has had a noticeable knock-on effect upon investment in the region, as investors seek to capitalize on the increased market access available to goods produced in participating countries. In 2001, the region's exports to the US were worth $8.4 billion - an increase of 1110 percent from the previous year.

Intended to be a major plank of US efforts to encourage economic growth in Africa, the AGOA was signed into law in May 2000. In return for the implementation of various good governance and liberalization commitments, beneficiary countries receive preferential access to the American market. President Bush recently announced that he would ask Congress to extend these trade preferences, for which 38 of the 48 sub-Saharan countries are eligible, beyond the original 2008 deadline.

Two and a half on, some countries, especially South Africa, Mauritius, Lesotho and Kenya, appear to have enjoyed some key benefits from the removal of barriers to the US market. According to figures cited by the Associated Press, AGOA accounted for 21 percent of South Africa's total exports in 2001. Other sources indicate that Lesotho has seen the opening of 11 new factories and the creation of some 15,000 new jobs. Notably, most of the investment for these projects has come from Asia, from Taiwanese and Chinese businessmen looking for cheap labour and ways to escape textile quotas on Asian countries. It has been said that AGOA has helped attract an additional $1 billion to the region.

Moussa Seck, a program director at the NGO, ENDA-Tiers Monde (Environmental Development Action in the Third World) in Dakar, Senegal, does not find AGOA's effects surprising. "Available markets," he said, "are an incentive for investment in general." As to whether these investment flows taking advantage of newly-opened export markets for textiles came at the expense of other developing countries, an IMF paper concluded that this was unavoidable, but the loss of production in those countries represented no more than a fraction of their total output.

Despite the expanded overall export volume, most countries, having only recently received accreditation, are yet to benefit visibly from the programme. Moreover, primary resources continue to account for a disproportionate share of exports from Africa to the US. Marelize van Taak summed things up in an analysis for the Trade Law Centre for Southern Africa, where she notes "At the moment, five countries account for 95 percent of AGOA exports - and most of that is oil." Critics of AGOA contend that its benefits are more than offset by American farm subsidies which effectively neutralize Africa's comparative advantage in agricultural production. Critics also note that the much bally-hooed AGOA trade preferences in the textile sector are undermined by the rules of origin placed on some of the exports.

Nonetheless, some remain hopeful about AGOA's prospects for stimulating growth in sub-Saharan Africa. Moussa Seck suggests that the passage of time will likely be beneficial. While he allows that "investment hasn't come as far as people had expected," he hails the potential importance of improved market access, "business happens between people... finding (business) partners is hard. People are learning how to do this... lack of information is the real problem." Which is why the transparency of the terms of exchange has been a clear benefit of AGOA, in Seck's view: "Everything is written, nothing is hidden." Although cautioning that it is too early to determine AGOA's overall effect, the African NGO Director sounds an optimistic note, maintaining that South Africa and Mauritius are "positive examples... (and) we hope it's going to grow."

Sources:

<http://www.agoa.gov/Eligibility/eligibility.html>

"African Officials Applaud Bush Plan for Trade Extension," Associated Press, January 16, 2003

"US Trade Deal Brings Mixed Success to African Nations," Associated Press, January 11, 2003

Paul Busharizi and David Mageria, "Africa looks for more US trade and investment," January 12, 2003

Trade Law Centre for Southern Africa (TRALAC):

Marelize van Taak, "If AGOA isn't the future, then what is?", TRALAC, January 21, 2003, (available online at http://www.tralac.org/scripts/content.php?id=1147)

Magriet Ruthven, "An Overview of AGOA II," TRALAC, August 13, 2002, (available online at http://www.tralac.org/scripts/content.php?id=515)

"An Overview of AGOA," TRALAC, April 24, 2002, (available online at http://www.tralac.org/scripts/content.php?id=31)

Aaditya Mattoo, Devesh Roy, Arvind Subramanian, "The Africa Growth and Opportunity Act and Its Rules of Origin: Generosity Undermined?," International Monetary Fund, September 2002

8. Two Conferences to Look at International Investment Policy Issues

A workshop slated for March. 3, in Geneva Switzerland will explore the impact of international trade and investment law upon fresh water (see details below), while a second event scheduled for March. 6, in Brussels, Belgium, will discuss the prospect for further international investment rules which take account of sustainable development concerns (see details below)

March 3, Geneva, Switzerland: WORKSHOP ON FRESH WATER AND INTERNATIONAL TRADE LAW.

Co-hosted by the Graduate Institute of International Studies, the Faculty of Law of the University of Geneva, and the Georgetown University Law Center, this forum will bring together scholars and policy-makers concerned with issues of water supply, trade and investment. Its purpose is to make clear problems of trade law for water management and international water law for trade agreements. For further information on the conference, please contact Makane Mbengue, email: Makane.Mbengue@droit.unige.ch.

March 6, Brussels, Belgium: THE EU BETWEEN JO'BURG FOLLOW-UP AND CANCUN POLITICS: HOW TO SET THE RIGHT FRAMEWORK FOR INVESTMENT RULES.

The Heinrich Boell Foundation, in collaboration with the European Parliament, is hosting a public hearing to assess the outcomes of the World Summit on Sustainable Development on globalisation, trade and corporate accountability, and public-private partnerships in the field of water. It will address some of the sustainable development- related aspects of the EU's services liberalisation and investment agenda in the WTO. The hearing will address the potential for developing binding rules for corporations at the European and international level and will elaborate on alternatives to investment and trade liberalisation. For further information, contact Heinrich Boell Foundation EU Regional Office: e-mail: Brussels_2@boell.de; tel: +32-2-743-41-05.

Source: Bridges Weekly Trade News Digest, www.ictsd.org

READERS' NOTE: Subscribers to INVEST-SD News Bulletin are encouraged to submit news articles, notices of events, press releases, analyses, questions and requests for information to invest-sd@lists.iisd.ca.

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1. Canada Releases Initial Free Trade Area of the Americas (FTAA) Investment Positions,
By Luke Eric Peterson

At a meeting last week in Panama, the 34 nations hoping to negotiate a Free Trade Area of the Americas (FTAA) exchanged initial offers for market access in the investment sector. The FTAA is expected to include a set of rules similar to those in modern bilateral investment treaties and the NAFTA, which would liberalize and protect flows of foreign direct investment into any of the FTAA nations. The various FTAA partners must table offers of market access, in advance of formal negotiations which will commence in June of this year.

While the government of Brazil missed the deadline for tabling its opening offers, both the United States and Canada tabled proposals which open all sectors to investment, subject to a so-called "negative list" of key areas to be sheltered from treaty obligations. Recently, Canada has made its positions available through a public website. Canadian officials insist that "health, social services and public education" will remain non-negotiable in an FTAA, and that cultural policy will be sheltered by a "cultural exception".

However, the former claims have already attracted skepticism from some trade analysts. Scott Sinclair, a senior researcher with the Canadian Center for Policy Alternatives, says he fears that the Canadian government has "failed to learn anything from their experience under NAFTA". In

Sinclair's view, Canada is simply proposing to replicate the "flawed" provisions of the North American Free Trade Agreement. Sinclair notes that several recent analyses have pointed to weaknesses in the NAFTA language, including a report which he co-authored for Canada's Romanow Commission on the Future of Health Care in Canada.

In particular, Sinclair observes that Canada's proposed "reservation" for social services, does not prevent investors in the social services sector from launching expropriation claims against government regulatory or policy measures. Moreover, he adds, the very nature of a "reservation" makes it much more susceptible to the winds of political change, as a government of a different political persuasion could withdraw Canada's reservation, thereby exposing key social services to permanent liberalization. Sinclair notes that an "exception" for social services, along the lines of what has been mooted to protect cultural industries such as film and radio, would be a more reliable safeguard for key sectors - as exceptions require the consent of all parties before they will be written into (or out of) a treaty.

A full list of Canada's initial FTAA offers in the area of investment and services has been made publicly available by the Department of Foreign Affairs and International Trade (DFAIT) on its website (see link below).

Sources:

Canada's initial offer and background material can be found on-line at: http://www.dfait-maeci.gc.ca/tna-nac/ftaa_neg-en.asp

Inside US Trade, "US FTAA Tariff Offers See Quicker Phase Outs for Smaller Economies", Feb, 14, 2003

For recent research papers on NAFTA & Canadian Health Care see: www.romanowcommission.com

See also a legal brief on NAFTA & health care prepared in 2000, for the Canadian Health Coalition by Appleton & Associates, at www.appletonlaw.com, under publications section.

2. US Moving to Sign Pacts with Chile & Singapore, But Texts Remain Secret,
By Trineesh Biswas

Congressional review of the recently-concluded US Free-Trade Agreements (FTAs) with Chile and Singapore is under way - but in a peculiar fashion. Access to the text of the agreements has thus far been restricted to selected industry advisors and Congressional staff.

Opposition to the decision by the Office of the United States Trade Representative to keep the text of the agreements confidential has come not only from public interest groups and elected representatives (both Republicans and Democrats), but also from business leaders who contend that continued secrecy makes it impossible for businesses to assess the benefits that the agreements may hold for them, and to lobby Congressional representatives accordingly.

On January 30, President Bush notified Congress of his intent to sign the two treaties, setting in motion a 90-day review process that must occur before he can sign the agreement into law. US Trade Representative Robert Zoellick has indicated that the recent Presidential notification means that the deals could be finalized as soon as "late April or early May", however more pressing legislative concerns could mean that final approval may have to wait until fall.

Despite the current lack of transparency surrounding the texts, the advisory committees charged with assessing the trade agreements are slated to submit their reports to Congress by March 1. However, committee members have complained of the difficulties they face in communicating the

detail of these secret agreements to their respective constituencies. Public hearings on the agreements are also precluded so long as the details of the FTAs remain concealed.

US trade law does not require the US administration to release the texts to the public before the deals are actually signed (at which point, no further changes can be made). However, the Office of the USTR insists that it will release the documents prior to their signature, following the completion of a "legal scrubbing" and an official translation of the texts. One concern mooted by a US trade official has been that the premature circulation of legal language which has yet to be finalized could lead to that language being tabled in subsequent dispute settlement cases as evidence of the parties earlier or "genuine" intentions.

Meanwhile, the public interest groups that successfully sued for the release of negotiating documents relating to the US-Chile FTA (see January 31, 2003 edition of Invest-SD bulletin) have filed a court case which seeks to compel the release of the final texts of both the Chile and Singapore pacts under US Freedom of Information laws.

The final text of the two FTAs is of particular public interest because the US has touted the Chile agreement, with its significant service sector liberalization and strong protections for the free-flow of capital, as a template for other future agreements.

Sources:

Inside US Trade, February 21, 2003; February 14, 2003; February 7, 2003; January 31, 2003; January 17, 2003; January 10, 2003; December 13, 2002

3. US Pursuing Investment & Trade Rules on Several Levels in Americas,
By Trineesh Biswas and Luke Eric Peterson

In an August 2000 campaign speech, then-Texas Governor George W. Bush declared his goal of seeking "free-trade agreements with all the nations of Latin America." Time was of the essence, he explained, since "if the United States cannot offer new trade with the nations of Latin America, they will find it elsewhere - as they are doing already in new agreements with the European Union."

The Bush Administration is now making good on its campaign promise of seeking free-trade agreements (FTAs) on several fronts in Latin America. In addition to its FTA with Chile (see article 2 above), the US has also started negotiations for an FTA with five Central American nations (Nicarauga, Costa Rica, El Salvador, Honduras and Guatemala; investment rules are at the center of both these new trade initiatives. However, the Administration's multi-pronged strategy has come under fire from some who fear that these bilateral forays are diverting attention from the broader Free Trade Area of the Americas (FTAA) process.

In addition to the 1994 North American Free Trade Agreement (NAFTA), between the United States, Canada, and Mexico, the US has also signed Bilateral Investment Treaties (BITs) with 11 other countries in the western hemisphere: Argentina, Bolivia, Ecuador, El Salvador, Nicaragua, Honduras, Panama, Jamaica, Haiti, Grenada, and Trinidad & Tobago (although some of these earlier treaties do not contain provisions as far-reaching as those of the NAFTA).

As the administration seeks to add to its catalogue of agreements, it has had to pick and choose from a number of potential suitors. And while Chile and the CAFTA group have been in negotiations with the US, other countries and trading blocs have been politely advised to take a number. In a recent edition of Inside US Trade, the head FTAA negotiator for the Caribbean countries revealed that "In the Caribbean, we were told 'Don't come knocking on the door for a bilateral agreement - the game in the hemisphere is the FTAA'..." According to reports, the

Caricom nations now fear that US bilateral efforts are diverting energy and attention away from the FTAA process.

When the grouping of Andean nations (Colombia, Ecuador, Bolivia, and Peru) made a similar bid for bilateral talks, they were also told by trade officials that they would do better to focus on the FTAA process.

Despite the US Government's selectivity in choosing new trading partners, US trade officials have come in for some criticism from industry figures who question whether the office of the US Trade Representative has the capacity to engage in bilateral, regional and multilateral talks simultaneously. Nonetheless, these negotiations on multiple levels appear designed to leverage greater gains in bilateral talks as a prelude to replicating those gains in regional or multilateral forums.

Certainly, trade officials in Canada claim to have divined US intentions for the western hemisphere. In a confidential briefing memo prepared by the Canadian Department of Foreign Affairs for the Canadian Cabinet, and seen by the editors of INVEST-SD Bulletin, trade officials noted that the US administration is pursuing an "aggressive agenda of seeking new investor protection rules in trade agreements" and that these rules can expect to be tabled in the FTAA context.

Seen in this light, those nations of the Americas which have not yet had their affections reciprocated by the US Administration, may rest assured that regardless of when individual nations get invited to the table, the menu on offer will look much the same.

Sources:

"In Speech, Bush Sets Goal of Free-Trade Agreements with Latin American Nations," (excerpts from a speech given by George W. Bush at Florida International University in Miami), New York Times, August 26, 2000

Inside US Trade, February 14, 2003; February 7, 2003; November 15, 2002

"Investment Agreements in the Western Hemisphere: A Compendium," Foreign Trade Information System, Organisation of American States; http://www.sice.oas.org/bitse.asp

Department of Foreign Affairs and International Trade, Memorandum to Cabinet: Revised Model Foreign Investment Protection Agreement, Oct. 28, 2002

Arbitration Watch:
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4. Czech Broadcasting Dispute Moving Towards Damages Award, Appeal in a Swedish Court, By Luke Eric Peterson

Two new developments are on the near horizon in the long-running investment dispute between Central Media Europe (CME) and the Czech Republic - a dispute which has worried international investment policy watchers due to the contradictory signals it has thrown up. Any week now, an Arbitral Tribunal is set to issue a final damages award in the case, while the Czech Republic appeals to a Stockholm court the Tribunal's earlier ruling that the Czech government violated international investment commitments by its treatment of CME.

The case arises out of CME's 1990s investment in the Czech Republic's first nation-wide private television station. CME was freezed out of its role as the provider of programming, when a separate Czech sister company which was required by law to hold the TV license, renounced its relationship with CME.

CME subsequently sought to challenge the actions of its former sister company, as well as various actions and omissions of the state-run Media Council, which presides over the Czech industry. In a legal strategy which could have been drafted by the editors of "Let's Go Europe", CME launched protracted court battles in Prague, a commercial arbitration through a Paris-based institution, and two separate arbitrations under different bilateral investment treaties (BITS) in London and Stockholm.

In one BITs case, arbitrated in London, and brought by Ronald Lauder, the cosmetics heir, and a major shareholder in CME, the Czech Republic's treatment of the investor was found not to have violated any of the major provisions of the US-Czech Republic BIT. However, in a parallel arbitration brought on behalf of CME, under the Dutch-Czech Republic BIT, and headquartered in Stockholm, a separate arbitral tribunal passed a very different judgment on what amounted to essentially the same facts and allegations.

In a partial award issued a mere 10 days after the London award was handed down, a divided tribunal decided by a 2 to 1 margin that the Czech Government had not only taken measures tantamount to an expropriation of CME's investment, but that it had also violated its commitments to provide "full protection & security", "fair & equitable treatment", non-discriminatory treatment, and treatment in accordance with the principles of international law.

In the case's latest twist, the Czech Government is now challenging this arbitral ruling before a Stockholm court. Although the arbitration was brought under the Dutch-Czech treaty, because the arbitration was legally sited in Stockholm, this opens the door for a challenge of the decision in the Swedish courts.

In documents submitted to the court, and seen by the Editor of INVEST-SD Bulletin, lawyers for the Czech Republic argue that the "contradictory outcome of the partial award is legally unacceptable" and that the finding of treaty violations ought to be overturned on several grounds. These include allegations that one of the arbitrators was excluded from essential deliberations of the tribunal and that the Stockholm arbitration was commenced after the London arbitration and concerned substantially the same investment and claims. Lawyers for CME have countered that the Czech Republic had actively opposed the consolidation of the two tribunals at an earlier date.

CME's wrangle with the Czech Republic case has raised alarm bells amongst lawyers and analysts for underscoring that there are no mandatory rules for the consolidation of similar claims under bilateral investment treaties, thus allowing for conflicting or contradictory interpretations to arise. A large spate of cases pending against the Government of Argentina by a host of investors in that nation's electricity, gas, oil and water sectors, challenging a series of emergency measures put into place by the embattled Argentine Government, is also feared to hold out the prospect of numerous - and potentially contradictory - interpretations of standard investment treaty provisions.

For its part, however, CME appears thankful that it pursued a multi-pronged legal strategy. Company President Fred Klinkhammer recently told the Times of London that when the Stockholm tribunal issues its damages award in the coming weeks - an award which could run as high as 500 million dollars - that he will pursue payment aggressively, even lobbying for the Czech Republic to be declared a "rogue state" if they fail to pay.

While payment might be delayed as the Czech Republic continues to pursue its challenge in the Stockholm courts, Klinkhammer appears to relish his possible future role as collections agent:

"If they decide their hockey team is going to play in an international tournament," he told the Times, "I'll get the sweaters and the hockey sticks because they have to understand that they can't function in Western society without paying their bills as ordered by the international community".

Sources:

INVEST-SD Interviews

"Broadcaster Awaits Outcome of Czech Affair", By Raymond Snoddy, The Times, Feb.10, 2003

Ronald S. Lauder v. Czech Republic, UNCITRAL arbitration, final award, London, Sept. 3, 2001, available at: http://www.mfcr.cz/Arbitraz/en/finalAward.pdf

CME v. Czech Republic, UNCITRAL arbitration, partial award, Stockholm, Sept. 13, 2001, available at: http://www.mfcr.cz/Arbitraz/en/PartialAward.pdf

"A Crisis of Legitimacy", By Charles N. Brower, National Law Journal, Oct.7, 2002, available at: www.whitecase.com/article_international_adr_10_7_2002.pdf

5. New ICSID case: Ed. Züblin AG v. Kingdom of Saudi Arabia

A new bilateral investment treaty case was recently lodged at the International Center for the Settlement of Investment Disputes (ICSID), an arbitration facility with links to the World Bank. Lawyers representing the firm did not reply to an inquiry for information about the case. However, other sources suggest that the case seeks to enforce a judgment of a Saudi court which had ordered that the firm be compensated for construction work on a university in Saudi Arabia.

Sources:

INVEST-SD interviews

www.worldbank.org/icsid/cases/pending.htm

Reader Response

6. Re: EU-US Quarrel Over US BITs with Central European Nations

A recent INVEST-SD article (see Jan.31, 2003 issue) noted that the EU is concerned about the impact which US BITs signed with EU accession candidates could have on several EU policies, including local content requirements. That report prompted this query from a reader (further replies are welcome):

Just a matter of curiosity. What kind of local content requirements does the EU have in the agricultural sector? Didn't they have to abolish all local content requirements under the TRIMs Agreement within 2 years of the entry into force of the Agreement? I am very surprised that the prohibition of local content requirements contained in BITs is the EU's concern. Perhaps, you could shed some light on this.

Best regards,
Duangjai Asawachintachit
Bangkok, Thailand

READERS' NOTE: Subscribers to INVEST-SD News Bulletin are encouraged to submit news articles, notices of events, press releases, analyses, questions and requests for information to invest-sd@lists.iisd.ca.

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Contents at a Glance:

Negotiations Watch:

Negotiations Watch

1. Prospects for WTO Investment Agreement Still Up in the Air,
By Luke Eric Peterson

As the Conference of WTO Trade Ministers looms later this year, members show few signs of bridging disagreements over whether negotiations on investment should be launched in Cancun, Mexico, in September, 2003.

At the WTO's last Ministerial Conference in Doha, Ministers agreed to continue discussions within the WTO's Working Group on Trade & Investment, and set out seven areas to focus upon (listed in note 1 below). In addition to these ongoing discussions, the Doha Ministerial Declaration announced that actual negotiations on a WTO agreement would commence at the 2003 Cancun Ministerial meeting only if "explicit consensus" could be reached on the "modalities" for such negotiations. This clumsy terminology managed to paper over a disagreement which had threatened to deadlock the Doha Meetings. Now, it appears that all WTO members must agree as to how such negotiations would take place, and what they would encompass, before any investment talks could be formally launched at Cancun.

Some 15 months on from the Doha Conference, a number of developing countries continue to voice opposition to the launch of multilateral talks on investment, with some preferring the

flexibility to negotiate investment rules on a bilateral basis with selected partners. Others have tied any movement on the investment issue to progress in the efforts of WTO members to strengthen so-called special & differential treatment for developing countries in existing WTO trade agreements.

Recently, concerns were voiced at the WTO that lack of progress in these talks on special & differential treatment has further diminished the likelihood of developing countries offering concessions on investment. Earlier in February, the WTO Committee intended to clarify the provisions on special & differential treatment, suspended its work due to a disagreement between developing countries and developed countries over the committee's mandate.

Many developing countries insist that the WTO needs to look at changes to current trade agreements, so as to strike a fairer balance between the rights & obligations of developed and developing nations. However, some developed countries including the United States maintain that no serious changes to WTO texts are mandated.

Meanwhile, the first scheduled meeting of 2003 for the WTO's Working Group on Trade & Investment, charged with the unenviable task of finding common ground on the investment issue, is slated for March 31 and April 1. Discussions in the Working Group typically center upon papers circulated in advance of the meetings. However, as of Feb.28, the most recent publicly-available submission to the committee was the WTO secretariat's report of the committee's activities in 2002. A spokesperson for the WTO noted that submissions tend to be tabled around two weeks in advance of Group meetings; those submissions which are declassified will be notified through INVEST-SD Bulletin.

It is less than clear from earlier submissions to the Working Group, how any new multilateral framework would relate to the more than 2000 existing bilateral treaties governing FDI flows. Many of these latter treaties are of a broader scope than the one being mooted in the WTO Working Group, and offer individual investors direct recourse to dispute settlement under international law - something which the current state-to-state dispute settlement mechanism of the WTO does not countenance. It remains unclear how partial to a WTO agreement investors will be, if they continue to enjoy access to numerous bilateral avenues offering deeper levels of commitment and protections.

In other developments related to investment at the WTO, the International Institute for Sustainable Development (IISD) and the International Center for Trade and Sustainable Development (ICTSD) have produced a briefing note on the current state of investment at the WTO. This briefing is part of a just-released series on progress under the WTO's Doha Round. The series can be found at www.iisd.org/trade/wto/doha_briefing.asp or www.ictsd.org

(Note 1: The seven areas of discussion for the WTO's Committee on Trade & Investment, as set out in Paragraph 22 of the WTO's Doha Declaration,
are: scope and definition, transparency, non-discrimination, modalities for pre-establishment commitments based on a GATS-type positive list approach, development provisions, exceptions and balance-of-payments safeguards, and consultation and the settlement of disputes between Members.)

Sources:

INVEST-SD Interviews

"US, Developed Countries Block Agreement on S&D Report at WTO", Inside US Trade, February 14, 2003

Arbitration Watch:
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2. Oil Firms Queuing up to Arbitrate Against Ecuador?,
By Trineesh Biswas and Luke Eric Peterson

Ecuador's government has agreed to go along with US-based Occidental Petroleum Corporation's demand for international arbitration in an industry-wide tax dispute. Recent reports from the region indicate that Canadian oil and gas company EnCana is also looking to challenge Ecuadorian tax measures through arbitration.

In addition to Occidental and EnCana, eleven other oil companies had filed earlier lawsuits in local courts against the Ecuadorian government, claiming that under a mechanism designed to promote oil exports, they were owed rebates of a 12 percent value-added tax on their crude oil exports.

Ecuador's tax agency countered that this rebate had been factored into the companies' contracts to drill for crude in the country's Amazon jungle - and had thus already been paid. In November 2002, a Quito court agreed with the government, rejecting the principle upon which EnCana's $70 million lawsuit was based. (See "Encana loses tax case; mulls BITs challenge," Invest-SD Bulletin, December 12, 2002)

Having had no success in local courts, foreign investors are now turning to international arbitration. Occidental was the first company to file such a claim: for some US $50-60 million. A report by the Business News America wire service suggests that the case is being brought under a "reciprocal trade agreement" between the United States and Ecuador. However, as the two nations have not signed a free-trade agreement, it seems almost certain that the agreement in question is the bilateral investment treaty which came into force in 1997, and allows for investor-state arbitration.

Business News America further reports that the arbitration is being brought under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL). Unlike the arbitration facilities provided by ICSID, these UNCITRAL rules contain no requirement that pending cases be publicly acknowledged or registered. When contacted by Invest-SD Bulletin, Occidental spokesperson Lawrence Meriage declined to offer any information about the pending case.

Press reports from the region, however, indicate that the government of Ecuador is now reconciled to the prospect of arbitration with Occidental, following pressure from the US government, and threats which might have jeopardized certain preferential trade concessions enjoyed by Andean nations in South America.

Meanwhile, a Business News Americas story from December 21, 2002 indicates that EnCana is also seeking international arbitration in its dispute with the government. Such a dispute would likely be based upon the bilateral investment treaty between Canada and Ecuador. Notably, this treaty offers the two state-parties to the treaty a limited veto in challenges to tax policy. Under the terms of this treaty, the tax authorities of Canada and Ecuador retain the ability to jointly determine whether a tax measure contravenes an agreement between the investor and the host state. The treaty offers the two states 6 months in which to make such a determination before the arbitration process would resume its course.

Despite threatening to withdraw its investments from the region if its dispute is not satisfactorily resolved, the Canadian firm has not done so. Indeed, Encana recently broadened its exposure in

Ecuador with a January 2003 acquisition of US oil company Vintage's assets, for approximately US $138 million.

Sources:

"EnCana to Seek Arbitration for US $70 million in 1Q03 - Ecuador," Business News Americas, December 31, 2002

"Oxy seeks International Arbitration Over Tax Dispute," Business News Americas, November 22, 2002

"Government Agrees to Arbitration Over Tax Dispute - Ecuador," Business News Americas, December 25, 2002

"Ecuador Tax Dispute With Oil Companies Threatens Trade Benefits," Maria Elena Verdezoto, Dow Jones and Co., September 3, 2002

"EnCana earns $1.25 billion in 2002, cash flow exceeds $4.2 billion ," EnCana news release, available online at www.encana.com/news_and_views/4_0_20030220_1.shtml

3. Canada Tables Defence in UPS Arbitration, Makes Documents Public,
By Luke Eric Peterson

The Government of Canada has tabled a statement of defence in its long-standing dispute with United Parcel Services Inc. (UPS) which is being arbitrated under the North American Free Trade Agreement's investment rules. The dispute arises out of a challenge by the US-based courier service to certain features of the Government of Canada's postal monopoly.

In a decision on Jurisdiction reached on November 22, 2002, the Tribunal hearing the case had struck down many of UPS's initial claims and ordered the company to submit a new amended statement of claim, which it did on December 20, 2002.

In more recent developments, Canada has filed a motion calling upon the Tribunal to strike down many of the amended claims put forward by UPS. Among other things, Canada insists that many of the US courier company's grievances relate to allegedly anti-competitive behavior on the part of Canada Post (a state-owned Crown Corporation), and that such accusations are not fodder for NAFTA's investment chapter.

For its part, the company insists that many of its allegations, including that Canada Post illegally cross-subsidizes a courier operation which competes with UPS, will bear the Tribunal's scrutiny.

All documents related to the case are posted on the website of Canada's Department of Foreign Affairs and International Trade at: www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp

Sources:

"Ottawa Hits Back Over UPS Lawsuit", By Steven Chase, The Globe and Mail, February 27, 2003

4. ICSID Publishes Latest Newsletter

The International Center for the Settlement of Investment Disputes
(ICSID) has issued its latest edition of News From ICSID. The Winter 2002 edition offers a list of disputes lodged at the center in the second-half of 2002, as well as several short articles,

including the text of a speech delivered by ICSID Deputy Secretary-General Antonio Parra, which outlines recent changes and amendments to ICSID's rules and regulations.

News From ICSID can be downloaded in PDF version from ICSID's website:
http://www.worldbank.org/icsid/news/news.htm

Upcoming Events:
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5. Conference at Montreal's McGill University to Explore Relationship of Investment Rules to Environment

A two-day conference organized by Environmental Law McGill (ELM) on "Greening the FTAA" is scheduled for March 17th and 18th. Speakers from throughout the Americas will discuss the effort to ensure that the Free Trade Area of the Americas will ensure the protection of the region's ecological integrity. Several panels will discuss proposed FTAA investment rules and their implications for environmental policy-making.

Further information about the conference is available at:
http://www.law.mcgill.ca/elmftaaconference

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