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Negotiation Watch:

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1. US signals desire for investment to be dropped from WTO's Doha Round,

By Luke Eric Peterson

In a letter to all 140 members of the World Trade Organization, US Trade Representative Robert Zoellick has set out proposals for moving forward the stalled Doha Round of trade negotiations.

Zoellick indicated a preference for investment to be dropped from the WTO agenda - or for the issue to be submitted for further study - rather than negotiated as part of the Doha round.

For some time now, the US has displayed a relative lack of interest in multilateral investment negotiations, preferring to pursue a more ambitious template at the bilateral and regional levels.

This week's call for the investment issue to be dropped follows a less sweeping proposal late last year by the European Commission which would have unbundled the so-called Singapore Issues (investment, competition, transparency in government procurement, and trade facilitation) and seen several of these issues negotiated outside the Doha Round on a plurilateral basis between interested WTO members.

This consensual slow-track approach to investment negotiations has been criticized on the one side by a large bloc of developing country WTO members, and on the other, by countries like South Korea, which call for binding negotiations on investment as part of the Doha Round.

Sources:

"Acting conciliatory, U.S. seeks to revive global trade talks", By Elizabeth Becker, The New York Times, Jan.12, 2004

"WTO: Members Decide on Way Forward in Doha Round", Bridges Weekly Trade News Digest, Vol.7, No. 43, See:  
[www.ictsd.org/weekly/03-12-17/story1.htm](http://www.ictsd.org/weekly/03-12-17/story1.htm)

2. Australia-US Negotiations at final stage; Australia-Thailand FTA ready for signature,  
By Luke Eric Peterson

Free-trade negotiations between Australia and the United States are set to resume for the final round of talks next week in Washington.

In a Jan.14th news conference in Australia, Trade Minister Mark Vaile and Chief Negotiator Stephen Deady noted that the US continues to press for changes to Australia's foreign investment regime, its system of price-controls on prescription medicines, and its system of local-content rules in the audio-visual sector.

Minister Vaile sought to draw a line under the latter two issues:

"We've said there are two critical areas of public policy that have been raised in this discussion that are very important to 20 million Australians. One is the PBS, and the other is local content rules in the audiovisual sector.

"And as I've continued to say here and all through this process, that as a result of this FTA, Australians will not be paying more for their medicines, and as a result of this FTA, we will be maintaining an ability to deliver an Australian message to Australian people with Australian voices through our television system in Australia."

Meanwhile, in Washington, trade-policy newsletter Inside US Trade reports that US industry is willing to accept a "grandfathering" of Australia's existing local-content rules in the television sector, provided that new such rules are not introduced. For its part, Australian negotiators are pushing for some modicum of flexibility with respect to introducing such rules for future technologies which may be developed to deliver broadcast programming.

In terms of US pharmaceutical industry demands, very little concrete information has emerged. Inside US Trade reports that the US Trade Representative still has yet to table formal negotiating positions, but has mooted a variety of proposed changes to the pricing structure and procedures used by Australia's Pharmaceutical Benefits Scheme.

Finally, in terms of other investment provisions in the proposed FTA,

the two sides are still grappling over the threshold at which Australia's Investment Review Board would require inward investments to be subjected to a screening procedure. More controversially, Australia is reported to have opposed the inclusion of an investor-state dispute settlement mechanism into the agreement's investment chapter.

This appears to represent a divergence from Australia's normal practice of agreeing to investor-state arbitration in other of its investment and free-trade agreements, including the 2002 Australia-Singapore FTA.

Meanwhile, Australia reports that it has wrapped up negotiations on a free-trade agreement with Thailand. The agreement, which will be signed later this year, has not been released to the public, however a series of Australian Government fact sheets set out many of the features of its investment rules.

Among the notable features are provisions providing for market access for foreign investors in a number of sectors; an absence of any undertaking by Australia with respect to market access in its audio-visual, broadcasting or media sectors; and an absence of any undertakings with respect to government subsidies or grants to Australian service providers, service consumers or investors.

Sources:

Transcript of Media Briefing by Trade Minister Mark Vaile and US FTA Chief Negotiator Stephen Deady, Jan.15 2004:

[http://www.dfat.gov.au/media/transcripts/2004/040115\\_vaile\\_deady.html](http://www.dfat.gov.au/media/transcripts/2004/040115_vaile_deady.html)

"U.S. still to table key Ag offers as FTA talks with Australia resume", Inside U.S Trade, Jan.9, 2004 (available by subscription only)

Singapore-Australia FTA, investment chapter:

[http://www.dfat.gov.au/trade/negotiations/safta/chapter\\_8.pdf](http://www.dfat.gov.au/trade/negotiations/safta/chapter_8.pdf)

Australian Media Release announcing the Australia-Thailand FTA, Jan.15, 2004

[http://www.trademinister.gov.au/releases/2004/mvt003\\_04.html](http://www.trademinister.gov.au/releases/2004/mvt003_04.html)

Fact sheet on investment and services provisions of Aus-Thai FTA:

[http://www.dfat.gov.au/trade/negotiations/services\\_outcome\\_benefits\\_031003.html](http://www.dfat.gov.au/trade/negotiations/services_outcome_benefits_031003.html)

Fact Sheet about Australia's investment commitments under Aus-Thai FTA:

[http://www.dfat.gov.au/trade/negotiations/service\\_outcome\\_aust\\_commitments\\_03.html](http://www.dfat.gov.au/trade/negotiations/service_outcome_aust_commitments_03.html)

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Arbitration Watch:

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3. Canadian Court dismisses judicial review of NAFTA SD Myers decision,

By Luke Eric Peterson

A Canadian court tasked with reviewing the arbitral decisions in a NAFTA arbitration between Canada and a US investor has dismissed the application for review in its entirety.

Canada, supported in an intervention by Mexico, had appealed to the Federal Court of Canada in an effort to set aside the arbitral rulings in the dispute between US-based SD Myers, Inc. and the Government of Canada.

The arbitration arose out of a decision of the Canadian Government to close the border to the flow of hazardous PCB wastes, to the detriment of SD Myers, whose Canadian operation was engaged in the sale of PCB remediation services and the shipment of those wastes to its US-based facility.

In its liability award issued on Nov.13, 2000, a 3-person tribunal found that Canada had not acted for a legitimate environmental purpose, and had been motivated by a protectionist desire to favour Canadian firms engaged in waste remediation.

The tribunal held Canada to be in violation of the NAFTA provisions on National Treatment and Minimum Standards of Treatment, at the same time as it rejected allegations by SD Myers that Canada's treatment had also violated the NAFTA rules on expropriation and performance requirements.

In subsequent rulings, the tribunal awarded SD Myers damages of some \$6 million and legal costs (including arbitrators' fees) of \$850,000 (figures in Canadian Dollars). Canada objected to several aspects of the tribunal's reasoning, including its holding that the sales office of SD Myers Canada could be deemed an "investor" under the terms of NAFTA, and the tribunal's decision to compare the circumstances of SD Myers and Myers Canada with those of waste facilities located within Canada's borders.

In the view of Canada's lawyers, the tribunal had wrongly extended NAFTA's chapter on investment so as to protect businesses engaged in "cross-border trade in services" (which should have fell under a different chapter of the NAFTA - one which offered no right for service-providers to have recourse to international arbitration).

Canada mounted its challenge to the tribunal's rulings with an application to the trial division of the Canadian Federal Court on February of 2001 in an effort to set aside the arbitral awards. However, in a decision handed down on Jan.13 of this year, that court dismissed Canada's application in its entirety.

The court characterized Canada's application as falling under two general headings. First, Canada argued that the tribunal had exceeded the scope of the arbitration agreement set out in the NAFTA's Chapter 11. Second, Canada contended that the tribunal's awards contravened Canada's "public policy", thereby falling afoul of Canada's domestic laws governing the enforcement and review of such arbitral decisions.

In rejecting the first of these claims, the Court held that Canada's

concerns ought to have been expressed in a "clear objection to the tribunal's jurisdiction" as a preliminary matter, rather than after the case was resolved by the tribunal. With respect to the second claim, the Court noted that the term "public policy" denoted a very narrow category of "fundamental notions and principles of justice" - not just any political position or international position held by the government playing host to the investment. The Court went on to hold that the tribunal's reasoning with respect to a variety of sub-issues could not be said to trigger a violation of "public policy" as set out in the relevant arbitration law governing this judicial review.

More broadly, the court rejected calls from Canada and Mexico to apply a more flexible standard of review - correctness in law and fact - than the higher-level of deference accorded to run-of-the-mill commercial arbitrations. In rejecting this argument, the Federal Court followed the lead of another Canadian court in last month's review of the Feldman v. Mexico NAFTA arbitration. In the Feldman review, the court noted that arbitral awards generally, and "international commercial arbitrations in particular", ought to be accorded a high degree of deference by domestic courts.

Together, these recent cases serve to set the bar at a high level for court challenges to NAFTA arbitration decisions - at least in the Canadian context. In particular, unless these recent court rulings are appealed, they indicate that Canadian Courts will be disinclined to take a less deferential view of NAFTA arbitrations, by virtue of the fact that they are disputes involving an investor and a government (rather than two private commercial entities) or that they might center upon matters of particular public interest.

Sources:

Judgment of Federal Court in Attorney General and SD Myers Inc and The United Mexican States, Jan.13, 2004, available at:

<http://www.dfaid-maeci.gc.ca/tna-nac/documents/ReasonsforOrder.pdf>

"Canadian court declines to set aside award in NAFTA Feldman arbitration", By Luke Eric Peterson, INVEST-SD News Bulletin, Dec.8, 2003

4. Investor in Manila investment arbitration at center of twin corruption investigations,  
By Luke Eric Peterson

A German airport firm which has launched arbitral proceedings related to its investment in the construction of a Philippines airport terminal is now at the center of two different corruption investigations by German authorities.

Fraport, which manages the Frankfurt airport, and which participated in a consortium contracted to build and operate a new airport terminal in Manila, is now at the centre of two investigations into company investments in Manila, and in an unrelated project in Uzbekistan.

Fraport has brought an arbitration to the World Bank-affiliated International Center for Settlement of Investment Disputes (ICSID) alleging that the PIATCO consortium was forced out of the airport contract in preference to a "government-favored" investor.

As earlier reported in INVEST-SD, The Philippines Senate has launched investigation into allegations by Fraport that advisors close to President Gloria Macapagal-Arroyo have solicited bribes from Fraport. However, recent news reports suggest that a committee of the Philippines Senate has accused the PIATCO consortium itself of engaging in "corrupt business practices" and paying a series of fees to a local consultant in return for government approvals for the airport project.

In December, German prosecutors opened their own investigation into these allegations. According to a report in the Financial Times newspaper, authorities have raided Fraport offices in Frankfurt, seizing thousands of documents, in an effort to determine whether former chief financial officer Johannes Endler is guilty of any wrongdoing.

Meanwhile, the Financial Times reports that the Philippines Government plans to defend against Fraport's investment treaty claim by advertising to these alleged bribery charges.

Finally, in a separate development this week, the Financial Times reports that Fraport's Chief Executive is being investigated by German prosecutors in relation to alleged bribes paid during a modernization of Tashkent airport in Uzbekistan. Authorities in Germany have confirmed that 11 individuals are under investigation in that case.

Sources:

"Fraport chiefs in bribe probe", By Hugh Williamson, Financial Times, Jan. 13, 2004

"Former Fraport CFO investigated in Philippines", By Roel Landin and Hugh Williamson, Financial Times, Dec.10, 2003

"ICSID registers two new bilateral investment treaty claims", By Luke Eric Peterson, INVEST-SD News Bulletin, Oct.20, 2003

##### 5. US Business Head Challenges Stiglitz Characterization of NAFTA Investment rules

In a letter published in the New York Times, Thomas T. Niles, President of the US Council for International Business, takes issue with economist Joseph Stiglitz's characterization of the NAFTA's Chapter 11 on investment.

Stiglitz, a Nobel-prize winning professor of economics at Columbia University, had noted in a New York Times op-ed that NAFTA's rules on investment "potentially weakened democracy throughout North America."

He wrote, "Under Nafta, if foreign investors believe they are being harmed by regulations (no matter how well justified), they may sue for damages in special tribunals without the transparency afforded by normal

judicial proceedings. If successful, they receive direct compensation from the federal government. Environmental, health and safety regulations have been attacked and put into jeopardy. To date, suits with claims in excess of \$13 billion have been filed.

"While many of the cases are still pending, it is clear that there was not a full and open debate of the consequences of Nafta before passage. Conservatives have long sought to receive compensation for regulations that hurt them, and American courts and Congress have usually rejected these attempts. Now businesses may have accomplished indirectly, through treaty, what they could not get more openly through the democratic political process."

In a brief rejoinder to Prof. Stiglitz, published in the Jan.13 issue of the New York Times, USCIB President Thomas T. Niles countered that

"The main issue is fairness, not some new set of corporate rights. Nafta obliges governments to treat foreign investors equally vis-a-vis their domestic counterparts, including in matters of expropriation. This precept is deeply embedded in United States law and practice. Thus Nafta raised the bar for legal protection of private property in Canada and Mexico.

"Nafta does not inhibit the ability of governments to regulate in areas like the environment, health or safety. It simply says that government regulations must be applied fairly and not serve as a cloak for protectionism."

#### Sources:

"The Broken Promise of NAFTA", By Joseph Stiglitz, The New York Times, Jan.6, 2003 is available on-line at:  
<http://www.globalpolicy.org/globaliz/econ/2004/0106stiglitznafta.htm>

Thomas T. Niles' letter to the editor can be found at:  
<http://www.uscib.org/index.asp?documentID=2811>

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