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Negotiations Watch:

1. New European Constitution would bring FDI under European competence,
By Luke Eric Peterson and Jan Ceyskens

A draft European Constitution under consideration by European Union (EU) member governments could strengthen the hand of the European Commission in negotiating future rules on foreign direct investment (FDI) on behalf of European Union member states.

The proposed EU Constitution was drafted earlier this year by a special Constitutional Convention led by former French President Valéry Giscard D'Estaing and composed of representatives from the European Commission, the European Parliament, national-level Parliaments and other government nominees.

As matters currently stand, foreign direct investment does not fall squarely under the EU's Common Commercial Policy. Instead, the 15 EU member-states negotiate their own bilateral investment treaties with preferred trading partners - treaties which encompass both FDI and other forms of short-term investment (for eg portfolio investment).

Some member-governments have amassed significant stockpiles of the treaties over the years, with the United Kingdom and Germany, for example, having each concluded upwards of 100 such agreements.

Individual EU member-states also negotiated on their own behalf during the ultimately aborted discussions on a Multilateral Agreement on Investment (MAI) at the Paris-based Organization for Economic Co-operation and Development (OECD). Indeed, it was the decision of the French government to withdraw from negotiations, out of concern for the safeguarding of cultural objectives, which contributed to the collapse of talks in 1998.

Although the European Commission (the EU's executive branch) has entered into discussions on investment at the World Trade Organization, this has been with the blessing of each individual member-

government.

However, should the European Constitution pass into law as currently written, Article III-217 would bring FDI under the EU's common commercial policy.

EU officials interviewed by INVEST-SD insist that the move represents a natural progression, as other trade-related areas such as services and intellectual property rights already come under the common commercial policy.

Under the proposed changes, the European Commission would continue to obtain a mandate from member-states to enter into international negotiations on FDI, however this mandate would be based upon "qualified majority voting" by the EU member-states, rather than unanimity.

Due to the opposition of some member-states, such as France, the proposed Constitution would still require unanimity for any agreements which dealt with FDI as it relates to the cultural and audio-visual sectors.

EU officials told INVEST-SD News Bulletin that the Constitution would enable the EC to lead negotiations on investment liberalization - for example, to pursue rights of establishment for investors in given sectors - but that it has no plans to pursue protection agreements (for eg governing expropriation of investments).

If the EU Constitution passes as drafted, the fate of existing bilateral investment treaties remains unclear. When contacted by INVEST-SD, an official with the United Kingdom's Foreign & Commonwealth Office indicated that the future of such treaties was still under discussion.

Under the terms of the proposed EU Constitution, new FDI treaties negotiated by the EU with external partners would not require the assent of national parliaments, however, the current draft Constitution does envision an enhanced role for the European Parliament in reviewing new trade and investment treaties.

However, the draft Constitution has come under fire from some quarters, with the Confederation of British Industry criticizing what it sees as the Constitution's excessive centralization of foreign and commercial powers with the European Commission.

In comments reported in the UK press, CBI Director-General John Cridland has called upon the UK Government to "prevent the international interests of UK business being eroded by the EU's role in foreign policy. For example we must keep our right to negotiate bilateral investment treaties."

A spokesperson with the CBI, Gary Campkin explained to INVEST-SD that the CBI is particularly concerned that EU member-states retain a national veto over all taxation matters, and that the CBI harbours concerns that the new EU Constitution might permit the European Commission to negotiate investment agreements which could touch upon tax-related matters.

An EU official played down such fears in an interview with INVEST-SD.

As matters now stand, EU member-states are currently reviewing and debating the draft constitution as part of an inter-governmental conference. This work is scheduled to wrap up in early December. Plans for national-level approval of the Constitution are still in flux, with critics in some member-states calling for popular referendums on the proposed constitution. For his part, UK Prime Minister Tony Blair has rejected calls for such a referendum in the UK.

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Draft Constitution: <http://europeanconvention.eu.int/docs/Treaty/cv00850.en03.pdf>

INVEST-SD Interviews

"Blair Rules out Referendum on EU Constitution", by Andrew Woodcock, Press Association News (UK),

Sept.9, 2003

2. Investment negotiations proceed on many levels in Asia,
By Trineesh Biswas and Luke Eric Peterson

With the WTO's Doha Round at a standstill, Asian countries - historically among the staunchest supporters of multilateral trade rules - are launching a multitude of regional and bilateral initiatives aimed at liberalising trade and investment flows.

As a number of intra-Asian accords are being mooted, the United States is also looking to expand its commercial ties with countries in the region, announcing the launch of bilateral trade talks with Thailand, and hinting at the prospect of the same for the Philippines. As is the pattern in recent US Free Trade deals, investment rules would play a key part in any such agreements.

These deals have been publicized in conjunction with US President George W. Bush's tour of East and Southeast Asia, where he took part in the Asian Pacific Economic Co-operation (APEC)* leaders summit in Bangkok.

Further economic integration across the Pacific Rim region was a top agenda item at the APEC summit. In 1994, APEC set a target of 2010 for the achievement of liberalized trade and investment between industrialized Pacific Rim economies, with developing economies to be integrated into that system by 2020.

However, on the sidelines of last weekend's APEC meetings pushed a flurry of bilateral and regional initiatives.

Thailand and Australia continue to pursue one-on-one talks on trade and investment, with the Australian government indicating that it is "pressing for an outcome that... entrenches most-favoured-nation (MFN) treatment for Australian investors," and is "advocating a comprehensive approach encompassing market access and national treatment as well as the promotion, protection and facilitation of investment."

Meanwhile, Japan and Korea signed a bilateral investment treaty in March 2002, and are looking to expand that into a broader free-trade agreement, although no formal negotiations have taken place.

An official with the Korean Ministry of foreign Affairs tells INVEST-SD that the Korea-Japan investment treaty is a state-of-the-art treaty, following the template championed by Canada and the United States which extends disciplines to the pre-establishment stage of treatment. The treaty also includes rules on different forms of expropriation, as well as binding investor-state arbitration under the ICSID and UNCITRAL rules.

While Japan has sewn up a deal with Korea, US efforts to conclude a BIT with Korea continue to be hung up on the issue of Korea's protection of the domestic film industry. The US Motion Pictures Association has criticized the Korean screen quota system for dictating that a certain percentage of films shown in Korean theaters must be domestic productions.

In other developments in the region, Japanese negotiators have recently concluded an FTA with Singapore which covers investment. That agreement diverges from the recent pact concluded between Singapore and the United States, insofar as it permits temporary safeguard measures to override the rules on capital transfers, in the case of "serious balance-of-payments or external financial difficulties or the threat thereof" or "exceptional circumstances" in which capital movements could lead to "serious economic and financial disturbance."

A source at the Japanese Permanent Mission to the WTO in Geneva told Invest-SD that as part of Japan's ongoing trade negotiations with Mexico, an investment chapter is under discussion.

*APEC members are Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, South Korea, Taiwan, Thailand, United States and Vietnam.

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"US, Thailand to start talks on free trade," Bangkok Post, October 15, 2003, available online at http://www.bangkokpost.com/151003_News/15Oct2003_news03.html

"Failure at Cancun spurs trade deals in Asia," by Guy de Jonquières and Victor Mallet, Financial Times, October 16, 2003

"President Bush faces a skeptical Asia," by Elizabeth Economy and Adam Segal, International Herald Tribune, October 16, 2003

"APEC seeking to boost global trade say security crucial for economic growth," by Elaine Kurtenbach, Canadian Press, October 15, 2003

Arbitration Watch

3. ADM files notice of intent to sue Mexico under NAFTA chapter 11

US-based Archer Daniels Midland has served Mexico with a notice of intent to arbitrate under the terms of Chapter 11 of the North American Free Trade Agreement. The firm seeks to challenge a Mexican tax on soft drinks using high-fructose corn syrup.

ADM claims that the tax effectively forces soft-drink producers to use Mexican sugar in the manufacturing process, rather than imported corn syrup which ADM produces in the United States.

In a press release issued last week, ADM indicated that they will seek compensation for \$100 million US incurred in damages since the tax came into effect on January 1, 2002. The ADM case is the second to target this particular Mexican tax; a similar NAFTA claim was lodged by US-based Corn Products

International earlier this year.

Sources:

"ADM Files Notice of Intent to Submit Claim Against Government of Mexico For Violations of the Investment Provisions of the North American Free Trade Agreement", Tuesday October 14, PRNewswire

4. ICSID registers two new bilateral investment treaty claims,
By Luke Eric Peterson

A well-publicized quarrel between a German investor and the Philippines Government has landed in arbitration at the World Bank's International Center for Settlement of Investment Disputes (ICSID).

Earlier this month, the Center registered the case brought by Fraport AG Frankfurt Airport Services Worldwide under a bilateral investment treaty (BIT) between Germany and the Philippines. The case arises out of Fraport's involvement in a consortium which was contracted to build and operate a new airport terminal in Manila.

The contract was cancelled when the project was nearly completed, and Fraport alleges that the Government sought to force out another local partner in the consortium in favor of "government-favoured interests". When the Government ultimately cancelled the contract, Fraport appealed to local courts. Recently, the Supreme Court ruled that the Government was justified in canceling the contract - citing a number of onerous terms which contravened the public interest.

The case will now proceed to arbitration before ICSID, where Fraport will allege that the Government's actions violate its undertakings in its BIT with Germany.

In a separate development, the Philippines Senate is undertaking a separate investigation into allegations by Fraport that advisors close to President Gloria Macapagal-Arroyo have solicited bribes from Fraport.

A second BIT arbitration to land on ICSID's door in recent weeks will see a Spanish investor, Inceysa Vallisoletana S.L., pursue compensation for alleged violation of the Spain-El Salvador bilateral investment treaty, in relation to the establishment and operation of a series of vehicle inspection facilities in El Salvador.

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