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Negotiations Watch  
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1. EU-US agree to alter US BITs with EU accession candidates,  
By Luke Eric Peterson

The European Union and the United States have resolved a long-standing disagreement related to bilateral investment treaties concluded by the US with 8 Eastern European countries\* which are now candidates for accession to the EU.

According to Inside US Trade, a Washington-based newsletter, the terms of the agreement between the EU and the US provide that the BITs will be amended in a variety of ways so as to limit the reach of rules on national treatment and most-favored nation treatment into certain sensitive sectors of the economy.

Inside US Trade reports that the areas which will now be exempted from national treatment provisions are: "agriculture; audiovisual; securities; investment and other financial services; fisheries; hydrocarbons; subsidies; and three different modes of transport: air carrier; inland waterways and maritime."

Moreover, the BITs will now deny MFN treatment in relation to agriculture, audio-visual services and hydrocarbons investments.

The treaties will also be amended so as to permit certain forms of performance requirements to be imposed in the agriculture and audiovisual sectors. With respect to the latter of these, the EU accession candidates will once again be permitted to introduce minimum national-content requirements such as those utilized in the broadcasting sectors of some developed nations such as the UK and Canada, without fear of running afoul of the treaty's requirements.

What is notable about the amendments is that they appear to have been conceded very grudgingly; Inside US Trade reports that the US agreed to the amendments only out of fear that if the accession countries were forced to choose between the EU and the US on the issue, that their loyalty would lie with the EU and that they might terminate the BITs altogether.

Certainly, the confrontation between the EU and the US raises questions about the difficulty which other nations may face should they wish to rectify commitments made in bilateral investment treaties with the United States - particularly in the absence of a powerful advocate such as the EU fighting their corner.

It has been common for developing countries to sign off on such agreements in the expectation that they will yield new FDI flows, but with little appreciation for how the treaties may circumscribe domestic policy options when it comes to regulating foreign investors at a later date.

Indeed, legal interpretation of the standard treaty provisions remains at an early stage, with numerous claims still pending, and a lack of clarity as to the substantive reach of provisions on expropriation, non-discrimination and performance requirements (the last of these being covered in far fewer treaties).

As the experience of the EU accession candidates indicates, less developed countries have not always effectively shielded certain sensitive sectors from the reach of these agreements.

\* The EU accession countries with US BITs: Czech Republic, Estonia, Latvia, Lithuania, Poland, Bulgaria, Romania and the Slovak Republic.

Sources:

"US, EU Agree to keep US investment deals with enlargement nations", Inside US Trade, Sept 12, 2003

"US Resists EU Demands that Investment Treaties be Altered", INVEST-SD News Bulletin, June 13, 2003

2. US businesses worry about Brazil's lack of ambition in FTAA investment talks,  
By Luke Eric Peterson and Trineesh Biswas

With the prospect of multilateral investment talks now off the table for the immediate future following the collapse of the WTO's Cancun conference, eyes in this hemisphere are now turning to the flagging process to negotiate a Free Trade Area of the Americas (FTAA).

In a letter to the US Trade Representative, key business groups are calling for the Bush Administration to pursue a "commercially meaningful" agreement which would include strong provisions on investment.

Over the past months, the FTAA investment discussions have been at a "standstill" according to one developing country negotiator involved in the process who spoke with INVEST-SD News Bulletin last week.

Until now, the Brazilian Government had signaled that it wanted to talk about investment at the WTO rather than in FTAA negotiations - and had refused to table any offer on investment in the FTAA process.

One proposal which had been floated in an effort to accommodate Brazil's misgivings would to negotiate a scaled-back investment chapter in any FTAA; a proposal which has been met with strong opposition from US business groups.

In a letter to the USTR, they argue that a strong investment chapter "could help spur greater investment throughout the Western hemisphere", and appear to suggest that investment rules might help to reverse Brazil's own record at attracting inward investment (which has declined, along with that of most nations, since mid-2000).

In their letter to the USTR, business groups call for the US to champion strong investment rules which would consolidate the provisions found in a series of bilateral investment treaties signed by the US since the 1980s. In particular, they argue for rules on fair & equitable treatment, expropriation, capital transfers, limits on performance requirements and recourse to investor-state arbitration.

The Brazilian government approaches the investment issue from a position of strength, by virtue of its never having ratified any of the some one-dozen BITs which it negotiated with Western governments in the mid-1990s, for internal constitutional reasons. As such, as South America's largest economy contemplates creating rules to stimulate and govern FDI, it begins with a tabula rasa - unlike many of its neighbours, many of whom have acceded to BIT templates with the US and other Western governments.

Sources:

INVEST-SD Interviews

Inside US Trade, Sept.19, August 29, 2003; July 25, 2003; June 20, 2003

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Arbitration Watch  
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3. Argentina faces treaty claim launched under UNCITRAL rules,  
By Luke Eric Peterson

The Argentine Republic has seen another case added to the long list of claims which it faces arising out of its financial crisis.

Latin America Today Newsletter reports that Argentine transmission company Transener has lodged a bilateral investment treaty claim in relation to Argentina's emergency laws, which froze utility tariffs and converted dollar-denominated tariffs into (seriously devalued) pesos.

Transener is owned by several multinational firms including the UK-based Nationa Grid. According to the investor, the claim falls under the terms of the UK-Argentina investment promotion and protection agreement. The claim is notable for invoking the UN Commission on International Trade Law (UNCITRAL) rules of arbitration, rather than those the Washington-based International Center for Settlement of Investment Disputes (ICSID). As a consequence, the UNCITRAL rules require no disclosure of the arbitrators who will hear the case. It is also common for UNCITRAL cases to be closed to the public, and for legal argumentation and awards to remain confidential.

It is unclear how many other Argentine claims have been mounted under UNCITRAL rules. However, any such claims will further complicate efforts at ICSID, and elsewhere, to ensure that the slew of treaty claims are resolved in a similar manner by arbitrators. Because most investment treaties do not provide for the consolidation of similar claims under the supervision of a single tribunal, the specter of conflicting rulings plagues the arbitral process in cases where a number of foreign investors individually mount claims against the same government measures.

4. Washington DC, colloquium to discuss international arbitration topics  
in November

A joint colloquium by several leading arbitration institutions is slated for Nov. 14 in Washington, DC. The event which will take place at the World Bank's International Center for Settlement of Investment Disputes (ICSID) will feature a series of panel discussions on issues such as the publication of arbitral awards, as well as discussion of procedural and substantive rules for arbitrations between investors and states.

Organized jointly between ICSID, the American Arbitration Association, and the International Chamber of Commerce, the symposium is open to the members of the ICC or AAA at a cost of 300 USD; non-members pay \$325 for the day's proceedings.

Scheduled speakers include key government officials involved in defending against NAFTA Chapter 11 investor-state claims, as well as practitioners and arbitrators involved in major investment treaty disputes between foreign investors and states.

For more information, including a brochure of scheduled speakers, contact ICSID at [www.worldbank.org/icsid](http://www.worldbank.org/icsid) or telephone (202) 458 1534.

#### 5. International law newsletter highlights investor-state disputes

A newsletter produced by the law firm of Hunton & Williams offers an overview of international investment arbitration, with a particular focus on investment treaty-based claims. The firm notes that tribunals have often been called upon to "consider disputes about the bounds of legitimate Government treatment of investors in sensitive sectors or industries. ... including access to essential resources such as water or environmental protection."

A note of caution is introduced, however, in relation to several recent investment treaty cases which have offered up restrictive approaches to the question of what constitutes and "investment" under this form of dispute resolution - with some claims falling outside the ambit of arbitration.

The full newsletter is available at:

[http://www.hunton.com/pdfs/newsletter/Intl\\_Lit-Arbitration\\_Summer2003.pdf](http://www.hunton.com/pdfs/newsletter/Intl_Lit-Arbitration_Summer2003.pdf)

#### 6. Newsletter looks at investment arbitration under Singapore-Australia free trade treaty

Another law firm publication issued over the summer turns its focus to the recently concluded free trade agreement between Singapore and Australia.

The newsletter offers an overview of the substantive provisions of the so-called SAFTA's investment chapter, as well as the dispute settlement rules which provide for arbitration under the UNCITRAL or ICSID rules.

See:

[http://www.claytonutz.com/areas\\_of\\_law/controller.asp?aolstring=20&na=162](http://www.claytonutz.com/areas_of_law/controller.asp?aolstring=20&na=162)

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INVEST-SD Bulletin is edited in Boston, Massachusetts, by Luke Eric Peterson for IISD. Subscribers may submit news articles, notices of events, press releases, analyses, questions and requests for information to [lpeterson@iisd.ca](mailto:lpeterson@iisd.ca)

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