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Arbitration Watch  
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1. Latest Arbitration Against Argentine Emergency Financial Measures,  
By Luke Eric Peterson

Another foreign firm has mounted an international arbitration claim against the embattled Argentine Republic. Camuzzi International has filed a claim under the Bilateral Investment Treaty (BIT) signed by Argentina with the Belgium-Luxembourg Economic Union. Camuzzi's claim which will be supervised by the Washington-based International Center for the Settlement of Investment Disputes (ICSID), relates to shareholdings in Argentine-based gas distribution firms.

Along with US-based Sempra International, which launched a BITs claim earlier this year, Camuzzi holds a stake in Sodigas Sur, a firm which controls, in turn, two Argentine-based companies which jointly supply natural gas to approximately 45% of Argentina's market.

The BITs arbitration comes on the heels of an ominous ruling from the Argentine Supreme Court, which could set back the country's efforts to follow the dictates of the International Monetary fund (IMF). In a long-awaited decision, the Court ordered the redollarization of a \$247 million bank account held by the Argentine Province of St. Luis. In so doing, the Court cast serious doubt on the broader legality of the Administration's Pesofication decree of 2002 which had permitted banks to convert dollar accounts in Pesos in order to save the Argentine banking system from collapse.

Following the Argentine Government's abandonment of its policy of holding the Peso in parity with the US Dollar, and the subsequent devaluation of the peso, the process of forced

pesofication had seriously diminished the value of hundreds of thousands of bank accounts. Numerous outstanding cases challenging the pesofication measure are still before Argentine courts, and will be emboldened by this week's Supreme Court ruling.

The forced pesofication has also led to numerous disputes between foreign investors and the Argentine government, particularly those firms who signed contracts to supply services such as gas, electricity or water. Because these contracts often stipulated dollar-denominated prices and tariffs, based on a one-to-one dollar/peso valuation, Argentina's currency travails have led to serious revenue shortfalls for foreign investors, who have been hindered from raising tariffs and rates to compensate for losses. Camuzzi and Sempra are only the latest in a growing cohort of foreign investors to use BITs to pursue claims for damages outside the domestic court system.

Argentina faces a number of other BITs claims including ones at ICSID lodged by the AES Corporation (electricity generation), CMS Gas Transmission Company (gas), LG&E Corporation (gas), Enron (tax matters), Siemens A.G. (informatics contract), Azurix Corporation (water concession), and Vivendi (water concession). Several of these cases pre-date Argentina's financial crisis, including the dispute with Enron and the long-running battle with Vivendi and a local subsidiary (see "Vivendi-Argentina Water Dispute Heading Back to BIT Arbitration?", INVEST-SD Bulletin, Jan.17, 2003)

Because many BITs also allow investors recourse to arbitral avenues other than ICSID, further arbitrations may have been launched without any public notification (for example under the ad-hoc UNCITRAL arbitration rules). Moreover, a number of other foreign investors are on record as threatening to bring BITs claims, if current efforts at amicable settlement with the Argentine authorities do not bear fruit. These potential claimants include Total-Final Elf, the Suez Corporation, PSEG and EDF (a French Power company) among others.

Such a raft of arbitrations could significantly clarify the treaty obligations of host states to foreign investors during times of serious financial crisis. Although proceedings themselves tend to be closed to the public, final awards are often circulated publicly. It is feared, however, that with so many arbitration proceedings running in parallel, that different tribunals will reach a series of diverging or even contradictory interpretations of standard treaty provisions. This very problem has already reared its head in the context of two recent arbitrations against the Czech Republic (see: "Czech Broadcasting Dispute Moving Towards Damages Award, Appeal in a Swedish Court", INVEST-SD Bulletin, Feb.21, 2003)

Sources:

ICSID Pending Cases: [www.worldbank.org/icsid/cases/pending.htm](http://www.worldbank.org/icsid/cases/pending.htm)

"EDF Attempts to Salvage Investments in Argentina", Les Echos (French Business Newspaper) Sept. 12, 2003

"Sempra Seeks Govt. Compensation - Argentina", Business News America, Sept. 23, 2002

"Camuzzi Distributors Discontinue US \$300 MN Bond Issue - Argentina", Business News America, Dec.4, 2002

"AES Buys PSEG Assets in US \$ 30MN Out of Court Deal - Argentina", Business News America, Jan 30, 2003

"Financial Woes Flare Anew in Argentina: hopes for a Speedy Improvement Upset by Top Court Ruling", by Larry Rohter, The New York Times, Mar. 6, 2003

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## Negotiations Watch:

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### 2. Industry Decries Cumbersome Review of FTAs; Enviro Groups Offer Initial Comments Based on First Public Summary of Text, By Trineesh Biswas and Luke Eric Peterson

The failure of the US Administration to disclose the texts of proposed free trade agreements (FTAs) with Singapore and Chile has attracted criticism from politicians, environmental groups, labor unions, and the general public. However, even insiders are unhappy with their access to the texts. Members of the various trade advisory committees which advise the US Congress, and which have been granted limited access to the proposed texts, are critical of the US Trade Representative's tight-fisted grip on official texts.

A number of committees which submitted reports to Congress on February 28 saw fit to criticize the USTR's policy of allowing access to the voluminous texts electronically, without any capacity to print or download the texts. Notably, one industry advisory group on chemicals and pharmaceuticals, submitted incomplete reports on account of the Administration's parsimony with information about the proposed FTAs.

However, scattered press coverage in the mainstream media has not highlighted this dissent coming from within the ranks of the government's own 700-odd advisors, but has rather focused upon the general support of these groups for the proposed agreements.

The lack of public information about the texts has seriously hampered the efforts of critics to assess the contents of the agreements. Recently, a 30 page summary prepared by the Chilean Government on the proposed US-Chile FTA has circulated publicly. While this document is an unofficial translation of an overview of the various sections of the US-Chile FTA, critics have seized on it in an initial effort to gauge the shape of the agreement's provisions on investment.

In a joint statement issued by Friends of the Earth, the Center for International Environment Law, Defenders of Wildlife and the National Wildlife Federation, these environmental groups express concern that the FTA's language on expropriation appears ambiguous, and fails to "adequately reflect US law."

Recalling negotiating mandates laid down by the US Congress, the groups question whether negotiators have managed to produce an FTA which does not grant foreign investors any "greater substantive rights" than those enjoyed by US investors under the US Constitution.

It appears that the proposed FTA's provisions on expropriation follow those contained in the North American Free Trade Agreement (NAFTA), but with the addition of an annex to clarify the notion of "indirect expropriation", which, under NAFTA, has been used to challenge various regulatory measures affecting public health or the environment.

In their joint statement, the environmental groups suggest that the US-Chile provisions need to be tightened further, in order to bring them in line with US and international law. Arguing that US jurisprudence establishes that steps having adverse effects on economic value alone, do not necessarily constitute an expropriation, the groups suggest that the language in the US-Chile FTA remains unclear on this point. In particular, they remain unhappy about the proposed text's vague stipulation that only in "rare circumstances" will a government's exercise of its so-called police powers be considered expropriatory.

In their joint statement, the groups indicate that they would prefer an explicit statement that "regulatory actions designed to protect health, environment, or the public welfare do not constitute expropriation, except in extraordinary circumstances." The FTA, as apparently drafted, they warn, does not appear to adequately differentiate between an "invasion" of property (defined

by the US Supreme Court as a "permanent, compelled and physical occupation") and a "normal regulatory action" in pursuit of the public good.

Innovations on the process side, have been met with rather more enthusiasm. Although the agreement includes provisions allowing for investors to arbitrate at the international level against the host state, greater transparency has been explicitly mandated in the treaty. Such language would over-ride or fill in gaps in existing arbitration rules which have allowed for the proceedings and legal documents to be shielded from public scrutiny. The submission of amicus curiae briefs by interested parties also will be permitted under certain circumstances.

Formal, specific deadlines for dispute settlement have also been introduced in order to dissuade foreign investors from making frivolous claims. Furthermore, the US and Chile are apparently committed to considering, within the next three years, the establishment of a court of appeals to review international arbitration rulings.

On the whole, however, critics warn that this unofficial summary of the contents of the proposed US-Chile FTA does not allow them to assess in detail the commitments made in the investment chapter.

Sources:

"Chile-United States Free Trade Agreement: What is it about?" (Unofficial translation of an informal summary prepared by the Government of Chile to explain the agreement to the public.)

Statement jointly released by Friends of the Earth, Center for International Environmental Law, Defenders of Wildlife, and National Wildlife Federation (as seen by the Editor of INVEST-SD Bulletin)

"Except for labor, trade advisory committees favor approval of Chile, Singapore trade deals", By Martin Crutsinger, Associated Press, Feb. 28, 2003

"Business, NGOs Attack FTA Investment Protections From Opposite Corners" and "Advisory Committees Say Secrecy on FTA Texts Impaired Work", Inside US Trade, March 7, 2003

3. New Tobacco Control Treaty May Clash With Trade & Investment Treaties,  
By Trineesh Biswas and Luke Eric Peterson

The member states of the World Health Organisation (WHO) recently finalized the text of a public health treaty to control the supply and consumption of tobacco. However, several trade measures recommended by the treaty could be contestable under the World Trade Organization (WTO) and other international trade and investment agreements. Notably, the proposed Framework Convention on Tobacco Control (FCTC) does not make explicit the relative priority given to public health concerns and other international trade and investment treaty commitments.

The Convention sets out guidelines for tobacco taxation, product regulation (including labeling), illicit trade, advertising, sponsorship and promotion, smoking prevention and treatment, and liability for the costs of smoking. Following its presentation for adoption to the World Health Assembly in May, signatories will be legally bound to implement comprehensive tobacco control programmes, once the treaty obtains the ratification of 40 countries.

In recent years, the specter of conflict with international trade agreements has served to dissuade some countries from implementing public health measures similar to those present in the FCTC. For instance, when the Canadian government broached the idea of requiring plain (generic) packaging of cigarettes, a former US Trade Representative drafted a legal opinion on behalf of the Philip Morris company which stated that such a measure would deprive owners of their

entitlements under NAFTA and the WTO, since company trademarks would be 'encumbered' by 'special requirements' on their use. The initiative was dropped, in spite of the fact that research had suggested it might have had a salutary impact on public health.

With the conclusion of negotiations on the FCTC, the stage could soon be set for tobacco firms to challenge the validity of FCTC provisions through the use of existing trade and investment remedies. During the negotiations, some countries, including the United States, preferred to see the FCTC rules explicitly subordinated to existing trade and investment agreements. However, several African and Southeast Asian countries lobbied for public health considerations to be deemed paramount.

The compromise, according to Julie Archer, an Information Officer with the WHO, has been silence in the FCTC text: "there's nothing explicitly in the treaty that indicates that the FCTC has precedence in the hierarchy of treaties."

Michelle Swenarchuk, a programme director at the Canadian Environmental Law Association professes uncertainty about how conflicts between the FCTC and trade and investment agreements will be resolved: "I don't think anyone can predict [which will rules will take precedence], it depends on the case, the measure being disputed, which country is challenged, which country is bringing the challenge..."

Swenarchuk observes that a good test case is likely to come, once again, from Canada where the government has signaled its intention to ban the use of the descriptors 'light' and 'mild' on cigarette labels, on the grounds that they deceive smokers into believing that such products are safer. Such a policy move would seem to be in line with Article 11(a) of the draft FCTC, which prescribes that "each Party shall...adopt and implement... effective measures to ensure that tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading... or likely to create an erroneous impression about its health effects... [These 'deceptive' terms, descriptors and trademarks] may include terms such as 'low tar,' 'light,' 'ultra-light,' or 'mild.'" Tobacco firm Philip Morris International has claimed that such a policy move would amount to an expropriation of its intellectual property rights, and has threatened to sue Ottawa under the North American Free Trade Agreement's provisions on investment.

Sources:

World Health Organisation (WHO), Draft WHO framework convention on tobacco control, February 28, 2003; available online at <http://www.who.int/gb/fctc/>

WHO, "Agreement reached on global Framework Convention on Tobacco Control," March 1, 2003; available online at: [www.who.int/mediacentre/releases/2003/pr21/en/print.html](http://www.who.int/mediacentre/releases/2003/pr21/en/print.html)

Steven Chase, "Tobacco firm warns 'mild' cigarette ban may violate NAFTA," Globe and Mail, March 16, 2002

Neil Collishaw, Cynthia Callard, Michelle Swenarchuk, Harley Stanton; "Trade Agreements and Tobacco Control: How WTO Agreements may stand in the way of reducing tobacco use," Briefing Paper Series: Trade and Investment (2:7), Canadian Centre for Policy Alternatives, <http://www.policyalternatives.ca/publications/brief2-7.pdf>

"International Negotiators Reach Agreement on Anti-Tobacco Treaty," Dow Jones International News Service, March 1, 2003

"WHO adopts global anti-tobacco treaty," Agence France Presse, March 1, 2003

Invest-SD interviews

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Resources  
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#### 4. UN Launches World Investment Directory Online

The United Nations Conference on Trade and Development (UNCTAD) has announced that comprehensive statistics on foreign investment are now available on-line for close to a dozen countries. Full press release reprinted below:

##### UNCTAD LAUNCHES WORLD INVESTMENT DIRECTORY ONLINE

Geneva, 27 February 2003 -- UNCTAD today launches the online version of its World Investment Directory, which will provide quick electronic access to comprehensive statistics on foreign direct investment (FDI) and the operations of transnational corporations (TNCs). Online as of today are the latest available statistics on 11 countries:

Albania <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Albania\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Albania_brief.pdf)> , Australia <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Australia\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Australia_brief.pdf)> , Belarus <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Belarus\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Belarus_brief.pdf)> , Czech Republic <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Czech\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Czech_brief.pdf)> , Hungary <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Hungary\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Hungary_brief.pdf)> , Japan <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Japan\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Japan_brief.pdf)> , Latvia <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Latvia\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Latvia_brief.pdf)> , Lithuania <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Lithuania\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Lithuania_brief.pdf)> , Norway <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Norway\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Norway_brief.pdf)> , Slovakia <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Slovakia\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Slovakia_brief.pdf)> and Spain <[http://r0.unctad.org/en/subsites/dite/fdistats\\_files/pdfs/Spain\\_brief.pdf](http://r0.unctad.org/en/subsites/dite/fdistats_files/pdfs/Spain_brief.pdf)> .

There are also statistical definitions and sources, a brief discussion and listing of relevant national laws and regulations, information on bilateral and multilateral agreements and a bibliography. Information on each country is available in two formats: a detailed profile, and an "FDI in Brief", highlighting the most interesting aspects of the profile.

Data on nearly all countries in the developed world, as well as Central and Eastern Europe, will be online within the next month, to be followed eventually by other regions.

For more information, please contact: Masataka Fujita, Officer-in-Charge, Investment Trends Section, T: +41 22 907 6217, F: +41 22 907 0194, E: [masataka.fujita@unctad.org](mailto:masataka.fujita@unctad.org) or UNCTAD Press Office, T: +41 22 907 5828, E: [press@unctad.org](mailto:press@unctad.org).

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Negotiations Watch:  
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1. US-Singapore FTA Text Released; Investment Provisions Reveal Many Changes,  
By Luke Eric Peterson

A provisional text of the US- Singapore Free Trade Agreement (SUFTA) has been released to the public, more than a month after the Bush Administration officially notified the agreement to Congress. The Administration's notification of the agreement had set in motion a 90 day period of Congressional review, before the FTA would be signed.

While some 900 trade advisors to the Administration, had been granted limited access to the text, media organizations, public interest groups and the broader public were denied access to details of the treaty. The release of a provisional text by the Office of the US Trade Representative (USTR) this week, offers the general public an in-depth look at the first investment rules negotiated since the US Congress laid down a series of negotiating guidelines last year for future agreements pursued by the US Administration.

Although the text released by the USTR may be subject to further legal tweaking, its broad outline reveals a number of changes from previous US bilateral investment treaties and NAFTA's Chapter 11 on investment. An initial comment on the key substantive legal protections contained in Chapter 15 of the SUFTA, has been prepared by Howard Mann, an Ottawa-based international lawyer and an Associate of the International Institute of Sustainable Development. Dr. Mann's analysis is attached as a separate file to this week's INVEST-SD Bulletin.

The SUFTA also introduces various innovations in its dispute settlement procedure, a number of which appear to bring more transparency to any investment disputes arbitrated under the treaty. Most notable is the fact that all arbitral proceedings will be publicly notified, and will provide for public access to the proceedings. Likewise, all documents including legal pleadings and arbitral awards will be made available to the public, with the exception only of confidential business information. A further innovation is seen in the express provision calling for a process for amicus curiae (friend of the court) briefs to be considered by arbitral tribunals.

Another key procedural problem which plagues other trade and investment treaties, the lack of any requirement for similar claims to be consolidated under a single tribunal, has been addressed in Article 15.24 of the SUFTA. By providing a procedure by which related claims may be subsumed under the jurisdiction of a single tribunal, the dispute settlement process follows the path initiated by the NAFTA, and appears to be less vulnerable than that of typical bilateral investment treaties, to situations where competing or even conflicting awards are handed down by a series of separate tribunals which have been convened to assess virtually the same (or closely related) government measures.

Absent from the treaty, however, is any appellate mechanism which would review tribunal awards; The tribunals themselves continue to be ad-hoc bodies, conceived only to arbitrate a single case. The treaty does contemplate the possibility that Singapore and the United States will discuss the creation of an appellate mechanism sometime in the next three years. In addition, the two parties signaled that they will consider using any new appellate body created in a future multilateral trade or investment agreement.

For the time being, however, subsequent review of tribunal decisions will differ depending upon which arbitral rules are selected by the investor to govern the initial arbitration. In cases where arbitration follows the standard ICSID arbitral rules, recourse may be had only to an ad-hoc annulment committee on a handful of grounds set out in the ICSID Convention. Arbitrations which use other sets of arbitral rules provided for in the SUFTA, will be reviewable by national legal systems, typically on grounds set out in domestic arbitration legislation. These different avenues of review may allow for differing legal standards to be applied from one case to the next.

Also of note, is the fact that the type of claims which may be brought by investors under the SUFTA dispute settlement provisions, are broader than under the NAFTA. Whereas the NAFTA basically restricted investor claims to alleged violations of the substantive rights contained in the NAFTA investment chapter (eg National Treatment, Expropriation without compensation, etc.), Article 15.15 of the SUFTA is notable for permitting arbitrations to arise not only out of the alleged violation of substantive treaty provisions, but also in relation to "an investment authorization" or "an investment agreement".

One deeply contentious issue in the negotiation of the SUFTA had been the question of capital controls imposed by the Singapore government. Disagreement over how much latitude Singapore should have to impose such controls, had led to delays in concluding negotiations of the treaty. In the end, the investment chapter of the SUFTA allows investors to mount claims for damages arising out of capital controls, however a separate side letter to the agreement sets out certain circumstances in which Singapore would not be liable, these include where measures are put into place for less than a year, or where they do not "substantially impede" the transfer of capital.

The full-text of the US-Singapore FTA can be found on the website of the Office of the US Trade Representative ([www.ustr.gov](http://www.ustr.gov))

## 2. Seminar on WTO and Investment Scheduled for Geneva Next Week

On March 20, 2003, a group of Geneva-based non-governmental organizations (NGOs) are hosting a day-long seminar on the potential implications of a WTO Agreement on Investment. The

seminar will see participation from a cross-section of government diplomats, officials from intergovernmental organizations (UN, WTO, etc.), NGO representatives, and investment experts. In addition to providing a forum for NGOs to hold a dialogue on the issues, the event will also highlight the various positions and proposals which have been put forward to date by member states of the WTO

Full details: Seminar on the Nature and Implications of a WTO Investment Agreement and other New Issues: to be held at the Geneva International Convention Centre, 17 rue Varembe, Geneva, Conference Room 2, on March 20, 2003, from 9:00 to 18:00. Further information about the event can be obtained from Sabine Granger, WWF International, Geneva. Email: [sgranger@wwfint.org](mailto:sgranger@wwfint.org)

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Arbitration Watch:  
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### 3. Impregilo Company Invokes Bilateral Investment Treaty for Second Time Against Pakistan, By Luke Eric Peterson

The on-again off-again construction of a hydroelectric dam by an Italian firm in Pakistan has ended up in international arbitration once again. The Italian firm Impregilo S.p.A. has launched its second dispute under the Italy-Pakistan bilateral investment treaty in as many years. Since the terrorists attacks in the United States on Sept. 11, 2001, Impregilo and Pakistani authorities have had several disagreements as to the appropriate security measures required at the Pakistani construction site.

An earlier arbitration launched at ICSID in February of 2002 was settled amicably and discontinued when the two sides agreed to conditions for resuming work on the construction project. However, on March 3 of this year, a second arbitration was registered at ICSID by the firm. According to sources, continued concerns about security remain at the heart of the latest arbitration.

Sources:

INVEST-SD Interviews

ICSID Roster of pending cases: [www.worldbank.org/cases/pending.htm](http://www.worldbank.org/cases/pending.htm)

"Italian firm Files Case for Settlement of Investment Disputes", The Nation (Pakistan), March 30, 2002

### 4. Dispute Over Slovenian Nuclear Plant Sees Political Progress; but Investor Arbitration Still Possible, By Luke Eric Peterson

The Slovenian Government has finally ratified an inter-state agreement with the Government of Croatia, which could pave the way for a 50-50 sharing of the disputed Krsko nuclear power plant in eastern Slovenia. The plant had been built jointly in the early 1980s when the two nations were both part of the former Yugoslavia. Despite the political agreement reached by the two nations, a Croatian firm continues to threaten arbitration under the investment provisions of the Energy Charter Treaty, unless its demands for compensation are met by Slovenian officials.

The Croatian power company, HEP, is claiming damages arising out of Slovenia's decision in the late 1990s to cut off HEP's access to electricity from the facility. As reported earlier by INVEST-SD Bulletin, the HEP company is claiming some \$900 million (US) as compensation for its lost-

supply of electricity, and for costs associated with building a replacement facility (See "Energy Charter Treaty Suit Threatened Over Slovenian Nuclear Plant", INVEST-Sd Bulletin, Feb. 14, 2003).

While the two nations now hope to work out a joint plan for managing the facility, handling its nuclear waste, and financing its longer-term decommissioning (expected by the year 2023), they must also attempt to resolve the demands of HEP for compensation, or see the dispute go to binding international arbitration. It remains unclear whether local citizens living near the Krsko plant will proceed with threats to call a referendum to challenge Slovenia's recent ratification of an inter-state agreement with Croatia. Locals have denounced as inadequate the measures contemplated in the inter-state agreement for the handling of nuclear waste and the decommissioning of the controversial plant.

Sources:

"Slovenia Ratifies Deal With Croatia to end Row Over Krsko Nuclear Power Plant", Agence France Presse, Feb 25, 2003;

"Croatian Premier: Arbitration Still Possibility in Case of Krsko Nuclear Plant", BBC Monitoring International Reports, March 10, 2003;

"Daily Argues Experts Should Solve Slovene-Croatian Nuclear Plant Dispute", BBC Monitoring International Reports, March 11, 2003

#### 5. UN Offers On-Line Training Course on Investment Arbitration

As part of its program on international dispute settlement, the United Nations Conference on Trade and Development (UNCTAD) is offering a comprehensive on-line training module on the arbitration rules most commonly included in international investment treaties. The course focuses on the basic rules and jurisprudence of the Washington-based International center for the Settlement of Investment Disputes (ICSID).

Additionally, the program offers a course module on the World Trade Organization system. Other modules, including one on the UNCITRAL rules of commercial arbitration - commonly included in investment treaties - are slated to be added to UNCTAD's internet site on August 1, 2003.

The current modules on ICSID and the WTO can be found online at:

<http://r0.unctad.org/dispsett/course.htm>

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5. Tufts University Panel Will Discuss Investment, Development at WTO on April 2nd

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1. Czech Republic Hit With Massive Compensation Bill in Investment Treaty Dispute, By Luke Eric Peterson

It wasn't "Shock and Awe", but it certainly focused the minds of Czech Politicians.

Last week, a Stockholm-based arbitral Tribunal awarded record damages, of some 350 million US Dollars, to Central European Media (CME) in its investment treaty dispute with the Czech Republic.

The damages dwarf by at least a factor of ten, those in any other known investment treaty arbitration, and were based upon the Tribunal's estimate of the losses incurred by CME in 1989 when it was deprived of its stake in TV Nova, a popular English language television station in Prague.

For an Administration already running a record budget deficit of some 360 million dollars (US), the Tribunal's decision threatens to double the Czech Republic's budget shortfall this year. As the government scrambles for solutions, one proposal mooted by some officials is for an increase in value-added tax on goods and services which would see all taxpayers absorbing the cost of the investment treaty arbitration.

CME's multi-pronged legal strategy has thus far proved successful in its long-running battle with the Czech Republic. A separate arbitration brought by CME's major shareholder Ronald Lauder

under the US-Czech Republic bilateral investment treaty (BIT) had come up empty, when a London-based arbitral Tribunal ruled that the Czech Republic had not violated most of the key commitments made in that agreement.

Despite having been vindicated in that case, the Czech Republic was not off the hook. CME managed to convince a second Tribunal, this one based in Stockholm, that the same actions by the Czech Republic had constituted multiple violations of a BIT concluded with the Netherlands.

The Czech Republic now clings to a last hope that the Stockholm Tribunal's ruling on the merits of the case (and which paved the way for last week's damages award) will be overturned on appeal. A challenge is currently pending before a Stockholm Court, as is the prerogative of a losing party in arbitrations operating under the UNCITRAL rules of arbitration. (see "Czech Broadcasting Dispute Heading Towards Final Damages, and Appeal in a Swedish Court", INVEST-SD Bulletin, Feb.21, 2003)

In the mean time, both sides have toned down their rhetoric in relation to the damages claim. In recent weeks, CEO Fred Klinkhammer had appeared to relish the opportunity to extract compensation from a possibly recalcitrant government, but this week he suggested that the Czech Republic could deposit the amount owing into a special bank account which would only be tapped after the Stockholm Court rules on the Czech Republic's appeal later this Spring.

Meanwhile, Czech media report that most Czech politicians accept that any damages owed will need to be paid. Foreign Minister Cyril Svoboda has said that prompt payment is a must in order to safeguard the nation's "reputation abroad"

In recent years, CME shareholder Ronald Lauder, a former US ambassador to Austria and heir to the Estée Lauder fortune, had conducted a very public campaign to discredit the Czech Republic for its treatment of CME, running full-page advertisements in major US newspapers alleging that the Czech Republic was a dangerous place in which to invest.

In addition to any negative publicity generated by its public spat with Mr. Lauder's firm, the Czech Government has also spent more than 10 million US dollars on legal fees in its defence of the two BIT arbitrations mounted against it.

Sources:

"Czech Republic Unlikely to Avoid Paying to CME - Politicians", CTK National Newswire, March 15, 2003

"Czech Republic to Pay Billions to US Media Company", BBC Monitoring International Reports, March. 15, 2003

"Czech Minister Advocates Immediate Settlement of TV Arbitration Fine", BBC Monitoring International Reports, March. 17, 2003

"Money for CME Could be Raised Through Special Tax - KDU-CSL", CTK Czech News Agency, March 18, 2003

"Govt Spending on Lawyers in Nova Case Tops KC 300M" - Press", CTK Business Newswire. March 20, 2003

2. Canadian Columnist Warns of Government Misgivings About NAFTA's Investment Provisions

In a recent column for Maclean's Magazine, a Canadian newsweekly, regular columnist Mary Janigan suggests that NAFTA's Chapter 11 has government officials worried, even if foreign investors have not succeeded in all of their arbitration claims mounted under the agreement. The full text of Janigan's column is available on-line at:

[http://www.macleans.ca/xta-asp/storyview.asp?viewtype=search&tpl=search\\_frame&edate=2003/03/10&vpath=/xta-doc1/2003/03/10/columns/56390.shtml&maxrec=92&recnum=1&searchtype=BASIC&pg=1&rankbase=64&searchstring=janigan](http://www.macleans.ca/xta-asp/storyview.asp?viewtype=search&tpl=search_frame&edate=2003/03/10&vpath=/xta-doc1/2003/03/10/columns/56390.shtml&maxrec=92&recnum=1&searchtype=BASIC&pg=1&rankbase=64&searchstring=janigan)

If this link does not work, an archive search of the author's name at [www.macleans.ca](http://www.macleans.ca) should yield a copy of the column.

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Negotiations Watch:  
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3. Australia and US Will Negotiate Investment Rules as Part of FTA; Future of Investment Screening at Issue,  
By Trineesh Biswas and Luke Eric Peterson

The United States and Australia concluded the first round of negotiations on a free trade agreement (FTA) this week in Canberra. Market access for agricultural products is one of Australia's top negotiating priorities, while leading issues for the United States include pharmaceuticals, entertainment products, and access for products derived from genetically modified organisms.

A set of investment rules are also on the negotiating table. It is relatively rare for OECD countries to agree to such reciprocal investment rules; most bilateral investment treaties have tended to be concluded between developed and developing countries, or between two of the latter. Australia's mechanism for reviewing incoming foreign investment is likely to be a sensitive subject for negotiators, as the US will be pushing for its elimination.

Australia's Foreign Investment Review Board (FIRB) was created in order "to examine proposals by foreign interests for investment in Australia". Among its objectives, the Board seeks "to encourage foreign investment consistent with community interests." American business groups have looked with suspicion upon this process, which has the power to deny approval to investments judged not to be in the 'national interest'.

Last month, US Chamber of Commerce Vice President for Asia, Myron Brilliant, told Inside US Trade that his group is calling "for the elimination of the board, or at least a commitment to make the review process more transparent." Meanwhile, Stephen Canner, Vice President of the US Council for International Business, allows that while he is not overly familiar with the Australian regulatory scheme, his group encourages the US Government to pursue investment rules which hew closely to the pattern of the NAFTA and existing US BITs. It is standard practice in these earlier US agreements to require guarantees of "non-discrimination" to be extended to investments not only once they are established in a host territory, but also at the pre-establishment stage.

For his part, US Trade Representative Robert Zoellick has indicated in a letter to the US Congress that he would "seek to establish rules that reduce or eliminate artificial or trade-distorting barriers to US investment in Australia, including investment screening by the Australian government."

However, Australian trade officials have said that "it would likely be difficult" for Australia to make concessions on investment approval procedures. Nevertheless, they downplay the concerns of US investors. In comments last week, Jan Adams, the minister commercial of the Australian Embassy in Washington, DC, likened the Australian review board's actions to those of the American Committee for Foreign Investment. Adams added that the board does not "make a habit" of turning down investors; given Australia's dependence on foreign investment, such decisions are "extremely rare." As matters currently stand, even given the existence of the review board, US investors have been the single largest source of FDI for Australia.

Gary Hufbauer, a Senior Fellow with the Washington-based International Institute for Economics, suggests that the US-Canada investment agreements might shed some light on the future of the Australian FIRB: "What happened in Canada," which had a similar investment review agency, hufbauer said, "is that the limits [i.e. value of the investment] at which the review would happen were raised, and eventually phased out." A possibility he saw for the Australian FTA was a raised limit that would exempt all relatively small investments and some entire sectors from review. The review would then only occur for large deals in certain, mutually agreed upon, sensitive sectors.

The texts tabled by the US at the Canberra talks were similar to those in the Chile and Singapore FTAs, upon which the US is said to be hoping to base its agreement with Australia. However, in recent weeks, business representatives have expressed dissatisfaction with their rights under the Singapore FTA. Nonetheless, Dr. Hufbauer allowed that though NAFTA Chapter 11-style rights offer US investors the stronger protections that they want, the Singapore model may be the best they can hope for. The environmental critics of the Singapore FTA have some advocates in the US Senate who would strongly object to a return to NAFTA protections, which are regarded to be even less favourable to environmental concerns. "My guess," Hufbauer concluded, "is that they would not go back to the Chapter 11 language because of objections from the US environmental community."

Sources:

Invest-SD interviews

Foreign Investment Review Board, Government of Australia, <http://www.firb.gov.au/>

"USTR reassures farm groups as it launches Australian FTA"; "Farm groups split on how to respond to Australia-U.S. FTA launch", Inside US Trade, November 15, 2002

"Australian ambassador tags sensitivities in FTA talks with U.S.", Inside US Trade, February 14, 2003

"U.S., Australia to begin negotiations next week with tabling of texts", Inside US Trade, March 14, 2003

"World Business Briefing: Australia," New York Times, March 18, 2003

#### 4. Geneva Meeting Throws Up Competing Views on Potential WTO Talks on Investment, By Trineesh Biswas

A group of six non-governmental organizations (NGOs)\* held a seminar on the "Nature and Implications of a WTO Investment Agreement" in Geneva on March 20. The seminar's basic goal was to examine the nature and desirability of a multilateral agreement on investment within the framework of the World Trade Organisation.

NGO participants and developing country representatives were in general agreement that a multilateral treaty on investment might not be a bad thing if properly structured, many also

concluded in the view that the WTO would not be an appropriate forum for such an agreement. Representatives from the United States and the European Union, on the other hand, spoke in support of a launch of investment negotiations at the pending WTO Ministerial meeting scheduled for Cancun, Mexico in September. However, one representative from the EC cautioned that the WTO would not be an appropriate forum for an agreement which sought to impose responsibilities on investors.

NGO delegates made a case for developing countries' need for policy flexibility in their treatment of foreign investment. They noted that foreign direct investment can have positive and negative effects - the latter, for example, if it crowds out employment-generating small-scale industries. Some NGO groups argued that countries with differing resource endowments and capabilities will need to retain the space to create and dictate appropriate development policies if they are to harness foreign investment to their long-term national interest.

Professor Ha Joon Chang, of Cambridge University, offered the meeting a portrait of Korea's heavy regulation of investment in the 1970s, when FDI was welcomed in labour-intensive export-oriented industries, but highly restricted in other sectors of the economy. He also added that, "All of today's developed countries put restrictions on foreign investment when they were net recipients of foreign investment." Accordingly, it was thought that a one-size-fits-all WTO agreement on investment might severely limit the array of policy levers available to developing countries which seek to develop in their own fashion.

For the most part, NGO representatives argued that multilateral rules on investment would be inherently asymmetrical: with developing countries often being recipients of foreign investment, rather than beneficiaries of the protections offered to investors. On this view, the WTO's core principles of national treatment and non-discrimination were seen as valid for trade in goods, but as inapplicable to investment, because they did not allow for forms of 'affirmative action' for weaker developed-country enterprises. The principle of 'Non-discrimination' was said in this context to amount to discrimination in favour of developed country investors.

Counter to this view, a US representative claimed that policy space could be a double-edged sword, since it could simply become a cover for protectionism. Representatives from the US and EU argued that making investment rules subject to dispute settlement would be in the interest of developing countries, since the system would be based on rules rather than on power relations. NGO representatives tended to reject the EU's proposal of a GATS-type approach in which countries would liberalise investment in sectors of their choice. Such an approach was criticized for its likelihood to become a focus of pressure for developing countries to open up sector after sector to foreign investment.

Notably, representatives from India, Kenya, and Uganda all rejected any suggestion that a decision to negotiate an investment agreement could be taken at Cancun. They noted that the current WTO agenda is already far too crowded, and expressed concerns that the inclusion of new issues could detract from far more important efforts to address the existing imbalances in current WTO agreements. They also cited capacity problems with developing countries simply lacking the resources to be able to defend their national interests in investment negotiations. Uruguay Round commitments had had unintended consequences, they said, and developing countries had no desire to sign on to any further agreements which they did not properly understand.

Civil society generally expressed concerns that a multilateral investment framework would privilege corporate investor rights over the pursuit of development and human rights. Third World Network's Martin Khor said in his conclusion that such an agreement would "regulate governments, not corporations - it would prevent governments from regulating corporations." A dispute settlement mechanism was dismissed as irrelevant and even inimical, if the very rules it would enforce were unfair. NGO representatives concluded with an appeal to countries to reject

the NAFTA approach to investment rule-making, and with a request that the WTO's Cancun Ministerial Conference be more open and participatory than the previous one in Doha in 2001.

\*(Centre for International Environment Law, Institute for Agriculture and Trade Policy, Public Services International, Third World Network, Oxfam International, Worldwide Fund for Nature)

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Upcoming Events:  
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5. Tufts University Panel Will Discuss Investment, Development at WTO on April 2nd.

The Fletcher School of Law and Diplomacy at Tufts University is hosting a panel discussion on April 2, 2003. A press release for the event is pasted below:

"Foreign Investment and the WTO: Leaving Room for Development"

As the World Trade Organization begins negotiating rules liberalizing foreign investment, questions remain about the extent to which WTO investment rules will leave room for national development strategies.

April 2, 5:00 pm  
Cabot 205, Fletcher School of Law and Diplomacy  
160 Packard Ave., Medford, Massachusetts

Featuring:

Joel Trachtman  
Fletcher School of Law and Diplomacy (invited)

Kevin P. Gallagher  
Global Development and Environment Institute (GDAE), Tufts

Lyuba Zarsky, GDAE, former Director of the Globalization and Governance Program of the Nautilus Institute for Security and Sustainable Development

Luke Eric Peterson  
Trade and Investment Program, International Institute for Sustainable Development

For more information, contact Kevin Gallagher, 617-627-5467, [Kevin.Gallagher@tufts.edu](mailto:Kevin.Gallagher@tufts.edu).

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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](mailto:invest-sd@lists.iisd.ca).

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Arbitration Watch:  
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1. Public Outcry Leads to Abandonment of Investment Treaty Arbitration Against Guyana,  
By Luke Eric Peterson

A British-based conglomerate has abandoned an investment treaty claim against the Government of Guyana, after being targeted by demonstrations at selected UK retail locations and coming under harsh scrutiny from the British press.

The Big Food Group, owner of the Iceland grocery store chain announced last week that it will terminate its claim which was registered at the Washington-based International Center for the Settlement of Investment Disputes (ICSID) in September of 2001.

The case arose out of that country's nationalization of Big Food Group subsidiary Booker PLC's Guyanese sugar industry interests in 1976. The arbitration under the UK-Guyana Investment Promotion and Protection Agreement was profiled in a recent edition of this bulletin (see "Development Campaigners Decry Investment Arbitration Against Guyana", INVEST-SD Bulletin Feb 7 & 14, 2003).

At the time of the nationalization, the government and the investor had agreed that compensation would be paid. For over a decade Guyana paid down its debt. However, in 1988, the two parties agreed to suspend repayments, as Guyana considered a re-privatization of the sugar industry. When the government ultimately resolved to keep the industry in public hands, the two sides resumed negotiations over the remaining debt owed to Booker PLC. A failure to come to terms led the Booker company to take the case to arbitration to ICSID, a member of the World Bank Group which administers investment arbitrations and conciliations.

Development campaigners had warned that the decision to pursue the outstanding debt by lodging an investment treaty claim could lead to the Guyanese Government failing to meet a key

requirement of its bid for qualification in the IMF's Highly Indebted Poor Countries program: namely, that the country treat all of its commercial creditors on equal terms, rather than showing favoritism by paying off one of them (ie. Booker PLC).

In recent weeks, public pressure on the parent company Big Food Group had intensified. Press reports in the London Observer Sunday newspaper pointedly noted that the UK company was seeking compensation which amounted to a full 10% of the tiny nation's annual income. With the poverty-ridden nation coping with an AIDs epidemic, the Observer's correspondent likened the claim to an earlier effort - also abandoned after public outcry - by the Nestle Corporation to extract compensation from the Ethiopian government over another asset long ago nationalized in the 1970s.

Notably, other similar claims against the Ethiopian government arising out of decades-old nationalizations continue to be mediated through another arm of the World Bank: the Multilateral Investment Guarantee Agency (MIGA). However, the lack of any household names in this lot of investors appears to have immunized them from the sort of public backlash which proved to be the undoing of Nestle and the Big Food Group, whose Iceland grocery chain is a household name in the UK.

A spokesperson with MIGA would reveal no details about the investor claims being pursued against the Government of Ethiopia. It is not clear that Ethiopia has acceded to any investment treaties with western nations, which might explain why its creditors have opted for mediation, rather than the legally binding arbitration which the Big Food Group had mounted at ICSID in its now-abandoned dispute with Guyana.

Sources:

INVEST-SD Interviews

"Big Food Does Big U-Turn", By Nick Mathiason, The Observer, March 23, 2003

"After 26 years, UK food group squeezes poverty-stricken Guyana for £12 million", By Nick Mathiason, The Observer, March 16, 2003

"Iceland Debt Campaign Victory", World Development Movement press release, [www.wdm.org.uk/campaign/icelandvictory.htm](http://www.wdm.org.uk/campaign/icelandvictory.htm)

"Ethiopia Urges Creditors to Agree to Its Terms", By Charlotte Denny, The Guardian, Dec. 30, 2003

2. Peru Launches Unprecedented State-to-State Arbitration in Dispute with Chile,  
By Luke Eric Peterson

Following the decision by a Chilean firm, Lucchetti, to launch an investor-to-state arbitration against the Peruvian Government under the terms of the Chile-Peru bilateral investment treaty, the Peruvian Government has responded by invoking the state-to-state dispute settlement provisions of the same treaty against the Government of Chile.

This appears to mark the first known instance where a state has formally instigated state-to-state arbitration under an investment treaty. Although most modern investment treaties accord such a right to the states, the body of known treaty arbitrations which has grown up since the late 1980s has arisen exclusively out of claims brought via the investor-state mechanism of investment treaties.

The Lucchetti dispute stems from a decision by the Chilean-owned firm to challenge a Peruvian order to close a pasta factory which had been operating in an environmentally protected area near the Peruvian capital of Lima. (See "Peru Closes Chilean Factory in Environmental Reserve; Triggers Investment Treaty Dispute", INVEST-SD Bulletin, Jan. 24, 2003)

Sources at the International Center for the Settlement of Investment Disputes (ICSID) indicate that the investor-state dispute between Lucchetti and the Government of Peru has been officially registered, and selection of an Arbitration Tribunal will proceed. Although ICSID rules do not provide the Center's secretariat with the authority to call a halt to the investor-state arbitration process, one knowledgeable observer suggests that the Tribunal, once constituted, might choose to suspend the ICSID arbitration in deference to the parallel state-to-state process between Chile and Peru.

If the two disputes were allowed to run in parallel, there is a possibility that different Tribunals might reach differing views on the substantive merits of the dispute. The Chilean Government would also find it difficult not to be seen to be espousing the claim of its investor (Lucchetti) in any such state-to-state process, in contravention of Article 27 of the ICSID Convention which forbids home states of an investor from espousing claims which are already being pursued through investor-state arbitration at ICSID..

Further details of the state-to-state arbitration, which is expected to be mounted under UNCITRAL ad-hoc rules of arbitration, will be provided in a future issue of INVEST-SD Bulletin.

### 3. Canadian Think-Tank Releases Study of NAFTA Arbitration Process

A new report commissioned by the Montreal-based Institute for Research on Public Policy argues that the investor-state arbitration process found in the NAFTA agreement is in need of reform. The study entitled "NAFTA's Chapter 11: Investor Protection, Integration and the Public Interest," was prepared by Toronto international trade law expert Julie Soloway, and features comments by University of Victoria law professor Chris Tollefson.

While both experts cite various procedural changes needed to make the NAFTA Chapter 11 investor-state arbitration process more transparent, they disagree on the need to clarify the scope and nature of the substantive investor protections contained in the Chapter.

The 60-page report can be accessed through the IRPP's home page at: [www.irpp.org/indexe.htm](http://www.irpp.org/indexe.htm)

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Negotiations Watch:  
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### 4. Chile Concludes Trade & Investment Pact With Several European Trade Partners

The Government of Chile has concluded a broad free-trade pact with the four nations of the European Free Trade Area (EFTA): Switzerland, Norway, Liechtenstein, and Iceland. As European nations not party to the European Union, the EFTA nations entered into a free trade pact amongst themselves in 1960. In more recent years, the EFTA bloc has concluded free trade deals with various other nations.

The Chile-EFTA agreement includes commitments related to goods, services, government procurement, intellectual property and investment. Following signature and ratification by the parties, the agreement is expected to enter into force in January of 2004.

An earlier bilateral investment treaty between Switzerland and Chile had been signed in 1999, and entered into force in 2002. A draft of the new investment provisions contained in the EFTA-Chile free trade agreement was not publicly available at press-time.

Sources:

EFTA Secretariat, [www.efta.int](http://www.efta.int)

"Chile reaches accord with EFTA countries to create free trade zone", AFX European Focus, March 25, 2003

"EFTA forms free trade agreement with Chile", Nordic Business Report, March 25, 2003

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INVEST-SD Bulletin is edited in Boston, Massachusetts by Luke Eric Peterson for IISD.

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