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Editor's Note

1. Delayed Publication

Due to the participation of staff members in the World Trade
Organization's Civil Society symposium in Geneva last week, the June
20th edition of INVEST-SD News Bulletin is being published today.

Negotiations Watch:

2. Tobacco Treaty Opened for Signature; Trade and Investment Remain Vague, By Luke Eric Peterson

Last week, the World Health Organization opened for signature the Framework Convention on Tobacco Control, a multilateral treaty designed to control the supply and consumption of tobacco.

As reported earlier in INVEST-SD News Bulletin, tobacco firms (and their home governments) may enjoy the ability to challenge the validity of FCTC provisions through the use of existing trade and investment remedies. Several countries including the United States had lobbied for the FCTC to include language which would have expressly subordinated the treaty's commitments to those undertaken in international trade and investment agreements. However, this effort was opposed by a number of other nations during negotiation of the FCTC.

As a consequence, the treaty itself remains silent on the relative hierarchy between its own provisions and those of other international agreements. It will be left to other bodies to determine whether compliance with the FCTC may force nations to run afoul of their other international trade and investment obligations.

Last month, the United States delegation to the Geneva-based WHO had attempted to re-open discussions in order to insert treaty language which would permit signatories to the treaty to opt out of any provisions with which they disagreed. More recently, the Bush Administration abandoned this quest, which has paved the way for the Convention to be opened for signature. As yet, however, the Administration has not signaled whether it will sign the treaty - or seek ratification of the agreement by the US Senate.

Already, some nations have moved to sign the agreement. This week, member-states of the European Union signed the Convention. Meanwhile, Norway (which is not an EU member) has already signed and ratified the Convention, making it the first nation to have done so. Upon the signature and ratification of 40 nations, the treaty will come into legal force. At this point those nations which have acceded to the treaty will have certain obligations under international law to promote tobacco control.

Some controversy has dogged earlier efforts by the Canadian Government to implement certain national tobacco control measures - and industry

spokespersons have insisted that restrictions on advertising and marketing may contravene international investment rights contained in the North American Free Trade Agreement.

INVEST-SD News Bulletin will continue to monitor the FCTC and its implementation.

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"Britain Signs up to Treaty on Smoking", The Birmingham Post, June 17, 2003

"An About Face on Tobacco", The New York Times, May 26, 2003

"New Tobacco Control Treaty May Clash With Trade & Investment Treaties", INVEST-SD News Bulletin, March 7, 2003

Arbitration Watch:

3. US Senate Considering ban on MTBE; Substance at Center of NAFTA dispute,
By Luke Eric Peterson

As the US Senate continues to debate a long-delayed energy bill, it has added an amendment which would phase out, over four years, the controversial gasoline additive which has been at the center of the NAFTA arbitration between the Canadian-based Methanex Corporation and the United States.

The Senate's Energy Bill would require refineries to use more ethanol - a corn-derived gasoline additive - and would ban use of Methyl Tertiary Butyl (MTBE), a substance which has been banned in a number of US states due to concerns about its contamination of groundwater supplies.

When the Government of California moved to phase out MTBE use by 2002, the Methanex Corporation, a producer of Methanol (a key ingredient of MTBE), challenged this move under Chapter 11 of the North American Free Trade Agreement.

That case is still pending. Lawyers for the International Institute for Sustainable Development (IISD) have sought intervener status in the

arbitration. The Tribunal has indicated that it is minded to entertain submissions from IISD and several other organizations which would highlight the sustainable development implications of the dispute.

The Tribunal is currently deliberating whether to entertain submissions on factual issues - in addition to legal arguments - from prospective interveners.

Sources:

"U.S. senate passes plan to increase amount of ethanol in gasoline by 2012", The Associated Press, June 6, 2003

4. NAFTA Tribunal in Feldman Case Won't Revisit Ruling; Headed for Court Review?,
By Luke Eric Peterson

This month, a NAFTA tribunal issued a follow-up decision to its Award handed down last December in the investment dispute between a US-owned cigarette reseller and the Mexican government.

Last year, a divided tribunal had found that the Mexican Government had violated the national treatment provisions of the NAFTA. The claim arose out of Marvin Feldman's failure to receive tax rebates on taxes paid on cigarettes purchased for export out of the Mexican market.

Two of the three tribunal members held that the Mexican government had provided such rebates to domestic firms engaged in the same line of business.

This month, the tribunal issued a decision denying a Mexican request for interpretation of its earlier award. The Mexican Government had asked the Tribunal to consider the relevance of NAFTA Article 2105 to its ruling that Mexico had violated the NAFTA's provisions on national treatment.

(Article 2105 of the NAFTA protects the rights of state-parties to withhold certain forms of information including, in order to protect the "personal privacy or the financial affairs and accounts of individual customers of financial institutions.")

The Mexican government had expressed concerns about the Tribunal's having based its finding of discrimination, in part, on the failure of the Mexican authorities to produce evidence which would disprove the claimant's allegations of discrimination.

In its award, the Tribunal had noted that if Mexico had evidence that it had not treated domestic firms more favorably than the US-owned

claimant, "it has never been explained why it was not introduced." While a majority of the tribunal went on to infer discrimination based upon the available evidence, one arbitrator dissented from the finding of a violation of the NAFTA's national treatment provisions, on the grounds of a dearth of evidence.

However, in a decision handed down on June 13th, the Tribunal unanimously rejected a Mexican request for interpretation of its earlier ruling in light of NAFTA article 2105. The Tribunal held that the various questions raised by the Mexican Government related to Article 2105 amounted to an effort to seek "a new decision" in the case.

This decision of the Tribunal may not mark the final chapter in the case.

The Mexican Government has filed papers with a court in Ottawa, Ontario, for an order to have the original award set aside. A date of August 29th has been set for an initial hearing. Sources familiar with the case indicate that a decision to pursue the process in the Canadian courts has not yet been taken. However, Mexico did appeal an earlier NAFTA award in the Metalclad case, and was rewarded with a partial setting aside of that award by a Canadian court.

Although not the subject of this month's decision by the tribunal, the tribunal's earlier ruling on expropriation in the Feldman case is also of interest, insofar as it offers some comment on the contentious line between legitimate government regulation and treatment which amounts to an expropriation. While recognizing that some category of "valid governmental activity" will not be deemed to be an expropriation - and that, for example, certain forms of taxation, environmental regulation or zoning decisions would not need be accompanied by compensation for affected investors - the Tribunal added that analyses of the NAFTA's vague provisions on expropriation will need to be grounded on the specific facts of a case.

In this particular dispute, the Tribunal held that the behavior of the tax authorities while sometimes wanting, was not deemed to constitute a violation of NAFTA's Article 1110.

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Marvin Feldman V. Mexico, Correction and Interpretation of the Award, June 13, 2003

Marvin Feldman v. Mexico, Award, Dec 16, 2002, ICSID Arb (AF) 99/1, available online at:

http://www.worldbank.org/icsid/cases/feldman_mexico-award-en.PDF

5. Enron's Investment in Indian Power Plant Still Embroiled in Legal Battles

By Trineesh Biswas

Efforts to restart generation at Enron's mothballed \$2.9 billion Dabhol power plant, India's single largest foreign-owned investment, remain stalled amidst disagreements among key stakeholders in the project, in particular, between foreign and domestic lenders. From its very outset, controversy has dogged the 2,184 megawatt project based in the western Indian state of Maharashtra. In recent years, Enron's bitter dispute with the Indian government has had, according to CNN, "a chilling effect on investment in India."

The Dabhol Power Corporation (DPC) was formed in 1992 by three major US corporations, Enron (with the majority share), Bechtel, and General Electric. The project proved deeply unpopular among sections of the local public. Critics expressed concerns about the plan's social, economic, and environmental impacts, and pointed to collusion between the investors and state authorities to suppress protest activities. Subsequent investigations by Human Rights Watch and Amnesty International found credible evidence of allegations of human rights abuses inflicted upon protestors.

The project has also been dogged by allegations of corruption. The price at which the state government agreed to purchase power from the DPC was considered by many observers to be excessive. Maharashtra State Electricity Board (MSEB) officials claimed that the DPC was charging them a unit price over twice that levied by publicly-owned generating stations. Officials of the MSEB used this to justify their December 2000 default on payments and the MSEB's subsequent rescindment of its power purchase agreement with the DPC in May 2001, which prompted Enron to shut down the functioning first phase of the plant.

Former Enron chairman Kenneth Lay raised the spectre of US action against India if the dispute was not amicably resolved. Last year, a US official based in India told Dow Jones News Wire that the US Government might invoke the Hickenlooper Amendment, which provides for the withdrawal of foreign aid to a country which has expropriated US property interests without compensation.

Litigation related to the Dabhol dispute has occurred on multiple fronts. Human Rights Watch reports that the Enron-led consortium has filed an approximately \$200 million claim with the US Overseas Private Investment Corporation in an attempt to recoup losses from the DPC.

Enron has also filed arbitration claims against the Indian government, vowing that it would refuse to settle for anything less than 100 percent of the cost of its investment. In the absence of a US-India Bilateral Investment Treaty, the firm relied upon an arbitration clause in the contract which provided for arbitration in a London court. However, this arbitration has encountered various obstacles.

In October of 2001, the London Commercial court issued a stay order against efforts by the Maharashtra government to challenge in the Indian Courts the London-based arbitration.

However, following the Enron Corporation's financial collapse, the Mumbai (Bombay) High Court appointed a court receiver for the DPC and stayed the consortium's efforts for international arbitration in London.

Meanwhile, the contentious investment sits idle. The Mumbai-based Business Standard has said that "unless the plant restarts operations soon, it will become junk." However, efforts to restart generation at the plant have not gone anywhere. After showing some promise, negotiations for the sale of Enron, GE, and Bechtel's 85 percent equity to Indian firms fell through in 2002.

Sources:

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"Enron: History of Human Rights Abuse in India," Human Rights Watch, January 23, 2002. Available online at http://www.hrw.org/press/2002/01/enron_012302.htm

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

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