

INTERNATIONAL LAW NEWS

Section of International Law and Practice

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1996 Issues Agenda Announced

by Michael Sandler, Section Chair

Our Section's largest untapped resource is the array of projects our 50-plus committees and task forces are pursuing. This issue of the *International Law News* contains the "agenda" of the substantive legal issues each committee is following. I hope the publication of this list will lead more of our 15,000 members to become engaged in some of these committee activities.

Each issue listed may result in one of several possible projects: legislation, a publication, an update to committee members, model "uniform" rules, a proposed treaty, comments on pending regulations, a CLE program. Some projects may be well advanced. Many have not yet been launched, and are awaiting volunteers to form a subcommittee to take the lead.

I have listed the names and telephone numbers of each committee chair and

vice-chair, with the hope you will call the appropriate committee leader to learn more about any topic in which you are interested — and perhaps volunteer to take part.

To join the committee itself (and you may join up to three different committees), please contact our staff c/o: Committee Coordinator, ABA Section of International Law and Practice, 740 15th Street, N.W., Washington, DC 20005; (202) 662-1671; fax: (202) 662-1669; email: jgodfrey@attmail.com.

If you have not yet renewed your Section membership, you can do so by VISA, Mastercard or AMEX, by calling (800) 285-2221 (press #1 when you hear the recording).

The Issues Agenda begins on page 3.

Developments In Private International Law: Regional Approaches to Harmonization Draft 1994 Inter-American Convention on the Law Applicable To International Contracts — Plans for CIDIP VI — Other

by Don Wallace, Jr. and Harold Burman

In our prior column, we invited readers to write or call us with comments. Several of you have done so and in some cases we have referred you to possible activities in which you can become involved, within the Section

and the ABA, and elsewhere. We again encourage you to contact us.

In that column we referred to the fact that the pragmatic Anglo-American approach, based more on business practice, than the more doctrinaire continental approach,

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A Slow Boat to Chile The Prospects for Chilean Accession to the NAFTA

by John R. Magnus and
David S. da Silva Cornell

Although there is substantial agreement in both Congress and the administration that the logical next step for the United States in expanding free trade should be to extend the North American Free Trade Agreement ("NAFTA") to include Chile, it appears unlikely that this step will actually be taken any time before the 1996 elections. The cause: a political and ideological dispute over the terms on which Congress should extend "fast-track" procedures governing its consideration of new agreements negotiated by the president. Without fast-track, Chile's NAFTA accession most likely cannot proceed.

Chile

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The Need for Fast-Track Rules

Fast-track ultimately derives from the Constitution's division of powers among the branches of the federal government. Whether styled as "treaties," which must be ratified by two-thirds of the Senate, or as "executive agreements" subject to approval by a simple congressional majority, international agreements negotiated by the president face the possibility of protracted, substantive attempts by legislators to revise agreed upon provisions and extract additional concessions. This serves as a disincentive to other countries, especially trade partners negotiating over economic matters, to be forthcoming in negotiations with the administration. They do not want to give the United States "two bites at the apple." The fast-track system for congressional consideration of trade agreements evolved in response to this problem.

Fast-track as it has evolved has several components. The best known is a requirement that Congress vote either "yes" or "no" on qualifying agreements, with no possibility of amending the administration's implementing legislation. But there are other, critical aspects. For example:

- To be eligible for fast-track treatment, an agreement must have been negotiated from the outset in close consultation with Congress.
- Although the administration's implementing legislation is unamendable once formally introduced, it is normally crafted in close consultation with Congress through a Committee "non-markup" process that closely resembles the normal legislative process.
- Fast-track bills in the past have been limited to provisions "necessary or appropriate" to the implementation of

the particular trade agreement under consideration.

- Most relevant at present, fast-track rules — which are enacted as an exercise of each House's rulemaking power — expire periodically and have to be renewed. At this writing, fast-track is not in effect, so that there is no guarantee that agreements currently being negotiated by the administration will be accorded fast-track treatment.

In the House, the Republican trade leadership has sought to extend fast-track on terms that would essentially preclude agreements containing provisions on labor and the environment from receiving fast-track treatment.

With fast-track in place, trade partners can negotiate secure in the knowledge that once an agreement is signed, it cannot be altered by Congress. Chile has repeatedly stated that it will not negotiate its NAFTA accession with the United States outside the fast-track framework.

Fast-Track Still on Hold

The most recent fast-track extension, which was narrowly drafted to apply only to the Uruguay Round agreements, expired at year-end 1994. Extension has been blocked ever since for reasons both political and ideological.

When President Clinton announced his support for the NAFTA, negotiated by the Bush administration, he did so in the face of significant opposition from labor and environmental organizations. To address the concerns of these constituencies, he tied his support to the completion of side accords on labor and the environment.

Although congressional Republicans largely supported the NAFTA, and did not withdraw their support based on these new accords, many of them opposed in principle any linkage of labor and environmental issues with trade liberalization.

Now dominant in Congress, Republicans are in a position to control the terms of any fast-track extension. In the House, the Republican trade leadership has sought to extend fast-track on terms that would essentially preclude agreements containing provisions on labor and the environment from receiving fast-track treatment. With respect to the NAFTA, the Republicans are united (or nearly so) in seeking to ensure that any accessions do not extend or reinforce the side agreements. This position is anathema to the Clinton administration, which has stridently opposed any fast-track formula which would prevent it from addressing labor and environmental issues during trade negotiations.

At one level, then, what is occurring is a policy disagreement between the two political branches over the terms on which free trade should be extended to Chile and, presumably after that, broadly throughout the hemisphere. But it is broadly assumed that any new fast-track rules will apply, so long as they are in effect, to all new trade agreements and not just to an agreement bringing Chile into the NAFTA. Thus, the fast-track debate brings into play all of trade policy priorities of the United States.

Intra-party factors are at work as well. There appear to be at least three broad categories of congressional Republicans. One is a group likely to oppose fast-track as a matter of principle, as it views trade agreements as infringing on national sovereignty and causing job losses to other countries. A second group, which other-

wise would tend to support trade liberalization initiatives, appears reluctant to hand President Clinton an opportunity to reap political credit for a new trade agreement in advance of the 1996 election. A third group is sufficiently committed to trade liberalization that it would support almost any fast-track bill that satisfactorily addressed the labor/environmental issue.

Congressional Democrats are also divided over fast-track. Many Democrats would like to prohibit fast-track treatment of agreements that do not address labor and the environment. But others favor trade liberalization and are looking for a formula that would allow it to go forward — perhaps a compromise ensuring that only directly trade-related labor and environmental provisions can be included in fast-track agreements. As a further complication, congressional Democrats have linked any approval of fast-track to the full preservation of Trade Adjustment Assistance, a program benefitting workers suffering economic dislocation as a result of trade agreements. Congressional Republicans have considered cutting this program from the budget entirely.

Issues to Watch Once Chilean Negotiations Commence

Once the fast-track problem is solved, it is generally assumed that the parties will be able to conclude an agreement adding Chile to the free trade area. Although negotiating developments are notoriously difficult to predict, several issues are likely to surface once substantive negotiations begin. Among them:

- *Relationship between Chile's commitments to the NAFTA parties and its commitments to other regional trade groups.* This issue could grow in complexity and importance depending on how much time elapses, and what understandings Chile enters into within South America, before NAFTA accession talks move ahead.

■ *Adherence to the NAFTA template.*

Several aspects of the existing NAFTA package have been called into question on substantive trade policy grounds. Most noteworthy in this category are the NAFTA supplemental agreements on labor and environmental cooperation, whose extension the current congressional trade leadership has pledged to block. But another highly controversial aspect of the current NAFTA formula — with substantial opposition in the United States and apparently in Chile as well — is the Chapter 19 system of binational panel appellate review of antidumping and countervailing duty determinations. While renegotiation of these items among Mexico, Canada and the United States might be difficult, there is precedent for application of some NAFTA provisions (e.g., the “cultural industries” provisions) among fewer than all of the parties.

- *Sectoral issues.* As with any negotiation, there will be difficult sectoral issues and areas where both Chile and the existing NAFTA parties will need to cushion or phase in trade liberalization. Although U.S. imports from Chile are relatively small overall, they represent a significant percentage of Chile's total exports and consist in significant part of agricultural products. Particular concerns have been raised already regarding, for example, Chilean wines, tomatoes and peaches.

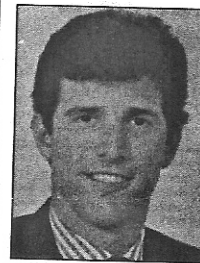
Conclusion

Given the unresolved policy dispute behind the fast-track impasse and the political reasons for key players to continue to disagree, it will be difficult to enact any extension of fast-track rules until after the 1996 elections. It is conceivable that — faced with a delay until 1997 at the earliest — Chilean officials might change course and elect to go forward even without fast-track in place. At a

minimum, some of the non-controversial issues could be cleared away during 1996 so that an accession pact can be quickly concluded once fast-track rules are in place.

It is important to remember, however, that the current landscape could change while the U.S. government deliberates over fast-track — because other governments in the region are not similarly constrained. Chile is sure to continue exploring other (non-NAFTA) free trade options, and there is no lack of suitors including the Southern Cone Common Market (“Mercosur”) and the EU. Canadian officials, meanwhile, have floated the idea of NAFTA-based free trade discussions among Canada, Chile and Mexico, which the United States might join once fast-track has been renewed. Such a negotiating structure probably would not best serve U.S. interests. ■

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