

June 20th, 2008 CTPC meeting

**William Waren, Policy Director, The Forum on Democracy & Trade
Oral Remarks on the Kennebunk-Nestle Agreements**

Waren: OK, I've got to keep it short since you've had a long day already. I was asked to take a look at this pending contract between Nestle Waters North America, otherwise known as Poland Springs, and the Kennebunkport, Kennebunk and Wells Water District. Nestle Waters North America is a subsidiary of Nestle in Italy. You know these multi-national corporations really don't have any allegiance to any one country, but apparently Nestle being a big multinational runs a lot of their international operations out of Italy, probably because of the regulatory environment there. So the question that is posed is if the water district and Nestle sign a contract could this in the future give rise to an international lawsuit, either under the WTO or under a regional or a bilateral agreement like NAFTA, if the company believes that any future regulation of groundwater extraction violates their property rights in the contract between them and the water district. And the answer is possibly, very possibly.

What's that? *I said that's a good lawyer answer. (From Linda Pistner)*

Waren: The first thing you might want to look at is the General Agreement on Trade and Services, the GATS. There's been a lot of press on whether the GATS agreement, which is part of the World Trade Organization, would have an impact on water policy generally.

The one thing to note here is that the United States has not yet made a specific commitment on drinking water services. Of course under GATS, you have to commit a

specific sector before its covered unless it's under the general domestic regulation regime, and the United States has not made a commitment to subject drinking water services to GATS discipline. And the USTR has "assured" states that the US has no current plans to make such a commitment.

But at the same time, I think it's important to take a look specifically at bottled water operations. I think you could make an argument that bottled water operations fit under the definition of a distribution service, which the United States has already made a commitment to.

Now as a practical matter, I think it is less likely that you would have nation-state-to-nation-state litigation about a Maine regulation as it affects one parcel in Kennebunk. I think the hypothetical scenario where you might get WTO GATS litigation between Italy and the United States or the EU and the United States would be if Nestle and the other big European water services companies were having trouble across many jurisdictions of the United States such that the dollar amounts involved and the political costs involved would justify nation-state to nation-state litigation.

The real problem, I think, is that very possibly you could have an investor-to-state dispute raised under an international investment agreement. Of course, NAFTA Chapter 11 is the classic international investment agreement, but there are lots of others out there that might be more likely vehicles for Nestle of Italy or one of its subsidiaries to sue the

United States for damages if future groundwater regulation interferes with their perceived property rights in the contract.

First of all, let me be clear that there is no current bilateral investment treaty with Italy.

But that may not make too much difference because Nestle is a global organization.

They have subsidiaries all over the world, and it's reasonable to believe that they have or they could easily create a subsidiary for purposes of bringing suit under the appropriate investment agreement.

Now, if Nestle were to bring suit about Maine groundwater regulation in the future, I think that one concern I would have is what they call the post-Chile/Singapore trade and investment agreements, starting with the US-Chile, US-Singapore, US-Peru and all the recent bilateral trade agreements. These investment chapters have new language that we didn't have in NAFTA, which provides very significant property rights protection for contracts in certain specific categories. And, it's mainly in terms of natural resources. They create a right for investors to sue the United States for violations of what they call individual investment authorizations and individual investment agreements. That means contracts and concessions between a private party and a unit of government, in three areas: extraction of natural resources; infrastructure like roads, ports and pipelines; and three, public utilities including drinking water, among others. Now the question here is whether a bottled water operation would be considered a drinking water operation under these provisions of the most recent investment agreements. I don't think there's any

definitive answer. A tribunal would have to parse the text and make a decision; arguably it would be covered.

But even if these special property rights protections for contracts are not the basis of an investment suit, I think that it's very possible that a subsidiary of Nestle Italy could use another investment agreement and make a so-called minimum standard treatment under international law argument. We've seen a lot of recent cases, and in particular I think of the Occidental v. Ecuador case, where international investment tribunals have ruled that any kind of significant change in the regulatory environment, especially after a contract between a government and foreign investor has been concluded, amounts to an MST or minimum standard of treatment under international law violation. And I think that, again, is a major concern.

So, it's always hard to handicap what the chances are that there could be a suit, whether the party would have standing, and whether the tribunal would buy their arguments. But, I think that there is a real risk of litigation in the future if Maine were, in say a year or two's time, to impose a comprehensive regulatory regime over groundwater that Nestle would regard as trenching on its contract rights.

A question was raised as to whether it was a state law or a municipal mandate.

Waren: One of the questions a tribunal would have to look at is whether or not the water district has state legal authority to conclude the contract. If they have such authority or

even if they believe they do and make credible representations to Nestle, there arguably would be a state action in terms of international law. If the state delegated that authority presumably to the water district, and the water district signed the contract, I think Nestle or some other international water supplier could argue that was state action.

Linda Pistner raised the question as to the issues of states asserting their regulatory authority (state regulatory approval required for ground water extraction) and whether this assertion was totally barred by these treaties – some concerned legislators forwarded their concerns to our office, I mean, if they get their approvals, they're not likely to bring an expensive treaty challenge, but if they don't get their approvals there might be a different story.

Waren: Yeah, I think that's a possibility. I don't think you should assume that you don't have regulatory power just because the U.S. entered into the agreements. The trouble with these agreements is that the language is vague and the decision process at tribunals is in many ways unpredictable. You know if you decided not to regulate in every sector where somebody might bring an investment dispute, you'd really handcuff yourself.

Linda Pistner: Oh yeah, we have never advised our state agencies to not pursue their

Sarah Bigney: I'm wondering if other states and the New Hampshire and Vermont commissions have been taking any action or addressing this issue as well?

Waren: I know that they are very focused on this. New Hampshire in particular. Senator Jackie Cilley, the chair there, has repeatedly asked for more information on water issues. And, we hear from some other states too, particularly Michigan, and we get questions I might also add from the Council of Great Lakes Governors, which has a lot of responsibility related to protecting the Great Lakes. So yeah, Maine's concerns are not isolated. There are a lot of people in other jurisdictions who have similar concerns.

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