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Arbitration Watch:

1. ICSID registers five investor-state arbitrations in February

The International Centre for Settlement of Investment Disputes (ICSID) registered five new investor-state arbitrations in the month of February, bringing to a total of nine the cases registered so far in 2004.

The latest group of cases include a contract arbitration against Gabon arising out a rail privatization experiment; two further investment treaty arbitrations against Argentina related to a series of emergency measures taken during its financial crisis; a claim by a Spanish fishing enterprise against Chile under the Spain-Chile BIT; and a claim brought by a group of German and Finnish Banks against Estonia for alleged non-payment of a loan guarantee by an Estonian-state enterprise. The last of these claims has been brought under the German and Finnish BITs with Estonia.

Negotiation Watch:

2. Korea-Chile FTA enters into force; contains significant investment commitments,
By Luke Eric Peterson

South Korea's first-ever free trade agreement is slated to take effect on April 1st of this year. The agreement with Chile was approved by Korea's parliament in mid-February despite fierce opposition from Korean farmers.

The agreement contains broad provisions for the protection and liberalization of investment. In general, the agreement adopts a number of the innovations of the investment rules contained in the US-Chile free trade agreement, including rules for the consolidation of similar investment disputes and clarification that the minimum standard of treatment does not exceed the protection accorded to aliens under customary international law.

Notably, however, the agreement does not appear to qualify its language on expropriation so as to afford greater certainty in cases where environmental, health or other sensitive regulations are at issue. Nor does the agreement provide for open arbitral proceedings, publication of all documents related to arbitral claims, or procedures for intervention by amicus curiae. Instead, the agreement provides that requests for arbitration will be publicly registered, and either party to a dispute may make a final award public. In practical terms, investors enjoy the ability to mount a claim whose existence would be publicly registered, but which would be resolved behind closed doors.

In terms of the reach of its substantive provisions, the agreement is notable for offering protection to investors and investments at the

so-called pre-establishment stage on a national treatment basis. Moreover, the parties commit to further liberalization through the auspices of bi-annual negotiations which will target existing exceptions and reservations to the agreement. The agreement also breaks ground by including prohibitions on the use of a number of so-called performance requirements - for example, rules on domestic content, minimum level of exports, etc. - in line with the treaty practice of a handful of other countries, including Canada, the US and Japan.

Sources:

"S Korea-Chile FTA to go into effect April 1", Asia Pulse, March 3, 2004

Korea-Chile FTA Text available on-line at:

http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaind_e.asp

3. Bush admin releases annual trade policy report, sets out goals for 2004

The Office of the US Trade Representative (USTR) has issued its 2003 trade policy annual report, as well as its Policy Agenda for the current year.

US Trade Representative Robert Zoellick has reiterated the Bush Administration's policy of "competition for liberalization" - the simultaneous pursuit of global, regional and bilateral trade initiatives. The USTR's annual report of trade activities offers testimony to the rapid implementation of this policy of competitive liberalization.

In recent months, the Bush Administration has engaged in a dizzying array of trade and investment initiatives with countries in the developing and developed world - and has lined up a waiting-list of nations scheduled to commence negotiations some time in 2004.

In 2003, and the first two months of 2004, the Bush Administration has concluded free trade agreements with Chile, Singapore, Nicaragua, El Salvador, Honduras, Guatemala Costa Rica and Morocco. The last of these agreements was announced only this week, with the full text of the agreement expected to be released in the coming weeks.

The US has a full slate of negotiations under way. Talks with Bahrain, Thailand, and the 5 members of the Southern African Customs Union (South

Africa, Namibia, Lesotho, Botswana and Swaziland) are in motion. More negotiations are slated to be launched later this year.

In the Western Hemisphere, discussions with The Dominican Republic have begun in an effort to add that country to the existing free trade agreement with its five Central American neighbours. Ambassador Zoellick also notes that the US is well on its way to sewing up many of the major players in the Americas:

"This year the United States intends to launch new FTA negotiations with Panama, Colombia, and Peru, and will continue preparatory work for FTA negotiations with Bolivia and Ecuador, launching negotiations with those nations when they are ready. Taken together, the United States is on track to gain the benefits of free trade with more than two-thirds of the Western Hemisphere through sub-regional and bilateral FTAs."

Generally speaking, a bilateral investment treaty is a prerequisite to a free trade agreement with the United States. In those instances where one is not in place, or it is out-of-date, state-of-the-art rules on investment are written into the resulting trade agreement.

According to the 2003 USTR annual report, the US has functional BITs with 38 countries, and investment rules as part of larger FTAs with a further 4 countries (Canada, Mexico, Chile, Singapore). Meanwhile, BITs with Russia, Belarus, Nicaragua, Mozambique, Uzbekistan and El Salvador await ratification; and FTAs with Australia, the Central America Five, and Morocco are likely to come into force in 2004.

Parties interested in commenting on pending US trade negotiations with Thailand, Panama or the Andean countries (Colombia, Peru, Ecuador and Bolivia) should note that the US Trade Representative will hold public consultation hearings on these negotiations in the coming weeks. Deadlines for applications to make submissions are looming - with some as early as March 10th - and further information is available at the links below.

Sources:

The President's Trade Policy Agenda for 2004,
<http://www.ustr.gov/reports/2004.html>

The President's Annual Report on the Trade Agreements Program,
<http://www.ustr.gov/reports/2004.html>

"US and Morocco conclude free trade agreement", USTR Press Release,

March 2, 2004, <http://www.ustr.gov/releases/2004/03/04-15.pdf>

Public Consultation on US-Andes FTA:

<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/04-3390.htm>

Public Consultation on US-Thai FTA:

<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/04-4306.htm>

Public Consultation on US-Panama FTA:

<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/04-3872.htm>

4. Investment disputes play role in US review of Andean trade preferences,
By Luke Eric Peterson

In addition to plans to launch free trade talks later this year with the Andean countries (Colombia, Ecuador, Peru and Bolivia), the US Government currently accords unilateral trade preferences to those countries contingent upon their meeting a variety of economic and social conditions, including investment and intellectual property protection, and drug eradication.

Under the terms of the Andean Trade Promotion and Drug Eradication Act (ATPDEA), the 4 beneficiary countries are subject to annual review, including a process of public comment by interested parties and stakeholders.

The next round of reviews is slated for later this year, and will include an assessment of 12 petitions received from business and non-governmental groups last autumn in response to a call for public comment upon the compliance of the Andean countries with the ATPDEA criteria.

These petitions ran the gamut from allegations by the AFL-CIO and Human Rights Watch that Ecuador has violated worker rights, to claims by several US-based firms that they have been victims of expropriation in Peru.

While US trade officials examine these petitions, one country has already resolved its dispute with a North American firm, apparently with an eye to improving its case for renewal of its preferences under the

ATPDEA (and affirming its suitability for a broader free trade and investment agreement slated to be negotiated later this year).

Colombia, which had come under heavy pressure from the US and Canadian Governments in relation to a cancelled contract with Canadian-based Nortel Networks, announced this week that it had reached a preliminary settlement with the firm.

According to a report in the Toronto Star newspaper, "Nortel is one of a group of foreign companies demanding compensation from liquidated state-owned Telecom after the company received less than the stipulated returns for installing telephone lines under joint-venture contracts signed between 1993 and 1998."

Neither Canada nor the United States has concluded a bilateral investment treaty with Colombia, so efforts to force the country to binding arbitration under such an agreement had not been possible.

Preliminary results of a USTR examination of the remaining petitions filed against the Andean countries will be announced at the end of this month.

Sources:

US Federal Register Vol.68, No. 219, Nov. 13, 2003

"Nortel to receive \$80 million U.S. in compensation from Colombia", The Toronto Star, Reuters, March 4, 2004

5. US-Australia FTA text now available on-line

The Office of the US Trade Representative has released the text of the US-Australia Free Trade Agreement, including its provisions on investment (See also "Australia-US FTA sets precedent with lack of investor-state dispute mechanism", INVEST-SD News Bulletin, February 16, 2004).

The text is available on-line at:

<http://www.ustr.gov/new/fta/Australia/text/index.htm>

6. Conference Board of Canada releases report on FDI and tax policy

In a report issued this month, the Conference Board of Canada argues that corporate taxation is becoming a more important variable in determining the location of foreign direct investment. The report warns that Canada, and other smaller countries, may need to set lower tax rates in order to attract more capital. In line with a number of other recent commentaries, the report also advocates a move away from taxation of capital and a move towards taxation of consumption (such as value-added taxes on goods and services).

The report, "Foreign Direct Investment: Decisions, Determinants, and the Role of Taxation - A Survey", is available on-line at:

<http://www.conferenceboard.ca/boardwiseii/LayoutAbstract.asp?DID=646>

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