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Negotiation Watch:
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1. Czech Republic pursues shake-up of its bilateral investment treaties,
By Luke Eric Peterson

As part of a wide-ranging review of its back-catalogue of investment treaties, the Czech Finance Ministry has proposed to the Czech Cabinet that the country terminate its investment treaties with fellow European Union (EU) members.

According to a Finance Ministry spokesperson, the Cabinet has looked favorably upon

the proposal, but is postponing a decision until the future of a draft EU Constitutional Treaty becomes clearer. As earlier reported in this newsletter, that Treaty, if adopted by EU member states would give the EU Executive arm, The European Commission, greater competence for negotiating international rules on foreign investment.

The move to terminate those investment treaties concluded with fellow EU members is significant as they have provided for the majority of the 8 arbitration claims faced by the Czech Republic under investment treaties. (The Republic has faced at least 4 multi-million dollar investor arbitrations brought pursuant to treaties concluded with the Netherlands, as well as a further 2 such claims brought under BITs with the UK and Luxembourg respectively.*)

The professed rationale for the proposed termination of these agreements is that the Republic, as a new member of the EU, is under a duty to bring its bilateral investment treaties (BITs) into conformity with EU law. The Ministry of Finance Spokesperson pointed to Article 307 of the European Communities Treaty which obliges new member-states to ensure that agreements concluded prior to their joining the EU are brought into compliance with EU law.

Further to this end, the Finance Ministry spokesperson adds that the Czech Republic is also proposing changes to some 40 BITs which are currently in force with non-EU members. In an email interview, the spokesperson elaborated: “The duty of the Czech Republic is to eliminate the incompatibilities with the EU law relating to the exclusive competence of the EU - Articles 57-60 and 301 of the EC Treaty. Consequently we would like to change articles in BITs dealing with national treatment and MFN, transfers, and insert a new article dealing with essential security interests.”

The spokesperson also noted that the Czech Republic seeks to eliminate treaty protection for indirectly-held investments, so as to minimize the incentive for foreign investors to incorporate investments in third countries for tax reasons, but to retain the right to bring investment treaty claims under the investment protection treaties signed by their home government.

In the much-publicized dispute between US businessman Ronald Lauder and the Czech Republic, Mr. Lauder invested in the Czech Republic through the vehicle of a Dutch-incorporated company, CME, and later brought investment treaty arbitrations against the Czech Republic under the Dutch-Czech BIT, as well as under the US-Czech BIT. Mr. Lauder’s ability to “take two bites of the arbitration apple” would prove controversial, as would the fact that two separate arbitral tribunals reached divergent conclusions as to the Czech Republic’s liability in the dispute.

When asked of the response to the Czech Finance Ministry’s efforts to amend a number of its investment treaties, the Ministry spokesperson indicated that the response from most governments has been “positive”. However, Czech media reports suggest that the United States has opposed the Czech Republic’s desired reforms, and that the Czech Republic is prepared to terminate the US-Czech BIT if the two sides fail to agree to

changes.

* CME (Dutch) v. Czech Republic, Saluka (Dutch)v. Czech Republic, Eastern Sugar (Dutch) v. Czech Republic, Mittal Steel Company N.V. (Dutch) v Czech Republic, William Nagel (UK) v. Czech Republic, European Media Ventures (Luxembourg) v. Czech Republic

2. United States and Uruguay ink revised BIT, opposition to treaty remains,
By Damon Vis-Dunbar

The United States and Uruguay signed an amended bilateral investment treaty (BIT) earlier this month, replacing the original which was concluded in 2004 under the administration of President Jorge Batlle.

Since the left-leaning coalition government, the Progressive Encounter-Broad Front (EP-FA), took power last year, the BIT has remained un-ratified.

The minor revisions to the treaty, agreed at this month's Summit of the Americas in Argentina, are an effort to advance the prospects of ratification. The administration hopes the revised BIT will appease members of Uruguay's governing coalition who have been fiercely opposed to its ratification.

President Tabare Vazquez first mooted the possibility of revisions to the treaty during a visit to Washington in September, when he proposed changes to several provisions: Article 4 on Most Favoured Nation; Article 17 on Denial of Benefits; and Article 27 on Selection of Arbitrators.

A particular fear, raised by senators during congressional debates earlier in the year, was that future integration amongst Mercosur members (Uruguay, Paraguay, Argentina, and Brazil) may be hampered if the MFN clause of the US-Uruguay BIT required that the same benefits be extended to US investors.

Although the Most Favoured Nation (MFN) clause, has elicited the most criticism from factions of the coalition government, it remains unchanged in light of the recent renegotiation of the US-Uruguay BIT.

However, in the days following the signing of the revised investment treaty, government officials appeared confused as to whether or not changes had been made to this clause.

In one radio interview, a senior Uruguayan foreign affairs official involved in the negotiations declared that changes had been made to the MFN clause. This was refuted by opposition senators who were quick to point out that such changes were not evident in the text of the treaty.

The Uruguayan Ministry of Foreign Affairs later clarified that no changes were made to the MFN clause. Rather, Uruguay had made a unilateral "Interpretive Declaration", stating that Mercosur investment agreements would be exempt from the BIT's MFN clause.

An editorial in the Uruguayan newspaper El Pais has ridiculed the value of this move, noting that, "(i)t is of debatable legal validity and could have been made to the 2004 version without delaying its approval."

The BIT provisions which have been altered are of less concern to the treaty's critics in the EP-FA. Article 17 on Denial of Benefits had not been controversial to begin with; meanwhile the agreed modification to Article 27 dealing with Selection of Arbitrators did not reflect what Uruguay had originally sought from US negotiators.

Following the original negotiations between the US and Uruguay, Article 17 of the BIT permitted the US to deny the benefits of the BIT if an investment is partly owned or controlled by a party in which the US does not maintain diplomatic relations. A Uruguayan investment in the US, partly owned by a Cuban investor would be an example of a disqualified investment.

In a departure from the model US BIT template, this language in Article 17 was non-reciprocal, in that it did not extend this same right to Uruguay. Notably, this non-reciprocity had been at the request of the former government, according to public statements of Isaac Alfie, the former finance minister who signed the first BIT.

"Uruguay rejected the original writing … because historically it does not have enemies," Alfie explained during a radio interview in Uruguay.

Nevertheless, a change to this language was secured as a result of the recent renegotiations between Uruguay and the US; the new BIT extends denial of benefit rights to both Uruguay and the United States.

The second modification to the BIT relates to the process whereby a panel of three arbitrators would be selected to arbitrate investor-to-state disputes in those instances where the parties to the dispute fail to agree on the choice of a third arbitrator. The proposed treaty provided that, in cases where the parties can not come to an agreement, the Secretary General of ICSID becomes the appointing authority, who will appoint the third arbitrator.

However, Uruguay wanted to ensure that it had a greater voice in the selection of this third arbitrator, and proposed that Uruguay and the US form a roster of potential arbitrators to choose from, said Carlos Amorin, a foreign affairs official who helped negotiate the new treaty, during a radio interview in Uruguay.

This idea would be rejected by the US. Instead, the new treaty has changed the

appointing authority from ICSID's Secretary General to the Chairman of ICSI D's Administrative Council (World Bank President Paul Wolfowitz).

Amorin said that although this was not the change Uruguay had sought, it was still an improvement. He argued that Uruguay would "have control over (the Chairman's) actions" to an extent it would not have with a "civil employee" such as the Secretary General. The President of the World Bank is obligated to heed the advice of its member countries, explained Amorin.

While President Vazquez has said that he hopes the revised treaty will win the support of those EP-FA senators who have opposed the BIT, a number of factions of the governing coalition have already said they will not ratify the new treaty, according to press reports.

Sources:

Revised U.S.-Uruguay Bilateral Investment Treaty text:
http://www.state.gov/documents/organization/56650.pdf

Original U.S.-Uruguay Bilateral Investment Treaty text:
http://www.ustr.gov/assets/World_Regions/Americas/South_America/Uruguay_BIT/asset_upload_file583_6728.pdf

"Uruguayan Senate debates U.S. BIT, looks for common Mercosur posture on BITS", By Damon Vis-Dunbar, INVEST-SD News Bulletin, August 22, 2005

3. U.S.-Thai FTA talks stall on investment chapter,
By Damon Vis-Dunbar and Luke Eric Peterson

The U.S. and Thailand have made little progress on the investment chapter of their potential free trade agreement (FTA), due to a persisting debate over whether to take a positive or negative list approach to liberalization.

A negative list approach, which the U.S. is pushing for, would see all sectors opened up to foreign investors apart from those explicitly exempted, while a positive list would only liberalize those sectors designated by each party.

"This cannot be resolved by the negotiators," a Thai source told ITN, adding that a decision on whether to stand firm on this issue would have to be made at the ministerial level.

Thai and U.S. officials had emerged in a positive mood from a fourth round of talks in July, after Thailand agreed to put financial services on the negotiating table – a sector

which is of key strategic interest to the U.S.

However, the latest round, held in October, saw the parties sharply at odds on how to move forward, particularly on financial services, which Thailand views as an extremely sensitive sector that must be liberalized carefully and with strong safeguards.

Also stalling progress in these talks is the issue of intellectual property rights (IPR), a delicate subject on a number of fronts, including insofar as IPRs would be covered by the investment chapter of the proposed FTA.

The U.S. and Thailand have agreed to include intellectual property within the definition of investment, in keeping with other recent investment agreements concluded by both countries.

Yet an informed source says Thailand is hesitant to see IPR related disputes opened up to international arbitration under the dispute settlement provisions of the FTA.

This is a concern which has been raised before by civil society groups. Although it is still rare for foreign investors to sue under an investment treaty to protect intellectual property, some commentators reckon it is only a matter of time. (See "NGOs warn on spread of IPRs in investment pacts but disputes slow to arise", June 10, 2005, available on-line at: http://www.iisd.org/pdf/2005/investment_investsd_june10_2005.pdf)

Theoretically, the broad protection given to intellectual property in most modern investment pacts could allow foreign investors to sue governments for measures which, although legal under the WTO's Trade Related Intellectual Property (TRIPS) agreement, might violate separate investment protections. For example, a decision by a government to issue compulsory licenses – i.e. licensing third parties to exploit a patent owned by a foreign investor – could expose that government to claims that it has "expropriated" the patent rights of the foreign investor in contravention of the terms of an investment protection treaty.

In view of this potential loophole, some, but by no means all, investment treaties will contain exceptions which limit the scope for such IPR-related lawsuits.

For example, the 2001 Canada-Croatia bilateral investment treaty dictates that compulsory licenses which conform to WTO rules may not form the basis of a claim that a host government has expropriated the patent rights of a foreign investor. By contrast, the 2001 US-Croatia bilateral investment treaty contains no similar limitation on the ability of foreign investors to construe a compulsory license as a form of expropriation.

One Geneva-based think-tank, the South Centre, has cautioned developing countries not to sign investment agreements which incorporate expansive IPR protection, unless "there is a clear demonstrable long-term benefit to them."

As in all of the current U.S. trade and investment agreement talks, negotiators find

themselves under the gun to conclude the FTA before the U.S. Trade Promotion Authority (TPA) – so-called Fast Track negotiating authority for the US President - expires in the middle of 2007.

The U.S. has stated that it would like to sign the FTA by the spring of 2006.

Another round of talks is tentatively slated for early January.

Sources:

ITN interviews

"USTR Claims Progress in Thailand FTA, But Key Problems Remain", Inside US Trade, October 14, 2005

"NGOs Warn on Spread of IPRs in Investment Pacts, But Disputes Slow to Arise", By Luke Eric Peterson, Investment Treaty News, June 10, 2005

4. Americas no closer to a hemisphere-wide investment agreement,
By Luke Eric Peterson

Following a fractious Summit of the Americas this month, Western Hemisphere governments concede that progress on a Free Trade Area of the Americas – and, therefore, a hemisphere-wide investment protection agreement - remains stymied for the time being.

At the Summit, a full 29 Governments threw their support behind a call for a revival of FTAA negotiations, which have been stalled more or less since late 2003; however five governments opposed such a move.

Venezuela, along with the Mercosur Group (Argentina, Brazil, Uruguay and Paraguay) registered their opposition to a renewal of talks in the Summit's declaration, noting that "The conditions do not exist to attain a hemispheric free trade accord that is balanced and fair with access to markets that is free of subsidies and distorting practices."

While Venezuelan President Hugo Chavez would like to see a permanent end to the FTAA project, the Mercosur Group appear more focused on the Doha Round of trade negotiations at the World Trade Organization, and the effort to dismantle Western agricultural subsidies and tariffs.

The FTAA talks ran into serious difficulty at Ministerial-level meetings in Miami in November of 2003, with Ministers finally agreeing to a two-tiered negotiating track in deference to the wishes of some parties, such as Brazil, not to agree to deeper (WTO-plus) commitments in areas such as investment or intellectual property rights.

Following the Miami meeting, regional trade ministers instructed trade negotiators to work out a common set of issues which would define the core FTAA, as well as those issues which might be addressed in side-negotiations (perhaps on a so-called plurilateral basis) by those parties interested in committing to higher obligations.

However, trade negotiators proved unable to find consensus and following a February 2004 meeting of the FTAA Trade Negotiations Committee, the talks officially stalled.

In the lead-up to this autumn's Argentina summit, several parties, including Canada and the Caribbean Community (Caricom), had written to the US and Brazilian Co-Chairs of the Trade Negotiations Committee urging a revival of FTAA talks.

In a Sept.1 letter, Ambassador Richard Bernal indicated that Caricom was "deeply concerned about the protracted impasse in the negotiations, and the apparent breakdown in communications" between the Co-Chairs.

Ultimately, these professions of support did not overcome continued skepticism from some quarters about the FTAA project. As the Ministerial meeting of WTO members looms next month in Hong Kong, it appears that the attitude of both FTAA proponents and skeptics will be to await definitive movement in the WTO talks before devoting serious attention again to the FTAA talks.

Sources:

"Summit of the Americas: Leaders Agree to Disagree on FTAA", Marcela Valente, Inter-Press Service, Nov.5, 2005

Letter to Peter Allgeier and Adhemar Bahadian, from Ambassador Richard Bernal (Caricom), Sept.1, 2005

Miami Ministerial Declaration, Nov. 2005, at: http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp

5. Canada looks at environmental impact of investment pacts with China, India, Korea, By Luke Eric Peterson

Canada's International Trade Department has announced that it is undertaking environmental impact assessments of three ongoing international economic negotiations. The assessments will examine the potential impact on Canada of a free trade agreement with South Korea, as well as of foreign investment protection treaties with India and China. All of these negotiations are under way as of this writing, although draft negotiating texts are not publicly available.

As part of its environmental assessments effort, the Department is soliciting comments and input from the public, and has set a deadline of December 29th for feedback on the

China and India talks, and December 30th for feedback on the Korea talks.

(Disclosure: the Editor of ITN sits on an external advisory committee which offers advice and input on the International Trade Canada's Environmental Impact Assessments of its trade and investment agreements.)

For more information on the environmental impact assessments see:
http://www.dfait-maeci.gc.ca/tna-nac/consult-en.asp

Arbitration Watch:
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6. Methanex will not appeal NAFTA arbitration ruling,
By Luke Eric Peterson

A spokesperson with the Vancouver-based Methanex Corporation tells ITN that the company will not seek to overturn an arbitration ruling handed down in August by a NAFTA investment tribunal.

As earlier reported by this news service, Methanex lost an arbitration filed under Chapter 11 of the NAFTA, when a 3-member tribunal ruled that the US Government had not violated the NAFTA's investment protections.

Methanex had filed a $1 Billion (US) lawsuit, alleging that a decision by the California Government to ban the fuel additive Methyl Tertiary Butyl Ether (MTBE) was not a legitimate environmental measure, but rather a protectionist ploy contrary to the NAFTA.

After the arbitral ruling was rendered on August 3rd of this year, the Canadian company would have had 90 days in which to seek to vacate the arbitral award at the seat of arbitration (Washington, D.C.).

Contacted this week, Public Affairs Director, Diana Barkley, confirmed to ITN that "there will be no appeal" of the arbitral ruling.

7. Business group, union, and NGO weigh in on UPS arbitration against Canada,
By Luke Eric Peterson

With hearings on the merits set for early next month in an investment arbitration pitting the US company United Parcel Services (UPS) against the Canadian Government, several groups have moved to intervene as amicus curiae (friends of the court) in the arbitration.

UPS filed its arbitration under NAFTA's Chapter 11 in 2000, alleging that express-courier services provided by Canada Post Corporation (Canada's public postal service) receive more favorable treatment than that accorded to UPS's Canadian subsidiary.

A tribunal consisting of Mr. L. Yves Fortier (Canada's appointee), Mr. Ronald A. Cass (the investor's appointee) and Sir Kenneth Keith, issued a decision on jurisdiction in the case in November of 2002. Written arguments on the merits of the case were filed this year, and a hearing on the merits is slated to begin in Washington DC on December 12th.

The hearings will be open to the public, via closed-circuit broadcast at the headquarters of the World Bank in Washington D.C. Although the claim is governed by the UNCITRAL rules of arbitration, it is being administered by the World Bank's International Centre for Settlement of Investment Disputes (ICSID).

The UPS dispute has attracted considerable public attention, and several groups have recently applied to the tribunal for the right to make amicus curiae submissions in the case. Those applications and the accompanying legal submissions are now in the public domain.

In a joint application made by the Canadian Union of Postal Workers (CUPW) and an advocacy group, The Council of Canadians, the would-be amicus curiae observe that the UPS arbitration has the potential to impact upon jobs and pensions of CUPW members, as well as upon other universal public services in Canada.

In their legal submission, the groups lament that arbitral documents provided to the public have been "extensively redacted", and that this has caused "serious prejudice to the intervenors by denying them an opportunity to properly respond to issues that are of both direct interest to them, as well of broader public interest to many Canadians."

Notwithstanding this apparent obstacle, the groups raise several legal arguments for consideration by the tribunal. First, they criticize the effort by UPS to challenge the provision of a public service, and warn against permitting investor-state arbitration to be used in a manner which might undermine universal public services such as postal, health care, library or other services.

In legal terms, they emphasize that Canada Post is not "in like circumstances" to UPS, because of the former's obligation to provide universal services to all Canadians; as such, the intervenors say that an argument by UPS that it has not received 'national treatment' is not applicable in this case.

The brief also takes issue with a novel argument propounded by counsel for UPS in earlier written arguments to the tribunal.

UPS has argued in pleadings before the tribunal that Canada Post competes unfairly with UPS, by keeping wages low, thanks to the denial of collective bargaining rights to certain postal workers. UPS argues that this conduct runs afoul of Canada's obligations under

Article 1105 of NAFTA to provide “treatment in accordance with international law”. Indeed, counsel for UPS argue that Canada’s failure to permit collective bargaining, and other rights such as freedom of association, is in violation of international labour and human rights covenants and customary international law, which constitutes a failure on Canada’s part to live up to its aforementioned NAFTA Article 1105 obligations.

This claim has been contested by lawyers for Canada. They insist that the argument is “misplaced”, and that, in any event, UPS, as a foreign investor, does not have standing to allege breaches of rights owed to Canadian postal workers. In a filing before the tribunal, Canadian Government lawyers argue that “(A) NAFTA Chapter 11 tribunal is not the proper forum for a dispute over the application of labour law to Canada Post,” and that other complaints mechanisms exist for claims related to international human rights and labour standards.

In their amicus submission, CUPW and the Council of Canadians, argue that UPS not only lacks standing to argue such a claim, but that permitting a foreign investor to make such a claim could lead to a breach of human rights and labour treaties. Specifically, they warn against an “asymmetrical enforcement regime” whereby foreign investors are granted rights to claim damages which direct victims of labour rights violations lack for themselves.

Meanwhile, in a separate application and submission tabled in the UPS arbitration, the US Chamber of Commerce has put forward amicus curiae arguments which touch upon several legal points, most notably, the interpretation of the right to “national treatment” as it is owed to foreign investors.

The Chamber urges what it describes as a “predictable” and “uniform” interpretation of national treatment across different international economic treaties. The group objects to Canada’s efforts to distinguish the version of national treatment found in NAFTA’s investment chapter from that found in other economic agreements (such as WTO trade agreements or other of the NAFTA’s trade provisions).

Instead the group calls for investment arbitrators to interpret the right to national treatment in line with certain trade rulings which have characterized the concept as one which provides for “the protection of equality of competitive opportunities.”

The Chamber calls for this consistent interpretation so that “Businesses can operate in foreign countries confident in the knowledge that they will enjoy equal competitive opportunities, regardless of whether they are selling goods, services, investing or engaging in other international activities protected by trade and investment treaties. Businesses do not need to waste resources determining the interpretation of various national treatment provisions.”

However, the interpretation of national treatment in the foreign investment context has been a subject of some dispute in legal and academic circles, with some agreeing that the concept should be read primarily through the lens of existing jurisprudence from the trade

law realm, while others argue that trade law does not provide the best guide for interpreting legal obligations which are owed to foreign investors.

Recently, a NAFTA tribunal, in an award rendered in August of this year in the Methanex Corporation v. United States arbitration, rejected a bid by a foreign investor to read Chapter 11's national treatment obligations through the lens of trade law.

While the US Chamber of Commerce does not address the Methanex tribunal's ruling directly, the concluding paragraph of the Chamber's amicus curiae submission appears to hint that other (less desirable) interpretations have been adopted by NAFTA Chapter 11 tribunals.

In language which suggests that tribunals have not followed the Chamber's preferred interpretation of the national treatment clause, the body calls on the UPS tribunal to "use this arbitration to return to a straightforward interpretation of the national treatment obligation in NAFTA Article 1102 …."

Sources:

Canadian Union of Postal Workers and Council of Canadians Applications for Amicus Status and Amicus Submissions, Oct.20, 2005, available on-line at: http://www.dfait-maeci.gc.ca/tna-nac/documents/UPSdoc2.pdf

Chamber of Commerce of the United States Application for Amicus Status and Amicus Submission, Oct.20, 2005, available on-line at: http://www.dfait-maeci.gc.ca/tna-nac/documents/UPSdoc1.pdf

8. Czech farmers and environmentalists oppose Mexican investor; Arbitration in wind, By Damon Vis-Dunbar

A Czech politician has cautioned that a dispute between farmers and a Mexican car-part manufacturer could lead to international arbitration under a bilateral investment treaty (BIT) if the Mexican firm elected to pull out of the Czech Republic as a result of the dispute.

The warning comes as Nemak - one of the largest foreign investors in the Czech Republic – finds itself in conflict with farmers and environmentalists over a plant constructed in North Bohemia.

A small group of farmers, represented by an environmental law service, allege that Nemak was unlawfully granted building permits for agricultural land by Czech authorities who were eager to attract investment to the poor region.

Last spring, the courts found in favour of the farmers in the case of one of these building permits. Another case is still being heard.

For its part, Nemak has declined to comment publicly on the dispute. It has not suggested that it is considering arbitration.

Nonetheless, Vlastimil Aubrecht, a government representative for the region, has made several statements to the Czech press raising the possibility of a costly arbitration under a Mexican-Czech Republic bilateral investment treaty (BIT).

However, in an interview with ITN, a lawyer representing the Czech farmers dismisses Aubrecht's talk of arbitration as a fear tactic.

"It is obvious that state agencies were so eager to attract foreign investment that they violated the law," said Pavel Franc, a lawyer representing the farmers. "It would be hard to show that (Nemak) was treated unfairly."

In recent years the Czech Republic has been the target of a number of high profile disputes brought to arbitration under investment treaties. In one of the more notorious instances, the Republic was found liable for some $350 Million US in an arbitration with Central European Media (CME). The outcome of that case gave rise to extensive political recriminations within the country.

Sources:

ITN interviews

"Mexican investor Nemak in troubles", Czech News Agency (CTK), September 21, 2005

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