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Negotiation Watch:

1. Canada-European Union reach deal to amend six investment treaties,
By Luke Eric Peterson

The European Commission has given its blessing to a series of proposed changes to investment treaties concluded between Canada and various Eastern and Central European nations which recently have become - or are slated to become - members of the European Union.

The Commission, the EU's executive branch, announced in a press release that it has given its "full support to the results of the discussions between Canada on the one side, and the Czech and Slovak Republics, Poland, Hungary, Latvia and Romania on the other side aimed at ensuring full compatibility between bilateral Foreign Investment Protection Agreements (FIPAs) and the entire body of EU laws and regulations."

As reported in earlier editions of INVEST-SD News Bulletin, the Commission had raised concerns about a number of provisions in investment treaties previously concluded by its new members with a variety of foreign parties, including the US, Canada and Japan.

Last year, the US and EU reached a political understanding which paved the way for amendments to the US's investment treaties with various new EU member-states. However, the two sides were unable to resolve their differences over treaty provisions mandating the free transfer of capital.

The European Commission has expressed fears that some treaties lack safeguards which permit restrictions on capital flows under certain circumstances, such as a balance-of-payments or other financial crisis. In this respect, the investment treaties were considered to be at odds with European Union law which does provide for exceptional restrictions on the movement of capital flows.

However, as reported by INVEST-SD, US and EU officials could not agree on changes to the transfer provisions of the US's investment treaties, perhaps in part because US officials maintained that some long-standing EU member-states have negotiated investment treaties which are not in compliance with EU law.

Indeed, earlier this year, the European Commission announced that it had made formal information requests from Denmark, Sweden, Austria and Finland, asking each of these EU member-states to ensure that their investment treaties are in full compliance with EU law.

Meanwhile, a Canadian official with the Department of International Trade declined to provide INVEST-SD with specifics of the changes which were agreed with the European Commission, and six of Canada's investment treaty partners - citing the fact that the various member-states must still move to modify the agreements. However, a press release from the European Commission confirms that the EU gave its blessing to treaty changes which will ensure full compliance with EU laws, including with respect to capital movements.

Although a source tells INVEST-SD that Canada also sought certain changes to the existing treaties, inspired by its own 2004 model investment treaty, it is unclear whether these changes pertained to substantive and/or procedural features of the existing treaties with the Czech and Slovak Republics, Poland, Hungary, Latvia and Romania.

As reported in an earlier edition of INVEST-SD Canada's 2004 model treaty, which is expected to serve as a template for the negotiation of any new Canadian investment treaties, does countenance procedural innovations such as full disclosure of investor-state disputes, open arbitral proceedings, publication of all documents related to disputes, in addition to several key substantive changes, such as language designed to limit the scope and reach of several controversial provisions such as those on expropriation and so-called minimum standards of treatment.

Sources:

INVEST-SD Interviews

EU Executive Branch Looking at Possible Incompatibilities of Some European BITs, INVEST-SD News Bulletin, May 24, 2004, available at: http://www.iisd.org/pdf/2004/investment_investsd_may24_2004.pdf

"Canada Releases its Revised Model Investment Treaty", INVEST-SD News Bulletin, May 24, 2004, available at: http://www.iisd.org/pdf/2004/investment_investsd_may24_2004.pdf

"Bush Admin Sets Process in Motion to Amend BITs with Eastern and Central Europe", INVEST-SD News Bulletin, February 16, 2004, available at: http://www.iisd.org/pdf/2004/investment_investsd_feb16_2004.pdf

"EU-US agree to alter US BITs with EU accession candidates", INVEST-SD News Bulletin, September 19, 2003, available at: http://www.iisd.org/pdf/2003/investment_investsd_sep19_2003.pdf

2. Aggrieved investors urge US to deny FTA to Peru, Ecuador,
By Luke Eric Peterson

Representatives of two US business groups in testimony to a sub-committee of the House Committee on International Relations have highlighted a series of outstanding investment disputes which they say cast doubts upon the ability of Ecuador and Peru to live up to the terms

of a broader free-trade agreement which is currently under negotiation.

According to a report in the Washington-based newsletter Inside U.S. Trade, and testimony transcripts available on Inside U.S. Trade's website, representatives of the US Chamber of Commerce and the Council of the Americas have expressed alarm about the growing number of investment disputes in the two countries.

John Murphy, a Vice President of the US Chamber, told the committee that the conclusion of free trade negotiations between the US with Ecuador and Peru should be conditioned upon the resolution of the "great majority" of investment disputes currently outstanding in Peru and Ecuador.

Mr. Murphy pointed to a number of disputes between US firms and the Peruvian tax agency, SUNAT. He also cited several high-profile disputes between US investors in Ecuador, including Occidental, Bechtel and BellSouth. He also denounced a lawsuit brought by Ecuadorian citizens in local courts against Chevron-Texaco for alleged environmental and health damages.

Meanwhile, Eric Farnsworth, a Vice President with the Council of Americas, was critical of the comments of senior Ecuadorian government officials who had expressed the opinion that Ecuador should "unilaterally abrogate" its bilateral investment treaty with the United States. Farnsworth added that

"Even where companies have gone all the way to international arbitration, generally the end of a long road of local remedies and legal battles-a true last recourse for aggrieved parties-and have won favorable judgments, the government has refused to recognize the result."

Data on the appeal of arbitration awards are difficult to come by, not least because arbitrations themselves are not always a matter of public record. As such, it is difficult to know what percentage of arbitrations end up in domestic courts.

However, anecdotal evidence certainly suggests that governments - and investors - are turning to domestic courts on occasion, in an effort to challenge (or enforce) arbitral awards arising out of investment treaty disputes.

As reported in a recent edition of INVEST-SD, the Ecuadorian government is currently challenging in UK courts an arbitral award handed down this summer in an investment treaty claim brought by US-based Occidental.

Sources:

"Peru, Ecuador could be dropped from Andean FTA over investment", Inside U.S. Trade, October 8, 2004

Testimony by Vice President of Western Hemispheric Affairs, U.S. Chamber of Commerce, John Murphy and Testimony by Washington Vice President of The Council of The Americas, Eric Farnsworth before House Committee on International Relations, Sub-Committee on the Western Hemisphere

3. New US ambassador to Korea reiterates obstacles to BIT,
By Luke Eric Peterson

The newly appointed US ambassador to South Korea has confirmed that several outstanding concerns continue to stand in the way of a bilateral investment treaty between Korea and the United States. Moreover, Ambassador Christopher Hill noted that successful conclusion of BIT negotiations are being held out as a prerequisite for US consideration of a broader free trade agreement with Korea.

At the top of the list of outstanding US grievances is Korea's screen quota system which mandates that 40% of movies screened in Korea must be of domestic origin. This domestic-content rule has long angered the Motion Picture Association of America which lobbies on behalf of the US film industry.

Ambassador Hill confirmed that the US seeks a reduction of the quota to 20%, followed by its eventual elimination. He also flagged agricultural barriers, weak intellectual property rights protection and hefty tariffs in the auto sector as other obstacles impeding progress on a bilateral investment treaty.

As reported in earlier editions of INVEST-SD, US efforts to dismantle Korea's screen quota scheme have met with sustained opposition from Korea's cultural industries.

Sources:

"S. Korea has issues to solve for trade deal with U.S.: U.S. Envoy", Asia Pulse Pte Ltd., October 5, 2004

"US Ambassador calls for Korea to abandon film quota; PM promises to

keep talking", By Luke Eric Peterson, INVEST-SD News Bulletin, available at: http://www.iisd.org/pdf/2003/investment_investsd_nov28_2003.pdf

Arbitration Watch:

4. Tribunal upholds jurisdiction in investment treaty claim against Turkey,
By Luke Eric Peterson

In a decision released this past summer a tribunal at the International Center for Settlement of Investment Disputes (ICSID) has upheld jurisdiction in a claim under the US-Turkey bilateral investment treaty (BIT).

The claim was mounted by three parties, PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi (a Turkish-incorporated project company of PSEG Global).

A three member tribunal operating under the ICSID rules of arbitration ruled on June 4 that it had jurisdiction over the claims of PSEG and its local project company, however it declined the North American Coal Corporation's claim.

A legal summary of the tribunal's decision is available on the website of the American Society of International Law at:
<http://www.asil.org/ilib/ilib0716.htm#j3>

The tribunal's decision is also of note in that it helps to clarify an issue which will be of interest to countries that have acceded to the ICSID Convention or are planning to accede in future.

Under Article 25(4) of the ICSID Convention, parties may "notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre...". However, as the Turkish Government discovered, these notifications are of limited value. In particular, the notifications do not serve to rein in the (generally broad) consents to jurisdiction written into international investment treaties.

Although Turkey argued before the tribunal that it had notified ICSID

that it would not agree to arbitrate certain categories of investment disputes, this notification did not serve to bar PSEG's bilateral investment treaty claim.

The tribunal observed that the notification procedure was "for information purposes", and that it appears to have been intended to signal the types of disputes which a given state would consider consenting to bring to the ICSID facility.

In an earlier era, when such consent to arbitration was generally advanced in individual investment contracts, this notification might have served a useful function insofar as it alerted foreign investors as to whether they were likely to negotiate a contract which provided for ICSID dispute settlement in the event of a dispute.

However, this notification procedure has been rendered moot in many instances, thanks to the widespread proliferation of international investment treaties, most of which provide sweepingly broad advance-consent on the part of states to let investment disputes proceed to arbitration.

In Turkey's case, the dispute settlement provisions of its investment treaty with the United States had failed to demarcate the same limitations which had been notified to ICSID under Article 25(4) of the Convention.

In practical terms, the tribunal noted that Turkey could have followed the practice of some countries, such as China, which has drafted various investment treaties which expressly make certain to deny consent to those types of claims which it had earlier signaled (through the ICSID notification process) that it was unwilling to subject to international arbitration.

5. Iranian Parliament claims right to overturn foreign investment contracts,

By Luke Eric Peterson

According to recent press reports, hard-line elements in the Iranian Parliament have passed a bill which gives parliamentarians an effective veto over foreign investment deals concluded by the Iranian government.

The move has been seen as a blow to reformist President Mohammad Khatami and has cast a shadow over several major foreign investment projects, as

well as raising questions about Iran's investment climate.

Under legislation passed last month Parliament has reserved to itself the right to cancel foreign investment contracts, including a multi-billion dollar deal with Turkish firm Turkcell for a private mobile telephone network, as well as a \$200 million (US) deal with Turkish-Austrian consortium, Tepe-Akfen-Vie (TAV), for the building and operating of a new airport.

Earlier this year, work on Tehran's Imam Khomeini International Airport was halted, as hardline politicians denounced the appointment of the foreign consortium, and voiced concerns about the Turkish company's business links to Israel.

Parliamentarians have voiced national security fears in relation to both foreign investment contracts, warning that foreigners might be able to tap cellphone conversations.

Last week, the Parliament voted to impeach the Transport Minister, Ahmad Khorram, for "tarnishing the Islamic Republic of Iran's reputation" in relation to the airport deal.

Meanwhile, President Khatami was forced to cancel a planned visit to Turkey late last month as the fate of the two major Turkish contracts was put into limbo. As parliament prepared to vote on an earlier draft of its legislation, Khatami lashed out at the proposal, warning:

"It will paralyse the work of the government. It will discourage foreigners from investing in Iran. This will cost the country billions of dollars."

The Iranian Parliament is now reviewing the two Turkish contracts, and has reserved to itself the right to veto other major foreign investment deals.

While the Iranian Parliament grapples with the executive in an effort to control foreign investment into the Islamic Republic, it remains unclear if either of the Turkish firms at the centre of the controversy has resorted to international legal remedies. Some press reports have quoted unnamed sources warning that Iran could find itself brought before international tribunals if it quashes the contracts.

Turkey and Iran signed a bilateral investment treaty in December of 1996.

Sources:

Conservatives in Iran Battle the Spread of Foreign Investment, By Nazila Fathi, The New York Times, Oct. 9, 2004

Iran Conservatives sack architect of airport deal with TAV, Turkish Daily News, October 5, 2004

Fresh blow to Iran's Khatami as hardline MPs sack reformist minister, Agence France Presse, October 3, 2004

Reformist anger as Iranian hardliners approve foreign investment veto, Agence France-Presse, September 22, 2004

6. Mexico faces three new treaty claims under BITs, NAFTA,
By Luke Eric Peterson

The Washington-based International Centre for Settlement of Investment Disputes (ICSID) has registered three new investment treaty claims mounted against Mexico.

One claim has been brought by Archer Daniels Midland (ADM) and A.E. Staley Manufacturing Company under the North American Free Trade Agreement (NAFTA).

In common with an earlier NAFTA claim against Mexico launched last year by Corn Products International, the ADM case seeks to challenge a Mexican tax imposed on high-fructose corn syrup.

Foreign investors in the Mexican food processing industry allege that the tax forces them to resort to using Mexican sugar rather than corn-derived syrups.

Meanwhile, two firms - one French, and one Argentine - have filed separate claims under their nation's respective bilateral investment treaties with Mexico, alleging damages in relation to a concession to operate Mexico's national vehicle registry

Sources:

INVEST-SD Interviews

"ADM files notice of intent to sue Mexico under NAFTA chapter 11", INVEST-SD News Bulletin, available at:

http://www.iisd.org/pdf/2003/investment_investsd_oct20_2003.pdf

7. ICSID/AAA/ICC to hold Paris conference on international arbitration

The International Chamber of Commerce will host an international arbitration conference November 19th in Paris. The event, which is jointly sponsored by the International Centre for Settlement of Investment Disputes (ICSID) and the American Arbitration Association (AAA), will cover several issues of interest to investment law experts including a session on "The applicable rules of law to disputes between state entities and private companies - the interaction between contract arbitration and treaty arbitration".

For further information about the event and to register, see:

<http://www.worldbank.org/icsid/2004colloquium.pdf>

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