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Contents at a Glance:

Negotiation Watch:
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1. US Launches BIT negotiation with Uruguay; Pakistan Next in Queue?, By Luke Eric Peterson

Following an announcement last November, the Office of the US Trade

Representative has officially launched negotiations with Uruguay to conclude a bilateral investment treaty between the two countries.

Following the set-back of regional talks to conclude investment provisions as part of a Free-Trade Area of the Americas (FTAA), the BIT negotiations with Uruguay may represent an effort to take advantage of differences within the Mercosur trading bloc (consisting of Brazil, Argentina, Uruguay and Paraguay) on the contentious issue of international investment commitments. Of the Mercosur countries, only Argentina currently has a bilateral investment treaty with the United States.

At the conclusion of last November's FTAA meeting of regional trade ministers in Miami, US Trade Representative Robert Zoellick floated the possibility that the Mercosur members might be amenable to individual negotiations on investment. According to a report of the Brazilian news agency Estado, Zoellick Zoellick appeared to hold out a multi-track approach for Mercosur members: "There are differences among Mercosur members. For example, we have an agreement on investments with Argentina that may interest some of its neighbours."

Although US negotiations with Uruguay mark the first US investment treaty negotiation launched in five years, the US has concluded comparable legal provisions in a string of broader free-trade agreements in recent years.

Moreover, the USTR is also engaged in consultation with other countries to discuss possible BIT negotiations.

As reported in a recent edition of INVEST-SD News Bulletin, Pakistani government officials have reported that the US and Pakistan are contemplating the launch of negotiations on a BIT. While Pakistan's Commerce Minister, Humayun Akhtar Khan, had signaled that those negotiations would commence in April, a USTR official told INVEST-SD that, to date, there have only been "discussions with Pakistan on an eventual BIT negotiation".

Sources:

"United States and Uruguay Begin Investment Treaty Negotiations", USTR Press Release 2004-39, May 12, 2004

"Mercosur looking to begin trade talks with USA in January 2004", BBC Monitoring Reports, Agencia Estado News Agency, Nov.20, 2003

"US-Pakistan Slated to Negotiate Investment Treaty this Month", By Luke Eric Peterson, INVEST-SD News Bulletin, April 5, 2004

2. EU Executive Branch Looking at Possible Incompatibilities of Some European BITs,
By Luke Eric Peterson

In the latest sign that the European Commission is looking seriously at the rafts of bilateral investment treaties concluded by its member-states, the Brussels-based executive of the European Union has made formal requests for information from 4 member-states.

The requests to Denmark, Sweden, Finland and Austria highlight a potential loophole in some bilateral investment treaties (BITs) concluded by those countries before they joined the EU. The primary concern expressed by the Commission is that certain BITs concluded with non-EU members may conflict with EU rules on the free movement of capital.

The EU treaty contains certain safeguards for the imposition of exceptions in serious financial difficulties, as well as restrictions linked to an objective of the EU's common foreign or security policy, for example the imposition of sanctions against a given country, regime or terrorist group. Not all bilateral investment treaties have been drafted with such careful attention to balance.

Lately, the European Commission has sought to nudge its member-states, including prospective member-states, to confront potential incompatibilities between their investment treaties and EU law.

In the lead-up to the May 1st accession of 10 new members from Eastern and Central Europe, the European Commission initiated a dialogue between the United States and several accession candidates in order to address a series of Commission concerns with respect to existing BITs between the US and those accession countries. This discussion led to a political understanding which mandated certain legal revisions to the relevant investment treaties. It has also spawned similar discussions with other major EU trading partners, including Canada and Japan.

However, this month's request for information from several of its longer-standing member-states marks the opening of a new front in the European Commission's efforts to ensure compatibility between its laws and international investment commitments entered into by individual member-states with non-EU countries.

In addition to concerns about rules on the movement of capital, the Commission has flagged Denmark's failure, in its earlier BIT with Indonesia, to include an exception to most-favored nation treatment which would have ensured that Indonesian firms could not lay claim to the more-favorable treatment meted out by Denmark to investors of European Union member-states.

While such exceptions for so-called Regional Economic Integration Organizations (REIO), like the European Union, are common in investment treaties, the Danish-Indonesian treaty fails to include such a clause. Accordingly, the Commission expresses a fear that this treaty loophole might entitle Indonesian investors to certain forms of special treatment which had been earmarked only for EU investors under EU law.

By issuing a formal request for information from Denmark, Finland, Austria and Sweden, the Commission has set in motion a process which could culminate in legal action before the European Court of Justice, in the event that these treaty loopholes are not closed.

The affected member-states have two months in which to formulate a response to the Commission, before any further steps would be taken by the Commission.

Sources:

INVEST-SD Interviews

"Free movement of capital: infringement procedures against Denmark, Austria, Finland and Sweden concerning Bilateral Investment Treaties with non-EU countries", European Commission press release, May 10, 2004, at:
http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/618&format=HTML&aged=0&language=EN&guiLanguage=en

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

3. Canada Releases its Revised Model Investment Treaty; Disputes to be Open,
By Luke Eric Peterson

The Government of Canada has released a new model foreign investment agreement which boasts a number of key substantive changes, as well as a commitment to greatly increased transparency in the arbitration of international investment disputes.

The 2004 Model Foreign Investment Protection Agreement (FIPA) represents the second significant overhaul of Canada's template since the country began to negotiate bilateral investment agreements in the late 1980s. The new FIPA will replace a draft which dates to 1994, when Canada revised its negotiating strategy so as to take account of the state-of-the-art investment provisions written into the North American Free Trade Agreement (NAFTA) with the US and Mexico.

Many of the new features of the 2004 model reflect lessons gathered from a decade's experience with the NAFTA's controversial Chapter 11 on investment. In particular, Canada has opted to follow recent US practice in supplementing treaty rules on expropriation by including an understanding designed to clarify the definition of indirect expropriation. The concept has been subject to considerable speculation, with some investors insisting that it encompasses a wide category of regulatory interference which has the effect of diminishing an investment's value without destroying it.

In common with recent US treaty practice, the understanding contained in Canada's model FIPA urges a fact-based, case-by-case inquiry into alleged indirect expropriations; an inquiry which considers various factors including the economic impact of a measure, the extent of interference with reasonable investment-backed expectations, and the character of the impugned measure.

Additionally, the new FIPA adds a caveat similar to that found in new US agreements, to the effect that only in "rare circumstances" will non-discriminatory measures designed to protect legitimate public welfare objectives, such as health or environment, be deemed to be indirect expropriations.

Indeed, Canada's model language goes further than that of the US by offering an example of such 'rare circumstances': "when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith".

Apart from changes to the expropriation rules, Canada has also incorporated new language designed to clarify the meaning of the minimum standard of treatment - in line with recent US Free Trade Agreements, and an earlier Interpretative Statement by NAFTA Ministers.

Another contentious treaty provision, most-favored nation treatment, is limited by an exception which dictates that the treatment shall not reach back into existing agreements concluded by one of the parties.

A number of general exceptions formerly lodged in the 'suburbs' of the agreement have migrated to the centre of the treaty, and are included in the main body of the treaty text .

The annexes of the new model FIPA are given over to more extensive listings of specific exceptions, such as for non-conforming measures. Following the NAFTA approach, the new FIPAs will list all existing non-conforming national measures (but not those at the sub-national level). Additionally, the treaty will list all sectors where parties may introduce new such measures.

The greater part of the new treaty is given over to detailed rules on dispute settlement. In common with earlier agreements, investor-state arbitration is provided under the ICSID and UNCITRAL rules. The two parties can also agree to permit other arbitration rules to be used.

Following a recent trend in US free trade agreements, all dispute hearings are to be open to the public. Likewise, all documents related to a dispute, including hearing transcripts, will be in the public domain. Provision is also made for intervention by interested non-parties as amicus curiae.

Notably, the agreement does not provide for a process of appellate review of arbitral awards, leaving this task to domestic courts in the place where the arbitration is sited.

The new FIPA also contemplates the adoption of a code of conduct for arbitrators, to be agreed by the two state-parties to a given treaty.

Certain matters may be excluded from dispute settlement under the agreement, and Canada's draft treaty indicates that it will not permit challenges to any acquisition decisions under the Investment Canada Act; Nor will decisions pursuant to its competition laws be subject to the treaty's dispute rules.

In terms of the treaty's commitment to sustainable development, the agreement's preamble does advert to the concept, albeit only to insist that investment promotion and protection will be conducive to sustainable development. The agreement also contains a clause which recognizes that it is inappropriate to lower domestic safety, health or environmental standards in order to attract investment.

Notably absent from the model text is the tautological language that has appeared in other agreements, including the NAFTA, to the effect that nothing in the agreement prevented parties from adopting environmental measures which were consistent with the agreement.

In common with most recent Canadian and US treaties, foreign investors are accorded the better of national treatment or most-favored nation treatment at the pre-establishment and post-establishment stages of an investment (i.e. during the acquisition/entry stage, as well as after an investment has been established).

Finally, the agreement introduces further strictures against certain forms of performance requirements, including a prohibition of any measures which mandate that a foreign investor's local sales be pegged to the volume of its exports or foreign exchange earnings.

Sources:

Information about Canada's FIPA program, including existing FIPAs and the 2004 model FIPA, can be found at:
http://www.dfait-maeci.gc.ca/tna-nac/fipa-en.asp

Arbitration Watch:
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4. Argentine Government Lawyer Moves to Private Practice,

The former chief legal advisor to the Argentine Solicitor-General's office has joined the arbitration practice of the global law firm Clifford Chance.

According to an April 23 report in The Lawyer, Carlos Ignacio Suarez Anzorena will join the firm's London office pending work permit approval.

For the past four years, Mr. Anzorena has played a key role in the Solicitor General's defence of a string of investor-state arbitrations

leveled at Argentina in the wake of its 2001 financial crisis. Argentina has not used outside counsel to defend against these investor-state arbitrations, preferring instead to rely upon the strength of its in-house lawyers.

Audley Sheppard, an arbitration partner with Clifford Chance in London told INVEST-SD that Mr. Anzorena's "unique experience in investment disputes will be a great addition to the firm's growing worldwide investment protection practice." He added that Mr. Anzorena will also advise on commercial disputes in Latin America and elsewhere.

Although some 35 foreign investors have signaled their intent to arbitrate against the Republic, Clifford Chance has been retained in only one of these cases to date, an arbitration brought by US energy firm, AES.

Sources:

"Clifford Chance Snaps up Ex-Argentine Govt Advisor", The Lawyer, April 26, 2004

INVEST-SD Interviews

Briefly Noted:
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5. OECD and APEC Convene First Seminar on Investment Flows and Treaties

The OECD and APEC are convening the first in a series of cooperative seminars on international investment in the lead-up to this week's meeting of APEC trade officials in Pucon, Chile. The investment seminar will feature contributions from APEC and OECD Secretariat staff, along with government officials, private sector representatives and investment lawyers and arbitrators.

The seminar, "Current FDI Trends and Investment Agreements: Challenges and Opportunities", is hosted by the Chilean Ministry of Foreign Affairs, with the sponsorship of the Governments of Canada and Japan. The event will take place on the 25th and 26th of May and should explore foreign direct investment trends, investment agreement legal disciplines, and international investment disputes.

Full information can be found at the following web address:
http://www.apec2004.cl/Documento_det.asp?IdDoc=37&idioma=ing

6. NYT: Angola will reveal payments from Chevron

According to a recent report in the New York Times, the government of Angola has signaled that it will disclose some payments that it receives from foreign oil companies. Government officials have said that they will confirm some $300 million dollars in payments from Chevron, the single largest foreign investor in the resource-rich African nation.

In recent years, Angola has endured withering criticism for its inability to account for billions of dollars which have been paid in royalties, fees and taxes by foreign investors.
As reported in a recent edition of INVEST-SD News Bulletin, a study by Human Rights Watch alleges that more than $4 billion (US) in revenues disappeared in a five year period - an amount exceeding total expenditure on social spending in Angola during that same time span.

Angola's recent move towards greater openness has been hailed by some campaigners seeking greater transparency of fees paid to developing countries by investors in the extractive industries.

Global Witness, a UK-based campaign group, has praised Angola's recent gesture, but described it as very preliminary:

"This disclosure may be a first step to improve the transparency of Angola's oil income, which has previously been subject to wholesale diversion and theft by members of the country's elite."

"The Angolan government must now put concrete measures in place to address oil revenue mismanagement and misappropriation. Publishing Chevron's signature bonus is a step forwards, but billions of dollars of taxes and royalties paid by companies in Angola remain unaccounted for."

Sources:

"Angola Set to Disclose Payments From Big Oil", By Heather Timmons, The New York Times, May 13, 2004 at:
http://query.nytimes.com/gst/abstract.html?res=F70616FD3A580C708DDDAC0894DC404482

"Angola: transparency move welcome but serious questions remain", Global

Witness press-release, May 13, 2004, at:
http://www.globalwitness.org/press_releases/display2.php?id=238

"Angola Reported to have Misplaced More Than $4 Billion in Oil Revenues"
By Luke Eric Peterson, INVEST-SD News Bulletin, January 23, 2004

7. Energy Charter Secretariat Seeks Legal Advisor

The Energy Charter Secretariat is seeking a Legal Advisor to join its Brussels-based team. The Secretariat administers the Energy Charter Treaty, a 51-member plurilateral trade and investment treaty governing the energy sector.

A portion of the job posting follows:
"The successful candidate, who will be an experienced, first-class lawyer, is expected to take up duties in the second half of 2004. He/She will advise on all legal aspects of the Energy Charter Treaty and Related Instruments, as well as on all other legal issues relevant to the operation of the Energy Charter Secretariat.
A good knowledge of the functioning of international organisations and special experience in the main areas covered by the Energy Charter Treaty (investment, transit and trade) are key requirements for the successful candidate, as well as strong analytical skills, convincing oral and written communication skills, proven drafting ability and excellent proficiency in English."

For the full job posting see:

http://www.encharter.org/index.jsp?psk=10&ptp=tDetail.jsp&pci=268&pti=28

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