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Negotiation Watch:

1. Canada negotiating BITs with China, India and Peru,
By Luke Eric Peterson

Following a recent overhaul of its model investment treaty template, the Canadian Government is now moving

forward with new negotiations on bilateral investment treaties (BITs) with Peru, China and India.

Talks with Peru have been ongoing for some time, however they had slowed recently as Canada undertook a sweeping review of the template used during investment negotiations.

Canada's new model investment treaty template was agreed earlier this year, and profiled in an edition of the INVEST-News Bulletin.

A Canadian trade official now tells INVEST-SD that investment talks with Peru have now regained lost momentum; A meeting of Canadian and Peruvian negotiators was held earlier this month, and another is slated for December.

Meanwhile, Canada's trade minister has announced new negotiations with China and India. A Canadian negotiating team visited Beijing and Delhi in September of this year, and plans are afoot to host separate meetings in Canada with Chinese and Indian negotiators.

According to the same source, Canada would like to wrap up all three negotiations by the end of 2005.

Canada's NAFTA partner, Mexico, also announced recently that it is pursuing its own negotiations on a bilateral investment treaty with China; those talks were slated to have begun last month, and are expected to continue into 2005.

Canada is currently finalizing its broader regional and bilateral trade and investment strategy, the aforementioned trade official tells INVEST-SD that Canada is likely to pursue a "more aggressive agenda", adding investment negotiations with further countries once that strategy has been finalized.

Sources:

INVEST-SD Interviews

"Canada releases its revised model investment treaty, INVEST-SD News Bulletin, May 24, 2004 available on-line at:

http://www.iisd.org/pdf/2004/investment_investsd_may24_2004.pdf)

2. US-Uruguay BIT text released; new Uruguayan Govt may review text,
By Luke Eric Peterson

The text of an investment treaty concluded between the United States and Uruguay is now available on the website of the US Trade Representative.

However, following the recent election of a new left-leaning government in Uruguay, press reports suggest that the new government is dragging its feet in submitting the agreement to the Uruguayan parliament for ratification.

The UK-based Guardian newspaper reported earlier this month that new President Tabare Vazquez plans to “review” the treaty. Meanwhile, Spanish-language press reports indicate that Uruguay has also moved to consult its partners in the Mercosur trading bloc (Argentina, Brazil and Paraguay) on the BIT concluded by Uruguay’s previous administration.

Sources:

Text of US-Uruguay BIT, is available at:

http://www.ustr.gov/assets/World_Regions/Americas/South_America/asset_upload_file440_6728.pdf

“Nuevo gobierno consultara al Mercosur sobre acuerdo de inversiones con EEUU; Izquierda consultara a socios del Mercosur”, El Pais (Uruguay), November 12, 2004

“Uruguay turns left for first time in 170 years”, By Hannah Baldock, The Guardian, November 2, 2004

3. Canada, Chile announce commitment to transparency in investment arbitrations,
By Luke Eric Peterson

The Canada-Chile Free Trade Commission, a body created under the free trade pact between the two countries, announced in a statement this week that it has agreed upon declarations related to transparency of investment arbitration proceedings and the participation of non-disputing parties in such proceedings.

These declarations follow in the footsteps of declarations agreed in October of last year by parties to the North American Free Trade Agreement.

In particular, Canada and Chile affirm that they will consent to open any investor-state arbitral proceedings to the public, and will encourage disputing investors and, where

necessary, tribunals themselves to agree to the same. This move is necessary because the Canada-Chile FTA does not feature binding requirements that arbitrations be open to the public, as are found in some recent US Free Trade Agreements and in the 2004 model Canadian BIT.

A copy of the Canada-Chile Free Trade Commission joint statement is available here: http://www.international.gc.ca/tna-nac/RB/fifth_meet-en.asp

Copies of the declarations on non-disputing party participation and transparency will appear shortly on the Canadian Department of International Trade's website, following translation into all official languages.

Arbitration Watch:

4. Jilted Yukos shareholders turn to Energy Charter Treaty arbitration, By Luke Eric Peterson

A holding company which owns a majority shareholding in the beleaguered Russian oil company, Yukos, has brought a claim for compensation against the Russian Federation under the terms of the Energy Charter Treaty (ECT), a multilateral trade and investment treaty governing the energy sector.

In a letter sent to Russian President Vladimir Putin earlier this month, Group Menatep signaled a start of the treaty's mandatory 3 month negotiation period, before the group may commence formal arbitration.

Group Menatep board member Tim Osborne, confirmed in an email to INVEST-SD that the group's Cyprus-based subsidiaries, "Hulley Enterprises Limited has issued a notice to the Russian Federation requesting the opening of negotiations pursuant to Article 26(1) of the ECT"

The jilted shareholders are seeking compensation for the precipitous drop in Yukos' share price which has resulted from aggressive legal action taken by Russian authorities against the oil firm.

But a report in the Moscow Times raises doubts about the legal viability of Menatep's claim. While Russia has signed the ECT, its parliament – the Duma - has yet to ratify the agreement.

Menatep are expected to argue that the signed treaty is applicable "provisionally" in Russia thanks to the unusual terms of the ECT's Article 45(1) which provides that "Each signatory agrees to apply this Treaty provisionally" in advance of full ratification.

However, an official with the ECT's Belgium-based legal Secretariat told the Moscow Times that, "The manner and extent to which a state's acceptance of provisional application of a treaty creates legal obligations is not completely clear under international law,"

An expert on the Energy Charter Treaty contacted by INVEST-SD declined to comment on the possible "provisional application" of the treaty to Russia.

Even if Menatep's claim were deemed arbitrable under the Energy Charter Treaty, one businessperson with first-hand experience of arbitrating against Russia does not hold out much hope for enforcing any eventual arbitral award.

Franz Sedelmayer, a German national, whose own BIT claim against Russia was profiled in the October 27th edition of INVEST-SD, warns that such treaties "are not worth the paper that they are written on, when one of the parties is not willing to fulfill them."

Mr. Sedelmayer says that he has fought in several European court systems to seize Russian assets in order to collect on a favorable USD \$2.45 million award rendered by a Stockholm-based tribunal some six years ago.

The German businessman tells INVEST-SD that it is extremely difficult to enforce such awards outside of Russia, because Russian authorities routinely designate all assets held outside of Russia as "assets serving sovereign purposes", which makes foreign courts reluctant to seize those assets.

Sources:

INVEST-SD Interviews.

"Menatep Prepares to Sue Kremlin", By Catherine Belton, Moscow Times, November 5, 2004,

"Investors to seek legal redress over Yukos woes", By Andrew Jack and Paivi Munter, Financial Times, November 3, 2004

Briefly noted:

5. South Africa signs BIT with Israel

According to a recent press report, Israel and South Africa marked the occasion of a recent visit by Israeli Deputy Prime Minister Ehud Olmert to South Africa by signing a

bilateral investment treaty.

Source:

“Israeli deputy PM speaks of new era in ties with South Africa” Agence France Presse, October 21, 2004

6. OECD releases several secretariat papers on investment treaty rules,

The Secretariat of the Paris-based Organization for Economic Cooperation and Development (OECD) have released several papers which formed the basis of discussions earlier this year at a meeting of the organization’s Committee on International Investment and Multinational Enterprise (CIME)

As reported in INVEST-SD, representatives of the OECD’s 30 member-governments met in April to discuss several papers prepared by the OECD on key investment treaty themes; Committee members also convened a separate session with invited experts to discuss the papers prepared by the OECD Secretariat. While these sessions were closed to the public, the papers which formed the basis of discussions are now available to the public.

Three papers - on Indirect Expropriation and the Right to Regulate, Most-Favored Nation Treatment and Fair and Equitable Treatment – are now available for download on the website of the OECD.

Sources:

OECD Secretariat papers available at:

http://www.oecd.org/document/29/0,2340,en_2649_34863_33870109_119684_1_1_1,00.html

“OECD Group Calls in Outside Legal Experts to Review Key Investment Rules”, INVEST-SD News Bulletin, April 5, 2004, available on-line at:

http://www.iisd.org/pdf/2004/investment_investsd_april5_2004.pdf

7. British Institute’s Investment Treaty Forum seeks International Economic Law Fellow

The Investment Treaty Forum, a venture of the London-based British Institute for International Comparative Law (BIICL), is now seeking a Fellow who will lead the Forum’s research activities and manage the Forum’s regular events.

Further information about the post is available here:

<http://www.biccl.org/index.asp?contentid=562&menuid=82>

8. Annual Geneva Global Arbitration Forum slated for December 1-2

An annual gathering of arbitrators and arbitration experts will take place in Geneva this year on December 1st and 2nd. Topics to be discussed include several related to investment treaty arbitration.

For more information see:

<http://www.iaiparis.com/dwnld/agenda/Program%202004.DOC>