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Contents at a Glance:

Negotiation Watch:
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1. Norway proposes significant reforms to its investment treaty practices,

By Luke Eric Peterson

The Government of Norway, after an extensive inter-agency process, has released a draft text of a model bilateral investment treaty which would set a template for future negotiations with developing countries and economies in transition.

The Government has not entered into new BITs since the mid-1990s, following concerns about the compatibility of such international agreements with Norway's own constitution, and the impact of such agreements upon policy-making in developing countries.

A model template which has been released for public comments represents a notable departure from Norway's past practice, particularly in the areas of transparency of dispute settlement, access to arbitration, the definition of expropriation, and the express objectives of such agreements. (See next two items in this newsletter for further analysis).

With respect to the last of these innovations, the preamble of the draft BIT acknowledges standard BIT objectives, such as ensuring favourable conditions for foreign investments, however it also hails other goals, including the importance of corporate social responsibility, human rights commitments, anti-corruption efforts, sustainable development, and "the basic principles of transparency, accountability and legitimacy for all participants in foreign investment processes".

A commentary accompanying the model BIT elaborates on the various considerations which motivated the drafting of the model BIT, including a desire "to lead the development from one-sided agreements that safeguard the interests of the investor to comprehensive agreements that safeguard the regulative needs of both developed and developing countries, making investors accountable while ensuring them predictability and protection."

Indeed, the commentary observes that investment agreements may limit the exercise of national authority, and that as a "regulative state with a high level of protection", it is in Norway's interest, as well as that of many developing countries, to conclude agreements which give security to investors, whilst safeguarding the ability of governments to regulate for purposes of social welfare, environmental protection and other important interests.

Norway's was impelled to develop a new negotiating template following growing concerns as to the constitutionality of concluding treaties which granted foreign investors the right to bring claims against Norway through international arbitration, and the potential that arbitrators might impose limits on the exercise of government authorities which are granted under Norway's constitution.

While acknowledging uncertainty as to what degree of authority can be legitimately transferred to international arbitration tribunals, the inter-agency committee determined that it was clearly preferable to limit and clarify the extent of such transfer. As such, the model template developed by the inter-agency committee seeks to remove as much discretion as possible from the treaty text, so as to minimize the any unnecessary transfer

of Norwegian governmental authority. For example, the committee notes that "the extent of the authorities' obligations under international law to refrain from regulations should be defined as clearly as possible."

Further to this, the committee adds that future investment agreements should "not intervene in the state's legitimate exercise of authority where major public interests are affected."

2. ANALYSIS: Norway draft BIT calls for transparent investment arbitrations,
By Luke Eric Peterson

A draft model BIT released by the Norwegian government would provide that any arbitrations brought by a foreign investor against a host country be conducted with a high degree of transparency and public scrutiny.

Furthermore, the agreement professes a concern to not usurp domestic judicial processes, thus prescribing that recourse to international arbitration will only be available following an effort by the investor to pursue claims in the local courts until all local remedies or exhausted or a period of three years has elapsed.

In desiring greater transparency in the resolution of investment treaty disputes, Norway looks set to follow the path blazed by Canada and the United States – which have pushed for such transparency in recent investment treaty negotiations.

Indeed, in addition to requiring that all arbitrations be publicly disclosed, and that all relevant documentation, arbitral awards, and oral hearings be open to public scrutiny, the model BIT also stipulates that Requests for Arbitration (the documents filed by investors to initiate an arbitration) should "contain sufficient information for the parties and the public to be able to familiarize themselves with the issues raised in the dispute." The latter innovation will be of particular use for outside stakeholders who might wish to intervene in the arbitration as amicus curiae (friend of the court) – a prospect for which the model BIT also expressly provides.

Meanwhile, in a commentary accompanying the model treaty, the inter-agency committee which drafted the template elaborates at length on its reasons for obliging foreign investors to pursue their grievances in local courts, at least initially. These arguments have a particularly European flavour, with some regard paid to the principle of subsidiarity (i.e. the principle that disputes ought to be resolved at the closest-possible level to citizens, be that local, national, or, if necessary, international).

In addition, the committee observes that the general rule under international law (including under the European system for human rights protection) has long been to limit direct access by private individuals to international law remedies – and to do so only after domestic remedies have been exhausted. Notably, many modern BITs have deviated from

this principle, in opening a path to international arbitration, without requiring investors to exhaust legal remedies in the host country.

The inter-agency committee also evinces a particular concern for the impact of international arbitration upon domestic institutions both in developed countries such as Norway, as well as in developing countries. With respect to the former, the committee expresses the desire that unconditional access to international arbitration for foreign investors destabilizes the constitutional relationship between different branches of government – and weakens the authority of national courts to review the actions of legislative and administrative bodies. Additionally, with respect to developing countries, the desire is expressed that legal institutions are given the opportunity to develop in the face of external requirements. In other words, "(b)y requiring exhaustion of national legal remedies it is thus possible to contribute to strengthening of the institutions."

Despite such considerations, the committee does acknowledge that a requirement for recourse to local remedies may present Norwegian investors with less favourable dispute settlement options than those open to other investors under their own applicable investment treaties. Thus, the decision was taken to impose a finite three-year window in which claims must be pursued locally, rather than an infinite window. As well, so-called "inappropriate legal remedies" need not be exhausted by investors, thus giving some scope for dispensation of the local remedies rule.

After studying the various avenues of international arbitration which might be made available to foreign investors, the inter-agency committee settled upon the rules of the International Centre for Settlement of Investment Disputes (ICSID) and its so-called Additional Facility (for cases where one party does not hail from an ICSID Convention member-state). While acknowledging that other options are made available in some Norwegian BITs (e.g. UNCITRAL or ICC arbitration), the committee noted that the ICSID is the only option that was purpose-built to resolve disputes between investors and governments

3. ANALYSIS: Norway draft BIT has many innovations with respect to protection,
By Luke Eric Peterson

A draft model BIT released by the Norwegian government for public comment boasts a number of innovations that deviate from standard BIT practice, while also drawing upon reforms adopted in other contexts.

In terms of its scope of coverage, the treaty expressly seeks to limit the ability of investors to use the treaty's protections merely by incorporating "postbox companies". Rather, the treaty imposes a requirement that legal entities such as corporations have "substantive business operations" in the putative country of origin.

As for the concrete protections accorded to foreign investors, the treaty extends National Treatment, Most-Favoured Nation Treatment, Fair and Equitable Treatment and protection against expropriation without compensation, among other protections.

However, these protections are subject to a wider range of exceptions and/or limitations. For example, the commentary to the BIT stresses that the purpose of National Treatment is to combat arbitrary or unfair discrimination. At the same time, a footnote to the draft BIT stresses that there may be genuine and legitimate grounds for governments to treat foreign investors differently, including for the protection of public health, safety, or the environment. The commentary to the BIT further explains that there may be reasons to regulate foreign investors in a less favourable fashion so as to achieve important social considerations. “If the state can document that there are objective grounds for discriminatory treatment, this is not in conflict with the provision,” opines the commentary.

The MFN clause of the draft agreement expressly stipulates that it does not apply to the dispute settlement procedures of the treaty, thus clarifying what has been a point of contention in other contexts: whether investors can use an MFN clause to gain access to more favourable arbitration options available under other treaties.

The draft agreement also seeks to rein in interpretations of the fair and equitable treatment standard, by stressing that the protection to be accorded is the basic standard provided under customary international law. As the commentary to the text makes clear, arbitrators should not read the standard as an invitation to judge subjectively what they deem to be fair or unfair.

One of the most innovative features of the draft agreement is its treatment of the issue of expropriation. Citing a fear that expropriation clauses may be interpreted broadly and in an unpredictable fashion, the draft treaty departs from typical BIT practice and draws its inspiration from the realm of international human rights law.

As the commentary to the draft BIT makes clear, the expropriation clause is modeled on that of the European Convention on Human Rights – a standard which Norway has already committed to, and which is viewed by Norway as striking a clearer balance between the protection of property and the right of states to make regulations and administrative decisions without having to pay compensation to affected business interests.

The draft BIT also contains provisions which are designed to limit the use by governments of so-called performance requirements (e.g. to higher a given level of local employees or to use a certain percentage of domestic content). However, all of these provisions are square-bracketed in the text, and the commentary to the draft makes clear that Norway will take into account “developmental considerations” when determining whether such provisions should go beyond the demands of the existing WTO Agreement on Trade-Related Investment Measures (TRIMs).

Finally, the agreement diverges from the bulk of BITs in proposing that National Treatment and MFN be extended to foreign investors in relation to the establishment and acquisition of investments. Whereas, most BITs apply only to investments that have been cleared and established in the host country, the Norway model proposes to follow the precedent set by recent North American and some Asian BITs in guaranteeing NT and MFN even with respect to the acquisition and establishment of investments. In other words, the BIT would give some additional market access, and it would fall to governments to signal in a so-called negative list, those sectors where this market access would not apply.

4. Canada says China BIT will have minimal impact on Canada's environment,
By Luke Eric Peterson

The Government of Canada has released an initial environmental assessment of an investment treaty currently under negotiation with China. Canada says that the negotiations could wrap up this year.

In keeping with the findings of previous assessments carried out on Canadian BITs with India and Peru, the Government says that the environmental impact of the proposed agreement is likely to be minimal.

Notably, the methodology used for this process seeks to measure the potential impact on Canada's environment, but not that of the other treaty-partner, or the world at large. The methodology has been criticized in the past by environmental organizations for not taking a more global view of environmental impacts.

According to the initial assessment, Canada anticipates no major changes to investment flows into Canada as a result of the Canada-China BIT negotiations. As a consequence, the Canadian Government says the environmental implications will be scant. Likewise, the assessment suggests that the proposed agreement will "not have an impact on Canada's ability to develop and implement environmental policies and regulations."

The assessment lays particular emphasis on a set of revisions made to Canada's model investment treaty template in 2003. Among these changes were certain efforts designed to lessen the likelihood that legitimate environmental measures would not run afoul of the treaty strictures.

As was recently reported in ITN, Canada has been confronted with several new investment arbitrations with environmental overtones. These include a claim related to the environmental impact assessment of a proposed quarry site, and a dispute over the use of a former open-pit mine as a garbage disposal site*

Because the initial impact assessment conducted on the Canada-China negotiations has found negligible likely environmental impacts, the next stage of the assessment process – production of a draft assessment will not be undertaken.

For more information see:

http://www.international.gc.ca/commerce/consultations/active-consultations-en.asp#fipachina

*The Editor of ITN sat for a time on an external advisory committee which offered input on the Government of Canada's environmental impact assessment of trade and investment agreements

** See Investment Treaty News, Feb 21, 2008, available on-line at: http://www.iisd.org/pdf/2008/itn_feb21_2008.pdf

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Arbitration Watch:
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5. Investors in South Africa mining arbitration to file first set of pleadings in late April, By Luke Eric Peterson

A procedural timetable has been set in a high-profile ICSID dispute between a group of European mining investors and the Republic of South Africa.* According to the timetable agreed at a December 2007 procedural hearing, the claimants will file their initial written brief by April 29, 2008. Following this, the South African Government will have 140 days in which to prepare its own initial written response to the claimants' allegations.

The case is expected to be closely scrutinized – to the extent permitted by the parties – given the subject-matter of the dispute, which includes allegations that certain Black Economic Empowerment obligations imposed upon foreign investors in the mining sector run counter to guarantees contained in South Africa's bilateral investment treaties with Italy and Belgium & Luxembourg.

ITN understands that the question of the confidentiality of the legal pleadings has not been discussed as yet in the arbitration proceeding. While the ICSID Secretariat has no authority to release such documents to the public, either party to a case – absent any contrary confidentiality agreement or order by the tribunal – can release such documents to the public.

Meanwhile, ITN the Republic of South Africa has reserved its position on the question of publication of the final award, whereas the claimants have signaled their willingness to see the final award published.

All that is required for an award to enter the public domain is the willingness of one party to see it so released. (Under the ICSID rules, either party may unilaterally release a final award; meanwhile, where both parties consent to publication, the ICSID facility will publish the award on its website and in its publications.)

ENGLAND CHOSEN AS SITE OF ARBITRATION

Because the arbitration is taking place under the so-called Additional Facility of the International Centre for Settlement of Investment Disputes (ICSID), the arbitration – in contrast with arbitrations under the standard ICSID rules - will be subject to (limited) legal supervision by the courts of the place of arbitration.

At the procedural hearing in December, the parties agreed that England would be the formal place of arbitration, although actual hearings in the case could take place elsewhere.

* Piero Foresti, Laura De Carli, and Others v. Republic of South Africa, ICSID Case No. ARB/(AF)/07/1

6. Lid remains on ICSID award in Georgian dispute over Iron & Steel Works,
By Luke Eric Peterson

An award was rendered last month in an arbitration between a pair of Italian investors and the Republic of Georgia, however the decision has not entered the public domain. ITN understands that the Georgian Republic has not given its consent to the International Centre for Settlement of Investment Disputes (ICSID) to publish the award.

Notably, the investors initially turned to the European Court of Human Rights, however in 2006 they changed course and brought an arbitration claim to the ICSID facility. The dispute pertains to the Rustavi Iron & Steel Works located in the South-East of the country.

As previously reported in ITN, Ares International and MetalGeo alleged that a share purchase agreement agreed with an earlier Georgian administration was annulled in a series of allegedly irregular legal proceedings, and supposedly at the behest of the more recent administration of President Mikhail Saakashvili.

While little information has surfaced about the claim and its disposition, ITN has previously reported that the investors claimed that Georgia violated various provisions of

the Italy-Georgia bilateral investment treaty. In addition, the claimants alleged that Georgia owed them the "full protection and security" standard found in the UK-Georgia treaty, thanks to the operation of the Most-Favoured Nation treatment clause contained in the Italy-Georgia pact.

Georgia also faces two related arbitration claims by Mr. Ioannis Kardassopoulos and Mr. Ron Fuchs, investors in a concession for reconstruction of energy pipelines and infrastructure. The two cases were initiated at different times, however the same three arbitrators are presiding in both cases, which may minimize any likelihood of divergent outcomes in the two proceedings.

As previously reported in ITN, a jurisdictional ruling issued in the Kardassopoulos case is particularly notable for the tribunal finding that Georgia took on an obligation to "provisionally apply" the Energy Charter Treaty (ECT) from the moment of signature (rather than from the later date of formal ratification) thanks to an unusual (and previously untested) clause in the ECT. (See: "ICSID has jurisdiction in Energy Charter case against Georgia, as second claim arises", Investment Treaty News, available at: http://www.iisd.org/pdf/2007/itn_aug10_2007.pdf)

IISD Perspectives:
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7. IISD contributes briefing paper to the UN Secretary General's Special Representative (SGSR) on Business and Human Rights process

The IISD has contributed a briefing paper on investment agreements, business, and human rights to the ongoing process undertaken by Prof. John Ruggie to examine the linkages between business and human rights. The paper drafted by IISD's Howard Mann, is one of several new briefings contributed by various actors to the SRSG process, including recent research papers on stabilization clauses and criminal liability of corporations. The briefing papers are accessible on the SRSG's website at:

http://www.business-humanrights.org/Updates/Archive/SpecialRepPapers

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Briefly Noted:
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8. Czech Republic wins ICC battle with Mittal Steel, also faces separate BIT claim

As ITN was going to press, various international media outlets were reporting that the Czech Republic has claimed victory in a contract arbitration with steel giant

ArcelorMittal. Mittal turned to arbitration following a dispute over a minority stake in a Czech steel business, Nova Hut. The arbitration was conducted at the International Chamber of Commerce, and the arbitration ruling has yet to enter the public domain.

As has been previously reported in ITN, Mittal is also pursuing a separate investment treaty arbitration against the Czech Republic in relation to a thwarted bid for another Czech steel asset, Vitkovice. In 2006, ITN revealed that that claim was being heard under the UNCITRAL procedural rules before a tribunal consisting of Prof. Piero Bernardini, Lord Steyn, and Prof. Christopher Greenwood.

According to a recent report by Reuters, the BIT arbitration has been suspended since November of 2007, as the two sides seek a negotiated solution.

Sources:
http://www.reuters.com/article/marketsNews/idUSL2691764220080326

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