

INVEST-SD: Investment Law and Policy Weekly News Bulletin, February 23, 2004

Published by the International Institute for Sustainable Development
(www.iisd.org/investment)

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Negotiation Watch:

1. US releases draft-text of revised bilateral investment treaty

template,
By Luke Eric Peterson

The US State Department has released a draft-text of its revised bilateral investment treaty (BIT) template.

The model text which is available on the State Department website, reflects a long-running inter-agency effort to reform and modify the existing model in key respects.

Already, the Bush Administration has revised the investment template used in broader US free trade agreements (FTAs) - including those with Chile, Singapore, Australia and the Central American countries - as per a series of requirements set down by the US Congress. However, this Congressional mandate did not compel comparable changes to the narrower investment treaties which the US State Department has negotiated since the early 1980s with developing countries (often as a prelude to future trade negotiations).

Nevertheless, the US Government is seeking to update its BIT program in-line with the changes mandated by Congress for US free trade agreements.

Among the notable features of the new draft model BIT are extensive transparency commitments on the part of host governments, to publicise and notify new regulations and decisions affecting investment, as well as to create a domestic administrative process to which foreign investors will be guaranteed recourse.

Additionally, the BIT model follows the lead of new US FTAs by incorporating a range of changes to the investor-state dispute settlement process, including mandatory public disclosure of legal pleadings, transcripts and final awards, as well as provision for the consolidation of similar claims, and for a right of non-parties to apply for permission to intervene as amicus curiae.

The agreement also adds new language to clarify the meaning of certain substantive provisions, including those on expropriation and the minimum standard of treatment. Broadly speaking, these changes also follow the lead of earlier US FTAs.

The new draft treaty includes provisions on labour and the environment. These clauses require governments "to strive to ensure" that they do not lower or waive their domestic labour or environmental laws in an effort to encourage investment. The model text provides for state-to-state consultation in the event that one state objects to the other's

behaviour in this regard.

In addition, the treaty's labour clause clarifies that the domestic labour laws which should not be waived or derogated from, are those directly related to certain internationally recognized labour rights, including the right of association, the right to collective bargaining and labour protection "for children and young people".

The model BIT also contemplates the creation of a future appellate body or mechanism which would provide a means for review of arbitral awards under the treaty. Within three years of the entry into force of a treaty, the parties would consult on the question of creating such a body.

The full text of the model BIT is available on the website of the US State Department at:

<http://www.state.gov/e/eb/rls/prsrl/28923.htm>

The State Department's Office of Investment Affairs, in the Bureau of Economic and Business Affairs, is the appropriate contact-point on this inter-agency effort. This Office can be reached in Washington D.C. at: 202-736-4060 or 202-736-4907.

Arbitration Watch:

2. US firm mounts BIT claim against Ukraine for failure to enforce arbitral award,

By Luke Eric Peterson

The World Bank's International Centre for Settlement of Investment Disputes (ICSID) has registered a claim by a US firm against the government of Ukraine under the US-Ukraine bilateral investment treaty. The claim arises out of a dispute between the investor, Western NIS Enterprise Fund, and its Ukrainian partner, Sonola, in a joint venture to produce high quality sunflower oil.

The US investor had extended a line-of-credit to its Ukrainian partner in 1997, but when payments became sporadic and eventually ceased, Western NIS pursued commercial arbitration in the United States under the rules set out in the loan agreement. Although the firm succeeded in winning its arbitral claim, its efforts to have the award enforced in the Ukraine proved unsuccessful.

According to arbitration documents filed with ICSID late last year, and seen by INVEST-SD News Bulletin, Sonola then applied to the courts in the state of New York to vacate the arbitral award. This effort failed and the court confirmed the award. Western NIS then sought enforcement of that award in the Ukraine courts, however before this process was put in motion, Sonola had already applied to the Ukraine courts in a successful effort to have the loan agreement declared invalid.

Accordingly, the Ukrainian courts later declined to enforce the US arbitral award at the request of Western NIS on the grounds that the Ukrainian legal system had already declared the underlying loan agreement to be invalid.

Following a further decision by the Ukrainian Supreme Court to not enforce the award, the US-based investor turned to the provisions of the US-Ukraine bilateral investment treaty in an effort to challenge the actions of the Ukrainian judiciary. The investor's claim registered with ICSID alleges that Ukraine's failure to enforce an arbitral award under the terms of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards violates several undertakings in the investment treaty, including the obligation to provide investors with fair and equitable treatment and to refrain from discriminatory or arbitrary treatment.

Sources:

Request for ICSID Arbitration, Western NIS Enterprise Fund v. Ukraine, October 2, 2003, unpublished

Upcoming Events

3. London think-tank to discuss briefing paper on UK BITs on Wed Feb 25th.

The London-based Royal Institute of International Affairs is hosting a discussion meeting on the UK Bilateral Investment Treaty Programme and Sustainable Development on Wednesday February 25th.

The meeting has been convened to discuss a recent briefing paper prepared for the RIIA's Sustainable Development Programme by Luke Eric Peterson. This paper offers an overview of the UK's BIT programme and highlights several areas where the treaties may have implications for sustainable development.

Speakers will include: Graham Minter, Deputy Head of Economic Policy Unit at the UK Foreign & Commonwealth Office; Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development (IISD); Clare Melamed, Trade Policy Manager, Christian Aid; and Luke Eric Peterson.

The event takes place from 11:00-13:00 at Chatham House (10 St. James Square, London, SW1Y 4LE). Attendance is free, but pre-registration is required. To register, please email sustainable-development@riia.org or call Sam Usiskin on +44 (0)20 7957 5711.

The briefing paper is available on-line at:
<http://www.riia.org/pdf/research/sdp//BinvestFeb04.pdf>

Further information about the session is available at:
<http://www.riia.org.uk/index.php?id=250>

4. Washington conference to examine NAFTA Chapter 11 and launch book

The American University in Washington is hosting a one-day conference on what the organizers deem the most controversial and important chapter of the Agreement: Chapter 11 on Investment. March 22, 2004. The event will feature discussion panels on a number of themes including: "The NAFTA as a human rights treaty?"; "Issues in running the arbitration"; "Challenging awards, challenging arbitrators"; "The future for international investment protection";

The event will conclude with an "arbitrators' roundtable" featuring contributions from Charles Brower, Luis Miguel Diaz, Martin Hunter, Carolyn Lamm, Thomas Walde, Yves Fortier.

For further information see: www.wcl.american.edu/secle

5. Cambridge University to Host Symposium on International Economic Disputes

The UK-based Cambridge University will host a high-level series of panels exploring various facets of international dispute resolution. The panels will run over a series of three days, from April 1 through 3, and feature discussion of international commercial arbitration, ICSID arbitration between investors and states, as well as World Trade Organization dispute settlement. Speakers include Dame Rosalyn Higgins, of the International Court of Justice; Margrete Stevens, of ICSID; Jan

Paulsson, of Freshfields Bruckhaus Deringer, Paris; and Professor Emmanuel Gaillard, of Shearman & Sterling, Paris.

Information about the event can be obtained from the London Court of International Arbitration's International Dispute Resolution Centre: telephone Irene Bates or Sarah Roberts at (44 20 7405 8008) or email: ib@lcia-arbitration.com

Duly Noted:

6. NY Times profiles Chad's spending of World Bank-supervised oil revenues

In a recent issue, the New York Times profiled Chad, one of the world's poorest nations, and "Africa's newest petrostate".

The Times profile highlights the Chad-Cameroon pipeline - Africa's largest single foreign investment - and the efforts of the World Bank and other project partners to ensure that the project revenues are used so as "to better the miserable lives of its nine million citizens."

The full article is available on-line at:

<http://www.nytimes.com/2004/02/18/international/africa/18CHAD.html>

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