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IIA Insighter

A Parliamentarian's Guide to international investment agreements and their implications for domestic policy-making

Bloc of countries refuses to discuss transparency in investor-State arbitrations

A Working Group of the United Nations charged with revising key international arbitration rules has rebuffed calls by many States and non-governmental organizations (NGOs) to discuss introducing transparency requirements into arbitrations brought by private foreign investors against States.

Under most international investment treaties, foreign investors have the right to bring disputes with the host State to international arbitration in what is known as the investor-State arbitration process. These arbitrations involve the State in its sovereign capacity and often involve important public interest issues, such as the impacts of failed water privatizations, financial crises in developing countries, and environmental and health regulations. In recent years, these arbitrations have resulted in a number of awards against governments, mainly against developing countries, and several of the awards are in excess of US$100 million.

One of the key sets of rules that govern these arbitrations was prepared by the United Nations Commission on International Trade Law, or UNCITRAL. Despite the public interests at stake, investor-State arbitrations conducted under the UNCITRAL Rules are frequently veiled in secrecy. In particular, it is often impossible for the public or other States to find out that an arbitration has been filed, what is at issue in an arbitration, what the investors and States have argued in the case, and, in some cases, even what the tribunal's ultimate decision is. Tribunals may go as far as imposing full bans prohibiting revealing information in the case to the public.

This secrecy precludes interested citizens, NGOs and other governments from knowing about investment arbitrations affecting them or keeping tabs on the evolution of this very important area of the international law on globalization. These cases often have a particular bearing on critical balances between investor rights and the public interest in the State where the investment is made, and replace more transparent domestic judicial proceedings with private and closed international processes, often run by arbitrators from major law firms and chambers in London, New York, Paris and Washington.

UNCITRAL is currently revising these Arbitration Rules for the first time since they were adopted in 1976. Following the Working Group's session on 4–8 February 2008 in New York, the Center for International Environmental Law (CIEL) and the International Institute for Sustainable Development (IISD) expressed their deep disappointment in the efforts of some governments to block the inclusion of transparency provisions in the revised Rules. Fortunately, these governments were not completely successful!

Further discussion has been delayed, but not ended. The Working Group has now asked its parent body, the UNCITRAL Commission to give it specific guidance on how to proceed. The UNCITRAL Commission is meeting in June of this year to discuss this issue, at the United Nations headquarters in New York. CIEL and IISD urge Commission Members to speak out strongly in favour of transparency when they meet in June, and to clearly mandate the Working Group to return to this issue during the current revision process.

Many governments, particularly developing and other countries facing investor claims, spoke strongly in favour of transparency and expressed their desire that the issue be addressed immediately. But a number of governments, including governments that proclaim to be "strong supporters" of

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Block of countries refuses to discuss transparency in investor-State arbitrations **(continued from page 1)**

transparency, spoke against including transparency in the current revision process. They claim that the issue is too complex and will hold up the revision process. However, those countries that already have experience in incorporating transparency into investor-State arbitrations claim that the complexity is greatly exaggerated. They say that there is no reason why discussion on this important issue should be postponed.

The issues at stake were well-summarized by the UN Special Representative to the Secretary General on Business and Human Rights in his statement to the Working Group in February 2008:

> "*adequate transparency where human rights and other state responsibilities are concerned is essential if publics are to be aware of proceedings that may affect the public interest. Indeed, such transparency lies at the very foundation of what the United Nations and other authoritative entities have been promulgating as the precepts of good governance.*"

CIEL and IISD look forward to a clear decision by the UNCITRAL Commission at its June 2008 meeting to mandate the Working Group to include clear rules supporting transparent investor-State arbitrations as part of the current revision process.

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Key FDI disputes to watch in 2008

Pending arbitral rulings could address sensitive policy questions

International arbitrations between foreign investors and their host governments can be mundane affairs—touching on purely commercial considerations—or they can be controversial disputes with potential ramifications for public policy-making. In 2008, rulings could be handed down in several cases that fall squarely into the latter camp.

Biwater v. Tanzania

This case which pits a U.K. water services company against the Government of Tanzania has already attracted its fair share of controversy. When Tanzania cancelled a water-services contract with Biwater's local subsidiary City Water, the company mounted a high-profile publicity campaign against the Government. Advertisements were taken out in leading newspapers, decrying alleged mistreatment at the hands of Tanzania.

Meanwhile, the Tanzanian Government fired back by accusing the company of mismanagement of the water utility in Dar es Salaam. Both Biwater, and its local subsidiary, mounted arbitration suits, accusing Tanzania, and a State water agency, of breach of contract, as well as breach of an investment protection treaty between the U.K. and Tanzania.

In January of this year, Tanzania announced that the Dar es Salaam Water and Sewerage Authority (DAWASA) had prevailed in the contract arbitration with City Water, netting itself some US$6 million in compensation. Although the arbitration ruling has not been published to date, reports indicate that arbitrators rebuked City Water for certain contractual failings.

What remains to be seen, however, is how a separate panel of arbitrators convened at the World Bank will resolve Biwater's treaty claim against Tanzania.

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News in Brief

(from Investment Treaty News)

http://www.iisd.org/investment/itn

Argentina chagrined that World Bank tribunal errors cannot be corrected

No appeals mechanism means that Gov't must pay $130 million +

Tensions are rising between foreign investors and the Argentine Government as Argentina has thus far neglected to pay a World Bank arbitration award rendered in favour of a U.S.-based natural gas company. For its part, Argentina has publicly criticized the ICSID arbitration system for its inability to correct errors of law made by arbitrators.

The dispute centres upon a 2005 arbitration award rendered in favour of CMS Gas Transmission Company. CMS successfully claimed that certain emergency policy measures taken by Argentina during its financial crisis had served to violate provisions of an investment protection treaty between the U.S. and Argentina. However, Argentina sought to annul the award—a limited review process according to which a new three-member panel may examine an award on certain narrow grounds.

To Argentina's chagrin, the annulment panel agreed that the original arbitrators had made significant errors of legal reasoning, but the annulment panel was powerless to overturn such errors. While conceding that these errors may have determined the outcome of the case, the annulment panel noted that Argentina remained legally bound to pay the $133 million in compensation which had been ordered in the original arbitration.

In particular, the annulment panel noted that the arbitrators hearing the case had not examined whether certain exception clauses in the U.S.-Argentina treaty might have provided shelter for emergency policy measures taken by Argentina to stem its financial crisis.

The outcome of the case has stoked criticism of the World Bank's ICSID facility, with some observers calling for an appeals process which would have wider authority to overturn foreign investment arbitration decisions.

Key FDI disputes to watch in 2008
(continued from page 2)

In response to growing public interest in the arbitration, and the leak of certain legal documents, the tribunal issued an order in 2006 which imposed heightened confidentiality obligations on the two parties. That move was criticized by non-governmental organizations, some of whom have formally intervened in the arbitration in an effort to raise arguments about the wider human rights and development policy implications of the dispute. Indeed, IISD, publishers of *IIA Insighter*, co-authored an *amicus curiae* brief in the Biwater case.*

An arbitration ruling is widely expected in the case sometime in 2008. Observers are waiting to see what credence the World Bank tribunal will give to the parallel contract arbitration ruling issued in January. Similarly, observers are wondering to what extent the tribunal will engage with the perspectives raised by the intervening non-governmental organizations.

Suez, *et al.* v. Argentina

Another high-profile water services dispute pits the Government of Argentina against a handful of European water companies. In 2003, Suez, Aguas Barcelona, Anglian Water Group and Vivendi filed arbitrations, alleging that Argentina had violated the terms of several investment protection treaties. The dispute centres on a 30-year concession granted to the foreign investors to run the local water utility in Buenos Aires.

The privatization of Buenos Aires' water service did not proceed smoothly, and both sides quarreled for several years over various alleged contractual failings. When a financial crisis rocked Argentina in 2001, the Government slapped a freeze on the prices charged for water. Foreign companies argued that such a move was contrary to their contracts, as well as several investment treaties signed by Argentina. The companies responded by initiating arbitration claims, seeking compensation for their inability to increase water prices. In 2006, Argentina ultimately cancelled the investors' contract.

The Suez *et al.* claim is one of a number of arbitrations filed in the aftermath of the Argentine financial crisis, with foreign investors in various water concessions understood to be raising similar arguments against Argentina. Notably, a bloc of non-governmental organizations filed a legal brief with arbitrators in the Suez case, raising concerns about the human rights implications of the dispute. Particular stress has been laid upon the obligations of Argentina to regulate water services in light of the international rights to water, health, and life.

In 2006, arbitrators declared that they had jurisdiction to hear the dispute on its merits. A final ruling could come sometime in 2008.

Glamis v. United States

A ruling is expected some time this year in a long-running arbitration between a Canadian mining company and the United States Government. In 2003, Glamis Gold Ltd. brought a claim for breach of investor protections contained in the North American Free Trade Agreement. The company objects to a pair of measures introduced by the California Government mandating the back-filling and re-contouring of open-pit mining sites in that State. According to Glamis, the measures impose steep financial costs on its Imperial Mine project located in southeast California.

For their part, California and U.S. Government officials have defended the new measures as necessary to ensure that mine sites pose no threat to public health and safety, as well as to respect any nearby Native American sacred sites. Glamis insists that the new measures amount to an expropriation of its investments, rendering them essentially worthless.

Arbitrators will need to grapple with the perennially sensitive question of how to draw the line between actual expropriations—for which compensation must be paid to affected investors—and legitimate public welfare regulations for which no compensation should be forthcoming. The United States has pointed to a favourable ruling in an earlier arbitration with the

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Investigation finds many arbitration cases proceeding through opaque channels

Total number of lawsuits impossible to measure

An extensive investigation by the IISD news service, Investment Treaty News, has found that in 2006 foreign investors were more apt to file investment treaty lawsuits against governments through channels which do not require mandatory disclosure of such cases.

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The investigation, based upon more than a hundred interviews with lawyers, government officials and arbitration centers, found that the majority of cases known to have been initiated in 2006 will be arbitrated under arbitration rules which are less transparent than those of the World Bank's International Centre for Settlement of Investment Disputes (ICSID). In contrast with other arbitration avenues, the ICSID maintains a mandatory public registry of all claims brought to the Centre. By contrast, other arbitration options available to foreign investors lack such a public registry.

Notably, some governments have moved to draft investment protection treaties which mandate that all arbitrations related to such treaties—regardless of the procedural rules used—must be publicly disclosed. While both Canada and the United States have moved in this direction, most governments have declined to do so. Indeed, of the more than 2,500 bilateral investment treaties concluded worldwide, the vast majority impose no such transparency requirements. As such, even though investigative interviews can unearth evidence of some arbitration claims proceeding through opaque channels, there is no way to know the total number of cases proceeding through such avenues.

For more information see: Investment Treaty News 2006: A Year in Review, available on-line at: http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf

Key FDI disputes to watch in 2008
(continued from page 3)

Canadian-based Methanex Corporation, where a different panel of arbitrators highlighted the importance of governments being able to enact legitimate public welfare regulations without having to pay compensation.** Meanwhile, Glamis has invoked other arbitration rulings which give less latitude to government regulation.

Environmentalists, Native American tribes and business groups have also intervened in the arbitration to present arguments for the tribunal's consideration.***

Unusually, the oral hearings in the arbitration were conducted in public in July of 2007, thanks to an earlier decision by the Governments of Canada and the United States to push for greater transparency in relation to foreign investment arbitrations under NAFTA. By contrast, most arbitrations under bilateral investment treaties are not conducted with similar levels of transparency. Indeed, legal pleadings typically remain confidential, and oral hearings are conducted in-camera.

Further reading on:

Biwater v. Tanzania

"ICSID Tribunal issues ruling on confidentiality in Tanzanian water concession dispute", *Investment Treaty News*, October 19, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_oct19_2006.pdf

Suez, et al. v. Argentina

"NGOs to submit arguments in Suez/Vivendi/Aguas Barcelona dispute with Argentina", *Investment Treaty News*, March 2, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_mar2_2007.pdf

Glamis v. United States

"US and Glamis Gold dig in for fight over definition of expropriation under NAFTA", *Investment Treaty News*, June 13, 2007, available on-line at: http://www.iisd.org/pdf/2007/itn_june13_2007.pdf

* An IISD legal intervention in the Biwater case is available at: http://www.iisd.org/pdf/2007/investment_procedural_order5_petition.pdf

** For an IISD commentary on the Methanex v. USA ruling, see: http://www.iisd.org/pdf/2005/commentary_methanex.pdf

*** "Wave of new third party submissions in Glamis Gold arbitration with USA", *Investment Treaty News*, November 15, 2006, available on-line at: http://www.iisd.org/pdf/2006/itn_nov15_2006.pdf

Multiple environmental suits filed against Canada

Cases will test green-friendliness of NAFTA's investment chapter

In the mid-1990s, the Government of Canada found itself on the receiving end of several high-profile foreign investor lawsuits. These lawsuits brought by investors in the toxic waste and chemicals sectors served to galvanize public attention, and led the Canadian Government to re-think how international trade and investment agreements should balance environmental considerations.

Today, Canada once again finds itself on the front lines of several lawsuits with clear environmental overtones, and the suits serve as a reminder that governments remain vulnerable to compensation claims under the North American Free Trade Agreement (NAFTA).

Indeed, while Canada has introduced more stringent protections for environmental policy-making into *new* trade and investment treaties, the NAFTA itself has not been subject to the same sorts of rigorous revisions and updates.

Hence, observers will be watching the new cases against Canada with considerable interest to see if arbitrators will strike the appropriate balance between protecting foreign investors and legitimate environmental or heath and safety regulation by governments.

Investor sues over thwarted plans to use mining site for garbage disposal

Among the new claims to have been filed against Canada in recent months is one

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World Bank tribunal will decide if foreign investor can sue Bolivia

Effects of Bolivian renunciation of ICSID remain unclear

Following a well-publicized move by the Government of Bolivia to withdraw from the World Bank's International Centre for Settlement of Investment Disputes (ICSID), it remains to be seen whether foreign investors can still pursue arbitration claims against the country at the Centre.

The controversy is being closely monitored as other governments in Latin America have made rumblings about following Bolivia in withdrawing from the ICSID. Already the Republic of Ecuador has written to ICSID to notify the Centre that it does not wish to see disputes related to natural resources arbitrated by ICSID.

It is unclear, as yet, what effect such unilateral gestures will have. Many foreign investors are insisting that governments remain bound by pre-existing unconditional offers to arbitrate disputes, for example contained in investment protection treaties. In the case of Bolivia, the Government has concluded numerous such treaties. Recently, a subsidiary of the Italian firm Telecom Italia invoked the terms of the Italy-Bolivia investment treaty in order to bring an arbitration claim to the ICSID facility.

Bolivia reacted with anger to a decision by ICSID in October of 2007 to convene an arbitration tribunal to examine Telecom Italia's claim. According to the Bolivian Government, it formally notified ICSID in May of 2007 that it was renouncing the ICSID Convention. Thus, Bolivia insists that any investors filing arbitration claims after that date cannot have their cases heard at ICSID. Meanwhile, lawyers representing foreign investors dispute this interpretation.

For its part, the ICSID Secretariat informed Bolivia in a written communication that it registered the claim by Telecom Italia's subsidiary Eurotelecom because the threshold for doing so is very low. Only where the case is manifestly outside the jurisdiction of the Centre, can the Centre's permanent staff refuse to register a case. However, it will fall to a panel of arbitrators to decide whether the case can actually be heard—or whether Bolivia's May 2007 denunciation of the ICSID Convention served to immediately closed the door on future arbitration claims.

Multiple environmental suits filed against Canada (continued from page 4)

by a U.S. investor who has been prevented from using a former open-pit mine as a garbage-disposal site. Vincent Gallo accuses Canada of expropriating his investment project which had called for transporting and disposing of the City of Toronto's non-hazardous municipal waste in a disused mining site in rural Ontario. The project had come under fire from environmental groups who objected to the deposit of waste in a man-made lake, and the periodic removal of contaminated waste-water.

When a new government came to power in the Province of Ontario, Mr. Gallo alleges that he was thwarted in his effort to renew a waste-water removal permit which was integral to the project and which had been granted by the previous administration. The American investor says that subsequent legislation passed in the province served to rule out any use of the site for waste-disposal, thus driving him out of business. For their part, both the Ontario and Federal Governments have dismissed claims by Mr. Gallo that the treatment of Mr. Gallo served to violate protections owed to him under the NAFTA.

Investor seeks to challenge environmental impact assessment process

In parallel with the Gallo case, another U.S. investor has served Canada with notice of a potential claim alleging Canada has breached the North American Free Trade Agreement. The claimants had encountered local opposition to a proposed quarry operation located on a coastal plot of land in the Canadian province of Nova Scotia. The proposed 50-year scheme would have provided for one of the largest such industrial mining operations in Canada, with two million tonnes of crushed basalt being shipped by sea to the Eastern United States on an annual basis.

According to media reports, locals expressed concerns about the impact of the proposed quarry on the local fishery, as well as the impact upon the endangered right whale. Many local critics also expressed concerns about the impact of noise, dust, traffic and depletion of groundwater.

Following what the New Jersey-based investors characterized as an overly lengthy federal-provincial environmental impact assessment process, the investors were informed that their project had been rejected. Following this, the New Jersey firm alleged that it had fallen prey to a politically-biased and discriminatory process, and signaled their intention to sue Canada for damages under the NAFTA, seeking some US$188 million in lost profits.

U.S. chemical producer revives NAFTA claim over Canadian ban on Lindane

In yet another environmental claim against Canada, a U.S.-based chemicals company, Chemtura (formerly Crompton) has revived its bid to sue over the phase-out of the controversial agro-chemical Lindane.

According to a recent paper prepared for a Research Centre at the University of Guelph, Canada banned the use of Lindane on January 1, 2005; Chemtura's arbitration claim alleges that the Lindane ban violated protections owed to the company's investments in Canada. The Government of Canada banned the chemical on human and environmental grounds.

In late 2007, an arbitration tribunal was appointed by the two sides to hear Chemtura's claim.

Further Reading:

Kathy Baylis and Dan Badulescu, "Pesticide Regulation Under NAFTA: Harmonization in Progress?", Canadian Agricultural Trade Policy Research Network, Paper 2006-6, Available on-line at: http://www.uoguelph.ca/~catprn/PDF/Commissioned_Paper_Baylis_2006-6.pdf

A case for an international investment court

Gus van Harten, Lecturer, Department of Law, London School of Economics

The aspiration of a global economy does not require us to jettison open and independent courts as the most appropriate institution for interpreting and applying the laws that bind legislatures and governments.

If one accepts this premise, then one should also support replacing the current system of investment treaty arbitration with an international investment court, for two key reasons.

The first is that investment treaty arbitration is fundamentally different from other forms of international arbitration in that it is a non-reciprocal, public law system. That is, only one of parties, the investor, brings the claims and only one class of parties, the State, is punished for breach of treaty. The system regulates legislators, judges, and other public officials in order to protect business. It does not regulate business to protect the public.

Moreover, investment treaty arbitration goes well beyond other forms of international adjudication that engage the regulatory relationship between individual and State—especially in the human rights field—because investment treaties excuse investors of their customary responsibility to pursue domestic remedies before bringing an international claim, and because they allow money awards in favour of investors that are enforceable across the globe, while barring domestic courts from reviewing the awards for legal errors made by the arbitrators.

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A case for an international investment court (continued from page 5)

As currently structured, investment treaty arbitration is heavily slanted in favour of a small elite, mainly large businesses, to the disadvantage of all those who would benefit from legislative and other government initiatives that are foreclosed by the risk or reality of investor claims.

This leads to the second reason to replace the system with an international investment court. As currently structured, investment treaty arbitration is heavily slanted in favour of a small elite, mainly large businesses, to the disadvantage of all those who would benefit from legislative and other government initiatives that are foreclosed by the risk or reality of investor claims.

This structural bias results primarily from the system's lack of openness and independence. At present, under many investment treaties, arbitrations can be kept secret at the option of the disputing parties. This may be appropriate where two private parties are engaged in a contractual dispute. But it does not square with democratic accountability in public law. Likewise, one does not have an independent judicial body if the process is closed to public scrutiny.

Yet more troubling, though, is the fact that arbitrators lack security of tenure. In public law, judges are appointed for a set term in order to insulate them from inappropriate influence by powerful forces in government or the private sector. Security of tenure does not guarantee judicial independence, but it is widely recognized as a vital prerequisite. Arbitrators, in contrast, are appointed on a case-by-case basis. And while this may be appropriate in reciprocal forms of arbitration, in a public law system the use of case-by-case appointments raises a serious danger that arbitrators will decide cases and interpret the law in favour of investors so as to encourage more claims and, in turn, more business opportunities for arbitrators.

It is noteworthy that arbitrators, to date, have frequently interpreted investment treaties creatively in favour of investors, and to the detriment of the regulatory position of States, leading to awards against States that range in value from a few million dollars (US) to over one billion dollars in one award against Slovakia in 2004.* In the latter case, the arbitrators adopted the dubious position that Slovakia had consented to the arbitration by negotiating an investment treaty that was not itself in force, but that had been referred to, obliquely, in an investment contract. Pushing the legal boundaries in this way, especially to found a tribunal's jurisdiction, is commonplace in awards to date.

Can we imagine a claims of 'unfair regulation', brought by a company, being decided by an ad hoc tribunal, the president of which was appointed by the local chamber of commerce? Certainly not, if we expected the claim to be resolved in a credible way.

I doubt this type of system would ever be accepted in a domestic context as a means to resolve disputes between business and government. Can we imagine a claims of 'unfair regulation', brought by a company, being decided by an ad hoc tribunal, the president of which was appointed by the local chamber of commerce? Certainly not, if we expected the claim to be resolved in a credible way. But this is the effective state of affairs under many investment treaties that assign appointing authority to the International Chamber of Commerce, for example.

What can be done to fix the system's bias in favour of investors? The best option, without abandoning the use of international adjudication altogether, is an international investment court.

This need not be a grandiose project and it need not depend on agreement by all countries. Rather, groups of like-minded States might agree to establish an international judicial body to replace the role of arbitrators in the existing system, by providing for claims under the States' existing treaties to be channeled through the new court. They could appoint an appropriate roster of judges to the court for a set term, and direct the judges to develop rules for the court based on the relevant, time-honoured principles.

Such a court should be championed by all States as the best way to deliver fairness, openness and balance in this extra-ordinarily powerful new arm of the international legal system. But investors would also benefit. Most investors will never bring a claim under an investment treaty; claims are costly and best regarded as a last resort. Thus, the benefit of the system for investors is to deter exceptional instances of regulatory abuse by States. An international court, properly established, would deliver this benefit on a far more credible and lasting basis than the current system.

* *Ceskoslovenska Obchodni Banka v. Slovak Republic*, ICSID Case No. ARB/97/4).

Breaking the mold: The new investment treaties of Latin America

Once bitten, governments reconsider old commitments

For the longest time, bilateral investment treaties were quintessential bureaucrats' agreements. Terse and technical, these treaties were drafted by a handful of trade officials, with little consideration for their wider ramifications for public policy.

On the surface, therefore, many investment treaties look surprisingly similar. Although, they contain certain nuances and variations, the overall structure of such agreements has long been one-dimensional and focused largely on protecting foreign investors' property interests.

However, the BIT landscape is gradually evolving. In large part, this is in reaction to the ways investment treaties have been in interpreted by tribunals in international arbitrations. These disputes between foreign investors and host States have led tribunals to carefully weigh the language in investment treaties. States have learned that a word, or an absence of one, can make the difference between an arbitration won or lost.

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Breaking the mold: The new investment treaties of Latin America
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The first major innovators were the United States and Canada. The investment chapter of the 1994 North American Free Trade Agreement (NAFTA) was more ambitious than its predecessors, offering extensive protections and liberalizations to foreign investors operating in a host NAFTA State. All three NAFTA members (Canada, Mexico and the United States) have since found themselves targets of investor-State lawsuits; in the past, developing countries were the overwhelming target of investor-State lawsuits.

Even when they emerged victorious, defending these lawsuits drain government resources. They also plant a degree of uncertainty into policy-making. Government regulation in areas such as environment, taxation and healthcare that exert a cost on a foreign investor could become the basis for a lawsuit.

Canada and the United States temporarily put their investment treaty-making activities on hold. When they emerged again, both countries brandished new model agreements. The treaties constructed on these templates send a clearer message to tribunals as to how the treaty should be interpreted, by, for example, including provisions that refer to a host government's right to regulate in the public interest.

Now, greater precision in treaty making is spreading southward. More than any other region in the world, governments in Latin America have found themselves at the receiving end of lawsuits brought under investment treaties.

Now, greater precision in treaty making is spreading southward. More than any other region in the world, governments in Latin America have found themselves at the receiving end of lawsuits brought under investment treaties. Argentina has lost several arbitration cases related to measures taken to stem an economic crisis in 2001, while Ecuador has also been hit with a series of suits as it re-negotiates long-term contracts in the extractive industries.

In response, governments in Latin America have gone to the drawing board to draft templates which will guide the negotiation, or renegotiation, of future investment treaties. Argentina, Bolivia, Colombia, Ecuador and Venezuela are all at different stages in the exercise. Colombia, which began developing its model BIT in 2002, has led the pack.

"Our model reflects the fact that a developing economy is more likely to be a respondent in an arbitration," said José Antonio Rivas-Campo, Director of Foreign Investment and Services for Colombia's Ministry of Ministry of Trade, Industry and Tourism.

"Our model reflects the fact that a developing economy is more likely to be a respondent in an arbitration," said José Antonio Rivas-Campo, Director with Colombia's Trade Ministry.

The model demands, for example, that at least a year pass between when an investor provides a notice of arbitration, and when it can register a claim. The norm has been six months. Colombia hopes that extra time will increase the odds that the disputing parties will agree on a settlement. It also provides a period for the government to mount its defense.

Should a dispute proceed to arbitration, the Colombian model is mindful of the government's defense; it attempts to shield itself from frivolous claims, does not allow investors to sue in multiple venues (for example, domestic courts and arbitration), and draws a line between disputes related to a contract and those related to the treaty.

The result, according to Colombia, is a BIT that strikes a balance between "according protection standards to investors and provisions enabling the State to perform an appropriate defense if it is ever brought to an international arbitration."

With the new template in hand, Colombia has embarked on an ambitious treaty making spree: negotiations are currently underway with Germany, the U.K., China and Sweden. Having a model does not guarantee that Colombia's investment treaties will mirror the template, said Mr. Rivas-Campo. But it does ensure that Colombia enters negotiations better prepared and with an end-goal in mind.

Bolivia is also in the process of finalizing a new model BIT, which aims to bring its investment treaties in line with a revised constitution that was introduced at the end of 2007. Bolivia, like some other countries in Latin America, has been critical of the system of international arbitration used to settle investment disputes, and last year it became the first country to withdraw from the World Bank's arbitration facility, the International Centre for the Settlement of Investment Disputes (ICSID). Bolivia's new model will reflect this fact, said a Bolivian official, who declined to detail how the model would treat dispute settlement.

However, not all countries in Latin America are convinced of the benefits of bilateral investment treaties, even if based on progressive models. Brazil, for example, has never ratified a bilateral investment treaty, and remains skeptical of doing so. The government has indicated that it is unlikely that its congress would agree to an investment treaty, particularly if it allowed for disputes settlement through international arbitration.

Ecuador, meanwhile, has also adopted a more defensive posture. Its inter-ministerial process for developing a model BIT was recently put on hold, at the same that it announced plans to denounce at least nine of its existing investment treaties. Ecuador's focus will now turn to updating its domestic laws on investment, rather than expanding its network of international investment agreements, said an official in that country.

Further Reading:

Colombia's model investment agreement is available from the Web site of the International Institute for Sustainable Development's (IISD) Web site: http://www.iisd.org/pdf/2007/inv_model_bit_colombia.pdf

IISD has developed its own model BIT, which draws a balance between investor rights on the one hand, and the policy space of the host country on the other. It also addresses flaws in a wide range of areas including in transparency, conflict of interest and clarity of substantive obligations. IISD also

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Breaking the mold: The new investment treaties of Latin America
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offers advice to certain governments on issues related to investment agreements. The IISD model, along with a negotiator's handbook, is available from the IISD Web site at: http://www.iisd.org/investment/model/

Nordic freeze ends with radical new approach to investment agreements

Norway seeks to safeguard public policy-making

After more than a decade of shying away from negotiating new bilateral investment treaties, the Government of Norway has published a new model investment agreement which represents a dramatic effort to strike a different balance between investor protection and a government's authority to regulate inward investments.

After having harboured growing doubts about the appropriateness of earlier BITs negotiated with developing countries and emerging economies, Norway has produced a model which would serve as the template for any future international negotiations.

A commentary circulated with the draft model agreement stresses that Norway seeks "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."

Among the notable features of the draft model are a sweeping embrace of dispute settlement transparency, and efforts to shore up the ability of governments to pursue development goals and other important public policy objectives.

All arbitrations initiated under Norwegian agreements would need to be conducted transparently, with legal pleadings, arbitration rulings and oral hearings all opened to public scrutiny.

Moreover, in an effort to ensure that local legal systems will have the first shot at resolving investment disputes, the model treaty prescribes that international arbitration will only be available after claims have been pursued in *local* courts to the point of exhaustion—or for a minimum of three years.

In this respect, the model diverges from the practice of most modern BITs, and hearkens back to an earlier time when arbitration under investment protection treaties was treated as a last recourse, rather than a first line of defence for aggrieved foreign investors.

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Lying behind Norway's desire to restrict the use of international arbitration is a concern that existing investment agreements may provide too much leeway for foreign companies to sue and to do harm to important policy interests of States. Such a concern encompasses Norway's fear that its own policies might come under fire from foreign investors, as well as a desire to afford developing countries a certain discretion in governing their own affairs, without fearing devastating investor lawsuits.

In addition to restricting the use of arbitration—and ensuring that disputes are played out in the public eye—the draft model also lays particular emphasis on shoring up the ability of States to regulate for legitimate reasons.

Thus, while the agreement offers foreign investors protection against discrimination, it is also stressed that public health, safety, social or environmental considerations might lead governments to treat foreign investors less favorably than local businesses—without needing worry that investors can claim for damages arising from such differential treatment.

The model takes an even more innovative approach to the thorny issue of expropriation. While a core concern of BITs is to ensure that investors will be compensated in the event of expropriation or nationalization, views differ as to what sorts of government interferences should be considered as expropriations.

Citing a concern for the uncertainty and potential over-reach of many existing investment treaties, the Norwegian Government model would rely instead on the approach used in the European Convention on Human Rights. Under that Convention, property enjoys protection, however, courts have given more latitude to governments when it comes to imposing conditions or restrictions on property, without triggering a need to compensate affected property-owners.

Following a period of public consultation, the Norwegian Government is understood to be fine-tuning its draft model, prior to rolling it out as the template for future negotiations.

Further reading:

More information about Norway's draft model BIT is available here: http://www.regjeringen.no/nb/dep/nhd/dok/Horinger/Horingsdokumenter/2008/Horing—-Modell-for-investeringsavtaler/-4.html?id=496026