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Contents at a Glance:

Negotiation Watch
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1. New Japanese investment treaties pursue liberalization, in addition to protection,

By Luke Eric Peterson

As the prospects for a multilateral agreement on investment continue to recede, Japan, a long-time demandeur of such a pact, is forging ahead with various bilateral negotiations on investment.

And a survey of several recent investment agreements concluded by the Japanese Government reveals that in addition to their standard protective provisions, the agreements also take significant steps to liberalize bilateral investment flows.

Recent agreements with Vietnam, Singapore and the Republic of Korea all contain provisions which guarantee national treatment to foreign investors seeking to establish or acquire new investments.

In general terms, such provisions replicate those contained in the North American Free Trade Agreement (NAFTA) and in other recent bilateral investment treaties negotiated by Canada and the United States.

They stand apart, however, from the vast proportion of more than 2000 bilateral investment treaties (BITs) which tended to extend rights which apply only to investments once they have been established in - and, typically, screened by - the host government.

While most BITs concluded by individual European countries are known to hew to this older model, there are also signs that the European Union trading bloc plans to push for deeper commitments on investment market access in some economic agreements which it negotiates collectively on behalf of its member-states with selected trading partners.

For instance, the EU has recently concluded a so-called Association Agreement with Chile, which covers a wide range of issues, including political relations, trade relations and other forms of cooperation.

This agreement offers certain establishment rights for foreign direct investment in selected sectors. Notably, however, these rights are not subject to an investor-state dispute settlement mechanism. Rather, the home government of an investor would need to champion the investor's grievance with the host government.

An EU trade official confirmed to INVEST-SD that the EU-Chile agreement is the "first of a new generation of agreements" which the EU hopes to conclude with selected trading partners. For the time being, individual EU member states also continue to negotiate bilateral investment treaties along more familiar lines (i.e. without creating obligations to liberalize selected sectors).

As for Japan and its bilateral template, a study of several recent agreements shows that the treaties include relatively standard provisions on "fair & equitable treatment", expropriation (including measures tantamount to expropriation), and investor-state arbitration.

However, Japan's agreement with Vietnam is notable for the inclusion of a separate memorandum of understanding which offers greater clarity as to when tax measures will not be considered to constitute expropriation under the terms of the agreement. (a number of arbitrations under investment treaties have challenged various forms of tax treatment in recent years).

In their treaty understanding, the two parties agree that the imposition of taxes "does not generally constitute expropriation", and they go on to affirm that "A taxation measure will not be considered to constitute expropriation where it is generally within the bounds internationally recognized tax policies and practices."

All three Japanese treaties examined by INVEST-SD also place prohibitions on the use of a wide-range of so-called performance requirements - including obligations for investors to export a given level of content, use designated amounts of local inputs, or undertake a given level of research & development in a given territory.

Japan's investment template is also notable for the inclusion of language which ensure the right of a government to take safeguard measures in the event of a serious balance-of-payments crisis or other

serious financial difficulty.

Such safeguards would temporarily override the agreement's rules on free transfers provided that the safeguards were consistent with the IMF's Articles of Agreement and did not exceed those steps deemed necessary to cope with the crisis at hand. The Japan-Singapore treaty adds a further requirement that such safeguard measures not discriminate in favor of domestic investors; this provision is absent in Japan's agreements with Korea and Vietnam.

* Trineesh Biswas of IISD Geneva assisted with the research for this article.

Sources:

Japan-Singapore Economic Agreement (Investment is Chapter 8):
http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html
<https://webmail.iisd.ca/exchweb/bin/redir.asp?URL=http://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html>

Japan-Vietnam Agreement:
http://www.mofa.go.jp/region/asia-paci/vietnam/agree0311.pdf
<https://webmail.iisd.ca/exchweb/bin/redir.asp?URL=http://www.mofa.go.jp/region/asia-paci/vietnam/agree0311.pdf>

Japan-Korea Agreement - hard copy on file with editor

EU-Chile Association Agreement texts:
http://europa.eu.int/comm/external_relations/chile/assoc_agr/text.htm

2. Germany signs updated BIT with China

Germany and China have concluded a new bilateral investment treaty. According to press reports, the new agreement supplants an earlier BIT concluded in 1983, and offers improved levels of protection for investors. A text of the new agreement was unavailable at press time.

Germany leads all countries in the number of BITs which it has concluded - 114 - with a further 18 such agreements having been signed, but not yet entered into force.

3. US-Australia trade and investment negotiations go into overtime

Following a week of negotiations in Washington, Australian Trade Minister Mark Vaile, says that talks on a US-Australia free trade agreement are likely "to spill into January", according to reports in the Australian press.

Disagreements still center upon Australia's Prescription Benefits Scheme (PBS), as well as Australia's use of broadcasting quotas which set minimum levels for local content. Although the US Government still has yet to table a proposal which sets out its objectives with respect to the PBS, it is understood that a paper has been circulated amongst

advisors to the US Trade Representative which sets out possible negotiating objectives.

One goal of the US-based pharmaceutical industry has been to force Australia to alter its system of price controls so that brand-name pharmaceuticals could be priced at a higher level in the Australian market.

Arbitration Watch:
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4. Canadian court declines to set aside award in NAFTA Feldman arbitration,
By Luke Eric Peterson

One of two Canadian courts tasked with reviewing decisions handed down in recent NAFTA investment arbitrations has issued its ruling.

Last week, the Ontario Superior Court of Justice declined to set aside the tribunal's award in the case of Marvin Roy Feldman Karpa v. Mexico.

Citing the high degree of deference which Canadian courts are obliged to show to the "expert" rulings of international commercial arbitrators, the court rejected Mexico's argument that the original tribunal erred in holding Mexico in violation of its NAFTA obligation to provide Mr. Feldman with national treatment.

The Feldman case was mounted by Marvin Feldman, a US citizen operating a grey-market cigarette re-export business from Mexico, after Mexican authorities denied Mr. Feldman tax rebates which were alleged to have been extended to similarly-situated domestic firms.

A divided arbitration tribunal ruled in December of 2002 that the Mexican Government had indeed violated the national treatment provisions of the NAFTA - but rejected suggestions that the discriminatory tax treatment could be construed as a form of expropriation.

Mexico subsequently petitioned the tribunal to consider the relevance of provisions in the NAFTA, including Article 2105, which protect the rights of state-parties to withhold certain forms of information in order to protect the "personal privacy or the financial affairs and accounts of individual customers of financial institutions."

In Mexico's view, Article 2105 prevented the Government from revealing information about the tax treatment of Mr. Feldman's competitors. Accordingly, the Government argued that the tribunal made an "impermissible inference" when it based its finding of discrimination, in part, on the failure of the Mexican authorities to adduce evidence which would have refuted the claimant's allegations of discrimination.

Indeed, one of the three arbitrators, in a dissenting award had rejected the majority's finding of discrimination on the grounds of this dearth of evidence.

However, in a decision rendered in June of this year, the full 3-member arbitral Tribunal rejected Mexico's request for an interpretation of the earlier (majority) award which would take into account NAFTA's article 2105. The Tribunal dismissed Mexico's request and noted that various questions raised by the Mexican Government amounted to an effort to seek "a new decision" in the case.

Having closed the books on the arbitration, Mexico then turned to the Canadian courts in an effort to have the award set aside under domestic arbitration statutes.

According to the court's ruling, Mexico's arguments were threefold.

Mexico argued that it had been unable to present its case before the tribunal because the majority of the tribunal had drawn impermissible inferences from Mexico's compliance with its domestic tax laws (including provisions on privacy).

As well, Mexico contended that the tribunal failed to follow the agreed procedural rules for the arbitration by its failure to take into account NAFTA's Article 2105 (which was said to constitute part of the mandatory rules for the NAFTA arbitration).

And lastly, Mexico argued that the tribunal's order to pay tax rebates to Mr. Feldman - which had no legal basis under Mexican law - was in contradiction of public policy.

On the last of these points, Mexico had adverted to the reasoning of the dissenting arbitrator in the original arbitration who had pointed out that none of the tax rebates accorded to Mr. Feldman's competitors were legal under Mexican law - and that it would be "repugnant" to grant Mr. Feldman such rebates as well, simply in order to satisfy the NAFTA's requirements that foreign investors not be subject to discrimination.

However, none of these arguments were upheld by the Ontario Court.

Indeed, the Court placed particular emphasis upon its own view that Mexico could have disclosed basic information about tax payments to Mr. Feldman's competitors, without any need to disclose personal information which might have been confidential under Mexican law (and protected under NAFTA's article 2105).

And on the question of the award allegedly violating public policy, the court saw a very high bar for arguments to clear: "The Applicant must establish that the awards are contrary to the essential morality of Ontario." In the court's view this test had not been met.

The court also reiterated that arbitral awards generally, and "international commercial arbitrations in particular", ought to be accorded a high degree of deference by domestic courts.

This question is likely to take center-stage in another Canadian court case which is currently reviewing an award handed down in the NAFTA arbitration between SD Myers and Canada - a controversial case arising out cross-border restrictions on the movement of toxic PCB wastes.

In their pleadings to the court in the Myers case, lawyers for Canada argued that NAFTA Chapter 11 arbitrations "have important public policy implications that impact upon, and are of interest to Canadians generally and non-disputing NAFTA parties." Accordingly, they insisted that the decisions of NAFTA arbitration tribunals should be entitled to less deference than run-of-the-mill commercial arbitrations.

This view has been disputed by lawyers for SD Myers who argue that domestic courts must approach arbitral awards - including investor-state arbitrations under NAFTA - with a "powerful presumption" that the tribunal has acted within its powers.

INVEST-SD will report on the outcome of the Myers case, as well as any possible appeal of the Feldman case in higher Canadian courts.

Sources:

The Ontario Superior Court of Justice ruling in the Feldman case can be found at: www.naftaclaims.com/disputes_mexico/disputes_mexico_karpa.htm

Legal arguments in the SD Myers case are available at: www.dfait-maeci.gc.ca/tna-nac/disp/SDM-review_archive-en.asp

5. ICSID registers another BIT claim

A Turkish firm, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. has filed an arbitration under the Turkey-Pakistan bilateral investment treaty at the Washington-based International Center for Settlement of Investment Disputes (ICSID), bringing to a total of 28 the number of claims which have been mounted under investment treaties at ICSID in 2003. The firm's arbitration arises out of a dispute over a highway construction contract.

Source: www.worldbank.org/icsid

6. Environmental NGO issues analysis on minimum standard of treatment

The Washington-based Center for International Environmental Law (CIEL) has issued a briefing note analyzing the minimum standard of treatment under international investment law. The note surveys the origins of the concept in international law, its incorporation in investment treaties, and its invocation by investors in the context of disputes with host governments (particularly under the NAFTA).

The 8 page briefing note is available on-line in PDF format at: http://www.ciel.org/Publications/investment_10Nov03.pdf

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INVEST-SD Bulletin is produced By Luke Eric Peterson in Boston, Massachusetts for IISD.

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