

Emne: VS: Comment on Norway's model investment agreement

-----Opprinnelig melding-----

Fra: Gus Van Harten/osgoode [mailto:GVanHarten@osgoode.yorku.ca]

Sendt: 18. april 2008 05:51

Til: Postmottak NHD

Kopi: Norum Margrethe Reinertsen; Dannevig Tanja

Emne: Comment on Norway's model investment agreement

Dear Sir/ Madam

I am a Canadian legal academic who specializes in international investment law and arbitration. I wish to offer the following comment on Norway's draft model investment agreement.

First, I wish to congratulate you on the innovations in the draft treaty that will enhance transparency in the arbitration process, provide for greater precision in the definition of substantive standards, provide for check against forum-shopping, and ensure that investors undertake reasonable efforts to pursue domestic remedies before filing a treaty claim.

Second, I wish to offer a specific suggestion on how the treaty might be improved further. It is to include a provision whereby the states parties may agree to formalize the process of investor-state dispute resolution by addressing concerns of a pro-investor bias within the adjudicative system as currently structured. Such concerns arise because appointing authority is exercised on a case by case basis by executive officials who favour the capital-exporting perspective, and because in investment treaty arbitration (unlike other forms of arbitration) only one class of disputing party activates the system by bringing a claim. The ultimate solution to these concerns is to establish a regional investment court or other standing institution, the membership of which has secure tenure and other guarantees of independence. I can understand, though, that Norway may not be in a position to commit to such a regime without the support of other states.

Nevertheless, these concerns could be addressed alternatively by providing for the mandatory appointment of arbitrators (or at least presiding arbitrators) from a standing roster of reputable persons who have been selected for the roster in advance by the states parties, and who are in turn appointed to tribunals by an appointing authority or by lottery. Individuals selected for the roster would, ideally, be selected for a set multi-year term and would enjoy security of tenure in judicial or other employment outside of the arbitration context. In my view, the provision for a roster as described would assist in removing the increasingly evident perception that characterizes the current system based on case by case appointment. Incidentally, it would also permit greater control by the states parties over who should be eligible for appointment to resolve finally the important matters of law that often arise in regulatory disputes involving foreign investment.

Thank you kindly for this opportunity to comment on Norway's draft model investment agreement.

best wishes

Gus Van Harten
Assistant Professor
Osgoode Hall Law School
York University, 4700 Keele Street
Toronto, Ontario, Canada M3J 1P3
+1 416-650-8419 (tel)
+1 416-736-5736 (fax)
gvanharten@osgoode.yorku.ca

profile: http://www.osgoode.yorku.ca/faculty/Van_Harten_Gus.html