10 August 1994 RL-136

Ambassador Rutten

In response to your request, here are some informal, hastily written reactions to the Norwegian paper entitled "P.M." that was attached to Arne Walther's 5 August fax to you.

First, some general observations:

— This is a discussion of the ECT which freely assigns to its provisions meanings that the paper's author would like the ECT to have, but which do not necessarily follow from the language of the ECT.

— As you recognized in our conversation this morning, it is important to keep the discussion focused on the risks with regard to Russia and the other transitional countries. Norway's system should not be the issue.

— The risk that the conflicting language of 21(2) poses is not one related only to certain particular ECT provisions. Particular provisions are cited only as examples in the draft LSG Report. It is very difficult for anyone to predict in exactly what contexts or in what forms the problems stemming from the conflicting language are likely to manifest themselves.

— Norway tries to discuss the matter as if the issues were limited to host state management of its natural resources. That may have been their intent in the negotiations, but the resulting language of Art. 21 does not have that limitation. In the 29 July meeting with Longva I used as an example Mexico, where the "rules governing the system of property ownership of energy resources" regulate in detail state control over almost all oil, gas, electricity, pipelines, and transmission lines, not just hydrocarbons in the ground, and where Pemex is essentially an arm of the government for the exercise of sovereign rights.

— As I said in my earlier paper, it is the "close cases" that especially worry me, as concerns the application of Art. 21(2). And "close cases" are commonplace.

Now, some responses to the Norwegian paper with respect to specific ECT articles that are mentioned:

— Art. 6. The Norwegian paper asserts that since TRIMs applies only to investment measures related to trade in goods, "it cannot be seen that the ECT's Article 21(2) could be interpreted as being inconsistent with" Art. 6. But (leaving aside the fact alluded to above that Art. 21(2) may apply to goods) Art. 6(2) deals with "any investment measure which is mandatory or enforceable...and which requires.... or which restricts...." Trade in goods can be affected by investment measures, which in turn can be affected by "rules governing the system of property ownership." For example, as a condition of continuing to enjoy certain investment privileges or benefits, the existing

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investor-owner might be required to use domestic vs. imported goods. If this requirement were presented as integral to a comprehensive set of property ownership regulations, there could be a conflict between Arts. 6 and 21(2).

— Art. 13(7). It is easy to imagine "close" national treatment cases, where the host state asserts plausible domestic reasons of resource management, economic regulation, safety, environment, tax policy, etc., but the net effect is to disadvantage the foreign investor. In the trade field, analogous cases arise under GATT Art. III. If such measures can be presented as inextricable parts of the "rules governing the system of property ownership," it will be much harder to successfully challenge them.

— Arts. 13(2) and (5). Norway seems to read Art. 21(2) and (4) as nullifying any best efforts obligation under 13(2) and (5) with respect to the making of Investment (i.e., they say the best efforts commitment would apply only "once authorizations, licences, concessions and contracts have been allocated," which flies in the face of 13(2) and (5)).

— Art. 13(1). I think it is possible to imagine cases where a state takes actions, in accordance with its "rules governing the system of property ownership," which have the effect of impairing an Investor's ability to perform an agreement which the Investor has with that state. Such an action might, for example, have to do with new constraints on the rate of production, denial of easements, reversion of property rights, or other matters. In a case where the contract clearly deals with such occurrences, I agree that 21(2) may not impair the Investor's rights under Art. 13(1), last sentence. But if the contract is imprecise on the point, it seems to me that Art. 21(2) might be successfully cited to defeat an Investor claim that otherwise would be found to be meritorious.

— Art. 15. Longva told me there is a US paper on the effect of Art. 21(2) on cases of expropriation. He promised to send it to me, but hasn't done so and I haven't seen it. My own thought was that Art. 21(2) might shift the dividing line between what is expropriation and what is merely regulation, to the detriment of the Investor.

— Art. 25. I hate to base my argument too strongly on Art. 25, since for other reasons I have doubts as to its effectiveness. Nonetheless, para (3) of Art. 25 poses one of the most obvious conflicts with Art. 21(2); the latter could divest the former of any meaning. And it is easy to imagine a state citing Art. 21(2) as justification for its failure to comply with Art. 25(2). Finally, as we discussed earlier the paper's last two sentences are almost self-incriminating.

Best wishes,

Craig

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