investmenttreatynews

Published by the International Institute for Sustainable Development

www.investmenttreatynews.org

March 2009

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NEWS: MEG KINNEAR ELECTED SECRETARY-GENERAL OF ICSID

By Damon Vis-Dunbar

A Canadian national has been elected as the new Secretary-General of the World Bank's International Centre for Settlement of Investment Disputes (ICSID), the high-profile facility for investor-state arbitrations.

Meg Kinnear, who has worked as a lawyer for the Canadian government since 1984, will leave her post as Director General of the Trade Law Bureau of Canada to take over the helm at ICSID.

Ms. Kinnear will be the first full-time Secretary-General of ICSID; until this point, the job has also involved acting as General Counsel to the World Bank. The Centre has seen its case-load expand significantly in recent years, as an increasing number of foreign investors have exerted their rights under bilateral investment treaties. As of 2 March 2009, there were 123 cases pending at the Centre.

The ICSID is the best-known venue for settling investor-state disputes, which is partly due to the fact that arbitrations conducted under its auspices are more visible than the commonly used alternatives; ICSID maintains an on-line docket with a list of all its pending cases, for example, and routinely publishes arbitral decisions, or excerpts, on its website.

In light of the attention ICSID receives, the role of Secretary-General will be political, as well as administrative. Indeed, the Centre has come under criticism on a number of fronts from civil society groups.

In a telephone interview, ITN asked Ms. Kinnear how the ICSID Secretariat should be expected to respond to concerns expressed by civil society. Ms. Kinnear said that, personally, she found many of the criticisms from civil society that she had come across to be "thoughtful", and added that the ICSID Secretariat should "listen carefully to such comments and consider concrete responses to criticisms that are valid."

Those who use the ICSID facility, i.e., investors and governments, have voiced their own concerns, including the length of time it takes for ICSID arbitrations to come to a conclusion, and the costs involved. Indeed, legal practitioners have said anecdotally that these issues have encouraged a move to ad-hoc forms of arbitration, or to other arbitration facilities.

Ms. Kinnear said that while she had her own ideas on how the ICSID system could be made more efficient and less costly, the first step would be to consult with ICSID users. "I am extremely interested to hear from practitioners and views of Member States, about how ICSID can serve them better," said Ms. Kinnear.

Ms. Kinnear will begin her new job 22 June 2009. She has already stepped down as counsel in cases involving the Canadian government, and says that she is now mainly engaged in administrative tasks, such as helping find her replacement in the Canadian government.

Ms. Kinnear replaces Nassib Ziade, who has served as acting ICSID Secretary-General since Ana Palacio, a former Spanish Foreign Minister, stepped down last April.

NEWS: TRIBUNAL REBUFFS DEFENSE OF NECESSITY IN RECENTLY PUBLISHED AWARD: NATIONAL GRID P.L.C. V. ARGENTINE REPUBLIC

By Elizabeth Whitsitt

In a recently published award, a tribunal convened pursuant to a request for arbitration under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) found the Argentine Republic liable to the British firm National Grid p.l.c. for damages totaling more than US$53 million.

The dispute, like dozens of others, relates to measures taken by Argentina in 2002 in the midst of its financial crisis.

In 1989 and 1991, Argentina enacted laws providing for the privatization of, among other things, its electricity sector, while also pegging the peso to the US dollar at a fixed exchange rate of one peso to one US dollar. As a result of such changes and through a series of corporate transactions, National Grid became a shareholder in two corporations, Transener and Transba, which were granted 95-year concessions to provide high-voltage electricity transmission services.

In addition to the concessions, National Grid, via Transener, made investments in the upgrading and expansion of Argentina's electricity transmission system. In 1997, 1999 and 2001, Transener was awarded three contracts to construct, operate and maintain transmission lines in return for periodic payments from the beneficiaries of the lines. These payments, or cánones, were to be calculated in US dollars and adjusted periodically in accordance with the US Consumer Price Index ("CPI") and the US Producer Price Index ("PPI").

In response to its economic crisis, however, the Argentine Republic amended its State Reform and Convertibility Laws in early 2002. As a result, the following changes occurred: (i) the claimant lost its right to calculate public utility tariffs in dollars and to adjust those tariffs on the basis of international price indices, (ii) public service tariffs were converted into Argentine pesos at the rate of one peso to one US dollar and were frozen at that rate, (iii) other dollar-denominated payment obligations and their adjustment by international indices became subject to those same exchange-rate restrictions, and (iv) electricity transmission and public utility companies could not suspend or modify compliance with their obligations under their concessions and licenses.

> *"National Grid p.l.c. v. Argentine Republic is not the first time an arbitral tribunal has considered the Argentine Republic's argument that a change in domestic law was a necessary response to the economic crisis it had experienced in early 2002. "*

Asserting that the above amendments destroyed the remuneration regime provided for under the concessions and the previous regulatory framework, National Grid commenced arbitral proceedings against Argentina in April 2003. Specifically, National Grid argued that the Argentine Republic: (i) expropriated its investment, (ii) treated its investment unfairly and inequitably, (iii) failed to provide its investment protection and constant security, (iv) implemented laws that were unreasonable and discriminatory against the energy sector, and (v) breached the protections afforded investments pursuant to the umbrella clause in the UK-Argentine BIT.

While Argentina countered the above assertions using a number of arguments, its main contention was that "…its conduct was licit and exempt from responsibility because the Measures were taken in response to a state of necessity." Specifically, the Argentina argued the economic crisis was the result of a number of external factors including but not limited to: (i) increases in the dollar rate of interest, (ii) collapsing emerging markets, (iii) the devaluation of the Brazilian currency, and (iv) falling prices of exported goods.

In its 3 November 2008 decision, released to the public in February 2009, the tribunal first assessed the claims of National Grid. In so doing, the tribunal rejected the claimant's assertions regarding expropriation, discrimination and the UK-Argentine BIT umbrella clause. It did find, however, that the Argentine Republic breached the "fair and equitable treatment" and "protection and constant security" standards owed to the claimant's investment under Article 2(2) of the UK-Argentina BIT. With respect to both violations, the tribunal noted that in 2002 the Argentina fundamentally changed the legal framework that had been used to solicit National Grid's investment.

After finding the Argentine Republic in breach of those standards, the tribunal went on to consider the "state of necessity" defense. Referring to the International Law Commission's draft articles on state responsibility, the tribunal noted that necessity may not be invoked as a defense by a state if that state has contributed to the situation of necessity. Applying this principle to the facts of this case, the tribunal was not convinced that Argentina's economic crisis was solely attributable to external factors. Rather, the tribunal found that "[i] nternal factors such as external indebtedness, fiscal policies or labor market rigidity were under the control

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NEWS: EU MEMBER STATES REJECT THE CALL TO TERMINATE INTRA-EU BILATERAL INVESTMENT TREATIES

By Damon Vis-Dunbar

The majority of European Union Member States want to maintain the network of bilateral investment treaties (BITs) that exist between themselves, despite concerns by the European Commission that these treaties have been superseded by European Community law, according to a memo by the EU's Economic and Financial Committee (EFC).

The memo comes as a setback for the Commission, which warns that overlap between European Community law and BITs between EU Member States creates "legal uncertainty."

The Commission raised its concern with the EFC in 2006, when it cautioned that "investors could try to practice forum shopping by submitting claims to BIT arbitration instead of —or additionally to—national courts. This could lead to BIT arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States a possible outcome."

However, the Commission's opinion holds little sway over most EU states, according to a December 2008 letter by the EFC, a committee which includes representatives from the Finance Ministries and Central Banks of EU Member States.

"Most Member States did not share the Commission's concern regarding arbitration risks and discriminatory treatment of investors and a clear majority of Member States preferred to maintain the existing agreements," writes the EFC, in a letter to the President of the Council of the European Union.

Sergey Ripinsky, an expert on international investment treaty law at the British Institute of International and Comparative Law, told ITN: "Governments are likely to believe that BITs give their investors a higher level of protection abroad, compared to domestic laws of an EU host state or even EC law. For example, neither domestic systems nor European law include an obligation as broad or comprehensive as the Fair and Equitable Treatment obligation in BITs. Even more traditional provisions, such as the ones concerning expropriation, may be expressed in BITs in a stricter manner, leaving less discretion or margin of appreciation to host state governments."

> *""Governments are likely to believe that BITs give their investors a higher level of protection abroad, compared to domestic laws of an EU host state or even EC law."*

However, Dr. Ripinsky adds that "the European Commission may feel that existing intra-EU BITs create discrimination between investors from different Member States and pose indirect obstacles to the free movement of capital. For example, Estonia has a BIT with Germany while it does not have one with Hungary. It could be argued that this places a Hungarian investor in Estonia at a disadvantage compared to his German counterpart."

While the Commission has called for the termination of intra-EU BITs—i.e., investment treaties between two EU Member States—, it has also warned that certain provisions in the BITs between EU Member States and non-EU states pose a problem. As ITN has reported in the past, three countries —Finland, Austria and Sweden— currently face legal challenges brought by the European Commission at the European Court of Justice, after these countries refused to re-negotiate a number of their bilateral investment treaties with non-European states.

In these disputes, the Commission is primarily concerned about BIT provisions that grant foreign investors the rights to move capital freely, which the Commission says are incompatible with its right to restrict capital flows in extraordinary circumstances.

Although the ECJ cases concern extra-EU BITs, the EFC says that they may provide a clarification of the "basic principles involved in this complex area" with respect to intra-EU BITs. As such, the EFC says that the Commission will likely wait for the ECJ rulings, before determining its next steps.

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of the Respondent and created fertile ground for the crisis to develop when in the late nineties the external factors adduced by the Respondent came to play."

National Grid p.l.c. v. Argentine Republic is not the first time an arbitral tribunal has considered the Argentine Republic's argument that a change in domestic law was a necessary response to the economic crisis it had experienced in early 2002. The differing results, however, reflect the continued difficulty arbitral tribunals have in assessing the legitimacy of the necessity defense and whether domestic measures in this case were justifiable.

NEWS: CANADIAN FIRST NATIONS CHIEF INTERVENES IN NAFTA CHAPTER 11 TOBACCO DISPUTE

By Damon Vis-Dunbar

The head of the Canadian Assembly of First Nations Peoples has voiced his support for a group of Canadian investors in a tobacco company who are suing the U.S. government for alleged violations of NAFTA Chapter 11.

As ITN reported in January, the claimants – the tobacco company Grand River Enterprises Six Nations and its owners - complain that a settlement reached between the 46 U.S. States and four major American tobacco manufacturers has resulted in legislation that has made its product uncompetitive in the U.S. market.*

Recent briefings filed by both parties clash over the question of whether certain international treaties related to aboriginal peoples fall within the ambit of customary international law. This question is particularly relevant to the claimants' allegation that the United States has violated Article 1105 of NAFTA, which offers investors of the other NAFTA countries Fair and Equitable Treatment as reflected under customary international law.

The claimants, who belong to the Haudenosaunee First Nations community, argue that certain international treaties and conventions, such as the U.N Declaration on the Rights of Indigenous People (UNDRP) and the International Labour Organization's Convention 167 (I.L.O Convention #167), comprise a part of the evolving norms of customary international law, and should therefore be "considered by the Tribunal in its construction of NAFTA".

However, the United States, along with Canada, has not signed the UNDRIP or ratified the I.L.O Convention #167, and both countries deny that these treaties meet the threshold of customary international law.

In a letter to the tribunal, Phil Fontaine, the National Chief of the Assembly of First Nations, says that the arguments put forth by the U.S. "ignores the reality that we, the Indigenous peoples, have owned and occupied our lands, and conducted our businesses with each other, since time immemorial".

According to Fontaine: "The Tribunal should accordingly find that First Nations investors who have been promised 'fair and equitable treatment' under NAFTA Article 1105 are entitled to have their legitimate expectations – based on their rights as Indigenous peoples – honoured by NAFTA government officials."

Fontaine's submission will not necessarily be considered by the tribunal. The secretary to the tribunal says the letter was "unsolicited", and that the tribunal will determine "whether to consider the submission" in light of the NAFTA Free Trade Commission's statement on non-party participation, as well as any views expressed by the disputing parties.

NEWS: ICSID REGISTERS CLAIM BY SPANISH INVESTOR AGAINST ARGENTINA OVER AIRLINE DISPUTE

By Fernando Cabrera Diaz

The Spanish investor Grupo Marsans is behind a claim against Argentina registered by the International Centre for Settlement of Investment Disputes on 30 January 2009.

A spokesperson for the Madrid-based Grupo Marsans, Angel Del Rio, said his company had launched those proceedings through a holding company, Teinver S.A, as negotiations with Argentina over a possible settlement continue. According to Mr. Del Rio, the parties are close to reaching an agreement, although they have yet to sign one.

As reported previously by ITN, Grupo Marsans agreed to sell the troubled airline back to Argentina last July, but the two sides have been unable to agree on a sale price. Argentina's Planning Ministry says that Aerolineas Argentinas and its sister Austral are US$832 million in debt. However, a Credit Suisse valuation at the request of the Grupo Marsans estimated the airlines' combined worth at between US$350-445 Million.

Given the wide gulf in valuations, the negotiations have become bitter, with public accusations aired by both sides. With negotiations deadlocked, on 24 November the Argentine Senate introduced a bill that would expropriate the airlines in return for a symbolic sum of $1 in compensation. On 17 December, the Senate voted 42 to 20 to approve the bill.

Since Argentina took over the airlines, both parties have continued to negotiate. According to Mr. Del Rio, Grupo, Marsans is asking that the Argentine government take over part of a contract for 73 Airbus commercial planes, many of which were originally intended to join the Aerolineas fleet. Mr. Del Rio explains that if Argentina took over the contract, Grupo Marsans could recuperate a 180 milliion Euro deposit it has with Airbus.

The Marsans claim is registered on behalf of Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A., which belong to the Marsans corporate chain. The three companies held shares indirectly or directly in the airline, according to

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NEWS: U.S. ACADEMICS URGE THE OBAMA ADMINISTRATION TO IMPROVE THE INTERNATIONAL INVESTMENT REGIME

By Damon Vis-Dunbar

Faculty at Columbia University in New York have called on U.S. President Barack Obama's administration to address "imperfections" in the international legal regime that governs foreign investment.

In a letter to the President, the academics write: "While the current international investment regime has been heralded as a great success, the speed with which it has developed has led to imperfections that need to be addressed to maintain and strengthen its legitimacy and effectiveness."

The letter is now being circulated in the hopes that more people will sign on.

Members of the Columbia University faculty raise four concerns: the international investment law regime favours the rights of investors over those of host states; the piecemeal expansion of investment treaties and inconsistent interpretations of their provisions jeopardize the predictability of system; developing countries are not equipped to respond to complex investor complaints under investment treaties; and countries may restrict foreign investment in response to current financial troubles.

Among the proposed responses is the establishment of an international committee of academic institutions who would formulate a "Restatement of International Investment Law", which would distinguish between those tenets of the law which are generally accepted and those that are contested.

In addition, the letter recommends further consideration of a multilateral appeals mechanism for arbitral decisions in investment disputes. An appeals mechanism has been suggested in other fora in the past as a means to ensure that investment treaty provisions are interpreted by arbitrators with greater consistency; however, the concept has yet to gain endorsement from a sufficient number of states.

An advisory center for developing countries on international investment law is also proposed. Such a center would be intended to help developing countries negotiate investment treaties and respond to investor complaints.

Finally, the letter calls for a "standstill on FDI protectionist measures," in line with an agreement by G20 countries in November 2008.

INTERVIEW: NAFTA FIFTEEN YEARS LATER: THE SUCCESSES, FAILURES AND FUTURE PROSPECTS OF CHAPTER 11

By Elizabeth Whitsitt

Fifteen years ago the North American Free Trade Agreement (NAFTA) entered into force and became the first regional trade agreement between a developing country (Mexico) and two developed nations (Canada and the United States of America). While a number of criticisms and controversies have arisen with respect to different aspects of NAFTA, there can be little doubt that one of the most contentious features of the agreement has been Chapter 11; a chapter which contains obligations that each NAFTA Party must respect when dealing with the investors of other NAFTA Parties and their investments.

From its inception, NAFTA Chapter 11 has drawn a number of concerns with respect to its scope and operation. Some argue that the Chapter is overly protective of investors and, as a result, inappropriately infringes on a state's ability to regulate investment within its borders. Others argue that the Chapter has had a positive influence on international investment law by, for example, allowing for more transparent arbitration proceedings.

Given the diverging views on the Chapter, and on occasion of the fifteen-year anniversary of NAFTA, ITN has asked five experts for their thoughts on the successes and failures of Chapter 11, the most notable awards rendered by NAFTA tribunals, and predictions on the future direction of the NAFTA investment regime.

Gus Van Harten is an Assistant Professor at Osgoode Hall Law School at York University in Toronto, where he teaches Administrative Law, International Investment Law, and Governance of the International Financial System. He is also the author of the recently published book Investment Treaty Arbitration and Public Law (OUP, 2007).

Ian Laird is a lawyer practicing in Washington, D.C. and focuses his practice on international investment law. Ian is also the Editor in Chief of Oxford University Press' InvestmentClaims.com.

Todd Weiler is a professor, arbitrator, legal counsel and consultant in international economic law, and runs the website NAFTAClaims.com.

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Barton Legum is a partner and head of the investment treaty practice at Salans in Paris. From 2000-2004, Mr. Legum was the Chief of the NAFTA Arbitration Division of the United States Department of State.

Alejandro Faya Rodriguez is a senior legal advisor to the Ministry of Economy of Mexico. He was formerly the Deputy Director-General for International Affairs of the Directorate-General of Foreign Investment, in charge of the negotiation of investment treaties. He teaches Law of Foreign Investment, at postgraduate level, at Universidad Iberoamericana and Universidad Nacional Autónoma de México.

INTERVIEW WITH GUS VAN HARTEN

ITN: In your opinion, has Chapter 11 had a significant influence (negative or positive) on international investment law and why?

It has had a significant influence, both positive and negative. First the bad news. In today's age, international investment law should be the product of rule-making and adjudication that people admire and trust. I've said this elsewhere but will repeat that arbitration is a flawed method for deciding, once and for all, the vital questions of public law and policy that arise in disputes between businesses and states. So, unfortunately, the apparently great steps forward in our understandings of international investment law, arising from the awards, look more like steps backward if one doubts the basic legitimacy of the process. I don't want to seem to be dismissive. There are some beautifully reasoned awards alongside the embarrassing ones. But overall, to stick to the principle, all of them must be taken with a good dose of salt.

Now the positive. The quality of awards and the openness of the process under Chapter 11 arbitration has improved greatly over time as public awareness and scrutiny has risen. That is a welcome trend that is very clear under NAFTA, though far less so under other treaties. So Chapter 11 arbitrators have set a higher standard for others to live up to, even if I must discount the value of the jurisprudence overall.

> *"From its inception, NAFTA Chapter 11 has drawn a number of concerns with respect to its scope and operation. "*

ITN: How successful has Chapter 11 been in resolving disputes between investors and NAFTA state parties?

Well, we all have different criteria for measuring success! For investors, it is a mixed bag. Even those who have won have occasionally found it to be a hollow victory. And those who have lost their claims have been hammered with large legal and in some cases arbitration costs. I think more value for investors is in the bargaining power they gain in a regulatory context, and this accrues mainly to the big firms. It's one more tool with which to push for or deter regulatory changes, using the threat of a long drawn-out litigation. So the investors who actually litigate are rarely the winners, but they do a big favour for big firms that don't themselves bring claims. Even so, I think investors as a whole would be better served by a widely respected and credible adjudicative process. There is more deterrent value when the system is respected.

As for host governments, the one point of success is that they can direct aggrieved investors to Chapter 11 and say, there's your remedy, go ahead. But more broadly, in terms of the public interest, it's been a terrible failure from the get-go. It abandons very basic principles of democratic choice and the rule of law in exchange for a vague promise that investors will move money around more efficiently (keep in mind that much foreign direct investment is in fact round-trip or trans-shipped investment, i.e. it is not necessarily productive capital). In those respects, it's a huge loss for Joe public. We can reassure investors without abandoning both legislative supremacy and judicial independence.

ITN: In your experience, what has been the most noteworthy Chapter 11 decision and why?

It is a tough call between Ethyl, Metalclad and Loewen, but I will go with Loewen. This is the first award that declared boldly that the system was not a free-for-all for investors. It said that states retain important interests that need to be respected. It showed that arbitrators can and will exercise prudence for political reasons. Ironically, for an adjudicative process, this was a good thing. The glitch was that it looked like a gift to the hegemon. It makes sense to be nice to the guy who is holding a wrecking ball over your house. But I think its symbolism marked a turning point, especially because of how unambiguously the tribunal made its point.

ITN: What, if any, refinements to Chapter 11 would you recommend for the future and why?

Refinements is an interesting choice of words. The system needs to live up to its claims to deliver on the rule of law. That means deciding the law according to the requirements of procedural fairness, founded on an independent and impartial adjudicator. This is a vital prerequisite; we are reviewing legislative and judicial decisions after all. I respect many of the arbitrators (those I know personally) and I always feel bad to say it. But the fact is that the system does not deliver very well at all on independence when you peel away the layers. Injecting proper checks, by moving away from the arbitration model and the role of the arbitration industry, is the only way to solve the problem. For example, one could select the adjudicators case by case, by an objective method, from a set roster of sitting appellate court judges. There are of course many other options.

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And NAFTA offers a good platform on which to work out a proper system and then extend it to other treaties. But if an adjudicative system on these matters does not deliver in spades on independence, it is better to dump it in favour of something much more constrained. For example, one might afford an opportunity for the relevant government agencies to agree to dispose of claims (not just tax-related or annex-related claims). That would provide a more representative set of executive checks on the process and would be more open and honest than the current arrangement regarding the role that executive officials play in governing the system.

INTERVIEW WITH IAN LAIRD

ITN: In your opinion, has Chapter 11 had a significant influence (negative or positive) on international investment law and why?

NAFTA Chapter 11 has had an extraordinary positive influence on the growth and development of international investment law for a number of reasons. Firstly, it can be said that the early NAFTA cases in the 1998-2002 period, like Ethyl, Metalclad, Myers, Pope & Talbot, ADF, Loewen, and Waste Management, raised awareness of the investor-state dispute mechanism to such an extent that it spurred its wide use and application around the world. Prior to the early NAFTA cases, there had only been 20 some ICSID cases over the previous 30 years. Now the growth of these cases has increased exponentially in the past 10 years.

Secondly, because of the transparency of the NAFTA dispute settlement process, investor-state arbitration has moved out of the exclusive domain of a select few Washington and London firms to being a world-wide phenomenon. All pleadings and submissions to NAFTA hearings are public and the trend has been over the past few years for the hearings to be opened to the public as well. Even though critics have lambasted NAFTA Chapter 11 arbitrations for being held before "secret" tribunals, this has simply not been the case. The influence of NAFTA has had a positive impact on opening up ICSID and WTO arbitration processes because of its example.

Thirdly, NAFTA tribunals have dealt with some of the most contentious substantive issues in international law, such as the construction of the Fair and Equitable Treatment obligation and National Treatment.

Fourthly, it has encouraged respect for the international rule of law. The example set by the NAFTA parties visibly and tangibly supports the international rule of law in ways that other conventions and treaties do not. When smaller, perhaps less law abiding nations see countries like Canada and the US making themselves subject to international rules, this only encourages respect for the rule of law at all levels, domestically and internationally.

ITN: How successful has Chapter 11 been in resolving disputes between investors and NAFTA state parties?

Governments have generally done well in defending NAFTA arbitrations. Look at the record of the NAFTA parties, in particular the US, which has yet to lose a case. Claimants are well aware that it is a very serious matter to sue a government and are very hesitant to do so. However, sometimes governments give foreign investors no choice but to make a claim when they interfere with their investments to such an extent as to effectively eliminate or substantially diminish their investment. Although some critics find it offensive for governments to be held accountable, describing international arbitration as an assault on sovereignty, this is simply a red herring. What critics fail to mention is that the NAFTA seeks to encourage respect for certain fundamental principles of international law, such as prohibitions against discrimination and arbitrary treatment (as found in the National Treatment and Fair and Equitable Treatment standard obligations) and expropriation without compensation.

ITN: In your experience, what has been the most noteworthy Chapter 11 decision and why?

The most noteworthy decision, because it was perhaps the most outrageous on a number of levels, was the Loewen v. US decision. When surveyed in the OGEMID list-serve, the international investment law community almost unanimously criticised the decision as incorrectly made. Clearly the tribunal, as it even stated in the last part of the award, was loathe to make an adverse award against the US for fear of retribution by anti-trade interests in the US against the NAFTA and free trade. This was despite a clear breach of international law by the Mississippi Courts (as held by the tribunal earlier in its decision). The tribunal's decisions concerning finality and the failure to treat Mr. Loewen as a claimant distinct from his company have also attracted strong critiques.

ITN: What, if any, refinements to Chapter 11 would you recommend for the future and why?

NAFTA arbitrations have the same problem that all litigation and arbitration has – the cases take too long and cost too much. Access to justice, from the small claims courts to the International Court of Justice, require efficiency and speed as well effective decision making. One of the big debates in arbitration is the question of institutionalization: should investor-state arbitration like NAFTA Chapter 11 follow the model of international commercial arbitration or the model of institutionalised courts? This includes questions such as: should NAFTA Chapter 11 (or international investment arbitration more broadly) have a permanent court of arbitrators (like the WTO or the ICJ) or is the ad hoc process sufficient? Should NAFTA Chapter 11 have an appeal mechanism, like the WTO or domestic court

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systems, or retain the finality of the tribunal's decision in the first instance with a form of judicial review for egregious problems with the process (as currently occurs)?

Both of these issues relate to the question of cost and legitimacy of the process. Defenders of the status quo rightly note that adding more meat to the process will only increase already high arbitration costs and make it more difficult for claimants, other than the largest corporations, to make claims, or for small country respondents to be able to defend claims. Advocates for change suggest these reforms are merely the mark of a maturing system and that for consistency in the development of the law to be maintained, and hence the legitimacy of the overall process, these changes are a necessity. Both sides of this issue make strong arguments and certainly these issues will not go away any time soon.

One refinement that should be seriously examined is a better mechanism for encouraging pre-arbitration conciliation and mediation of disputes. At this point, the NAFTA makes it easy for governments to string out arbitrations rather than encourage the early resolution of claims. However, the ability of governments to force lengthy arbitral processes is clearly a strategic tool they will likely not easily relinquish.

INTERVIEW WITH TODD WEILER

ITN: In your opinion, has Chapter 11 had a significant influence (negative or positive) on international investment law and why?

NAFTA Chapter 11 was a key part of a catalytic process that led to the growth of international investment law as a 'full time' practice. A combination of exponentially-increased transnational investment, the communications and information technology revolution, and those inevitable moments of economic upset have combined to generate the present situation. The web of over two thousand investment protection treaties was obviously also necessary, but also largely already in place. The NAFTA supplied the context within which this catalytic process could get underway, although it arguably would have happened eventually nonetheless. Increased investment activity worldwide was eventually going to lead to more disputes, but a decade ago few lawyers seemed to be aware that investment treaties provided a forum for resolution of their clients' particular dispute with a government or regulatory authority. Implanting an investor-state dispute-settlement mechanism within the context of one of the world's largest trade and investment relationships (i.e. the US-Canada relationship) arguably sped up the process, leading to more cases sooner than might have otherwise occurred.

The communications and technology revolution that changed the way the world gathers and shares information, with expanded access to news and knowledge, comes into play here because the early NAFTA cases might not have had much impact in an earlier age. The tiny community of anti-globalisation activists, and their disproportionately large number of friends in the Media, were able to amplify their voices much louder than in previous times because of it. The increased awareness of these cases, and the existence of the dispute-settlement mechanism itself, was not limited to those who disapproved of it, however. In addition, some early pioneers made a point of publishing decisions, fostering a process of law and community building that continues today. Finally we had Argentina's currency crisis, and the measures that followed - which generated a lot of new cases that might have still remained rather obscure if not for the growing awareness of the NAFTA Chapter 11 dispute-settlement process. All of these factors led us to this present moment, NAFTA Chapter 11 included.

ITN: How successful has Chapter 11 been in resolving disputes between investors and NAFTA state parties?

I think it has been moderately successful. It has the potential to be much more successful, but only once it becomes more regularised in the minds of officials in each NAFTA Government (particularly in the US and Canada). A rather paternalistic view still appears to linger in the corridors of some governmental agencies that the NAFTA was only ever intended to protect Canadian and American investors from the hands of the Mexican State. Over a decade ago, Professor Joseph Weiler predicted that NAFTA government officials would come to accept this manifestation of how the State owes obligations to individuals just as they had in the European Union. I think he's right, but I think the process has been slower than one might have expected. After politicians and officials have truly internalised the obligations these States have undertaken, in respect of how they should regulate economic activity (in the broadest public interest), I think the dispute settlement process will become more effective – and perhaps even less necessary – in the long run.

ITN: In your experience, what has been the most noteworthy Chapter 11 decision and why?

I would like to think that the two most noteworthy cases thus far are ones that are still underway, both involving the USA. They are: Glamis Gold Inc. v. USA and Grand River Enterprises Six Nations Inc. et al v. USA. Both cases involve the intersection between the broader international law of human rights and the law of international investment protection, within the context of the rights of Indigenous peoples.

The most noteworthy, decided case would be Metalclad v. Mexico. The mythology that has arisen about that case within various legal, social and political communities is fascinating for its contradictions. Sometimes it is hard to believe that people are

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speaking about the same case (although, sadly, more than once I have come across academics who have mentioned it in public lectures who - it turns out - have actually never read the award for themselves, relying instead on someone else's description). It is also the case that seriously damaged the Canadian Province of British Columbia's reputation as a suitable jurisdiction for international arbitration, after a trial level judge substituted his understanding of what the term "international law" means for that of a tribunal chaired by the venerable Sir. Eli Lauterpacht. Indeed, because the Government of Mexico's challenge to the award was officially supported by the Government of Canada, the reputational damage was not even limited to British Columbia. Thankfullly, additional decisions from different Canadian courts have since returned the country to its reputational status quo within the international arbitral community.

ITN: What, if any, refinements to Chapter 11 would you recommend for the future and why?

I think the pull towards having a world investment tribunal - along the lines of the WTO DSU's panels and AB – is slow but inexorable. The Chapter would need to be amended to permit recourse to such a body when the time comes. I would also advocate removal of Article 1131(2) which I view as inappropriate and deleterious for any document that purports to establish a rule of law regime. This provision obliges tribunals to treat statements about the interpretation of NAFTA provisions as binding, when jointly issued by officials from the three NAFTA Parties (under the auspices of something called the North American Free Trade Commission). It has already been used by one of the NAFTA Parties to retroactively overrule a tribunal decision on liability, so as to avoid being compelled to pay a small amount of damages to the vindicated investor.

While those steeped in the Westphalian model of international law praise this mechanism for ensuring that control over substantive law stays in the hands of the treaty parties, I am not so sanguine. In my opinion, the very existence of this provision provides governmental officials, who would be judged for their conduct against established expectations, with an irresistible means of changing the grounds upon which such expectations may be held on a post hoc basis. While there can be no denying that these expectations only arise for individual investors because the treaty parties agreed to establish a mechanism for their redress as against the Sovereign, the notion that not only access to these rights, but the rights themselves, could be subject to change or outright rescission, without a moment's notice, smacks of the same kind of arbitrariness for which instruments, such as the Magna Carta, were established.

We are speaking about nothing less than the establishment of the rule of law, which is a fundamental precondition for sustained economic growth. Article 1131(2) is a leftover vestige of the Crown Prerogative whose very existence is anathematic to the object and purpose of establishing a regime for the protection of foreign investment.

INTERVIEW WITH BARTON LEGUM

ITN: In your opinion, has Chapter 11 had a significant influence (negative or positive) on international investment law and why?

Chapter 11 has had a significant positive influence on international investment arbitration. In 2000, when the field of investment arbitration was relatively new, there were differing views and approaches about the transparency of arbitral awards and proceedings. Early on in the practice of investment arbitrations under NAFTA Chapter 11, the US, Canada and Mexico agreed to publish awards and make proceedings public. While not all investment arbitration fora adopt such an approach, I think that the NAFTA Parties and subsequent practice under Chapter 11 have been instrumental in promoting and encouraging discussion about transparency in investment arbitrations generally.

ITN: How successful has Chapter 11 been in resolving disputes between investors and NAFTA state parties?

Generally speaking, I think that Chapter 11 has been successful in resolving disputes. Every case submitted and decided under Chapter 11 finally resolved the dispute between the parties. In other cases, like the Kenex v. United States case, disputes brought by investors against NAFTA governments via NAFTA have been resolved by domestic courts in favor of the investor, thereby by-passing the need to proceed with a NAFTA tribunal.

ITN: In your experience, what has been the most noteworthy Chapter 11 decision and why?

There are two decisions coming out of Chapter 11 that I think are noteworthy. The first is the Loewen decision, a case which raised numerous issues regarding the interaction between national courts and NAFTA tribunals. The second is the Methanex decision, a case that is noteworthy because it was the poster child for fears about Chapter 11 and that upon resolution laid to rest those fears, while still providing the investor with a forum in which its complaints could be heard.

ITN: What, if any, refinements to Chapter 11 would you recommend for the future and why?

I do not think that refinements in the form of amendments to Chapter 11 will happen. None of the NAFTA Parties have any appetite for this. It is important to note, however, that the changes made in the new US and Canadian Model Investment Treaties are largely based on each government's experience with Chapter 11.

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INTERVIEW WITH ALEJANDRO FAYA-RODRIGUEZ

ITN: In your opinion, has Chapter 11 had a significant influence (negative or positive) on international investment law and why?

The impact of Chapter 11 has been great. It actually triggered the investor-State arbitration mechanism worldwide. As the first Chapter 11 cases appeared, we witnessed a parallel growth of non-Chapter 11 cases. NAFTA was the first economic treaty in modern times to demonstrate that this scheme (investor-State) really works, as an alternative the long-standing concept that treaties only relate to matters between States. We can fairly say that Chapter 11 represents an inflexion point in the history of international investment law, which helped awake sleeping BITs everywhere. Prior to NAFTA, we relied on the traditional sources of customary international law (supported by traditional literature, rulings of the ICJ, the Iran-US Tribunal and a few landmark cases). Since NAFTA, we have relied strongly on treaties (BIT´s and FTA's) and jurisprudence arising from them. Moreover, NAFTA´s jurisprudence, interpretations and recommendations have been a mandatory reference, for both arbitration and treaty negotiation; and NAFTA has been a pioneer in several issues, such as transparency and third-party participation in arbitral proceedings.

ITN: How successful has Chapter 11 been in resolving disputes between investors and NAFTA state parties?

It has been pretty successful. After 15 years, Chapter 11 has generated a jurisprudence and clear patterns in many substantive issues (although, not without some struggling along the way). In general terms, disputes have been solved in an even-handed manner, and when the State has been found liable, non-exaggerated sums of money have been awarded. All the awards have been duly obeyed. Some credit has to be given to the legal defense teams of the three countries, which have always acted with very high standards in terms of quality and professionalism.

The objective of the Chapter has been fulfilled, in the sense that it is an extraordinary remedy for investors, not a resource to pursue any time the investor is bothered or affected. Investors have pursued their legitimate claims, and the States have not seen their ability to regulate diminished. Outside the NAFTA, we cannot see such a degree of order, consistency and equilibrium. Finally, Chapter 11 has been useful not only to investors, but to the NAFTA parties themselves, because they are compelled to subject their acts to a number of rules and standards, thus fostering institutional behavior.

ITN: In your experience, what has been the most noteworthy Chapter 11 decision and why?

It is very difficult to pick up or categorize one single decision as the most important. However, out of the most recent decisions, I like Methanex, because it reaffirmed the international law principle that the legitimate exercise of regulation is not compensable. It is important to maintain always a sound balance, for the benefit of the whole system; to punish arbitrary acts, and respect the ability of the State to regulate.

ITN: What, if any, refinements to Chapter 11 would you recommend for the future and why?

There are not urgent refinements, although some may be useful. I would go for some procedural matters, such as a clarification that indirect claims (legal standing to minority shareholders for harms to the enterprise in which they participate) are not allowed under Chapter 11. It is already forbidden in the text, but that did not stop the Gami tribunal from holding jurisdiction. The other issue would be to clarify that Chapter 11 only covers damage to established (cross-border) investments, not local investments, which may be affected by a measure of another country). We have seen some frivolous claims that have attempted to bring into the Chapter 11 disputes of a merely commercial nature.

RECENTLY PUBLISHED

Law and Practice of Investment Treaties: Standards and Treatment, By Andrew Newcombe and Lluís Paradell, Kluwer Law International, 2009.

A new book on international investment treaty law published by Kluwer Law International aims to provide a "a systematic, comprehensive and detailed statement of the law, along with applicable principles and policies ..." The book is authored by Andrew Newcombe, a law professor at the University of Victoria, and Lluís Paradell, counsel at Freshfields Brukhaus Deringer. The first chapter, providing a 73 page in-depth treatment of the historical development of investment treaty law is available for free from the website Investment Treat Arbitration: http://ita.law.uvic.ca/. Subsequent chapters examine the evolution and application of concepts such as National Treatment, Most-Favoured Nation Treatment, and Expropriation.

ICSID REGISTERS CLAIM...

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Craig Miles of King & Spalding, who is representing the Claimants.

Mr. Miles said that the claimants are alleging several violations of the Argentina-Spain Bilateral Investment Treaty, including expropriation without compensation, Fair and Equitable Treatment and arbitrary and discriminatory measures, among others.

According to Mr. Miles the ICSID claim is proceeding as normal despite the ongoing negotiations.