

Changing Investment Litigation, Bit by BIT

By Luke Peterson

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While the trade community focuses upon the likelihood of including investment provisions in a projected Free Trade Agreement for the Americas and in a possible future WTO round, there has been surprisingly little stock-taking of existing international investment agreements and their impact upon sustainable development. Readers probably are familiar with the aborted Multilateral Agreement on Investment and the equally controversial provisions of Chapter 11 of the North American Free Trade Agreement (NAFTA), but many may not realize that these agreements draw upon the established practice of hundreds of bilateral investment agreements (BITs) that have been signed since the late 1950s.

These earlier agreements ought to be of far greater public concern given the alarming uses to which their more famous cousin, the NAFTA, has been put in recent years. Foreign investors have successfully used its Chapter 11 investor-state dispute settlement mechanism to litigate against governments before international tribunals on a number of grounds. The most alarming cases for the sustainable development community have been those that have challenged government health, environment and other regulations as forms of creeping or indirect expropriation.

In one recent case, a NAFTA tribunal ordered the Mexican government to pay the Metalclad Corporation nearly US\$17 million in compensation for having prevented the company from establishing a waste management facility in the community of Guadalupe (a portion of this award was recently set aside by a domestic court in the Canadian province of British Columbia, but the case may be appealed to a higher level in Canada, see page 18).

Due to a significant public outcry over several recent investor-state disputes targeting health or environmental regulations, the Canadian government has shown some appetite for "clarifying" the intent of the NAFTA's investor rights chapter, but Mexico and the United States disagree on the need for an amendment.

Whatever the prospects for such efforts at damage-control, they come rather late in the game. Upwards of 60 bilateral and multilateral investment agreements already exist in the Americas, and figures released last year by UNCTAD reveal that these agreements are proliferating at an astonishing rate world-wide. In the last ten years alone, the number of BITs quintupled - going from 385 to 1,857. While there is considerable variation in these agreements, most BITs typically include disciplines in the following areas:

- national and most-favored-nation treatment;
- fair and equitable treatment;
- guarantees in respect of expropriation and compensation for war and civil disturbances;
- guarantees of free transfer funds and repatriation of capital and profits;
- subrogation of insurance claims; and

- dispute settlement provisions, both state-to-state and investor-to-state.

Most BITs cover only investments which are already "sunk" or "established", but the BITs concluded by the United States - and many of those concluded by Canada - go further and extend national treatment and most-favored nation treatment to cover the entry and establishment of investments.¹

Despite such differences of nuance, it has been increasingly standard, at least since the 1980s, for BITs to replicate the two most controversial features of the NAFTA: an investor-state mechanism which allows investors to take their own claims to tribunals, as well as generous provisions against expropriation of investments.

On expropriation, one well-placed lawyer within the Washington-based International Center for the Settlement of Investment Disputes (ICSID) - the forum where many BITs and NAFTA cases are arbitrated - admits that most of the BITs signed in the Americas "have comparable provisions" to the NAFTA's Chapter 11.²

Thus, whatever the prospects for a diplomatic solution to the problems presented by Chapter 11, it is clear that the legal community now have their eye on the NAFTA's long-lost cousins, the BITs. Savvy lawyers recognize that these BITs may prove to be useful tools for challenging government policies. While tribunals have not yet had the opportunity to confirm these suspicions, there is considerable evidence that they are being asked to do so.

Indeed, one prominent litigator predicted in a recent speech to a conference of arbitrators that, "We are witnessing the beginning of what may become a flood of litigation under the BITs".³

William D. Rogers, a Senior Partner with Washington law firm Arnold & Porter, went on to add that the BITs represent, "an open invitation to unhappy investors, tempted to complain that a financial or business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government." Meanwhile, the United Nations Conference on Trade and Development also warns that many BITs provisions on expropriation are cast so broadly that investors may use them to challenge so-called "regulatory takings" of their investment.⁴

The first BITs cases seeking to mimic the NAFTA-style litigation against health and environmental regulations are now emerging. Last autumn, a Spanish investor invoked a BIT between Spain and Mexico in order to challenge a Mexican environmental law. Sources at the Washington-based ICSID confirm that the case will be heard later this year. Nor is this case expected to be an anomaly.

Noting that big American and UK law firms are becoming more aware of these bilateral investment treaties, Thomas Walde, Director of the Centre for Energy, Petroleum and Mineral Law Policy at the University of Dundee and an expert on such agreements, predicts an increase in BITs disputes. Walde, who happens to be a fan of these agreements and the protections they offer investors, says that lawyers are beginning to invoke bilateral investment treaties during informal negotiations with governments. In fact, the mere threat of litigation under a BIT may

suffice to change the mind of a nervous government contemplating regulations that might hamper a foreign investor.

In this vein, there is evidence that the international consortium, which became embroiled in a controversial water privatization in Cochabamba, Bolivia, may have recourse to a BIT signed between Holland and Bolivia. When International Water Ltd. was forced to leave the country after a series of protests and riots over the rise in domestic water charges, media coverage tended to portray this as a triumph of people-power over corporate-might.

What has gone unreported, however, is that the company is currently seeking compensation for its losses from the Bolivian government. A high-level company official confirmed to me that if these negotiations fail, International Water will explore various legal options - including launching a BIT investor-state claim.

This newfound interest in the BITs is all the more striking given that investors had ignored these obscure agreements for so long. Long after investor-state provisions became standard features of international investment agreements - obviating the need for a home state to take up an investor's case against a host state - investors still preferred to use the agreements only as a last resort, in cases of outright seizure of factories or other fixed assets.⁵

The number of cases brought to the International Centre for the Settlement of Investment Disputes (the arbitral forum mentioned in the overwhelming number of BITs) reflects this restraint.⁶

In its 35-odd year history, ICSID has handled a mere 79 cases, of which approximately 40 have dealt with a BIT.⁷ However, a staggering half of ICSID's case-load has been instigated in the past five years alone.⁸ Whereas the center might have seen no more than a single new dispute each year during the 1980s, it now sees 1 or 2 new disputes a month. It seems that the high-profile disputes under the NAFTA appear to have inspired many litigators to dust off the NAFTA's more obscure predecessors.

Any coming "flood" of litigation under the BITs could also spill over from the Washington-based dispute settlement center into other arbitration forums. Indeed, many modern BITs offer a choice of such forums; in addition to ICSID, claims may be lodged with the arbitration divisions of the International Chamber of Commerce, or with the Chambers of Commerce in Stockholm or Vienna. Investors also frequently enjoy the ability to have their dispute heard by an ad hoc tribunal situated anywhere in the world.

This multiplicity of forums makes it all the more difficult to gauge the extent of the problems which may be posed by these investment agreements. Whereas the Washington-based ICSID at least discloses the name of parties involved in pending cases, as well as a terse indication of the issue at stake, other forums refuse to reveal even such basic information. They are forbidden to confirm the existence of any pending arbitrations and even settled cases remain confidential unless both parties agree to make details public.⁹ Indeed, the London Court of International Arbitration touts such secrecy as a benefit for prospective clients on its webpage:

Litigation in national courts is generally open to the public and to the media. By contrast, arbitral proceedings are conducted in private, so that the identities of the parties and of the tribunal, and the nature of the dispute, should remain confidential.

While such confidentiality may be attractive for investors seeking to exercise their rights away from the glare of public scrutiny, it ought to be deeply worrying to the sustainable development community. As far as can be ascertained, emerging disputes under bilateral investment treaties appear to be targeting government regulations in key areas of public policy such as water, energy, environment and health. Despite this, the resolution of such disputes is left in the hands of secretive tribunals that take no account of the wider public interests at stake, nor of the various safeguards available under domestic legal systems. Clearly, this system, which may have been well-suited for purely commercial arbitration, is deeply unsatisfactory in an era when investment agreements are starting to be wielded as trump cards against sensitive public policies.

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ENDNOTES

¹ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, Geneva and New York, 1998)

² Also confirmed in a declassified paper on BITs prepared by the OAS Trade Unit for the FTAA negotiating group on investment.

³ William D. Rogers, Speech to Inter-American Development Bank Conference, Oct. 26-7, 2000

⁴ UNCTAD, *Taking of Property, Issues in International Investment Agreements Series*

⁵ Thomas Walde & Stephen Dow, *Treaties and Regulatory Risk in Infrastructure Investment*, *Journal of World Trade* 34(2): 1-61, 2000

⁶ Antonio R. Parra, *The Role of ICSID in the Settlement of Investment Disputes*, *ICSID News*, Vol. 16, No. 1, Winter 1999

⁷ *Conversations with ICSID Staff lawyers*, January/February 2001

⁸ Antonio R. Parra, *The Role of ICSID*, pp 5-8

⁹ It is possible for final Awards to be published provided that all information which might identify the parties has been excised.