The New Concern About Investment Agreements: Is There a "There" There?

Presentation Summary and Comments

DAN PRICE,* HOWARD MANN,** HON. OLIN WETHINGTON,*** ROBERT STUMBERG****

Dan Price: Price began with a brief description of North American Free Trade Agreement's (NAFTA) chapter 11, which is essentially a bilateral investment treaty (BIT) incorporated into a trade agreement. BITs create obligations relating to the treatment a country must accord to foreign investors. Among the obligations typically in BITs: restrictions on performance requirements, provisions on expropriation, and a requirement to provide the international law minimum standard of treatment to foreign investors. One important aspect of BITs is that they provide a direct cause of action by the foreign investor against the host state for a breach of these obligations in binding arbitration.

Price described the long history of BITs. There are over 1,000 BITs in place around the world. The United States has numerous BITs and has had a BIT program in place for over twenty years. As a major capital exporting country, the United States has a vested interest in ensuring that U.S. firms are protected when they invest abroad, particularly in countries that may not have a history of respect for the rule of law.

According to Price, BITs became controversial in the United States only over the last few years, when Canadian investors brought claims directly against the United States under NAFTA's chapter 11. These cases prompted some groups in the United States to question the direct investor-state process and to question the standards of protection for investors in the BITs—standards which the United States fought hard to help create.

As a result of these concerns, a debate ensued over the investment issue as part of the Trade Promotion Authority legislation. In Price's view, there is no "there there." Investment agreements like NAFTA's chapter 11 serve an important function for protecting U.S. investors. Most of the concerns raised about investment agreements are based upon claims made by parties in cases that have not yet been ruled upon by the arbitrators. Price believed that there is every reason to expect that arbitrators (often well-respected lawyers, academics,

*Partner, Sidley, Austin, Brown & Wood.
**Associate and Senior International Law Advisor, International Institute for Sustainable Development.
***Partner, Steptoe & Johnson.
****Professor of Law, Georgetown University Law Center.

and jurists) will be able to throw out non-meritorious claims and provide appropriate interpretations of the rules protecting foreign investors.

Howard Mann: Mann noted that the concern about investment agreements, which has taken hold in the United States, has already been an issue in Canada for several years because Canada already lost a number of prominent cases under NAFTA's chapter 11.

Mann stated that there will be increasing conflicts over investment agreements now that they are mainstream and no longer obscure areas of law. The number of cases brought by investors against states has drastically increased and investment agreements are now used as a sword by multinational corporations to challenge government regulations. In the past, these provisions were primarily employed only as a shield against egregious government actions. Moreover, due to aggressive lawyering, the range of policy issues being addressed in investor-state challenges is quickly expanding and an increasing array of domestic regulatory measures are being challenged. These aggressive claims are possible because the standards in the investment agreements are often vague (for example, measure "tantamount to expropriation" and "fair and inequitable treatment"), and the arbitration panels have at times interpreted them surprisingly broadly. Foreign investors are using investment agreements to bypass domestic judicial processes and going directly to the international arbitrators.

Mann questioned whether the arbitration panels have demonstrated adequate deference to domestic regulatory authority. In his view, many of the arbitration panels have come down too strongly in favor of the rights of investors, extending the investment standards beyond the limited role for which they were created. Mann also expressed concern that these arbitration panels, often consisting of individuals with trade law backgrounds, incorporated principles of trade law into the unrelated field of investor protections. The result in some cases (for example, the *Ethyl* and *Methanex* cases) is that the investor-state process was used to privatize trade law.

Mann also raised concerns over the lack of transparency in the chapter 11 cases. Arbitration documents do not need to be made public, hearings are not open to the public, and arbitration opinions must not be made public. The lack of transparency lends an aura of secrecy to the process. Mann believed that greater transparency is a necessity.

Olin Wethington: Wethington focused on the investment negotiations in the Doha Round. He noted that the Doha Declaration provisions on investments are not comprehensive, and a high quality agreement in this area will be difficult to achieve due to a real reluctance to accept meaningful agreements by countries like China and India. The United States needs to be both principled and patient. Patience is essential because "no deal is better than a bad deal." He stated that the United States needs to recognize the importance of global capital flows and foreign investment. Rather than vague and undefined standards, a rich body of law exists under investment agreements, which is mostly in accordance with the basic principles from U.S. domestic law. While chapter 11 might have flaws, the case has not been made that it will undermine domestic regulatory rules.

Robert Stumberg: According to Stumberg, the debate over chapter 11 has only recently been joined in the United States. Several models have been presented on how to deal with the issue.

The first of these models is the Zoellick-Price Model. This model basically takes the approach that nothing is wrong, meaning there is no need to fix chapter 11.

Another model assumes that something is wrong, but only because investment agreements might provide greater rights to foreign investors than would be provided under U.S.

law. This model, the Pax Americana Model, suggests taking U.S. law and applying it to everyone.

Finally, the European Union Model uses the same standards as NAFTA's chapter 11, without the direct investor-state process. This model retains the basic standards but allows the State to take a greater role in shaping the jurisprudence, removing some of the anti-democratic aspects of the current system.

Stumberg called into question the democratic legitimacy of investment agreements and the direct investor-state dispute settlement process. He noted that through investment agreements, foreign investors were able to challenge federal, state, and local regulatory action and have these challenges heard by arbitration panels not elected or appointed through democratically legitimate means.

Question and Answer Summary: The panel was asked whether the real problem was not so much the investment agreements, as it was aggressive lawyering by international investment agreement "ambulance chasers" seeking to expand the investor protections in ways never envisioned.

Olin Wethington stated that it seemed that for the cases cited most often as going too far, the arguments used by the lawyers were mostly responsible for creating the problem. Many of these cases will not be successful in the end. Robert Stumberg agreed with the point that U.S. lawyers were bringing cases and making arguments that should not be recognized by arbitration panels. Stumberg also argued, however, that textual problems with chapter 11 (vague standards leaving much discretion to the arbitration panels) have also helped to create the problem. Howard Mann disagreed that the lawyers were primarily responsible. Mann laid part of the blame for the problems surrounding chapter 11 with the judgments that have been handed down, many providing very broad interpretations of the investor protections, for inviting further claims.

The recently-enacted Trade Promotion Authority bill includes an objective to provide "no greater rights" to foreign investors than allowed under U.S. law, and the panel was asked how congressional members would be able to test to see if that objective had been satisfied.

Some of the panelists questioned whether it was appropriate to use U.S. domestic law standards as a model for investment agreements, because in many cases discrete concepts from U.S. law do not cover the same variety of circumstances and contexts that arise in investment agreements (for example, "expropriation" may cover a broader array of circumstances than "takings").

Price argued that the current standards already are more or less consistent with U.S. law and that for any claim under a BIT, a roughly analogous U.S. law claim already exists.