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Issue 2 – Autumn 2007

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IIA Insighter

A Parliamentarian's Guide to international investment agreements and their implications for domestic policy-making

Inside this Issue

If left unattended, the tiniest tear can develop into a gaping hole, requiring more time-intensive mending.

Similarly, in international relations, a lack of attention to legal commitments made by governments can have wide-reaching ramifications at a later date.

Economic treaties containing easily-overlooked loopholes have the potential to tear asunder sensitive public policies or public interest regulations.

As our feature-story on page two makes clear, international investment agreements (IIAs), which harbour sweeping public policy repercussions for every level of government (local, state and national), are being signed with minimal parliamentary scrutiny or oversight.

Too often, binding international law commitments are entered into, with only a handful of technical officials appreciating the wider policy implications of such moves.

"While useful for protecting foreign investors against abusive and egregious treatment at the hands of their host-governments, these IIAs can over-reach…"

While useful for protecting foreign investors against abusive and egregious treatment at the hands of their host-governments, these IIAs can over-reach and place significant checks upon the actions of democratically-elected governments.

A number of items in this latest edition of the *IIA Insighter* offer updates on ongoing foreign investment disputes with wider public policy implications. One lawsuit lodged by foreign mining companies against the Republic of South Africa involves a challenge to policies that give social and economic preferences to historically disadvantaged persons. Another foreign investor lawsuit ongoing against the United States pits the interests of a Canadian mining company against California government measures designed to uphold the spiritual and environmental integrity of traditional Native-American lands.

Of course not all of these investor-state lawsuits are conducted—or even initiated—in the public eye.

That's why efforts are afoot by two non-governmental organizations to reform United Nations arbitration rules, which permit foreign corporations to launch confidential lawsuits against governments.

Meanwhile, elected officials are paying closer attention to treaties signed at the government-to-government level, so as to ensure the proper balance is struck between foreign investor interests and the public interest. Our guest opinion-column (see page four) by a pair of state-level U.S. politicians stresses the need for elected officials to cast a careful eye upon IIAs (as well as trade agreements with foreign investment protections).

Of course, with more than 2,500 IIAs already concluded, the public is often waking up to the impact of such agreements *after* they have come into force. Perhaps not surprisingly, some are questioning the constitutionality of such treaties—particularly the extensive legal protections offered to foreign investors and the special international arbitration processes which detour around domestic courts. In our Q & A feature, we highlight the efforts of one Canadian activist who is working with allies to ensure that basic human rights interests are not sacrificed on the altar of foreign investment promotion and protection.

Making the Case for Parliamentary Involvement in IIAs

Overwhelming Impact; Undewhelming Scrutiny

It's not often that international investment agreements capture the public's imagination.

But these often-obscure agreements took centre stage for a brief time in the late 1990s when the Organisation for Economic Co-operation and Development set its sights on negotiating a Multilateral Agreement on Investment (MAI).

The agreement attracted broad opposition from concerned citizens and non-governmental organizations (NGOs). It also attracted an unusual amount of attention from parliamentarians and elected officials.

France, Australia, the United Kingdom and Canada held intensive legislative enquiries and public hearings into the MAI. Even sub-national governments gave the MAI extensive debate. In the Canadian province of British Columbia, extensive hearings were held on the MAI and its potential domestic implications.

The B.C. Special Committee on the MAI concluded that it was "fundamentally flawed and should be discarded in favour of a fresh approach for future international negotiations ...." National government legislators, most notably France, reached equally damning conclusions, ultimately leading to the MAI's demise.

These legislative committees feared the fact that the MAI would allow foreign investors to sue governments for financial damages when some government action negatively impacted their business.

Yet as B.C. legislators scrutinized the proposed MAI, they also became aware of some 20 bilateral investment treaties (BITs) that Canada had entered into, without "any significant public scrutiny or debate." In fact, while parliamentarians in different parts of the world poured over the MAI, hundreds of BITs, many mirroring the proposed multilateral deal, were being signed with little fanfare or scrutiny.

Pakistan's former Attorney General, Makhdoom Ali Khan, has called these bilateral investment treaties (BITs) "photo-op" agreements. Speaking at a recent Washington arbitration conference, he said: "Because someone is going visiting someplace and an 'unimportant' document has to be signed ... until very recently (a BIT) was regarded as once such (unimportant) document."

But as governments have been hit by lawsuits under BITs in increasing numbers, for actions ranging from tax legislation to environmental standards, the illusion that these treaties are symbolic, rather than weighty legal instruments, has vanished.

Bilateral investment treaties guarantee foreign investors certain standards of treatment, such as the promise that they will be treated fairly and equitably, a standard which is inherently ambiguous and has been interpreted differently by various tribunals. And unlike domestic investors, which must use local courts to challenge governments, BITs often provide for international arbitration for the settlement of disputes. While protection of foreign investment can be an important objective, these treaties have drawn concern because they hand adjudicative functions to arbitration tribunals which are unaccountable to citizens.

"In many ways, the foreign investor is seeking an international arbitral review of sorts of government conduct on important public policy issues—issues which, until recently, were immune from any non-domestic scrutiny," said then-Attorney-General of Pakistan Makhdoom Ali Khan at a 2006 conference organized by the International Centre for Settlement of Investment Disputes.

A small number of parliamentarians have been leading the drive for more legislative oversight of international economic agreements, including investment agreements. One of these is Erica Mann, a Member of the European

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News in Brief

(from Investment Treaty News)

http://www.iisd.org/investment/itn

Miner's Lawsuit Over California Regulations Could be NAFTA Watershed

Tribunal Will Determine if Foreign Investor Owed Compensation

A ruling is highly anticipated in a controversial arbitration between a Canadian mining company and the United States government. Glamis Gold Ltd. raised eyebrows when it filed a multi-million dollar lawsuit, alleging that U.S. and California officials breached the foreign investor protections contained in the North American Free Trade Agreement (NAFTA).

Glamis contends that new California requirements for the back-filling of open-pit mining sites served to undermine its gold mine project located in the Southern California desert. The company alleges that a pair of California regulations have subjected the company to "unfair" treatment, and effected a virtual expropriation of its investments.

Glamis Gold has filed a multi-million dollar lawsuit against the United States. *iStockphoto*

For its part, the California government stands behind its move to require back-filling of open-pit sites. Among the reasons for the regulatory change was a desire to ensure that mining sites adjacent to Native American sacred sites would be minimally affected by mining activity.

Although Glamis still holds mining claims in California, the company insists that the value of those claims has been diminished to such an extent that the U.S. government

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Making the Case for Parliamentary Involvement in IIAs (continued from page 2)

Parliament, who maintains that parliamentary involvement is more important than ever given that these international treaties have become deeply entwined with domestic policies in areas such as intellectual property, taxation and government procurement.

"We need to build up knowledge amongst parliamentarians (on international economic agreements)," said Ms. Mann. "The best way to do that is to shift responsibility to them." That responsibility ranges from some degree of consultation and input during the treaty-making process, to the power to decide if a treaty is to be ratified or not.

As it is, there is great variance in the degree of parliamentary scrutiny of international treaties. Under its post-apartheid constitution, the South African Parliament must approve all international treaties before they become binding legal instruments. Elsewhere, however, international treaty making may be the purview of the Executive Branch, said Joanna Harrington, a law professor at the University of Alberta, Canada, and a specialist in international treaty law. She points to Canada as "an example of a State with virtually no required parliamentary involvement, whether federal of provincial, in the treaty-making process."

For effective parliamentary oversight of international treaties, an institutional mechanism is required, said Prof. Harrington. She points to Australia, which has formed a parliamentary committee, named the Joint Standing Committee on Treaties (JSCOT), which reviews all treaties before they come into effect. In addition to ensuring parliamentary scrutiny of international treaties, JSCOT also brings transparency to the process of treaty making by ensuring that all of Australia's international treaties are published on the Web.

But given many treaties that pass through a parliament, not all can be carefully picked apart and debated.

"You also need an active parliamentarian and often an outside force, like an NGO, to promote the issue," said Prof. Harrington. "Trade agreements and the MAI have received a lot of attention as far as most treaties go," she adds. "But bilateral investment treaties are an exception."

"You also need an active parliamentarian and often an outside force, like an NGO, to promote the issue," said Prof. Joanna Harrington of the University of Alberta law school. "Trade agreements and the MAI have received a lot of attention as far as most treaties go," she adds. "But bilateral investment treaties are an exception."

No better example exists than South Africa, which has an impressive-looking process for parliamentary vetting of international treaties. However, after the end of Apartheid, South Africa concluded a string of treaties with foreign investors—offering them legal protections which may be at variance with those offered in the national constitution.

Although these international agreements were subjected to some parliamentary review, this appears to have been glancing and superficial. Indeed, one treaty negotiator testifying before a parliamentary committee described the pending U.K. treaty with South Africa in benign terms, insisting that "the agreement did not place British investors in SA in a better position than local residents."

Less than a decade later, however, foreign investors are invoking their treaty rights in South Africa, in an effort to circumvent or challenge certain Black Economic Empowerment obligations imposed upon businesses in that country (See News in Brief item, opposite.) At the very root of such cases is the conviction that these international treaties do, in fact, place foreigners in a better legal position than local residents—something which parliamentarians appear not to have weighed carefully when the treaties were rapidly adopted in the hand-over from white Apartheid rule.

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Miner's Lawsuit Over California Regulations Could be NAFTA Watershed

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is liable for compensating the company under the terms of NAFTA Chapter 11.

The case has been closely watched by environmental groups—who defend the government's right to set health, safety and other regulations—and by mining groups who support Glamis's bid to use NAFTA's investor protections in order to challenge the regulations in question.

Oral arguments were heard in the case in August and September of this year. A decision could take anywhere from a few months to a year or more.

If the U.S. government prevails—as it did in another recent NAFTA arbitration brought by the U.S. company Methanex—the outcome will give pause to other foreign investors looking to invoke the NAFTA in order to challenge health or environmental regulations. However, if Glamis wins its case, it may lead to renewed debate on the meaning and impact of the investor protections written into the NAFTA.

Tribunal Selected to Hear Case Against South Africa

Foreign Miners Sue Over Affirmative Action Policies

Three arbitrators have been selected to hear an international arbitration with potentially wide-ranging financial and political ramifications for the Republic of South Africa.

Oxford University Law Professor Vaughan Lowe has been selected to chair a tribunal which will hear a claim lodged by a group of family-owned European mining companies against South Africa.

The miners are challenging elements of South Africa's Black Economic Empowerment policies (BEE)—including requirements to hire black or historically disadvantaged employees and to sell equity holdings to BEE shareholders.

Their case is being watched closely by other foreign investors, including in the multi-billion dollar natural resources sector. Some of South Africa's more ambitious Black Economic Empowerment policies have faced vocal opposition, however, the decision by the European miners to sue South Africa for violating the terms of investment protection treaties represents a new twist in the drama.

In the immediate aftermath of Apartheid, South Africa concluded a number of investment protection treaties so as to assuage the concerns of wary foreign

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Opinion: Yes, We're Open to Foreign Investment, But Not at the Cost of State Sovereignty

Legislators from America's Most Trade-dependent State Weigh in on Investor Rights

Representatives Maralyn Chase
and Steve Conway
Washington State House of Representatives

Washington is the most trade-dependent state in the United States. We nurture a great commercial environment for firms that want to invest in our state, and a high quality of life for people who do business here. Washington's entire history is bound up with trade and external economic linkages—with a concern for economic development, but also wariness about being dominated by outside interests.

Consequently, our state constitution strikes a balance between encouraging foreign investment, and ensuring that home-grown businesses get a fair shake. Article XII of the Washington State Constitution puts that concern quite plainly:

No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state. (Article XII, Section 7)

We've been troubled, therefore, that certain international investment agreements signed by the U.S. federal government—signed after virtually no consultation with the fifty states—DO give greater rights to foreign corporations than those enjoyed by Washington state businesses.

Our concern stems from the fact that the North American Free Trade Agreement (NAFTA)'s Chapter 11, and the investment chapters found in other free trade agreements and bilateral investment treaties, allow foreign investors to do an end-run around our state court systems, and bring cases to international tribunals that do not operate under any constitutional legal authority.

The members of international investment tribunals aren't sworn to uphold any constitutional principles. They don't have lifetime appointments, as is required under the constitutions of many states, nor are they democratically elected, which is the case here in Washington. Tribunal members, therefore, aren't true judges with the probity and experience adhering to the office. Mostly, they are lawyers whose experience comes from the world of commercial disputes.

> "(IIAs) allow foreign investors to do an end-run around our state court systems, and bring cases to international tribunals that do not operate under any constitutional legal authority."

And why do foreign investors have this right? It's based on the claim that our state courts wouldn't render an impartial verdict in the case of an investor dispute. As legislators, we have complete confidence in our state legal system. We are confident that, in the case of any investor dispute, our state court system would act in full consideration of the facts, and not, as NAFTA and the other investment agreements appear to imply, based on the nationality of the investor.

As legislators, we think that a system giving greater rights to foreign investors is a bad idea. We've seen NAFTA cases brought against environmental and public health laws passed by the legislature in our sister state of California. The U.S. State Department successfully defended California's ban on a toxic chemical, MTBE that had been

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Tribunal Selected to Hear Case Against South Africa

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investors who feared that they would be subjected to outright expropriation or nationalization in that country.

The European mining companies caught officials off guard, however, when those treaties were disinterred and used to challenge a range of new policy measures introduced by South Africa as part of its BEE program. Many in South Africa had assumed that if the flagship BEE policies were to be subjected to legal scrutiny, it would be South Africa's court system that would be entrusted with the task. However, thanks to IIAs concluded by South Africa with many European governments, foreign investors enjoy legal protections in addition to those enjoyed under South African law, including the right to sue the South African state in international arbitration.

Should the claimants succeed in their arbitration claim, it could open the door to a flood of other claims from foreign investors looking to challenge new policies which impose new financial burdens or administrative requirements.

In addition to Prof. Vaughan Lowe, the arbitration panel hearing the case will consist of Charles N. Brower, a U.S. lawyer, arbitrator and part-time Judge on the U.S.-Iran Claims Tribunal, and Joseph M. Matthews, a Miami-based business lawyer and arbitrator.

NGOs Continue Push for Greater Transparency When UN Arbitration Rules are Used

Governments May Debate Question at UN Meeting in February 2008

The International Institute for Sustainable Development (IISD, publisher of the *IIA Insighter*) and the Center for International Environmental Law (CIEL) continue to push UN members to revise a set of commercial arbitration rules commonly used to resolve investor-state disputes.

The two groups caution that the UNCITRAL rules of arbitration have been utilized widely for the resolution of sensitive investor-state disputes with public policy implications. For example, foreign investors may challenge a government's tax policies, legislation, administrative or court rulings and seek financial damages for alleged losses. Although dozens of multi-million dollar lawsuits are known to have been filed against governments under the UNCITRAL arbitration rules, there are no comprehensive figures on the incidence of such lawsuits. Indeed, the UNCITRAL arbitration rules permit such international

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Opinion: Yes, We're Open to Foreign Investment, But Not at the Cost of State Sovereignty. **(continued from page 4)**

challenged by the Canadian corporation Methanex. But defending the case was a huge drain on the state's resources—and the federal government didn't reimburse the California Department of Justice for any of their costs.

Another case pits California against the Canadian mining company Glamis, over environmental measures enacted by the state. The case is still pending.

Arguments on the merits took place this summer. Should Glamis prevail in this case, it would undermine California's ability to set environment and public health standards. Overall, both cases have had a "chilling" effect on regulation; some other states that also intended to ban MTBE, wanted to see a resolution of the case against California before they proceeded.

Overall, these NAFTA claims are second-guessing our democracy and our system of federalism. We are deeply concerned that the investment chapters in NAFTA and other free trade agreements signed by the United States could end up undermining our ability to protect precisely those values that make Washington such a desirable place to live, to work, and to invest.

As part of a multi-state Working Group of state legislators concerned with investment issues, we've raised this concern with the Office of the United States Trade Representative (USTR). Our Governor, the Honorable Christine Gregoire, has also raised concerns in a formal letter to USTR. In those communications, we've taken pains to point out that our state is pro-trade (always has been) and that we encourage foreign investment (we always have).

We've worked with the National Conference of State Legislatures (NCSL)—which represents legislatures from all fifty states—to draft a policy statement reflecting our concern about investor rights. By the way, that policy was approved *unanimously* by the NCSL committee concerned with economic development (see sidebar).

Every day, legislators are confronted with complicated issues of economic development and public-interest regulation. Every day we're engaged in a balancing act—how to protect the rights of businesses and investors in our state, while also protecting the health, safety and welfare of our citizens, and our natural environment.

We think our constitution got the balance just right: keep the playing field level for all businesses, ensure the integrity of our courts, and protect judges from potential conflicts of interests.

NAFTA Chapter 11 and the other investment agreements upset that balance, undermining both state and national sovereignty.

That's why, as legislators, we're paying close attention to these international investment agreements. And, as members of the Washington Legislature, we look forward to an exchange of views on these issues with colleagues from around the world.

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Maralyn Chase is the Chair of the Washington State Legislature's Joint Legislative Oversight Committee on Trade Policy.

Steve Conway is the Chair of the Labor and Commerce Committee, Washington House of Representatives, and chaired the Labor and Economic Development Committee of the National Conference of State Legislatures, 2006–2007.

IN THEIR OWN WORDS: U.S. State and Local Legislators on IIAs...

Excerpt from the "Free Trade & Federalism" Policy, adopted August 2007 at the Annual Meeting of the National Conference of State Legislatures held in Boston, Massachusetts.

Following the passage of the North American Free Trade Agreement (NAFTA) in the 1990s, several foreign investors have used the "investor-state" provisions of that agreement to attack state laws and state court decisions before an international tribunal. By providing access to international investment arbitration by foreign investors, NAFTA and various related Free Trade Agreements (FTAs) provide greater procedural rights for review of claims against U.S. law and policy than would be provided to a U.S. investor under similar circumstances. Consequently, the decisions of these tribunals have had an adverse impact on state sovereignty and federalism….

Trade agreement implementing language must include provisions that deny any new private right of action in U.S. courts or before international dispute resolution panels based on international trade or investment agreements. Implementing legislation must also include provisions stating that neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves are binding on the states as a matter of U.S. law….

NCSL urges the federal government to assure states that the federal government will not seek to preempt state law as a means of enforcing compliance with an international trade agreement…. Likewise, the federal government must not withhold federal funds otherwise appropriated by Congress to a state as a means of enforcing compliance with provisions of an international agreement…. If the federal government agrees to allow foreign firms to collect money damages for "harm" caused by a state law, then the federal government must bear the burden of any such award by international tribunals and not seek to shift the cost to states in any manner.

NCSL is a bipartisan body representing the legislatures of all 50 U.S. states as well as Puerto Rico and other U.S. territories. Such policy resolutions form the basis for NCSL interactions with Members of the U.S. Congress on Capitol Hill.

Bolivia to Withdraw from World Bank's Investment Arbitration Centre

Government Accuses Facility of Investor-centric Bias

Voicing unhappiness with what it describes as the investor-centric bias of the World Bank centre dedicated to resolving foreign investment lawsuits, the Bolivian Government has taken formal steps to withdraw from the International Centre for Settlement of Investment Disputes (ICSID).

Bolivia's Evo Morales believes that international arbitration is not in Bolivia's best interest. *Photo courtesy Agência Brasil, (http://www.agenciabrasil.gov.br/)*

When foreign investors sue a host government for allegedly denying them legal protections owed under investment protection treaties, the ICSID facility frequently administers the resulting arbitration proceedings.

In recent years, Bolivia has found itself on the receiving end of a handful of lawsuits by foreign investors who say that they have suffered mistreatment contrary to investment protection treaty guarantees. Most notably, the Bolivian government was slapped with a lawsuit by a subsidiary of the U.S. construction giant Bechtel Enterprises, when the Bolivian municipality of Cochabamba ended an unpopular water privatization experiment.

Although that arbitration was settled without any significant payment by either side, the confidential nature of the arbitration proceedings, coupled with the political sensitivity of the so-called Water Wars, served to harden public opinion against the ICSID facility.

In 2006 and 2007, Bolivia faced further arbitration threats from a cluster of multinational energy firms that objected to proposals by Bolivia to extract a greater government share from natural gas concessions in that country. Ultimately, the foreign energy corporations acquiesced to new contract terms without resorting to arbitration. However, the spectre of international arbitration was viewed by the newly-elected government of Evo Morales as an illegitimate brake on the will of the Bolivian electorate.

> "…the spectre of international arbitration was viewed by the newly-elected government of Evo Morales as an illegitimate brake on the will of the Bolivian electorate."

In May of this year, Bolivia formally gave notice to ICSID that it would withdraw its consent to have foreign investment disputes arbitrated at the Centre. The withdrawal is to take effect in early November.

Other governments, most notably Venezuela, have mooted the prospect of withdrawing from the ICSID facility; to date, however, only Bolivia has made the move to exit. As of September 30, 144 governments had ratified the ICSID convention, while a number of other governments have occasionally consented to use the centre to solve foreign investment disputes.

The ICSID facility was established in the 1960s in response to increasing demands on the President of the World Bank to mediate disputes arising between foreign investors and their host governments. For many years, governments would consent to ICSID arbitration on a case-by-case basis, by providing such an option in a given contract with a foreign investor. Over time, however, governments began to negotiate investment protection treaties that extended open-ended invitations to arbitrate *any* investment disputes with investors hailing from the other party to the treaty. For example, Bolivia's treaty with the Netherlands, concluded in 1994, permits nationals of either country, with investments in the other country, to resolve investor-state disputes through ICSID arbitration.

Other Forms of Arbitration Remain Open for Now

Despite the move by Bolivia to exit the ICSID system, the country has concluded a number of investment protection treaties with foreign governments which remain in force. While the offer of ICSID arbitration found in many of those treaties might soon no longer be available to foreign investors, many of these treaties also extend the possibility of *ad hoc* arbitration (i.e., arbitration without the involvement of an administering agency like ICSID). For example, many Bolivian

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NGOs Continue Push for Greater Transparency When UN Arbitration Rules are Used **(continued from page 4)**

lawsuits to be initiated without any public disclosure, and without any provision for media or public access to arbitration proceedings—no matter how acute the public interests at stake.

The UNCITRAL arbitration rules were designed for—and continue to be used most often for—private commercial disputes between two business entities. However, the arbitration rules were also inserted frequently into investment protection treaties, thus paving the way for the rules to be used as an important means of resolving disputes between sovereign governments and foreign businesses.

Currently, member of UNCITRAL are holding a series of working-group meetings to revise and update the UNCITRAL arbitration rules. The next such meeting is scheduled for early February 2008 in New York City.

IISD and CIEL have called for governments to adopt a series of amendments that would ensure that investor-state arbitrations are conducted with far greater transparency. Members have yet to debate the issue, preferring to conduct a detailed scrutiny of a first revised draft of the rules prepared by the UNCITRAL's permanent secretariat in Vienna. Thus, the February 2008 meeting in New York could provide the opportunity for governments to debate the merits of greater transparency when it comes to investor-state arbitrations.

Parliamentarians interested in finding out more about the stance taken by their own national government on this important issue are invited to contact Dr. Howard Mann, IISD's Senior International Law Advisor, at h.mann@sympatico.ca

Bolivia to Withdraw from World Bank's Investment Arbitration Centre (continued from page 6)

treaties also provide foreign investors with the option of arbitration under the United Nations arbitration rules (UNCITRAL).

Many of these investment treaties do not expire for several or more years. As such, even with withdrawal from the ICSID facility, there is no immediate prospect for Bolivia to foreclose entirely the possibility of foreign investors suing for breach of international investment treaties.

However, the Bolivian government is in the process of developing a new negotiating template which it hopes to use when existing treaties come up for renewal (typically after a decade or more) and when new treaties are considered with other trading partners. While details of this negotiating template have yet to be released, the government is seeking to carve out more leeway for the regulation of foreign investors.

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Would IIAs Withstand Constitutional Scrutiny?

Hard Questions Being Asked in Some Countries

While IIAs have been negotiated by governments for decades, it is only more recently that their scope and impact has begun to be appreciated. Given the wide range of government measures, policies and rulings that might be challenged by foreign investors through international arbitration, questions have begun to arise as to the compatibility of IIAs with national constitutions.

These aren't "sour grapes" efforts by governments eager to flout their international treaty commitments when it suits their interests. On the contrary, such questions are being raised by outsiders—including academics and civil society organizations—who are questioning whether governments have entered into international treaty commitments without squaring such commitments with domestic constitutional obligations, such as human rights protection and the independence of the judiciary.

For example, John Echeverria, Executive Director, Georgetown Environmental Law and Policy Institute, has argued that IIAs concluded by the United States are "almost certainly unconstitutional" because they undermine the independence of the federal judiciary in that country. His argument is based upon Article III of the U.S. Constitution which dictates that judicial power be vested in an independent judiciary with life tenure and a guaranteed salary. Because IIAs permit international arbitrators to sit for a single case—and to review all manner of local, state or federal regulations or measures—Echeverria suggests that these international agreements delegate sweeping judicial responsibilities contrary to the U.S. Constitution.

However, such an argument has never been put to a test. Echeverria suggests that the most likely party to raise such questions in the federal courts would be an individual U.S. state whose laws or regulations are being challenged by a foreign investor in arbitration.

Notably, a constitutional challenge was launched in Canada by a number of public interest organizations and a labour union. Among the arguments of these groups was one which echoed Prof. Echeverria's own concerns in the U.S. context: that the investor-state arbitration process provided in the North American Free Trade Agreement was unconstitutional because it transfers certain judicial powers from the courts to international arbitrators.

Ultimately, the Ontario Superior Court of Justice rejected these constitutional concerns. The court took the view that international arbitrators rule on questions of international law—which are wholly distinct from the domestic sphere (whatever their ultimate consequences for the domestic level). This lower court ruling was later upheld on appeal.

In addition to arguing that NAFTA arbitration usurped the constitutional authority of Canada's courts, the applicants also mounted a parallel argument: that Canada had not adequately ensured that basic human rights would be protected when it negotiated the NAFTA's Chapter on investment. A major fear is that foreign investors can undermine or "chill" government policies—including those inspired by human rights objectives—by mounting lawsuits under the NAFTA or other IIAs.

In a Question and Answer session, Bruce Porter, a member of the Ontario-based Charter Committee on Poverty Issues explains the concerns which he and his colleagues have attempted to raise in the Canadian courts (see below).

Q&A

Bruce Porter, Coordinator of the Charter Committee on Poverty Issues, a Canadian NGO, argues that the impact of IIAs upon human rights may render such agreements unconstitutional.

Q: What is your concern with investor-state arbitration?

A: Our concern is with the need to ensure that fundamental human rights are adequately considered and protected in the adjudication of investor-state disputes.

Investor-state arbitration in the North American Free Trade Agreement (NAFTA) and in similar IIAs deals with far-reaching challenges to government measures "related to investment." But the measures that are challenged as impacting on investment may also, more fundamentally, be critical to the enjoyment of human rights.

Measures such as environmental regulations designed to protect human life and health, protections of workers' rights and the rights of disadvantaged groups to employment opportunities, new government initiatives in the area of healthcare, social services, education and poverty reduction are, in fact, quite likely to have both an investment impact that can be the basis for a challenge under NAFTA, and a significant human rights dimension.

Q: Can you describe the *legal* arguments your group raised in a Canadian constitutional challenge to NAFTA?

A: We argued that when the Canadian government negotiates a treaty, and

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Q&A **(continued from page 7)**

creates a legal framework for individual challenges against government measures impacting on fundamental human rights, it has a constitutional obligation, under the *Canadian Charter of Rights and Freedoms*, to ensure that human rights are adequately protected.

In particular, we argued that the right to "life, liberty and security of the person" and the right to "equality" under the Canadian Charter have not been adequately protected in NAFTA adjudication and have been violated by permitting the adjudication of claims that directly impact on the enjoyment of those rights by NAFTA tribunals.

Q: What happened in the Canadian courts?

A: Our Charter challenge was dismissed at trial and the decision of the trial judge was upheld by the Court of Appeal for Ontario. We sought leave to appeal to the Supreme Court of Canada but were denied leave to appeal.

Essentially, the courts dismissed our allegations as "premature." They held that courts should only consider an allegation of a discrete breach of the right to life or the right to equality emanating from a particular NAFTA tribunal ruling. This would seem to foreclose the constitutional review of the decision-making regime itself, leaving disadvantaged groups with the prospect of challenging every negative effect of the investor-state regime on a case by case basis.

Q: Is this the end of the road in Canada? Or is there a possibility that the debate may be resurrected at a later date?

A: The Supreme Court of Canada declined to hear this case on appeal, so we do not yet know what the highest court here would have to say on the issue. There are a variety of ways that we might revisit the issues raised in future domestic cases in Canada.

Q: How relevant are these constitutionality arguments to other countries?

A: I think the arguments we made in Canada are applicable to most other countries. There is some precedent, in fact, in the decisions of the German and Italian constitutional courts in the 1970s to the effect that European law had to provide

Bruce Porter, Coordinator of the Charter Committee on Poverty Issues

equivalent protections of fundamental human rights as were contained in domestic constitutions before the domestic courts could properly cede authority to the European Court. Those decisions provided a real impetus for improved protections of fundamental human rights in European law.

There are a couple of ways in which domestic constitutional review of these new adjudicative regimes is mandated in most countries First, it is generally recognized that government authority to negotiate treaties is subject to constitutional limits, and must be exercised consistently with the obligation to protect human rights. And second, governments have a responsibility to ensure that when the decisions of international tribunals are made enforceable in domestic courts, the decision-making regime whose decisions are being enforced meets constitutional or human rights standards—not only procedurally but substantively, in terms of adequately protecting human rights. I would hope that advocates in other countries will use these kinds of arguments to hold governments more accountable to constitutional norms in the negotiation of investment agreements,

There is an important challenge that has been brought against South Africa by Italian investors, challenging government initiatives to promote the hiring of Black managers and to ensure positive social outcomes in the mining industry. Given the broad protections of social and economic rights in the South African Constitution, and the impressive constitutional jurisprudence that has emanated from the Constitutional Court in that country, it may be that other courts will get some guidance from there in the coming months.

Q: Some defenders of investor-state arbitration say that critics "want to have it both ways": they oppose international arbitration of investment disputes, but favour international judicial review when it is done by international human rights bodies. Is there an inconsistency here?

A: Those of us working in human rights advocacy can only dream of an enforcement mechanism for international human rights so robust as has been implemented for investors' rights. Imagine if the decisions of the UN Human Rights Committee were subject to enforceable compensatory damage awards of millions of dollars, instead of the communication of "views" to the state party.

But the important point here is that we are witnessing the beginnings of a global legal regime in many areas. International adjudication will only increase. What we need to ensure is that human rights are not pushed to the side.

The point of the challenge to NAFTA on behalf of disadvantaged groups here was not to question the value of international regulation and maintenance of a rule of law in relation to investment. It was to ensure that the regulation of investment is *in accordance* with fundamental principles of the rule of law and the primacy of human rights. That is a requirement that should be applied consistently in all areas of international law.

So, for example, in the case of a tribunal hearing a dispute challenging a measure to regulate a hazardous gasoline additive—as has happened under NAFTA—the right to health and the right to life ought to be considered in a very central way.

Too often investment treaties are negotiated without consideration of their broad implications for democratic accountability to human rights norms. It is the responsibility of parliamentarians to ensure that separate arms of a government bureaucracy are not concluding economic treaties which sidestep or undermine fundamental international commitments in the area of human rights.