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Persistent Objector argument also at issue in NAFTA case

Luke Eric Peterson (Investment Arbitration Reporter) · Tuesday, July 14th, 2009

Following on from Patrick Dumberry's post, I wanted to offer some information on another pending investor-state dispute where a version of the persistent objector argument has arisen.

There is an ongoing discussion in the *Grand River Enterprises v. USA NAFTA* arbitration, as to whether there is an "emerging" customary international law norm which requires States to "pro-actively consult" with "First Nations investors" (i.e. indigenous persons) before taking regulatory action that will substantially affect their interests.

In its counter-memorial in that case, the US Government has questioned whether there is such an emerging norm:

"Claimants allege that this "emerging norm" is reflected in UN reports and a UN treaty body's nonbinding recommendation, as well as in various provisions of the International Labor Organization's Convention No. 169 ("ILO 169") and in the United Nations Declaration on the Rights of Indigenous Peoples ("UN Indigenous Declaration"). Claimants fail to demonstrate that either the documents or international instruments on which they rely were "intended for adherence by states generally and are in fact widely accepted" and thus, are reflective of customary international law."

The US State Department further insists that, in any event, the United States fall into the category of "persistent objectors", as the US Government has consistently argued that a particular UN Declaration on the Rights of Indigenous Peoples and its provisions requiring consultation do not reflect customary international law. (See pp.127-129 of the [Counter-Memorial](#))

Indeed, the US Government argues that the "persistent objector" principle is one "which States and scholars regard as central to the legitimacy of an international legal order governed by rules of customary international law."

For those looking for some background on the Grand River claim, I've reported on some of the arguments and issues in that case in the [February 10, 2009](#) edition of *Investment Arbitration Reporter*.

The Grand River arbitration arises out of the effort by various U.S. states to conclude a settlement with tobacco manufacturers for tobacco-related health care costs. In addition to its interesting

public policy context, a read of the pleadings reveals that it also raises a multitude of issues, including the human rights obligations owed to indigenous persons – and the extent to which these bear upon NAFTA Chapter 11 investor-state claims.

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