Kluwer Arbitration Blog

A Brief Comment on the "Public Statement on the International Investment Regime"

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On 31 August 2010, a group of over 35 academics (not including the current author), published a Public Statement on the International Investment Regime (Statement). The preamble to the three-page Statement outlines why the Statement has been issued:

> We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.

The Statement highlights a number of concerns, including that investment treaties have been given unduly pro-investor interpretations; the award of damages as a remedy of first resort poses a serious threat to democratic choice; and investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes.

The Statement recommends that governments:

> should review their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above; should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors.

I will focus my comments in this blog on my objection to the guiding premise in the Statement's preamble—that the regime hampers "the ability of governments to act for their people in response to the concerns of human development and environmental sustainability" and will discuss concerns regarding threats to environmental protection.

Since the mid-1990s, beginning with the first NAFTA investment arbitrations, critics have argued that investment protection standards are a threat to environmental law and protection. Many of the critiques focused on the early NAFTA cases that involved environmental issues: *Azianian*, *Ethyl*, *Metalclad* and *S.D. Myers*. Later, critics highlighted the claims in *Methanex* and *Glamis* as

confirming their worst fears. Yet, these concerns simply have not been reflected in the final results of the cases. On the whole, tribunals have done a good job distinguishing between legitimate environmental legislation and arbitrary and discriminatory government conduct. In the NAFTA context, there have only been two awards—*Metalclad* and *S.D. Myers*—where tribunals have found respondent states, Mexico and Canada respectively, in breach of NAFTA. In *Metalclad*, among other things, a cacti reserve was created and Mexico had to pay for the expropriation of the investment. In *S.D. Myers*, the border ban on PCB waste was motivated by pure protectionism, not environmental protection. Although one can criticize aspects of the reasoning in both awards, the tribunals reached the correct result. In the one other high profile environmental case under an investment treaty (*Tecmed*), the tribunal's findings were that Mexico took the measures based on public pressure and not because of environmental infractions.

Overall, the trend is towards a definite rejection of claims challenging environmental measures—*Methanex*, *Glamis* and, on 2 August 2010, the award in *Chemtura Corporation v. Canada*, another NAFTA claim. All of Chemtura's claims with respect to the regulatory treatment of lindane, a pesticide primarily used on canola seed, were rejected. Chemtura was ordered to pay the costs of the arbitration and an additional CAD 2.8 million—half of Canada's fees and costs. In *Chemtura*, the tribunal recognized that its role was not to second judge science-based decision-making (para. 133); characterized the minimum standard requirement under NAFTA as one of "regulatory fairness" (para. 179); and also recognized that valid exercises of a state's police powers do not constitute an expropriation (para. 266).

Although I have argued elsewhere that the investment treaty regime could do more to promote sustainable development, I do not agree with the Statement's assessment that the regime has done more harm than good. The regime has and is serving an important and key role in securing the rule of law—a vital function in a global economy. Although there have been a number of recent high-profile withdrawals from investment treaties and ICSID, states on the whole appear to continue to have confidence in the system. The number of new treaties (over 100 in 2009 according to *World Investment Report 2010*), overwhelms the few terminations. State support for the system is also reflected in other developments, such as negotiations on a Latin American Advisory Facility on Investor-State Disputes and UNCTAD's work programme on international investment agreements. It seems doubtful that many states are going to take up the call in the Statement to withdraw from the current system. Nor, in my view, should they.

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