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Discussion Following the Remarks of Mr. Price and Mr. McIlroy

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF MR. PRICE AND MR. MCILROY

COMMENT, MR. ROBINSON: This is a hot topic. The only good thing that is going to happen out in British Columbia with this annulment matter on Metalclad, is that the law that is going to be looked to, the local, domestic law, is, in fact, the United Nations Commission on International Trade Law (UNCITRAL) model law in international commercial arbitration because Canada did and all of its provinces did adopt that law so it is a modern, decent arbitration statute and the grounds for reversing a decision of an arbitrable tribunal are pretty narrow, and British Columbia has also has attorn to the New York Convention as well, adopted the New York Convention.

I think Canada is going to adopt the panels under the International Center for Settlement of Investment Disputes (ICSID), so we will have comparable investor-state protections, together with the one hundred forty other countries that have adopted them since 1965.

Canada is going to be a little Janus faced because we are going to be party to ICSID so we can protect our Canadian investors from those nasty people in all sorts of places like Kazakhstan and Sri Lanka from expropriating our assets, while, on the other hand, we will be saying, "We do not think the investor-state provisions in the North American Free Trade Agreement (NAFTA) because these investors sue us."

So it is going to become very interesting in the next year or so once we finally adopt ICSID. By the way, the reason we are not in ICSID is the usual Canadian conundrum, there is no federal, state clause in ICSID so all ten provinces and the feds have to be in before it binds Canada.

Last week, a respectable, left wing critic of NAFTA named Shrybman, wrote an article in a paper in Canada about the horrors of Chapter 11. He wrote: "The decisions of the tribunals in the Metalclad and S.D. Myers cases are good examples, and both tribunals express a free-trade fundamentalism that is akin to a religious jehad against government and government's in the public interest; decisions by the Canadian Union of Public Employees (CUPE), the Council of Canadians, to take up the challenge of containing and dismantling the investor-state apparatus is providing an important compliment to the popular mobilization that was so successful in defeating the Multilateral Agreement on Investments (MAI). It is now time to take back the ground that was lost when this mechanism was entrenched in NAFTA and many other national trade agreements."

That is the kind of rhetoric that is happening from the left side in Canada.

QUESTION, MR. KING: Can you create an appellate tribunal within the ICSID framework without ICSID paralleling the same in their respects? In other words, can you take this particular situation, extract it, and give appellate review as distinct from the regular, garden variety of cases? It is very hard to amend the ICSID Charter; one hundred forty nations have adopted it. My question is a practical one. We agree on the ideal. My question is: How do you relate it to the normal ICSID procedures?

ANSWER, MR. PRICE: Excellent question. And just to make the question a little more complicated, the U.S. has forty-two bilateral-investment treaties, providing for investor-state arbitration before ICSID. Does this appellate mechanism only apply to NAFTA or the Free Trade Area of the Americas (FTAA) or would it apply to bilateral investment treaties?

Disputes come before ICSID not only under bilateral investment treaties, but because a number of states who were parties to ICSID Convention have, in their legislation, a unilateral offer to arbitrate.

In other words, disputes between our government and foreign investors may be settled before ICSID. So can one have an appellate mechanism applicable only to a class of ICSID disputes? I think the answer is yes. I think it would be hard. I also think, though, that enough of the world has drawn whatever erroneous conclusions they will from the MAI and from the fear mongering in the press surrounding the early NAFTA decisions, that one may find a different calculation now between the virtue of finality and the desire to have a substantive review.

We also have some experience at the appellate-body mechanism in the World Trade Organization (WTO) where many if not most ICSID signatories have experience.

I agree it is a difficult task, mechanically, but I think it can be done and I do not think it would be hard to muster the political will for it to be done.

QUESTION, MS. VERDUN: In terms of what makes investor-state different in NAFTA, I do not think it is so much a multilateral expansion of investor-state dispute settlement, but the fact that it is the first time that it is used between developed countries, and I would like to comment on how we got to the negotiations.

It came quite late in the process and Canada and Mexico were opposed, through the bulk of the negotiations, to investor-state, the Mexicans on the basis of constitution and, of course, being a good Canadian, we know how difficult, if not impossible, it is to change the constitution, so we were quite sure it would never come about.

When it became clear it was a bottom-line issue for the U.S., we realized we had to get serious about it and the Mexicans capitulated and decided they too could live with this. That is when we started negotiating the investor-state.

One concern I have about Chapter 11 is that either actual or perceived rights of foreign investors are somehow greater than those of domestic ambassadors.

In terms of the opposition, I find myself were with a twenty- one -year-old daughter who is studying international development, and is much to the left of the spectrum of her mother. We have had many heated dinner conversations about the evils of free trade agreements and how could I spend my life doing something so corrupt. She is not at Quebec City. However, when I tried to get from her what her opposition was, she was able to articulate three things that I think are important.

The first one is the power of multinationals. While we can dismiss them, I do not think we should, because, after all, some multinationals are more powerful and richer than some, not even that small, countries in the world, so that is one of the issues.

The other two were lack of environmental standards in some of the countries that are negotiating these agreements and the concern about a lack of redistribution of the benefits of economic growth. These are all real issues.

So my question really is: When we were first discussing NAFTA and at the beginning of the MAI, it was really difficult to get anyone in the public to pay attention to these issues. It just was not on the radar screen. Things have changed very much in the last five to ten years.

So my question is: How can we, whether we are government officials or international lawyers, how can we get a focus on the real issues and away from some of the rhetoric? If you look at the protestors in Seattle, most of them did not really know why they were there or could not articulate it, and from a government bureaucrat's point of view that is tying our hands to a large extent. We cannot ignore public opinion, and there is a concern that is it going to move from a small, fringe group that is quite, you know, extreme in their views to a general change in the pro-free trade sentiment among the general public.

So I would welcome your views on how we engage in a discussion on the real issues and get away from this uninformed extremism?

ANSWER, MR. MCILROY: I think the quick answer to your question is that the politicians have to stand up and defend free trade.

I personally think that our International Trade Minister's response to criticisms regarding Chapter 11 by saying, "Yes, you are right, let us get rid of it," has dignified what I think are unfounded fears with a response from the

Government of Canada. He, in effect, has agreed with these people, that there is a problem with Chapter 11 and every time he goes and asks the Mexicans to change Chapter 11, as recently as last week the President of Mexico was in Canada and said, "No, let us not change it."

So the image is that Canada signed a bad agreement, we want to try and fix it, our trading partners do not want to try to fix it. There is something wrong. I mean that has been created by our Minister for International Trade by agreeing that there is a problem with Chapter 11.

There is not a problem with Chapter 11.

The problem I think that we have is that this is the first time these provisions are being applied in a developed-country context.

In the past it was easy to decide whether something had been expropriated or not; somebody had come in and taken the plant. The past cases, the issue was not has there been expropriation, the issue was usually, there has been expropriation, and what are we going to do on compensation.

The problem right now is we do not really know what expropriation is. My response to your question as to what we should do is: One, let us not dignify these unfounded fears with the response we have seen so far; and, two, let us develop some jurisprudence and see what expropriation really means; and, three, that the lack of transparency in these proceedings has to be dealt with, it is giving rise to unfounded fears.

I think time will solve Chapter 11. I think, if we open the doors on Chapter 11 proceedings, people would watch the first two, they would get bored and go away and Chapter 11 would become part of the process.

QUESTION, MS. MCGUIRE: I wanted to follow up on what you just said and ask both of you what you think of the value, in addition to transparency and the appeal mechanism that you mentioned, to the possibility of an interpretive note or a series of interpretive notes on Chapter 11? I say that with three considerations in mind: You both talked about the scope of Chapter 11 and, with the Azinian decision and the descent on Waste Management, both of which I think made a very important point; that is, there is a difference between a violation of NAFTA obligations and non-NAFTA violations, which is precisely why the descent concluded that the investor should be able to pursue those non-NAFTA violations in domestic courts, so we have this issue of scope; what does it cover; what is the difference between a NAFTA violation and a non-NAFTA violation.

The second issue is clarity. I am sure everyone would like to negotiate an agreement and have what you intended interpreted in the way in which you had intended.

We are already starting to see with a couple of the cases some murmurs that the arbitral panels are not getting the issue of minimum standard correct.

I am wondering if we have a problem with clarity in some of the language of the chapter.

The third consideration is consistency. On the first day of these proceedings we had an international arbiter advise us, if we wanted consistent and well-reasoned decisions, try to move away from ad hoc arbitration.

I am wondering if you feel that is also a concern, a limit of the process and that it might benefit from some further interpretation as well as the other reforms you have mentioned?

ANSWER, MR. PRICE: Let me start with that last point first; that is, is there a relationship between the method of appointment of arbitrators. There are three points: One, consistency versus ad hoc appointments; two, the need for an interpretive note, which would explain both the reach of the rule and seek to distinguish between NAFTA and non-NAFTA claims.

Let me try and quickly address those three points. One, I do not think that there is a relationship between the method of appointment of arbitrators and the consistency of jurisprudence.

I think there is a relationship between quality of arbitrators and consistency of jurisprudence.

However, no decision is precedent or binding on a subsequent panel. To a certain extent we are all common lawyers and subsequent panels will rely upon a well-reasoned award by reputable arbitrators.

I do think there is something, though, to consistency, and I would like that consistency supplied through a judicial context and not through ad hoc agreement of the parties when they find an award they do not like.

I think the appellate mechanisms I suggested could help on the consistency point.

Two, NAFTA or non-NAFTA. I think what both of those tribunals, Azenian and Waste Management were wrestling with was the fact that contractual rights are an investment and are protected under NAFTA and that the deprivation or nullification of contractual rights is a violation of NAFTA norms and may also be a breach of contract.

So on Azenian, the tribunal, essentially, said you have a breach of contract claim, which has been rejected by a Mexican tribunal. Go away.

In Waste Management you had certain contractual elements of the broader expropriation claim being pursued in domestic court. Two of the panelists said that is not just part that is all, therefore, you failed to waive, and therefore, we have no jurisdiction.

I do not think we need any interpretation to deal with that issue. I think what we need is tribunals to pay attention to the fact that contract rights are protected investment and their wrongful deprivation or nullification can con-

stitution an expropriation. So on that NAFTA versus non-NAFTA claim, I do not think we need an interpretation.

The risk I see with interpretive notes is: One, a risk of futility, a risk of false specificity and a risk of confining arbitrators to a formula of words that the three parties could agree to a particular meeting, as to what is and what is not an expropriation.

You do not really advance the ball by having a note that says in general or, for the most part, a good faith, bona fide, non-discriminatory application of a regulation properly adopted, and even-handedly applied, should not, generally, be considered to be expropriatory. All you have done is loaded up the question with exactly the same considerations that are present in 1110 now, but by adding words, you are suggesting to the arbitrators that, well, you know, maybe they should put their thumb on the scale one way or another. So I am not a big fan of interpretive notes.

The only reason, may I say, that we said for purposes of greater clarity, a measure which, generally, effects macro conditions such that a person is no longer able to pay a debt does not constitute an expropriation of the debt was an attempt to respond to a concern of Mexico that was naturally preoccupied with debt issues, but I think that was as far as we felt comfortable going and really could usefully go.

ANSWER, MR. MCILROY: I would like to add, I agree with Mr. Price's view on trying to come up with a so-called clarity clause, and let me draw your attention to the kind of clause we are going to end up with, I think.

Article 1114 of NAFTA, regarding environmental measures, has one of these so-called clarity clauses. This is what it says, and if you can tell me what it means after I read it, I will buy you a drink.

"Nothing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure, otherwise consistent with this chapter, that it considers appropriate to ensure that investment activity in its territories is undertaken in a manner sensitive to environmental concerns."

That and a dollar will get you a cup of coffee. That phrase says absolutely nothing, yet it is in there, I think, because it is trying to make people feel a little better about where environment fits in.

I agree with Mr. Price's phrasing of the kind of question we are going to see, it is not going to mean anything.

The problem we have here is we have moved the concept of expropriation out of places like Iran, where it is very clear that the factory had been taken, into a developed-country context, where it is not always clear where regulatory taking that is compensable starts and ends. The only way we are going to deal with this is, we are going to have to bear with it over time;

there is going to have to be a few cases, there is going to be a little uncertainty.

I also agree with a remark that Mr. Robinson made prior to the panel starting; that is, Canadian investors have to win a few cases in underdeveloped countries where their investments have been scooped for the Canadian public to start to realize this is, in fact, a two-edge sword; there are, in fact, benefits for Canadian investors out of this Chapter 11.

Right now I think the perception is there is nothing but down side in Chapter 11 for Canada, whereas, that is precisely the opposite reason we agreed to it.

QUESTION, AUDIENCE PARTICIPANT: My question is really related to this issue of substantial deprivation. The term "substantial" suggests there is some quantitative aspect to the determination that is made. My question is: Given the jurisprudence we have seen so far emanating from these Chapter 11 panels, have they been able to elucidate any factors that get us any closer to clarifying the distinction between regulation and expropriation and this issue.

ANSWER, MR. PRICE: This is from the Metalclad award. "Thus expropriation includes not only open, deliberate and acknowledged takings of property such as outright seizure or formal or obligatory transfer of title in favor of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner in whole or in significant part of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host state."

It is the in whole or significant part. We have Pope and Talbot saying not sufficiently substantial, and here is, I guess, what I was talking about in the question of legitimacy. I mean, we all know, having now been washed in the cynical acid of U.S. legal realism, right? It is all legislative activity. We put black robes on them and we call them judges for our own comfort level, but it is all, in a sense, legislative.

I think what you are going to see is over time an elaboration of this is; this is not; this is too much; this is incidental; this is a risk you should not have to bear; this is a risk of regulatory change you should not legitimately have to bear yourself; this is the cost of living in a free, democratic society, and we are going to have a bunch of dots and right now, if you look at the cases, I do not think we are there yet. I think the decision in Metalclad is absolutely correct, it is not in significant part, and it was in whole, so that is easy.

In some of the cases in which I have been involved, those have fallen short of putting the investor out of business, the question is: What is the margin of decreased profitability or loss of lines of business which can be

compensated? I would suggest to you not so much the NAFTA case, but in other ICSID cases the more focused and targeted the measure, the more the measure can be seen to disrupt or subvert contractual undertakings or contractually backed expectations.

The more the measure appears not simply as part of a regulatory background, but as something, which really applies only to one or two or three economic actors, you are going to find a willingness to regard those measures as expropriatory. Let me say that, in the case of a targeted measure, an exercise of eminent domain, you take a classic case and build out, in an exercise of eminent domain you run the overpass through the house and they say, "You can live on either side of the highway." Well, one person can live on the other side of the highway. That is easy. As it affects more people, it is harder, but, again, keep the eminent domain model in mind, because whether that effected a single homeowner or subdivision or big chunk of a municipality, tribunals will still find that as a taking, and I think, in part that has to do with the extend of the deprivation, not simply upon the size of the class that the measure acted on.

QUESTION, MR. SCHAEFER: In terms of adding comfort level to the states regarding Chapter 11, take a look at the difference between remedies in Chapter 11 and remedies in the trade agreement context, and the pressure to change the local measure or local decision.

In the trade context, if a panel finds a measure inconsistent with the trade agreement and you wait a while, then you may get trade sanctions and those trade sanctions continue until the measure is changed.

In Chapter 11 damages are limited or remedies are generally limited to monetary damages. If the state takes an action, then the damages in many instances will be the final resolution of the dispute and, in fact, in the U.S. system, the Federal Government will pay the damages.

You could say now there was some discussion yesterday in Canada that they are going to try and recoup damages from the provinces. There is no system in place in the U.S. to do that, you can say, on an ad hoc basis that might be done after several decisions. I am wondering if the speakers would agree with the general proposition that in investment disputes under Chapter 11, there is less of a chance of a local decision being, in essence, overturned or overridden, than there really is under general trade agreements.

ANSWER, MR. MCILROY: I agree with you. That is a fundamental difference I, guess, between a WTO state-to-state dispute and a dispute under NAFTA Chapter 11.

The state dispute, as you indicated, the target is the measure and the remedy is fix the measure.

I think, again, this Chapter 11 is a funny beast in that it is based on an arbitration model where you had contractual privity between two parties that go to arbitration and the fight is over money.

I think that monetary compensation works just fine in a case like Metalclad, where a company goes in and starts spending money in reliance based on a decision that was made by the Federal Government. The sub-national government says, "We changed our mind, get out of here." Metalclad does get out of there, but they say we want some money on our way out the door. That is easy because it does not matter whether the measure is in place or not, Metalclad has left, they are no longer there or operating in the country.

I hear what you are saying, if there is an ongoing measure that is causing some problems and a company is working in that environment and they want to stay in that environment, it sounds like the damages could be ongoing and continue infinitely if the subnational body says I do not want to change the measure. I have no intention of changing this measure. I am not sure where that is going to come out.

You are right, NAFTA Chapter 11, ironically, because a lot of people say it attacks sovereignty, really does not attack sovereignty, because it does not get at the measure, it only gets at the money.

On the other hand, it allows people to say a multinational corporation that is not making enough money in Canada can go to an arbitration panel and say we should made one hundred dollars, we only made ninety, we want you to give us another ten, which, of course, is complete and utter nonsense, but that is the kind of argument that you are hearing in Quebec City this week-end.

ANSWER, MR. PRICE: I think this is an enormously difficult issue. You take a step back from dispute settlement and you say what is the goal of this dispute settlement system? Is it to compensate people injured by a result of the breach or is it to ensure and induce compliance? I mean, at a certain point they merge. The idea is continuing monetary awards will induce compliance.

The investment tradition focuses on injury to a discrete enterprise, and the goal of the system is to remedy that injury through compensation.

There is nothing in ICSID Convention, which precludes the awarding of specific relief.

On the enforcement side of the ICSID Convention it says you must enforce the pecuniary obligations of an awards as if it were a judgment of your highest court, but that is on the enforcement side.

I think that there are classes of breaches best addressed through money damages, whether those are in the investment context or, indeed, the WTO

context. There are other breaches, the injury or consequences of which are not monetizable.

Let us take Canada for example. I can monetize the value of the loss of three years of patent term for a particular pharmaceutical, what I cannot monetize, let us pick another Trade- Related aspects of Intellectual Property Rights (TRIPS) violation, what I cannot monetize is the absence of product protection in a particular country.

You know the grant of process but not product protection. So for a breach of TRIPS, which is the failure to enact legislation conforming to the obligation to provide product protection, money damages does not do it.

So I think the international system would benefit always from two windows; right? There is a money-damages window and there is a bring-your-measure-into-compliance window. We are not there yet. We have, kind of, two traditions and sometimes two traditions coexisting within a single agreement; Chapter 20 versus Chapter 11.

QUESTION, MR. ROBINSON: Let us look at this scenario. There is going to be a Chapter 11 claim by a U.S. citizen or a Mexican with respect to a deemed expropriation by a province. The foreign investor is going to win. The Federal Governments are going to have to pay. In Canada the Federal Government has have the broad taxing power and they collect all kinds of money and they dole it out to the provinces, if the provinces behave and do what they are asked to do. Sometimes they do and get the money and sometimes they do not and do not get the money. Quebec usually does not behave, does not get the money and screams that they have been treated unfairly.

It is an easy way to have a debit and credit account. My scenario is that the Federal Government would have no choice but to debit the next transfer payment against that province because the province forced the Federal Government, by the provincial action alone, to have to pay out this money, that would then cause us to relitigate the Labor Conventions case, which is that silly case by the privy counsel, highest judicial body in a unitized country that knew nothing about federalism, a bunch of old English judges that said Canada's Federal Government power to sign treaties cannot be exercised in an area of provincial responsibility unless the provinces also agree.

In my scenario the Supreme Court of Canada in 2001 would overrule the Labor Conventions bad precedent from the 1930s. I would be interested to see if anybody believes my scenario makes sense.

ANSWER, MS. VERDUN: I am not an expert on all the kind of transfers between the Federal Government and the Provincial Governments, but, initially, I cannot imagine that the Federal Government would be able to, either legally or politically, just duck an equalization payment, a health fund

education transfer payment, I do not think that would work. I think it would be a different case if it were a substantial award and the Federal Government did want to get some kind of money back. I think would be the usual kind of political thing. I cannot imagine that it would be outright, unless it was allowable, and I cannot think of a scenario. I am not sure if your hypothetical case would ever come to happen.

ANSWER, MR. ROBINSON: I think you are probably right. In the history of provinces ducking situations where a labor conventions retrial would happen is a pretty long one.

As we know, Ontario threatened a challenge on the constitutionality of the Canada/U.S. Free Trade Agreement by Ontario on the bases that Canada did not have a right to sign the treaty at all, saying it was going to bind the provinces. They backed off that position because I understood they could not get a solid legal opinion, but that would have represented the retrial of Labor Conventions. Whenever these things come up, the two parties seem to say, "We do not want to run the risk of losing."

QUESTION, MR. MCRAE: Is this the one comment I didn't get yesterday? I just wanted to raise a question about this "let us wait and see, it will work itself out" view that both speakers expressed.

I certainly have taken that view and I am inclined to agree with you on expropriation of 1110. I think if I were on the barricades of Quebec City, I would be chanting 1105 not 1110. I think that the jurisprudence so far, expropriation, I do not think has caused too much problems.

When I look at 1105, the minimum standard of treatment, I worry about the ability of ad hoc tribunals to come up with a consistent body of jurisprudence, there are some fairly strange things being said in each of the cases.

In Metalclad you have this funny idea of federal governments having to run around watching what states and provinces do in case they make a mistake and then leap in and remedy it.

In S.D. Myers you have this 1102 violation, means a violation of 1105.

In Pope and Talbot and the final Pope and Talbot, you get the view that the international minimums standard, I think the tribunal said there were two international minimum standards, but it really comes down to something like judicial review.

In other words, a Chapter 11 tribunal stands in the shoes of monitoring the actions of the federal administration.

I am worried about what Mr. Price said, "While you have got real experts sitting on these tribunals, they will do the right thing." That is a double-edged sword. When the tribunals say silly things, it is because of their experts.

So I am concerned that wait and see will develop an accumulated jurisprudence of things that are really problematic, and unless we do something like Mr. Price's suggestion of an appellate body, we're going to have problems.

I think that the parties should put in some kind of review mechanism within the system to deal with this continuing ad hoc, strange decision-making.

ANSWER, MR. MCILROY: I want to make sure what everybody understand what Article 1105 is, because I agree with you, that that is not the battle cry right now in Quebec City, but it is equally troublesome if you share the perspective of the folks in Quebec City.

Article 1105 says each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable agreement and full protection and security.

What in accordance with international law means, as you have mentioned, is not clearly defined. I guess all that I would say is, yes, it is going to take some decisions, but this appellate body idea is really pointing out the problem that I think Mr. Price pointed out, and that is: We are not comfortable with the legitimacy of the three arbitrators. We have a feeling they could go out on a lark and come up with an aberrant decision, whereas, if we develop an appellate body with very learned, respected, trustworthy individuals, it would give us a little bit more comfort and maybe that is the way we do have to go.

ANSWER, MR. PRICE: I think you have made some excellent points and I do think that over time attention will focus much more on 1105 than 1110 simply because it is less well understood, the body of precedent is thinner and the drafting of 1105 is awkward, it begs the question of whether it is additive, whether it is treatment in accordance with international law and fair and equitable treatment or whether it is entailed or, indeed, whether it is aspirational; that is, international law should include the obligation to accord fair and equitable treatment.

In terms of the specifics, the reason 1105 is relevant to determining whether there has been a national treatment violation is: It can, in a case of de facto discrimination, illuminate motivation. So, I think, when the Pope and Talbot tribunal said I am going to hold off on the national treatment question, until I get evidence of the fair and equitable treatment question, I think that it makes sense.

Second, with respect to Metalclad and does fair and equitable impose an obligation to follow a province around, no. That obligation exists as a matter of attribution. There are a couple of things operating here. One is, Mexico is

absolutely and strictly liable for any acts of its constituent subdivisions that violate NAFTA.

With respect to some activities that take place in its territory which affect foreigners, its obligation is only due diligence. That is generally, kind of, mob violence, but fair and equitable treatment is an independent norm, which can be violated by subfederal units, and when it is, the federal government is responsible.

So the obligation to, kind of, be responsible for your subfederal units arises not the fair and equitable rule but from the rule of attribution.

I will stop there.

