Who does Chapter 11 Belong To?

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The investor rights provisions in Chapter 11 of the NAFTA were a major innovation and remain a contentious aspect of the trade treaty. In spite of the concerns by the NAFTA partners over the breadth of the provisions, variants have been incorporated in a number of bilateral trade agreements signed since then. I suggest that the scope of investor-state dispute mechanisms have to be carefully defined because many of the checks and balances that exist in other trade related dispute mechanisms, such as at the WTO, and in domestic courts do not exist in the Chapter 11 style regimes.

Traditionally, trade disputes have been resolved at the diplomatic level between states. The WTO Dispute Settlement Understanding, incorporated an adjudicative mechanism to the resolve inter-state disputes. Chapter 11 has gone beyond the WTO system in two critical ways. Firstly, it allows non-state parties, namely an aggrieved investor of one of the states to challenge a state on violations of the agreement. Secondly, the disputes are resolved through ad-hoc panels operated independently of the NAFTA. Both of these aspects contribute to the potential loss of control by the states and require clear rules and limitations.

When state parties are resolving disputes either diplomatically or through adjudication, reciprocity is at the core of the regime. The parties know that any arguments they can make can, and likely will, be used against them in later disputes. This forces countries to carefully consider the implications of their arguments both on themselves and other countries. This is tempered by factors such as bargaining inequality directly in the resolution process and via indirect means. In contrast, with investor-state regimes, there is no reciprocity. The investor has no need to consider the wider implications of their arguments on society or other countries. Without this reflective application consideration, and only needing to focus on their own business requirements, investors need more sharply defined rules so the dispute stays within the bounds the rules would have. I suggest that the same set of rules applied in both a a state-state and a investor-state system, will be more divergent in the investor-state system

because it lacks the inherent self application check that exists in state-state relations. For example, with MFN interpretation, in state-state disputes, the both countries will recognize the trade offs of various exceptions to a strict MFN treatment, but in investor-state disputes, the investor will argue only for the most favourable treatment, ignoring any other factors. Therefore, in any investor-state regime, the rules have to be very carefully traded to incorporate the factors inherently considered by state parties but ignored by investors.

The treaty creating the investor-state dispute regime is between countries, not between the states and investors. This suggests that while investors have been granted the ability to submit claims against the states, it is at the pleasure of the states; investors do not have an inherent right to the process. While the states are unlikely to remove the dispute process altogether, states should examine whether the process addresses the goals they envision and have meaningful procedures to make changes if necessary. This is especially important in the case of Chapter 11 because it was a relatively new innovation at the time it was created and there was little precedent to build on.

On July 2001, after the agreement was in force for 7 years, the three parties to the agreement issued a clarification of certain terms of Chapter 11.[1] Todd Weiler suggests these changes were made in part because, "NAFTA tribunals were not agreeing with the arguments being made by the NAFTA governments about the proper meaning of the NAFTA provisions..."[2] While recognizing that having a stable and transparent dispute process for investors is worthwhile, I think that states should issue clarifications or amendments when their negotiated treaty provisions are being misinterpreted. In his article, Weiler suggests that the Free Trade Commission's clarification did not make any change to the NAFTA provisions. When interpreting domestic legislation, courts consider the legislature's intent to determine the meaning. I think that a similar consideration should be made in the investor-state dispute

1 Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001)
2 Weiler, Todd NAFTA Investment Arbitration and the Growth of International Economic Law at p422

process and the clarification issued by the Commission helps indicate the intention of the parties to the treaty. While not getting into the getting into the technical arguments made by Weiler, I disagree with the overall message that three parties to the NAFTA can not make modifications to the treaty by issuing clarifications.

The investor-state disputes under Chapter 11 are resolved under one of three choices of procedure at the choice of the investor. One of these choices uses the UNCITRAL Arbitration Rules[3] which do not require any disclosure. The rules were developed to resolve private disputes, "arising in the context of international commercial relations"[4] but are being applied under Chapter 11 in public law situations. For example, according to the rules, there is no requirement that any aspects of the dispute, including if the dispute exists, be made public without the consent of both parties. This makes it difficult for interested third parties to make arguments to their governments about the issue in dispute. Because of this problem, the parties, through the Free Trade Commission declaration mentioned above, have stated that information submitted by the state parties will be disclosed. This demonstrates the need for the state parties to maintain control over the dispute resolution process. As in domestic courts, with legislative oversight, the courts are independent from the legislature but the boundaries and procedures are defined by legislation.

The investor-state dispute system of Chapter 11 very powerful aspect of the NAFTA. A proper balance needs to be maintained between a stable investment regime and state sovereignty. While the Free Trade Commission's interpretations go part way to monitoring and adjusting the balance, I think that the state parties need to recognize the dispute resolution process belongs to them and they need to be able to make modifications to maintain the appropriate balance.

3 NAFTA, Article 1120 1(c)

4 UNCITRAL, Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules (1982) at para 1.