CHAPTER FIFTEEN

LOOKING FOR LEGITIMATE CLAIMS: SCOPE OF NAFTA CHAPTER 11 AND LIMITATION OF RESPONSIBILITY OF HOST STATE

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I. INTRODUCTION

One of the most striking features of international law in the new age of globalization is the proliferation of bilateral investment treaties (‘BITs’).\(^2\) The private remedies they offer to foreign investors are critical in the exposure of State sovereignty to new external pressures. The global phenomenon of arbitration between foreign investors and host States has been described in a variety of ways and from multiple standpoints. The expression ‘mixed international arbitration’\(^3\) has been used prior to the emergence of the current complex web of BITs. It focused most notably on the nature of the parties involved at the International Centre for Settlement of Investment Disputes\(^4\) (‘ICSID’) or at the Iran-US International Claims Tribunal.\(^5\) The expression ‘arbitration without privity’\(^6\) has been coined

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subsequently by Jan Paulsson. It was meant to capture the absence of any direct legal relationship between the parties, contrary to classical international commercial arbitration. In French scholarship, the expression ‘unilateral transnational arbitration’ is frequently used to describe the one-way seizure of the dispute settlement mechanisms. Indeed, only foreign investors can trigger the mixed dispute settlement mechanism in BITs. The most defining expression to encapsulate the legal significance of the phenomenon was suggested by the late Thomas Wälde, who emphasised the ‘treaty implementation’ aspect of the arbitration in international investment law. By doing so, Wälde rightly shed light on a fundamental dimension of the evolution of the sources of international investment law. This evolution is characterized by matching the prior internationalization of the procedural law for investment dispute settlement with the internationalization of the law applicable to those disputes, with the use of BITs. As a result, foreign investors were granted a direct right to invoke the host State responsibility for breach of treaty.

Turning to public international law in providing legal protection to foreign investors brought two immediate consequences. Firstly, the rules were to be drafted only by States, putting aside the foreign investor as a lawmaker as would be the case in a strictly contractual relationship. Secondly, a whole body of well-established rules of general international law was thus imported, as the underlying legal system giving life and

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