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Viewpoint 42-1: Scoring NAFTA: The United States Trounces Canada in Investor-State Disputes

September 8, 2017 (2017-09-08T07:38:48+00:00) By Peter Bowal (Posts by Peter Bowal) and Ahmed Zaid (Posts by Ahmed Zaid)

"NAFTA is the worst trade deal maybe ever signed anywhere, but certainly ever signed in this country" (September 26, 2016)

"Because NAFTA . . . is perhaps the greatest disaster trade deal in the history of the world. Not in this country. It stripped us of manufacturing jobs. We lost our jobs. We lost our money. We lost our plants. It is a disaster." (October 9, 2016)

"NAFTA's been very, very bad for our country. It's been very, very bad for our companies and for our workers, and we're going to make some very big changes . . . Cannot continue like this, believe me." (April 18, 2017)

-Donald Trump (candidate and US President)

Introduction

In light of the current renegotiation of the North American Free Trade Agreement (NAFTA), we focus on a 'chapter' of decisions in investor-state disputes.

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Chapter 11 of NAFTA, arguably the most controversial part of NAFTA, prohibits each of the three countries from punishing or nationalizing businesses and investments from the other countries. If there is to be free trade in investments across the three countries, each country must accord the NAFTA investor no less favourable treatment than it grants to its own investors and minimum standards of fairness in any event. Expropriating vulnerable foreign investments and assets are the worst sin under this Chapter. If these investor-state disputes are not settled, there is an arbitrated decision.

It is well known that the US President continues to sharply criticize NAFTA on the basis of unfairness. It is described as a leading cause of harm to American economic interests. What is less well known is how dominant and successful the US has been under Chapter 11 since it came into effect in 1994. (This should not be confused with another dispute resolution mechanism in Chapter 19 where Canada has enjoyed better outcomes.)

Background

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The Chapter permits investors to bring direct proceedings against non-compliant governments before impartial international tribunals. While observers originally expected Mexico to face the most claims under Chapter 11, Canada has (by far) been the target of most investor-state arbitration claims. Up to now, Canada is the most sued country under Chapter 11, but has answered claims only

from American investors. We have not found any of these claims by Mexican investors against Canada and vice versa.

Summary of Claim Outcomes

Accurate statistics are difficult to obtain because all claims are not publicly reported. About *half* of the total number of 84 claims against all three nations have been against Canada.

Half of the reported final cases brought by American investors against Canada have been successful (six out of twelve). As a result, Canada has paid a total of C$215 million in compensation, mostly due to provincial breaches. An example is the *AbitibiBowater* claim, the settlement of which cost the Government of Canada $130 million.

On the other hand, Canadian investors have lost all eleven reported claims they have filed against the United States. The most recent case filed against the United States by TransCanada Corporation, for more than $15 billion in connection with the cancellation of the Keystone XL Pipeline, was withdrawn.

The two tables below describe the completed Chapter 11 claims raised by Canadian companies against the United States and American companies against Canada, respectively. Withdrawn and ongoing cases are not included.

Table 1: Canadian NAFTA Chapter 11 Claims against the US

Case	Claim Summary	NAFTA Articles	Award
ADF Group Inc. v. USA	ADF, a Canadian construction company impacted by "Buy America" statutes which require federally-funded state highway project to use domestically produced steel only. ADF was forced to use US girders, rather than the company's girders in Canada. ADF claimed $90 million in lost profits.	1102 1105(1) 1106	2003 – Dismissed. Tribunal ruled that Article 1108 exempts government procurement from Chapter 11.
Apotex Holdings Inc. and Apotex Inc. v. USA *there were two arbitrations	Apotex is a Canadian pharmaceutical company with a US-based subsidiary. Apotex claimed $520 million in damages due to the US FDA Import Alert against two of its Canadian facilities. Apotex claimed the FDA did so without due process and in breach of NAFTA's fair treatment provisions.	1102 1105 1110 1139	2013 – Award I & II both dismissed.Tribunal found Apotex did not qualify as an investor. Money spent to obtain FDA approvals in the USA and to develop the drugs in Canada were not "investments".
	Apotex filed another claim based on its FDA applications which had been approved by the FDA (versus the first arbitration which was based on tentative FDA applications).		Award III Tribunal applied *res judicata*, finding claim was "precluded by a prior decision" which barred Apotex from further claims based on Awards I & II.
Canfor Corporation	Canfor claimed $250 million in damages resulting from the	1102 1103	2005 – Dismissed, for lack of jurisdiction.*Tembec withdrew

v. USA	US's antidumping and countervailing rules which imposed additional duties on Canadian-imported softwood lumber. Tembec filed a similar claim for $200 million and the claim was later consolidated.	1105 1110	from the consolidated case
Cases Regarding the Border Closure due to BSE Concerns	Several Canadian cattle companies filed claims ranging from $40 – $95 million, caused by the US decision to close its borders and bar Canadian cattle imports due to concerns around the so-called Mad Cow outbreak in Canada.	1102	2003 – Dismissed. Tribunal did not have jurisdiction as the Canadian complainants did not make the investment in the US, rather in their home country.
Glamis Gold Ltd. v. USA	Glamis is a Canadian precious-metals mining company with rights to develop an open-pit mine in California. The project was near a sacred Native land. The federal and state government imposed reclamation duties on Glamis to backfill and grade the open-pit mine as a measure to conserve the Native lands. Glamis claimed $50 million in damages.	1105 1110	2009 – Dismissed.Tribunal decided the government acts did not rise to the level of expropriation. Glamis was ordered to pay two thirds of the arbitration costs.
Grand River Enterprises Six Nations, Ltd. et al. v. USA	Grand River, an aboriginal tobacco manufacturer, claimed $300 – $500 million due to US anti-smoking rules and a settlement between the US tobacco companies and the US government.	1102 1103 1104 1105 1110	2011 – Dismissed. Tribunal did not have jurisdiction as the claimant did not make the investment in the United States.
Methanex Corp. v. USA	Methanex is a Canadian company that produces methanol, an ingredient in MTBE, which was banned by a California legislation for health reasons. Methanex filed for $950 million due to loss of market share in California.	1102 1105 1110	2005 – Dismissed. Tribunal found legislature was supported by scientific evidence. It was transparent and non-discriminatory. Methanex ordered to pay US government legal costs.
Mondev International Ltd. v. USA	Mondev is a Canadian real estate company with development projects in Boston dating to the 1980's. Mondev, other companies, and Boston entered a series of complex transactions where Boston might have violated its commitments. These issues were litigated in the local legal system. Mondev claimed the Supreme Judicial Court violated NAFTA.	1102 1105 1110	2002 – Dismissed. Tribunal determined that US court judiciary decisions did not breach NAFTA.
The Loewen Group, Inc. and Raymond	Loewen, a Canadian funeral services company, was the second largest chain in North America. It was a party in a	1105 1110	2003 – Dismissed. Tribunal agreed that Loewen was wronged, but he did not

L. Loewen v. USA	civil trial in Mississippi against a US funeral operator over a contract dispute. The Mississippi judge, clearly favoring the local company over the foreign investor, awarded the US party punitive and compensatory damages amounting to $1 billion which bankrupted Loewen. Loewen claimed the state court system discriminated against his company.		exhaust all local remedies. It also did not have jurisdiction due to the fact that Loewen filed for bankruptcy as a US company, so it is not protected by NAFTA.

Table 2: American NAFTA Chapter 11 ClAiMs against Canada

Case	Claim Summary	NAFTA Articles	Award
Windstream Energy LLC v. Canada	Windstream entered into a 20-year agreement with Ontario's Power Authority to develop a wind energy project in Lake Ontario. The Ontario government deferred the offshore wind development until a scientific study was completed. Windstream sought $475 million in damages for discrimination and delays imposed by Ontario.	1102 1105 1110	2009 – Tribunal agreed the study delays left Windstream in uncertainty and awarded it $21 million.
Mobil Investments Inc. and Murphy Oil Corporation v. Canada	Mobil and Murphy, US oil companies operating in offshore fields in Canada, Hibernia and Terra Nova. Canada-NL Offshore Petroleum Board passed rules requiring oil companies operating in the region to spend a percentage of revenues on research, development and training. Both companies claimed damages of $66 million.	1105 1106	2007 – Tribunal said Canada breached by asking both companies to buy services locally. * Contradicts with ADF Group Inc. v USA
V. G. Gallo v. Canada	Gallo, a US citizen, owned an Ontario-based corporation that owned an abandoned open-pit mine, Adam Mine. Gallo marketed Adam Mine as a landfill location. The Ontario legislature enacted legislation prohibiting use of Adam Mine as a landfill due to environmental concerns re: drinking water. Gallo filed a NAFTA claim.	1105 1110	2007 – The Tribunal dismissed the case, finding insufficient evidence of Gallo's ownership before the legislation.
AbitibiBowater Inc. v. Canada	AbitibiBowater is a US-incorporated company with Canadian headquarters in Montreal. The company owned a paper mill and hydroelectric generating	1102 1103 1110	2010 – Canada settled the case, paying AbitibiBowater $130 million.

	facilities in Newfoundland and Labrador, with water and forestry access rights. The company closed its mill and laid off thousands of workers. The province expropriated the company's water and forestry rights. The company claimed $500 million.		
Chemtura Corporation v. Canada	US-based Chemtura, produced "Lindane-based" treatment for canola seeds. The Pest Management Regulatory Agency conducted a review and determined the product bears public health risks. Chemtura filed a $78 million claim that the PMRA review was discriminatory and done in bad faith.	1103 1105 1110	2009 – The Tribunal found the review was supported by science. No bad faith was proven. The PMRA decision applied to all producers and did not discriminate against the claimant, who must pay costs.
Dow AgroSciences LLC v. Canada	Dow, a US-based pest control chemical producer, was impacted by the Government of Quebec's ban on pest control products containing a certain chemical. It filed a claim 2 million alleging that Quebec's decisions was not based on scientific evidence.	1105 1110	2009 – Claimant withdrew its claim in return of Quebec's admitting that the chemical poses no public risk. No financial compensation in the settlement.
Ethyl Corporation v. Canada	Ethyl is a US exporter and distributor of a fuel additive MMT that's meant to increase the octane level of gasoline. The Parliament in Canada passed legislation prohibiting MMT due to its effects to on-board emission monitoring systems and health risks. Ethyl filed a $201 million claim.	1102 1106 1110	1998 – Federal government settled with claimant after three provinces challenged the federal act on basis that it violated the Agreement on Internal Trade.
Merrill & Ring Forestry LP v. Canada	M&R owned timber land and marketed logs. It filed a $50 million claim that Canada's control measures on exports of logs from British Columbia violated Chapter 11.	1102 1105 1106 1110	2010 – Tribunal dismissed allegation of discriminatory practices. The rules applied to all players. The control measures did not qualify under the performance requirements in 1106. Measures constituted more inconvenience than expropriation.
Pope & Talbot Inc. v. Canada	P&T, a US-based company owning paper and softwood lumber mills in Canada, claimed $500 million on basis that Canadian export rules imposed on foreign company exports violated NAFTA chapter 11. Those controls put an additional levy and a requirement for permits from foreign companies.	1102 1105 1106 1110	2002 – Tribunal awarded the claimant only $400,000 under 1105 only as it found those measures discriminatory. All other claims were dismissed.
S.D. Myers Inc. v. Canada	Myers was a US company involved in processing and disposal of polychlorinated	1102 1105	2002 – Tribunal awarded $6 million plus interest and legal costs to claimant only under

	biphenyl (PCB) waste. PCB is a heavily controlled toxic chemical. Canada issued a temporary ban on US company exports of the substance in response to a US decision to ban the substance. Myers filed a claim for $53 million in damages.	1106 1110	1105 since it found Canada's treatment of US companies different than Canadian companies. All other claims were dismissed.
United Parcel Service of America, Inc. v. Canada	UPS, a US based courier, competed against Canada Post and Purolator, both government-owned entities. UPS claimed Canada's treatment of packages is not equal. It said Canada Post and Purolator received subsidy in imports costs. UPS claimed monopolistic practices of both entities breached Chapter 11.	1102 1105 1502 1503	2007 – Tribunal found the claims did not come under Chapter 11.
Detroit International Bridge Company v. Canada	DIBC is a US company that owns a toll bridge (Ambassador Bridge) between Canada and the US. It filed a $3.5 billion claim against Canada alleging its agreement with the US government to build a new bridge diverts travelers from the Ambassador Bridge, which will reduce its revenue. It accused Canada of delaying its decision to DIBC's application to build a bridge in favour of this new bridge.	1102 1103 1105	2012 – Tribunal found it did not have jurisdiction and ordered DIBC to pay Canada's legal costs.

Observations and Analysis

In reviewing the reported decisions under Chapter 11, several observable patterns arise:

- The number of US-investor disputes against Canada is about the same as the number of disputes Canadian investors have filed against the United States. However, Canada's perfect loss rate on its own claims is highly anomalous. Many of the tribunal decisions simply cannot be reconciled.
- One of the challenges for Canadian companies in their disputes against the US is the technical definition of "investment." For example, tribunals concluded that the money spent on obtaining regulatory approvals did not qualify as Chapter 11 "investment."
- Physical corporate presence was another important consideration. Conceived as a matter of jurisdiction, the more one is operating in the other country, the greater the chance that one's claim will be successful.
- There were no claims of direct expropriation against the United States, although a few claims relied on practices tantamount to expropriation. The *Loewen* case demonstrated clearly unfair and predatory treatment toward a Canadian investor, but it was dismissed on technical grounds.
- Government procurement is always challenging. The US government's "Buy America" rules imposed on Canadian companies operating in the US (ADF was required to use US-produced steel) were considered exempt. However, when Canada imposed similar rules on Mobil and Murphy Oil to spend locally, the Tribunal awarded damages to both companies.
- Although the NAFTA tribunals cannot order punitive damages, legal costs awarded may have a punitive effect. Canadian companies claiming against the US might wish to reconsider, given the low success rate and risk associated with legal costs.

- Geographically, most cases originated in Central and Eastern Canada. The small size of a provincial (or state) economy may be a factor why protectionist policies of industries and governments take root in these regions.
- Apart from cases involving emerging big pharma industry, none of the decisions involved the new digital economy. Countries are struggling to determine how they can regulate and tax Netflix, Amazon, Uber, Google, AirB&B and similar providers. Regulating these businesses in Canada will be even more challenging under NAFTA.

Conclusion

> ...Canada's perfect loss rate on its own claims is highly anomalous. Many of the tribunal decisions simply cannot be reconciled.

One of the Canadian government's priorities in the current renegotiation of NAFTA is to reform the investor-state dispute settlement mechanism found in Chapter 11. Governments should be able to adopt regulations that are in the best interests of the public in health or safety and security matters without the fear of facing private suits by foreign investors. Moreover, as Canada works to recalibrate NAFTA's Chapter 11, it must balance the freedoms it seeks to regulate its own marketplace with the expectations of Canadian businesses investing in the United States.

Not surprisingly, the United States seems much more content than Canada with the existing version of Chapter 11. Even then, the US is under the impression that investors from its NAFTA partners enjoy greater rights to its market than American investors. This scorecard showing disposition of claims over the 23 years of NAFTA experience shows that is not true.

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