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Keeping Score: Investor-State Dispute Awards between the US and Canada

by
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- Over the past 25 years, US investors have launched the vast majority of claims under the investor-state dispute settlement (ISDS) chapter of NAFTA, but with limited success.
- The track record of claims under the ISDS, which was dropped in the new Canada US Mexico trade agreement (CUSMA), shows Canada has borne the brunt of defending investor claims, all of which have been prosecuted by Americans – 23 in total, five of which are still in process.
- With the approval of the new North American trade deal, now dragging through Congress, the window will begin to close on the ability of US investors to launch claims against Canada.
- Canada's success in these arbitrations is often overlooked in public commentary, but the record of wins is quite impressive. The record shows that, over the last 25 years, the total of panel awards against Canada comes to about \$32.4 million, a relatively modest sum when compared to the billions of dollars originally claimed.

If the Canada-US Mexico Agreement (CUSMA) is ratified and replaces NAFTA, arbitration claims by US investors against Canada and, likewise, claims by Canadian investors against the US will be cut off after a three-year transition period.¹ Until CUSMA enters into force, however, NAFTA and its investment chapter will continue to operate.

The author thanks Daniel Schwanen and anonymous reviewers for comments on an earlier draft. He retains responsibility for any errors and the views expressed.

1 Although cases in the pipeline as of the entry-in-force date will continue to completion. Annex 14-C allows Canadian and US investors up to three years to file new arbitration claims under the NAFTA for any investment made between 1994 and the entry into force of CUSMA (defined as "Legacy Investments.") After that date, all Legacy Investment claims are barred.

With the turmoil in Washington these days and the future of CUSMA still up in the air,² it seems opportune to review where matters stand in terms of investor-state arbitration claims and what the future holds for these cases, whether or not CUSMA ever gets through the US Congress.³

When negotiations with the Americans and Mexicans were concluded on November 30, 2018, there was some expectation that replacing NAFTA could encourage new investor claims against Canada by US investors before that right was terminated. This didn't happen, possibly because the three-year cut-off period would allow sufficient time for US investors to initiate any new NAFTA claims if they so wished.

Some NAFTA History

NAFTA was the first bilateral trade agreement to incorporate investor-State dispute settlement (ISDS) provisions. While there had been a long trend to having ISDS provisions in bilateral investment treaties, NAFTA broke new ground by actually including these in a trade agreement.

Since then, many other bilateral and regional trade agreements have been concluded around the globe with ISDS provisions. These include the Canada-EU trade agreement (CETA), the Trans-Pacific Partnership (CPTPP) and the Canada-South Korea FTA. As far as can be determined, the CUSMA would be the first to reverse this trend and actually remove ISDS provisions from a pre-existing trade agreement.

As is known in policy circles - though not necessarily in the public mind – every full-blown NAFTA investor claim against Canada since 1994 has been by Americans; 23 in total, five of which are still in process.

This contrasts with a total of 18 claims filed by US investors against Mexico.⁴ No NAFTA cases have been brought against Canada by Mexican investors and only two cases have been filed by Canadians against Mexico. Canadian investors have filed 15 cases against the United States, although none were successful.⁵ Mexican investors have filed only one.

2 See “Grassley ‘very worried’ time is running out on USMCA,” *World Trade Online*, 22 October 2019; “House working group, USTR inch closer to an agreement on USMCA,” *World Trade Online*, 23 October 2019. As far as Canadian ratification goes, the recent federal election didn't affect the virtual certainty of Canada's Parliament passing the required legislation.

3 The last review by this author was in February 2018, while trade negotiations with the US and Mexico were underway and before the conclusion of the CUSMA in late 2018: Herman, L., “NAFTA Investment Disputes-Update” (February 2018): <http://hermancorp.net/wp-content/uploads/2018/02/NAFTA-Investment-Disputes-Update-Feb-2018.docx-2.pdf> . See also: “NAFTA Investment Sun May be Setting,” *Globe and Mail*, 3 March 2019.

4 A compilation of Chapter 11 cases is maintained by the three individual NAFTA Secretariats of the Parties. A summary of the cases filed against Canada is maintained by Global Affairs Canada; <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>. These numbers are also available in the data compiled by UNCTAD and available through its Investment Dispute Settlement Navigator: <https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1000>.

5 This includes several cases filed by Canadian forest products companies against the US in the ongoing Softwood Lumber dispute (*Tembec v. USA*; *Terminal Forest v. USA*; and *Canfor v. USA*) each of which was settled pursuant to an agreement between the two governments.

So, over the NAFTA's 25-year history, Canada has borne the brunt of defending these investor claims, all of which have been prosecuted by Americans.

Total Awards Far Less than Amounts Claimed

It is often claimed that Canada has been forced to pay hundreds of millions of dollars to American investors under NAFTA awards.⁶ As shown in the following paragraphs, that argument is exaggerated and somewhat misleading. Canada's actual loss record under NAFTA is much less dramatic than asserted.

As well, Canada's success in these arbitrations is often overlooked in public commentary, but the record of wins is quite impressive. To these successes must be added the results in controversial *Clayton-Bilcon case* (discussed below), where Canada lost on the merits but where the panel award in favour of the American investors was a paltry \$7.0 million versus \$110 million originally claimed.

In fact, the record shows that, over the last 25 years, the total of panel awards against Canada, including *Clayton-Bilcon*, comes to about \$32.4 million, a relatively modest sum when compared to the billions of dollars originally claimed.

Excluded from this total is \$150 million in agreed settlements in two cases: *Abitibi-Bowater* (\$130 million) and *Ethyl Corporation* (\$20 million).⁷ While this a significant amount of money, it is not included in the ledger because these were settlements reached between Canada and the investors and not the result of adverse panel awards.

Win-Loss Record

Looking at the actual record, of 23 Chapter 11 proceedings against Canada since 1994, 18 have reached final conclusion, including the two settled cases in *Abitibi-Bowater* and *Ethyl Corporation*. Four arbitrations were won by the US investors: *Mobil Investments* and *Murphy Oil* (\$19 million versus \$66 million claimed); *Pope & Talbot* (\$408,000 plus costs versus US\$500 million claimed); S.D. Myers (\$6.0 million plus costs versus \$53 million claimed); and most recently, *Clayton/Bilcon* (\$7.0 damages, versus US\$101 million claimed). The total, as stated above, is \$32.4 million.

Of the remaining cases against Canada,

- two were withdrawn under consent awards: *St. Mary's VCNA* (zero awarded versus US\$275 million claimed); *Dow AgroSciences* (zero awarded versus \$2 million claimed);
- one was dismissed on most counts: *Windstream Energy* (\$28 million awarded including costs awarded versus \$475 million claimed);

⁶ See for example, *Canada's Track Record Under NAFTA Chapter 11*, Canadian Centre for Policy Alternatives, 2018.

⁷ When the Newfoundland expropriation bill was enacted in the *Abitibi-Bowater* matter, it was accepted by the Province that compensation would be paid. Because of that and because of a desire to avoid long, drawn-out proceedings, Canada agreed to the \$130 million settlement. The case never went forward to a panel award. The *Ethyl Corporation* filed an arbitration notice after Parliament passed the *Manganese-based Fuel Additives Act*, which prohibits the importation and interprovincial trade for commercial purposes of MMT, a fuel additive. The original claim was US\$201 million. See <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng>.

- one was terminated because of non-payment of Tribunal fees by the claimant: *Centurion Health Corporation* (US\$160 million claimed).
- eight cases (showing the amounts claimed) were dismissed outright, in most cases the panels awarding several millions of dollars of costs in favour of Canada:

UPS (2007) – US\$160 million.

Chemtura Corporation (2010) – US\$79 million.

Merril & Ring Forestry (2010) – \$50 million.

V. G. Gallo (2011) – \$105 million.

Detroit International Bridge Co. (2015) – US\$3.5 billion.

Mesa Power (2016) – \$658 million.

Eli Lilly (2017) – \$500 million.

Mercer International (2018) – \$232 million.

Pending Cases Could Change the Balance

The above listing does not include those unfinished Chapter 11 cases where panel decisions have yet to be issued. Depending on the outcome, the total payouts by Canada could change considerably. As of the fall of 2019, five cases remain on the active list (showing the amounts claimed):

- *Murphy Oil and Mobil Investments* – \$25 million

These are actually separate cases but flow from the 2012 award referred to above and are therefore grouped together. The claims concern ongoing damages resulting from Canada-Newfoundland and Labrador Offshore Petroleum Board's Guidelines on Research and Development Expenditure obligations.

- *Resolute Forest Products* – at least \$70 million

Resolute's claim relates to measures by Nova Scotia and Canada in support of a paper mill located near Port Hawkesbury, Nova Scotia. Resolute contends those measures discriminated in favor of the Port Hawkesbury mill and resulted in the closing of the Resolute mill in Shawinigan, Québec, in 2014, depriving Resolute of its investment.

- *Tennant Energy LLC* – at least \$116 million

Tennant alleges that Ontario's administration of the Feed-In Tariff program (FIT) was non-transparent and opaque, and that Tennant was treated unfairly with respect to their project in Ontario. In addition, Tennant alleges that government records documenting the nature and extent of the alleged unfair energy regulatory measures were intentionally destroyed.

- *Lone Pine Resources Inc.* – US\$119 million

The investor claims that Quebec's moratorium on hydrocarbon development on the St. Lawrence riverbed is in breach of articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation) of the NAFTA.

- *Westmorland Coal Company* – \$470 million

Westmoreland alleges that Alberta's Clean Climate Leadership Plan (CCLP), which sought to phase out all

electricity generated from coal by 2030, has reduced the lifespan of Westmoreland's mines in Alberta and treated Westmoreland unfairly. It further alleges that Alberta has treated it unfairly and in a discriminatory manner by providing transition payments to three coal-fired generating unit owners impacted by the CCLP, and not providing such a payment to Westmoreland for its coal mine assets.

Save for the relatively modest claim in *Mobil Investments and Murphy Oil* (\$25 million), each of above involve substantial amounts. While claims are typically inflated by lawyers at the outset of proceedings, if one or more succeed, even in part, the balance on the win/loss ledger will change significantly.

Comments on Canada's Wins

What isn't mentioned as frequently as Canada's losses is that the Canadian government was remarkably successful in getting claims dismissed in the majority of Chapter 11 arbitrations listed above. This includes the \$800 million claim by *Mesa Power* involving Ontario's *Green Energy Act* and the \$500 million claim by *Eli Lilly* involving the company's patent applications. Substantial costs were awarded to Canada in several of these wins.⁸

The *Clayton-Bilcon* case must be given special mention. It was a controversial claim from the start because of the challenge to environmental protection measures brought by the American investor. That controversy was intensified after the 2-1 panel decision in favour of the investor, with member Donald McRae writing a strong dissent against the majority's finding.⁹ While Canada lost on the merits, the panel's ultimate damages award of only \$7.0 million was a remarkably positive result when contrasted to the \$101 million (plus interest) claimed against Canada by the investor.

Even so, *Clayton-Bilcon* caused shudders among both governments and environmental groups because of the spectre of NAFTA claims being launched by US investors over procedural breaches or shortcomings in assessment review hearings. With CUSMA entering into force and the ending of these claims after the three-year transition period, that unease will dissipate.¹⁰

Where to From Here?

The next phase is for the current roster of the five active US investor claims against Canada to be taken through to completion. It remains to be seen whether CUSMA will be ratified given the uncertain and volatile US political situation, particularly surrounding the ongoing impeachment inquiry in the House of Representatives.

8 For example, in the 2017 *Eli Lilly* case, the panel decided that the claimant should bear 75 percent of Canada's costs of legal representation and assistance, in addition to Canada's full share of arbitration costs, for a total of \$4.8 million.

9 McRae said that the majority made fundamental errors in holding that legal errors by the Nova Scotia environmental review panel amounted to breaches of the NAFTA. Even if the review panel ran afoul of its legal duties when it failed to explore project impacts and how they might be mitigated, McRae said such a breach of Canadian law does not amount to a NAFTA violation. "In NAFTA Dissent, Donald McRae Sees Chilling Effect and 'Remarkable Step Backwards in Environmental Protection' Due to Majority Ruling": *Investment Arbitration Reporter*, 21 March 2015.

10 Ending these NAFTA claims in no way limits the rights of investors to seek judicial review or pursue appeals in domestic courts due to legal irregularities, something the investors could have done in the *Clayton-Bilcon* case in lieu of invoking their NAFTA rights.

If ratification is further delayed or effectively killed by dint of these political factors, NAFTA will continue and Chapter 11 will remain operative vis-à-vis the US and Canada.

As we await the unfolding of events in the US Congress, the Canada-US ISDS situation remains in a state of flux. Whatever scenario unfolds, two questions remain. First, will the current cases in the pipeline change the win/loss record in terms of damage awards against Canada? Second, until these NAFTA claims are cut off, will there be more Chapter 11 cases filed by US investors challenging various Canadian federal and provincial measures? This last question is important with the possibility of additional measures by different levels of government in Canada in the environmental and social policy domain.

As to the basic question of whether ISDS is appropriate or necessary in Canada-US relations, the agreement to put an end to this in CUSMA makes sense. Canada and the US are mature democracies governed by the rule of law and respect for procedural and substantive rights of private parties, with recourse guaranteed through the ordinary court system, unlike other parts of the world where these safeguards are lacking and where investors need recourse to third-party protection.

Let's hope CUSMA proceeds to ratification and these kinds of ISDS claims are ultimately removed from the agenda in our bilateral irritants.

References

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