NAFTA INVESTMENT SUN MAY BE SETTING

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With the NAFTA arbitration award against Canada in the controversial *Clayton-Bilcon* case finally being released – a mere $7 million - it's seems timely to review these investor-State disputes and see where matters stand in the Canada-US context.

Canada has been the most frequent target (i.e., respondent) in these NAFTA investor arbitrations, all of which have been launched by Americans. Even though the system was designed to give US investors recourse against Mexico, it's turned out that American parties were much more interested in chasing after Canada.

Since NAFTA began in 1994 there have been a total of eighteen claims by Americans against Canada that went all the way to some final resolution. Seven were dismissed outright, one was terminated by the investor, two were settled by agreement and two were settled with no payment required. Only six out of eighteen claims have resulted in final arbitration awards against Canada.

The total damages payable by Canada in the six successful claims, including *Clayton-Bilcon* this month, amount to about $65 million.

While that's more than pocket-change, it has to be compared with over $5 billion originally claimed by these US investors. So notwithstanding the trouble and expense of Canada having to defend these cases, the win-loss record is very much in Canada's favour, something like a 98% success rate in dollar terms.

Where do matters stand today? And what lessons are derived from these cases, remembering that these investment arbitrations between the US and Canada are done away with under the NAFTA's replacement, the yet to be ratified CUSMA/USMCA?

As of today, there are five active NAFTA arbitrations against Canada in the works, including the most recent one relating to Alberta's program for phasing out coal-fired electricity generating plants. All these current claims are allowed to continue under the new trade deal.

Going back to the *Clayton-Bilcon* award last month, it arose out of a refusal by a Nova Scotia environmental board to issue a quarry permit. The US investors took the matter to NAFTA way back in 2008, claiming a whopping $400 million in damages. After a long and tortuous process, they succeeded, at least in getting the panel to vote 2-1 that Nova Scotia breached NAFTA non-discrimination obligations. Damages were left to be awarded in the next phase.

There was a lot of teeth-gnashing in Canada when the decision was issued, mostly because of the huge damages being claimed. And there was a dissent by one of the panelists, saying that whatever the procedural shortcomings before the Nova Scotia environment board, it wasn't serious enough to offend the NAFTA, which set a much higher bar.

In finally deciding the amount of compensation payable by Canada, the panel said that whatever procedural deficiencies might have occurred in the quarry approval process weren't all that serious and that all the American claimants were entitled to was a mere $7 million (plus interest at the US Treasury bill rate from 2007, when the breach occurred). Even with interest, this won't cover even a small part of the investors' own legal fees.

These Canada-US investor-State claims have now been done away with under the CUSMA, a good thing, since there never was a sound rationale for allowing these in the first place. Neither Canada nor the US is short on legal remedies for investors or a risky place to invest. So it made little sense to have this kind of fail-safe arbitration system under the NAFTA.

However, the story isn't quite over. For one thing, the CUSMA still has to be approved in all three countries and with all the political jockeying going on in Washington, it's not clear when the deal will get through the House of Representatives. Events this week with the Michael Cohen testimony will have an impact on a whole range of things in the Congress, including prospects for CUSMA approval.

So until the new trade deal gets ratified by all three governments, the NAFTA and its investor arbitration system continues to be operative. All existing claims in the works are allowed to continue– and so are any new claims that might be filed before the replacement treaty enters into force.

Whatever transpires, these Canada-US investor claims have been very much an anomaly, an ironic twist to a dispute settlement system intended to help make American investments in Mexico more secure. In fact, the entire rationale for investor-State dispute systems in the first place was to provide recourse for industrialized investors putting money into developing countries where the rule of law was less secure. The system was designed back in the 1970s to encourage north-south capital flows and aid in economic development.

It's perverse to see how the system has been used by deep-pocketed American investors against Canada over the last twenty-five years. Let's hope the CUSMA is approved soon and we put an end to this unnecessary system in our bilateral economic relations.

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