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by Lawrence L. Herman

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POLICY PERSPECTIVE

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This article looks at investment disputes involving Canada and Canadian investors, where things stand and where they might be taking us in the years ahead. Given recent developments, including measures taken in the context of the COVID-19 crisis, it seems opportune to update matters.

We do not know how long pandemic-related measures will last or their ultimate scope. Some could affect foreign investments in different ways. Whether that might result in treaty-based investment disputes is not clear at this point, but the prospect cannot be entirely dismissed.[1]

What are Investment Disputes Anyway?

By "investment disputes", we mean claims by foreign investors against host countries and procedures aimed at resolving those disputes through some form of third-party settlement. The commonly used term for the process is the investor-state dispute settlement – or ISDS – system. That is the term used throughout this piece.

ISDS cases are driven by private parties – investors who have invested capital in foreign countries. The investor is the claimant. The state and its government are the defendant (or, more neutrally, the respondent).

Unlike the World Trade Organization (WTO) agreement that deals with goods and services trade, there is no multilateral treaty relating to investments or investment disputes.[2] There are, however, hundreds of individual bilateral treaties with their own ISDS provisions.[3] Canada calls these foreign investment promotion and protection agreements, or FIPAs. Other terms are variously used, such as bilateral investment treaties (BITs) or international investment agreements (IIAs).

There are currently 38 FIPAs in force between Canada and other countries, some dating back to the early 1990s. An additional number have been concluded and signed but await ratification and entry into force. And there is a slew for which negotiations have been concluded or are still in process.[4]

Together with these stand-alone bilateral investment treaties, investment provisions with ISDS mechanisms have been incorporated into trade agreements. The best-known of these is Chapter 11 of the North American Free Trade Agreement (NAFTA) in 1994. NAFTA investment disputes have had a robust history since the agreement entered into force. Over 25-plus years, most

[1] This update deals with mechanisms for the disposition of investment disputes, not with reviews of foreign takeovers or acquisitions such as those under the *Investment Canada Act*, which is a completely separate issue.
[2] Attempts were made in the late 1990s to conclude a multilateral investment agreement (MAI) under the auspices of the OECD, but for a variety of reasons that effort came to naught.
[3] The latest UNCTAD *World Investment Report 2019* (Geneva: United Nations, 2019) calculates that as of 2018, there were 2,658 of these bilateral investment agreements in force worldwide.
[4] Government of Canada, "Trade and Investment Agreements," https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng

disputes involved claims by U.S. investors against Canada, including for measures taken by the provinces.[5]

While privately driven investment disputes under NAFTA will be gradually phased out under the new Canada-U.S.-Mexico Agreement (CUSMA), Canada's trade agreement with the European Union (CETA) and the Trans-Pacific Partnership Agreement (CPTTP), each contains binding ISDS mechanisms. The result is that, even if American and Canadian investors lose arbitration rights under CUSMA, the pool of future possible claimants (either from Europe and Asia or indeed from Canada) has been enlarged under these new trade agreements.

The question is whether Canada will be at the receiving end of challenges under these instruments, a question that has some resonance in the wake of the COVID-19 crisis and measures governments might enact to deal with this major public health crisis. A simple example could be where a foreign-owned business is forced to shut down because of some form of pandemic-related action and its foreign owners claim that the shutdown resulted from discriminatory or arbitrary measures in breach of treaty obligations.

Canada-U.S. Investment Disputes

While Canada-U.S. investor claims will no longer be permitted after the three-year CUSMA cut-off, cases started under NAFTA – before CUSMA enters into force on July 1, 2020 – are allowed to continue to completion.

As well, new investor claims will be permitted for any investments existing on July 1, 2020. These new cases need not be based on events taking place before CUSMA's entry into force; they can be based on measures after the entry into force date, up to the three-year cut-off.

A previous C.D. Howe update (October 2019) said that Canada has historically been the target of most NAFTA investor claims since 1994, all of which were filed by U.S. investors.[6] It also said that Canada had been fairly successful in having most, but not all, of these claims dismissed by NAFTA panels.[7]

As of today, the total awarded against Canada over NAFTA's 25-year history comes to around $60 million.[8] That figure has to be compared with several billions of dollars originally claimed by the investors. Even if amounts in settled cases are added in, the total comes to approximately $245 million over NAFTA's 25-year lifespan. While not insignificant, it is still a relatively modest amount when contrasted with the billions of dollars claimed by U.S. investors.

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5 U.S. investors have also brought claims against Mexico over these years, but more NAFTA cases have been filed against Canada.
6 L. Herman, "Keeping Score: Investor-State Dispute Awards between the US and Canada," C. D. Howe E-Brief, October 31, 2019.
7 Some of the cases launched against Canada involve provincial measures, such as Ontario's *Green Energy Act*. Each of the cases currently in the pipeline (see below) involves challenges of provincial measures.
8 The $60 million is the total for awards rendered against Canada in final NAFTA Chapter 11 panel decisions. It excludes cases settled by agreement: the Ethyl Corporation case ($20 million); the Abitibi-Bowater case ($130 million); and latterly, the Murphy Oil-Mobil Oil case ($35 million).

Five NAFTA cases are still on the active list.[9] The amounts claimed in these five cases total over $3 billion. While damage claims are always inflated when cases are filed, should any of these succeed it would alter the win-loss record significantly. And, as already noted, nothing prevents new cases from being launched prior to the three-year cut-off under CUSMA. So, we will have to wait for a few years to get a final tally of the win-loss record in these NAFTA cases.

One final point in this regard. The foregoing refers to investor-driven cases under NAFTA Chapter 11. Even if these are phased out under CUSMA, state-to-state obligations respecting investments and their treatment will remain in place. That means that even if private investor claims come to an end, nothing precludes future Canada-U.S. state-to-state disputes being launched.

Canada-EU and Trans-Pacific Partnership Agreements

While private Canada-U.S. investment disputes under NAFTA will be coming to an end, the Comprehensive Economic and Trade Agreement (CETA) with the EU opens a new chapter for potential challenges, whether by Canadian investors into Europe or by European investors into Canada.

CETA was provisionally implemented in September 2017, bringing into effect its duty reduction and other market access provisions. Because of divided competence between the EU Commission and the member states in the area of investments, the new ISDS regime will come into force only after each of the 28 EU countries has ratified the deal.[10]

Once they do enter into force, CETA's investment provisions will break new ground: first, by creating a permanent, institutionalized dispute settlement tribunal from which panel members will be selected for a given case; second, by creating a new appellate system, allowing panel decisions to be appealed for legal and factual correctness and reversed where a serious error has occurred.

These changes will remove some deficiencies under NAFTA and Canada's FIPA regimes and their single-tier *ad hoc* arbitration systems.[11] Those arrangements follow an ISDS template that is now over 40 years old. The changes under CETA respond to some of the criticisms of that older system. Depending on how the CETA regime unfolds, it could facilitate the launching of new investor claims because of the additional levels of certainty and rights of appeal.

The Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP or TPP) entered into force in December 2018. Like CETA, it contains ISDS provisions. Unlike CETA, it has

[9] Resolute Forest Products (at least $70 million); Tennant Energy LLC (at least $116 million); Lone Pine Resources Inc. (US$119 million); and Westmoreland Mining Holdings (at least $470 million). While not posted on the Global Affairs website, another NAFTA claim was filed against Canada in 2018 by a U.S. investor, Geophysical Service Incorporated (GSI), alleging improper disclosure of proprietary seismic data in respect of its operations in Western Canada (US$2.5 billion).

[10] Artis Pabriks, "Legislative Train Schedule: A Balanced and Progressive Trade Policy to Harness Globalisation," *Europarl*, https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-ceta

[11] There have been two criticisms of the NAFTA and FIPA regimes. First, because dispute settlement panels are *ad hoc* and appointed for each separate case, there is a lack of consistent jurisprudence, leading to an absence of predictability in legal interpretations in the arbitration process. Second, unlike the WTO process and domestic legal systems, there is no avenue of appeal for possible factual or legal errors made by panels.

no permanent investment panel or an appeal mechanism. While there have been some interstitial rules issued to improve ISDS procedures by the TPP commission, the TPP follows the standard *ad hoc* panel system and other aspects described above. [12]

As we gain experience under the CPTTP, it will be interesting to see whether governments will be prepared to consider adjustments to the ISDS regime. A Trans-Pacific commission, set up to keep the agreement under review, could make recommendations for ISDS improvements, like a permanent arbitration court or appeal body as under CETA. Depending on whether Trans-Pacific investment disputes grow in number, the idea of a permanent arbitration court or appeal body like this may make sense.

The FIPA Record

As mentioned earlier, hundreds of bilateral investment protection agreements with ISDS provisions are in effect globally. They can generally be broken down into two kinds of systems:

(1) those that provide for arbitration outside of any existing institutions, with panels appointed by parties to hear a given case, using selected rules such as those formulated by the United Nations Commission on International Trade Law (UNCITRAL), or:

(2) those that use established institutions and their rules, such as the International Centre for the Settlement of Investment Disputes (ICSID), an arm of the World Bank, the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and others.

While details are not always published, there are enough reports to show that Canadian companies have invoked their binding arbitration rights under Canada's FIPAs, especially mining companies with activities in developing countries.

Among the better known is a successful arbitration launched by Crystallex Corporation against asset expropriation in Venezuela. In 2016, the tribunal held that Venezuela had unlawfully expropriated the claimant's investment in the Las Cristinas gold mine project. The tribunal awarded the Canadian company US$1.202 billion.[13] Cases have also been brought by Canadian companies under the Canada-Colombia FIPA. Some are still in process, although one – Eco Oro v. Colombia – is reportedly nearing completion.[14]

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12 In Annex 9B. At its first meeting in January 2019, the CPTPP Commission established a code of conduct for ISDS panel members. Government of Canada, "Decision by the Commission of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Regarding ISDS Code of Conduct," https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/decision_isds-decision_rdei.aspx?lang=eng

13 Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2.

14 Lisa Bohmer, "Colombia Round-Up: An Update on 12 Treaty-Based Disputes Against the State," *Investment Arbitration Reporter*, February 28, 2020, https://www.iareporter.com/articles/colombia-round-up-an-update-on-treaty-based-disputes-against-the-state/

Canadian mining companies have launched other claims against African countries, such as under the Canada-Tanzania FIPA. And there have been cases brought by Canadian investors in former Soviet Republics under the 1989 Canada-USSR FIPA.[15] These are just a few examples.

Only one FIPA claim has been filed against Canada in all these years (distinct from NAFTA cases reviewed above) – a case launched in 2016 under the Canada-Egypt investment treaty by an Egyptian company, Global Telecom Holding.[16] The interesting point about the Global Telecom case is that it involved a role reversal. An investor from a developing country brought a case against Canada, whereas one of the main objectives of Canada's FIPA regime was to aid in capital flows to developing countries by reducing risk and providing security for Canadian outbound investments and investors in that part of the world.

The point of these references is not to engage in a review of Canada's investment protection agreements or to explain how they serve the interests of Canadian investors in their offshore activities. Rather, it uses some illustrations to show the extensive fabric of these investment treaties and their ISDS regimes globally.

Some Thoughts for the Post-Pandemic Future

While U.S.-Canada ISDS cases are coming to an end, CETA and the CPTPP have extended the pool of investors qualified to launch investor claims against host states. It remains to be seen whether a new chapter of disputes involving Canadian laws and regulations will arise under these agreements. It will be equally interesting to see whether future challenges emerge under Canada's many bilateral FIPAs, including under the 2014 Canada-China FIPA.

Whatever transpires in the Canadian context, the vast number of investment treaties with ISDS provisions means that binding investor-state arbitrations will continue as a fact of life of global commerce. Still unclear is whether a new wave of investor claims of one sort or another will result from national measures enacted in the current COVID-19 crisis.

Modernization of Canada's older generation investment agreements to make the *ad hoc* arbitration process more efficient and effective – and more consistent –makes sense. It is an issue for Canada and indeed the global community to consider when all the COVID-19 dust settles.

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[15] In a yet-to be released award in favour of the Canadian claimant in World Wide Minerals (WWM) v. Kazakhstan, the tribunal is reported to have found a breach of the Canada-USSR treaty's fair and equitable treatment standard in Kazakhstan's failure to grant it a uranium export licence in accordance with Kazakhstan's established procedures. *Investment Arbitration Reporter*, October 31, 2019, https://www.iareporter.com/arbitration-cases/world-wide-minerals-wwm-v-kazakhstan-2/

[16] The company claimed Canada had violated the Canada-Egypt FIPA in its treatment of a local joint venture company, Wind Mobile, in which Global Telecom held shares. While the decision has not been officially released, it is reported that the arbitration panel dismissed all claims in March of this year. Lisa Bohmer and Luke Eric Peterson, *Investment Arbitration Reporter*, March 31, 2020, https://www.iareporter.com/articles/canada-round-up-canada-prevails-in-claim-brought-by-egyptian-investor-as-a-number-of-other-cases-see-new-developments/

About the Author

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Lawrence Herman was a member of Canada's mission to the UN and the GATT in the 1970s and in private law practice acted as counsel for Canada in the International Court of Justice and has advocated cases before the Canadian International Trade Tribunal (CITT), NAFTA panels and Canadian courts. Mr. Herman advises governments, State agencies and international organizations on trade, economic sanctions and investment issues.

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Among his other affiliations, Mr. Herman has been chair of the Canada-Taiwan Business Association and has served on the boards of the Canadian Institute of International Affairs, the Canadian Manufacturers Association and the Energy Council of Canada.

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