

## Brussels Week of Action

### Observations about Investor-state arbitration

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1

## Background: sources and methods

- database on all known investment treaty cases with publicly-available materials up to May 2010 – see [www.iiapp.org](http://www.iiapp.org)
- content analysis of resolutions of contentious issues (of jurisdiction and admissibility) in all cases
- review of secondary literature
- further analysis of selected awards
- public law theory/ public international law doctrine

2

## OVERVIEW OF INVESTOR-STATE ARBITRATION

- legislative, executive, and judicial measures are reviewable by arbitrators against treaty standards of fair & equitable treatment, non-expropriation, non-discrimination, etc.
- claimants have no duty to exhaust reasonably-available local remedies such as domestic courts or administrative bodies
- claimants may have resorted to such remedies before or alongside arbitration proceedings

3

## OVERVIEW OF INVESTOR-STATE ARBITRATION

- allows companies and individuals to sue states before international arbitration tribunals
- arbitrations are conducted under various rules: e.g. International Centre for Settlement of Investment Disputes (ICSID), UN Commission on International Trade Law (UNCITRAL), International Chamber of Commerce (ICC)
- unusually, the primary remedy is a damages award providing for retrospective compensation against the state

4

## Observation 1

### Wars of attrition with TNCs

- Transnational firms may resort to multiple arbitrations against a state in order to entangle it in a tedious expensive litigation and pressure it settle
- e.g. *Bechtel v India*; *Chevron v Ecuador*; *Philip Morris v Australia*, *Norway*, *Uruguay*...

5

## Observation 2

### Risk of the catastrophic award

- A key risk for host states is that of a catastrophic award; this risk in turn shapes the bargaining power of investors that threaten lawsuits
- e.g. *CSOB v Slovakia* (over \$1 billion); *CME v Czech Republic* (\$350 million); *France Telecom v Lebanon* (\$266 million); Argentina, Ecuador, Russia, Venezuela face the prospect of billions or tens of billions in awards

6

### Observation 3

#### The costs of victory

- States may face legal and arbitration costs in the tens of millions of dollars merely to defend a claim and they rarely are awarded full costs when successful
- e.g. *Fraport v Philippines* (over \$50 million in legal and arbitration costs to date)

7

### Observation 4

#### Good faith democratic regulation is not immune

- Investors often challenge general measures aimed at protecting human health, the environment, human rights, etc., and sometimes win in such cases
- There is limited data and information on the degree to which investors have used the threat of a claim to block proposed regulatory measures – the question is hotly disputed

8

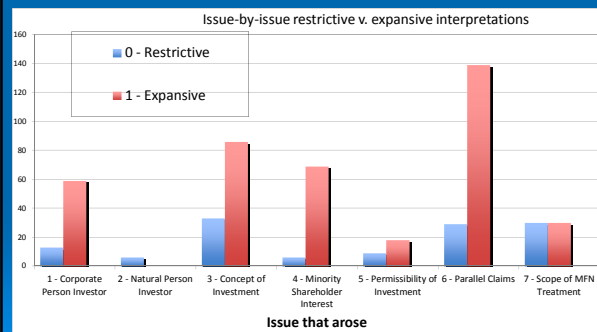
### Observation 5

#### Trends in arbitrator activism

- Tribunals have pushed the boundaries of the treaty language to expand the compensatory promise of the system for investors
- e.g. *Occidental v Ecuador* (arbitrariness, fair and equitable treatment, national treatment); *CMS v Argentina* (fair and equitable treatment); *Agua del Tunari v Bolivia* and *Tokios Tokelos v Ukraine* (corporate nationality); *Metalclad v Mexico* and *Tecmed v Mexico* (expropriation)...

9

### Expansive v restrictive approaches on seven jurisdictional/ admissibility issues



10

### Observation 6

#### Small core of 20 to 30 arbitrators seems to be driving expansive interpretation of the treaties

- May reflect economic/ career interests of arbitrators
- Without the conventional safeguards of judicial independence, will arbitrators favour:
  - prospective claimants (investors) to grow the market for arbitration?
  - States or businesses that have influence in the appointing authorities?
  - senior gatekeepers in the 'club' of international arbitration?

11

### Descriptive data – distribution of appointments among investment treaty arbitrators

No. of issues resolved	No. of arbitrators	Total appointments to cases	% of total appointments to cases	Median appointments per arbitrator	Mean appointments per arbitrator
0 to 2	144	195	41.0%	1	1.4
3 to 5	47	110	23.1%	2	2.3
6 to 11	13	62	13.0%	5	4.8
12 to 30	11	109	22.9%	11	9.9
<b>Totals:</b>	<b>215</b>	<b>476</b>	<b>100%</b>	<b>1</b>	<b>2.21</b>

12

Descriptive data – distribution of issue resolutions among investment treaty arbitrators

No. of arbitrators	% of arbitrators	No. of issue resolutions	% of issue resolutions
144	67%	170	26%
47	22%	172	27%
13	6%	99	15%
11	5%	208	32%
<b>Total: 215</b>	<b>100%</b>	<b>649</b>	<b>100%</b>

13

Descriptive data – expansive-to-restrictive ratios among investment treaty arbitrators

No. of issue resolutions	No. of arbitrators	Expansive resolutions	Restrictive resolutions	ETR ratio
0 to 2	122	84	50	0.63
3 to 5	47	92	45	0.67
6 to 11	13	67	13	0.84
12 to 30	11	158	18	0.90
<b>Totals:</b>	<b>215</b>	<b>401</b>	<b>126</b>	<b>0.76</b>

14

Observation 7

**Supreme arbitration tribunals?**

- Tribunals may order states to enforce, or to decline to enforce, decisions of domestic courts or other arbitration tribunals
- In doing so, tribunals are arguably coming to resemble a new form of extra-territorial 'supreme tribunal'
- awards and orders are enforceable in 100+ countries based on *New York Convention* and *ICSID Convention*

15

Observation 8

**Developed countries are not immune**

- e.g. Vattenfall claims against Germany for (1) local regulation of coal-fired power plant in Hamburg and (2) recent decision to close nuclear plants nationally
- among developed countries, Canada has the most extensive experience as a respondent government in investor-state arbitration

16

NAFTA Chapter 11 investor-state claims to date

Claimant nationality	Claims against Canada	Claims against Mexico	Claims against U.S.	TOTALS:
Canadian	NA	1	15	16
Mexican	1	NA	1	2
American	29	15	NA	44
Data unavailable	0	1	0	1
<b>Totals:</b>	<b>30</b>	<b>17</b>	<b>16</b>	<b>Total claims: 63</b>

17

NAFTA Chapter 11 mature claims to date

Claimant nationality	Claims against Canada	Claims against Mexico	Claims against U.S.	TOTALS:
Canadian	NA	1	11	12
Mexican	0	NA	0	0
American	19	11	NA	30
Data unavailable	0	0	0	0
<b>Totals:</b>	<b>19</b>	<b>12</b>	<b>11</b>	<b>Total claims: 42</b>

18

## SUMMARY OF OUTCOMES FOR CANADA

Adjudicated or settled cases against Canada (NAFTA only):

- Resulting in payment of compensation to the investor: **4**
- Resulting in no payment of compensation to the investor: **6**

Adjudicated or settled cases by Canadian investors (NAFTA + bilateral investment treaties):

- Resulting in payment of compensation to the investor: **0**
- Resulting in no payment of compensation to the investor: **16** (9 under NAFTA; 7 under BITs)

19

## SUMMARY OF NOTABLE CASES AGAINST CANADA

Some cases arising from legislative measures:

- *AbitibiBowater v Canada* (Newfoundland & Labrador)
- *Centurion Health v Canada* (Canada)
- *Ethyl v Canada* (Canada)
- *Gallo v Canada* (Ontario)
- *Gottlieb v Canada* (Canada)
- *Merrill & Ring Forestry v Canada* (Canada/ B.C.)
- *UPS v Canada* (Canada)

20

## SUMMARY OF NOTABLE CASES AGAINST CANADA

Some cases arising from federal administrative measures:

- *Detroit International Bridge v Canada* (infrastructure development decisions relating to Ambassador bridge)
- *SD Myers v Canada* (Orders-in-Council on PCB exports)
- *Chemtura v Canada* (Pesticide Regulation Agency orders on agricultural pesticide Lindane)
- *Pope & Talbot v Canada* (export quota administration under 1996 Softwood Lumber Agreement)

21

## SUMMARY OF NOTABLE CASES AGAINST CANADA

Some cases arising from provincial administrative measures:

- *Andre v Canada* (NWT – regulation of caribou hunting)
- *Clayton/ Bilcon v Canada* (Nova Scotia – environmental assessment process for quarry)
- *Dow AgroSciences v Canada* (Quebec – cosmetic pesticide use regulations)
- *Mesa Power v Canada* (Ontario – *Green Energy Act* eligibility rules)
- *Mobil & Murphy Oil v Canada* (N & L – offshore oil R & D expenditure decisions)
- *St. Marys v Canada* (Ontario – denial of approval for quarry)

22

## EXAMPLES OF NOTABLE CASES

### *Clayton/ Bilcon v Canada*

- challenge to federal-provincial Environmental Assessment process for a proposed basalt quarry in a sensitive coastal area in Nova Scotia
- EA panel recommended rejection of project based on significant adverse environmental effects
- project rejected by provincial Minister of Environment and Labour and federal Department of Fisheries and Oceans
- claimant did not seek judicial review of any decisions related to the project
- claimant alleges that it was subjected to more onerous conditions than Canadian investors and that the EA process was arbitrary and unfair

23

## EXAMPLES OF NOTABLE CASES

### *Mobil & Murphy Oil v Canada*

- Canada-Newfoundland Offshore Petroleum Board required companies in the Hibernia and Terra Nova projects to dedicate a set proportion of revenues to research and development
- on judicial review, the Board's decisions were upheld as reasonable by the NL Court of Appeal
- claimants object to the requirements on substantive (efficiency) grounds and procedural grounds
- Claimants argue that the Board's decisions are not covered by NAFTA annex that exempts federal legislation on the Atlantic Accord from NAFTA in its existing form

24

## EXAMPLES OF NOTABLE CASES

### *St. Marys Cement v Canada*

- proposed quarry in Flamborough
- challenge to MOE refusal to issue water permit; Ministerial declaration of provincial interest at OMB; municipal governments' refusal of *Planning Act* applications
- claimant alleges "unfairness and abuse... by self-interested political insiders who used unfair, non-transparent and secret regulatory procedures to circumvent the standard approvals process..."

25

## EXAMPLES OF NOTABLE CASES

### *Mesa Power v Canada*

- claimant owns wind farm locations in SW Ontario
- challenges OPA changes to the rules for awarding wind PPAs under the FIT program and changes to the eligibility rules for transmission line interconnections
- claimant alleges "unfairness, the abuse of power and process and undue political interference in the regulation of renewable energy... through the unannounced last-minute imposition of arbitrary measures and through opaque and secret administration... requirements"

26

## Observation 9

### **What is beneath the tip of the iceberg?**

- information and data on claims is limited by the ongoing confidentiality in arbitrations involving states
- roughly in order of confidentiality: International Chamber of Commerce, London Court of International Arbitration, Stockholm Chamber of Commerce; UNCITRAL; ICSID

27

## Observation 10

### **Solutions are straightforward (legally)!**

- small numbers of like-minded governments should conclude new agreements to override existing treaties/contracts in targeted areas:
  - best option: remove investor-state arbitration
  - some weaker options: clarifications of treaty standards; exceptions of from the treaty; reforms to assure openness; institution of a mandatory roster of investor-state arbitrators

28