Appendix C of complaint of Gus Van Harten to the Canadian Judicial Council

Opinion articles relied on by the Respondent and Crampton CJC to support the conclusion that I lacked impartiality due to my pre-appointment public commentary


The Carlisle quarry and NAFTA

14 August 2011

Provisions in free-trade agreement let international investors bypass laws and our courts

The controversy over the Carlisle quarry has gone global, illustrating how Ontario and Ontarians can be the victims of flaws in a trade deal.

St. Mary’s Cement is threatening Canada under NAFTA Chapter 11 because Ontario took steps to reconsider the aggregate quarry it wanted to excavate on about 67 hectares at the 11th Concession and Milburough Line. The company is represented by Canadian lawyer Barry Appleton, one of the pioneers of Chapter 11 lawsuits against Canada.

Local groups must now steel themselves for the next chapter in their long battle. They must ensure that Ontario and Canada will fight this lawsuit tooth and nail, as Canada has done in most other NAFTA cases. They can also now blow the whistle on how investor-arbitration can put unfair constraints on democracy.

Before NAFTA, this sort of lawsuit was impossible

Foreign investors, like Canadian investors and the rest of us, were bound by the decisions of Ontario courts, subject to Ontario legislature. The decisions were final, as they should be in a constitutional democracy based on the rule of law and the principle of independent courts.

But the arbitration process under NAFTA Chapter 11, and many other trade deals, gives foreign investors a trump card.

If a government rethinks a project for environmental or health reasons, foreign investors can sue for very generous compensation. This includes rights to compensation that do not exist in Canadian law out of respect for democratic choice and responsive regulation.

Worse, the lawsuits are not resolved in an international court. They are resolved by private arbitrators who do not have the safeguards of independence that judges enjoy.

The arbitrators lack secure tenure, are dependent on officials at organizations like the World Bank and the International Chamber of Commerce for their appointments to cases,
and can earn money outside of the judicial role. Their decisions are also heavily insulated from review in any court.

In many cases, the arbitrators who decide lawsuits brought by foreign investors in one case will work elsewhere for other foreign investors. The problem this raises is issue conflict: the “judge” decides what the law means in one case while also arguing, as a lawyer on behalf of a paying client, what the same law should mean in other cases.

Why did Canada give away these special privileges to foreign investors? Ostensibly, NAFTA Chapter 11 was supposed to protect companies from mistreatment in Mexico. Since then, Canada has been sued nearly 30 times, nearly always by U.S. companies, and far more often than Mexico.

This elevates foreign investors to a privileged position, relative to everyone else who lives, works, and does business in Canada.

It poses the question of whether government decisions about all sorts of regulations that affect foreign investors may be influenced by NAFTA threats. The answer is, we don’t know.

But we should expect that governments will stick to the right decisions, based on sound policy, without submitting to the pressure of a NAFTA lawsuit. We should expect that, when faced with a NAFTA lawsuit, they will fight tooth and nail to win.

More importantly, Canada must stop signing trade deals that allow for investor-state arbitration.

If Canadian companies need these protections abroad, they can negotiate them directly in their contracts with foreign governments. No major deal in a developing country would go through today without an elaborate contract that includes its own dispute settlement provisions.

For Canadians, the biggest worry right now is the Canada-Europe trade deal under negotiation by the Harper government. If signed, the deal will extend these NAFTA privileges to European companies with major interests in the water sector, for example. The deal would also likely allow U.S. investors to sue for provincial decisions that are now somewhat protected under NAFTA.

As an academic, I have raised concerns about this system in Canada and other countries. It was only a matter of time before the system would come to my own back yard. But, regardless of who gets sued and where, the implications are typically the same: Democratic choice and responsive regulation get trumped unfairly by the special rights of foreign investors.

Other countries have pulled away from this system. Most recently, Australia announced it would no longer include investor-state arbitration in any of its trade agreements.
Australia faces a lawsuit by Philip Morris after introducing anti-tobacco regulations. Canada was threatened with a NAFTA lawsuit by Philip Morris for much the same reason in the 1990s. Canada later abandoned a proposal for plain packaging of cigarettes.

Canada should have abandoned investor-state arbitration then. Following Australia, it should do so now. If not, Canadians need to know that the wrong-headed decision to allow these unfair lawsuits against democratic choice continues to rest squarely with the federal government.

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Canada could do a better job negotiating trade deals

26 October 2011

One purpose for the federal government’s pursuit of free trade deals with other nations is to protect Canadian investors from mistreatment in foreign countries.

In fact, the government is currently negotiating a major trade deal with Europe and has announced a flurry of other agreements, including one just concluded with Honduras.

However, the agreements perpetuate a flaw in Canada’s trade model: the lack of safeguards for the independence of those chosen to adjudicate disputes in which investors from one country are harmed by the other country’s actions — what is commonly known as dispute settlement or investor-state arbitration).

This flaw undermines Canadian interests. For example, Canadian investors have an abysmal record in investor-state arbitration. They have sued foreign countries — most often the U.S. — 16 times and lost every case. Although not necessarily definitive, this experience should raise alarm bells about investor-state arbitration.

In particular, safeguards of independence that are well-known in international and domestic courts need to be introduced. At present, investor-state arbitrators lack any security of tenure, are under-regulated in the activities they can pursue outside of the judicial role, and are not chosen from a set roster based on an objective method of appointment. This distinguishes investor-state arbitration from dispute settlement processes under other trade agreements, including the World Trade Organization agreements and most parts of NAFTA.
The Canadian experience in investor-state arbitration is dominated by NAFTA Chapter Eleven. To date, 30 claims had been filed against Canada, compared to 17 against Mexico and 16 against the U.S. Ten of the claims against Canada — all by U.S. investors — have been resolved, with a mixed record of wins, losses, and settlements.

On the other hand, Canadian investors have sued the U.S. nine times under NAFTA and lost every case. Likewise, under other treaties, they have sued various countries — such as Costa Rica, Croatia, and Sri Lanka — seven times and, again, they have lost every case.

Some of the cases lost by Canadian investors have pointed to the risk that investor-state arbitrators may choose to avoid ruling against powerful states for political reasons. In Loewen versus U.S.A., a Canadian funeral homes company was required to pay a massive jury damages award following a civil trial in Mississippi, leading the Canadian investor to seek relief under NAFTA Chapter 11. The NAFTA tribunal condemned the civil trial as “a disgrace,” but surprisingly decided to “stay its hands” and avoid ruling against the U.S., apparently to protect against an anti-NAFTA backlash.

Decisions like Loewen raise concerns that, in the absence of well-known safeguards of independence, powerful actors may be more able to influence the appointment and supervision, and ultimately the decisions, of arbitrators. Thus, the lack of safeguards fuels a concern that the system does not offer the same protections for all countries and for all investors.

Investor-state disputes would ideally be resolved by an international investment court that incorporated the highest standards of fairness and independence. Short of this, Canada should look to other models of dispute resolution as a basis for re-shaping the system. As an example, the person-to-government arbitration process under Canada’s Agreement on Internal Trade incorporates various safeguards that could be used in investor-state arbitration.

First, this agreement establishes a roster of qualified persons who are eligible to be arbitrators and provides that arbitrators must be appointed from the roster. This is important for reasons of quality control, public accountability, and independence.

Second, it provides for random selection of a tribunal’s chair where the disputing parties do not agree about who to appoint. This ensures neutrality in the process and limits opportunities for behind-the-scenes lobbying to stack tribunals.

Third, the agreement imposes a mandatory code of conduct on arbitrators to protect against potential conflicts of interest. Other arbitration processes — such as financial arbitration in the U.S. — take similar steps by precluding arbitrators from earning significant income as lawyers in the investment industry.
In contrast, investor-state arbitration does not institute rigorous checks on the activities of arbitrators outside of the judicial role. In some instances, an arbitrator may interpret the law in one case while arguing on behalf of paying clients about how the same issues should be resolved in other cases. There is clearly a need for tighter regulation of both the arbitrators and the arbitration process.

Indeed, in a trade deal between developed countries with mature and democratic judicial systems, there is no clear rationale for allowing foreign investors to circumvent domestic courts via investor-state arbitration.

The lack of safeguards of independence in investor-state arbitration contrasts with international and domestic courts and with dispute resolution processes under other trade agreements. Canada should seek to reform investor-state arbitration under NAFTA Chapter Eleven and adopt a revised model in ongoing trade negotiations with the European Union.


**Counterpoint: Danny Chavez**

9 January 2009

They call him Danny Chavez because he has the gumption to expropriate AbitibiBowater which is, apparently, a U. S. investor.

Newfoundland and Labrador agreed in 1905 to allow Abitibi to exploit its timber and water. Abitibi agreed to run paper mills and employ people in the province. Abitibi closed the mill in Stephenville, Nfld., three years ago; now it has closed the mill at Grand Falls. So Premier Danny Williams took back the timber and water.

This was courageous. The legislature of Newfoundland and Labrador should be applauded for it. It is about bargaining from strength instead of weakness. It is true that Canada now faces a legal attack under NAFTA Chapter 11. But we should not capitulate or pressure Newfoundland and Labrador to back down. NAFTA has weaknesses, above all the illegitimacy of its system of arbitration under which Abitibi will bring its claim.

Abitibi will say that the provincial legislation offends NAFTA's rules to protect foreign investors. That claim will be handed over to three arbitrators (read commercial lawyers, for the most part) and the lawyers will get to work. The arbitrators have the extraordinary power to order Canada to pay public money for Abitibi's lost profits arising from
legislative decisions. And their interpretations of NAFTA are insulated from review by any court, whether domestic or international.

Even if Canada loses under NAFTA, however, Danny Chavez wins. He wins because Canada must defend the claim, not Newfoundland and Labrador, and Canada must pay any award. Canada did not ask for the provinces' consent when it signed up to NAFTA. And so the federal government rightly holds the bag.

He wins also because he calls NAFTA's bluff. NAFTA Chapter 11 works mainly through fear and its claims of legitimacy. We are supposed to fear a company's legal threats and harassment of our governments. We are supposed to respect the awards of the arbitrators. But one need not fear a toothless beast or respect false prophets.

Danny wins because Canada can draw out the claim, taking Abitibi down all the procedural twists and turns to drive up costs. That is what the U. S. government does when it fights NAFTA claims by Canadian firms. And that is what Canada should do, not only against Abitibi, but also against Dow Chemical, which recently brought a NAFTA claim for the "harm" caused it by municipal pesticide bans in Quebec.

Danny wins, above all, because he challenges an illegitimate system. NAFTA Chapter 11 is illegitimate because the arbitrators are not independent like judges. They do not have security of tenure. They are paid by the day. They may practice as lawyers while working as arbitrators while advising companies. They are part of a tiny clique, populated mostly from the world of commercial arbitration. Those who study this world refer to it as a club or a mafia.

Consider that unlike other forms of arbitration, only one side can bring the claims under Chapter 11. So, the logical way to grow the industry is to interpret the treaties to encourage investors to bring claims. And, final authority to appoint the arbitrators rests usually with the president of the World Bank (via the International Centre for Settlement of Investment Disputes in Washington). Currently this is Robert Zoellick, the former U. S. trade representative. Previously it was Paul Wolfowitz, the former U. S. deputy secretary of defense. You get the idea.

Canada should not have submitted to this system of arbitration under NAFTA. During the primaries, Barrack Obama demonstrated an interest to renegotiate NAFTA. Canada should jump at the opportunity to rework Chapter 11, at the very least by subjecting arbitrators to a properly independent process of appeals, as proposed in the U. S. Congress six years ago.

In the meantime, let's support Newfoundland and Labrador for bargaining from strength and for calling NAFTA's bluff.

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