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Public Citizen

NAFTA's Corporate lawsuits

Briefing Paper

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Major "Investor-to-State" Legal Challenges Brought Under the North American Free Trade Agreement

CASES COVERED:

In 1994 the governments of Canada, Mexico, and the United States signed the North American Free Trade Agreement (NAFTA). One of the centerpieces of NAFTA is the agreement's investment chapter, designed to grant special legal protections to corporations from one NAFTA country that invest in another NAFTA country. Corporate investors have already begun to use these investment rules to challenge national and local laws in all three countries, raising concerns in the public interest community. This briefing paper summarizes six NAFTA investment cases and their implications for democratic procedures, federalism and environmental protection.

NAFTA's investment rules (Chapter 11 of NAFTA) require Canada, Mexico, and the US to give investors from the other two NAFTA countries a guaranteed level of protection. This includes the obligation to treat investors at least as favorably as domestic companies (national treatment) as well as a variety of absolute obligations (for example, governments may not require investors to hire a minimum number of local workers or prevent investors from transferring money in or out of the country).

If an investor believes that a government has violated NAFTA's investment rules, the corporation can initiate binding investor-to-state dispute resolution for monetary damages. Investors have the choice of suing in local courts or in special international arbitration tribunals, which are closed to public observation or input.

The record of these cases is clear: NAFTA's investment chapter has allowed corporations to bypass normal political and legal processes and challenge democratically enacted laws. NAFTA must be renegotiated to fix this fatal flaw.

SUMMARY OF FINDINGS & RECOMMENDATIONS

- NAFTA's Investment Rules have been used to challenge a variety of government action, including environmental protections and jury awards.
- All three NAFTA countries have been sued.
- Damages sought from taxpayers in NAFTA cases already exceed $1.8 billion.
- NAFTA lawsuits are closed to public scrutiny or input.
- The Governments of Canada, Mexico and the United states should renegotiate NAFTA' investment chapter to fix its fundamental flaws.

Corporation	Target of Case	Damages Sought
Ethyl	Canadian restriction on toxic fuel additive	$250 million
Metalclad	Mexican state ecological zone blocking waste facility	$90 million
SD Myers	Temporary Canadian ban on exports of PCBs	$20 million
Loewen	Civil justice system of State of Mississippi	$725 million
Sunbelt	Canadian restrictions on water exports	$220 million
Pope & Talbot	Canada-US agreement on lumber trade	$507 million

The Ethyl MMT Case

CORPORATION

Ethyl – the corporation that put the lead in leaded gasoline – is a Virginia-based chemical company. It produces a toxic gasoline additive called methylcyclopentadienyl manganese tricarbonyl (MMT) in Virginia, then ships the substance to Canada, where it is mixed in a plant in Ontario and sold to Canadian gasoline refiners. To complete the circle of poison, each year Ethyl ships 4 million kgs of toxic waste back into the US, burying it in Ohio, making the company the largest cross-border pollution trader in North America.

PUBLIC INTEREST

In 1997 Canada imposed a ban on the import and interprovincial transport of MMT. The ban was intended to protect public health, as MMT contains manganese — a known human neurotoxin. MMT is banned by the State of California and EPA has banned its use in reformulated gasoline.

LEGAL ATTACK

While the ban was being debated in the Canadian Parliament, Ethyl filed a notice that it would sue Canada for cash damages under NAFTA if restrictions were placed on MMT. The Parliament withstood these threats and passed the ban. Five days later, Ethyl filed a claim for $250 million before a NAFTA tribunal. Ethyl argued that the law was an expropriation of its assets; that it was unfairly treated because it was a foreign company (there are no Canadian manufacturers of MMT); and that the ban was an illegal "performance requirement" because it would force the company to build a factory in every Canadian Province

"Making Money the Toxic Way"

OUTCOME

In July 1998, the government of Canada settled with Ethyl. Canada reversed its ban on MMT, paid $13 million in legal fees and damages, and issued a statement that it lacked evidence of MMT's toxicity (for Ethyl's use in advertising).

"[T]he potential for lawsuits under this process is far-reaching since it could be used by more than 350 million individuals and corporations throughout the NAFTA countries."

Appleton & Associates (attorneys for Ethyl), October 1996

IMPLICATIONS

Intimidation: By threatening to sue before the law was passed, Ethyl hung the threat of monetary damages over the heads of lawmakers. While the Canadian parliament did not give in to the pressure, this tactic could have a "chilling effect" in the future.

Pay the polluter: Ethyl's claim that restrictions on MMT "expropriated" the company's property is a dangerous expansion of rules on regulatory takings. When a government regulates a dangerous chemical, it shouldn't have to pay the corporation that manufactures the toxic substance.

Successful Suit! Ethyl's NAFTA lawsuit succeeded in reversing the controls on MMT. This success will no doubt encourage other corporations to use NAFTA's investment rules to challenge government policies.

The Metalclad Waste Treatment Case

CORPORATION

In 1997, Metalclad, a California-based corporation, bought a waste disposal site in the Mexican State of San Luis Petosi. Metalclad planned to re-open facility, which had an earlier history of contaminating the local water supply.

PUBLIC INTEREST

An environmental impact assessment revealed that the facility was sited atop aquifers. The state government then declared the site part of a special ecological zone, preventing Metalclad from re-opening its waste facility. Local people, still wary from previous water contamination from the site, had strongly opposed re-opening it.

LEGAL ATTACK

Metalclad sued the government of Mexico for $90 million, claiming that the company's investment and future profits had been expropriated. This amount is more than the combined annual income of all residents in the surrounding community.

"Trashing Local Control"

OUTCOME

Metalclad presented its arguments in a secret legal brief more than 1000 pages long filed at the end of 1997. Mexico responded in February 1998. The special tribunal, operating under rules of ICSID, an arm of the World Bank, will hold its hearing on the merits of the case on July 1, 1999.

"I don't know of anything the federal government could have done and didn't do, short of sending the army in"

Metalclad spokesman quoted in Wall Street Journal, October 14, 1997

IMPLICATIONS

Eroding local control: Local activism against the Metalclad facility is an example of new and growing grassroots environmentalism in Mexico. Under NAFTA, Metalclad must sue the Federal Government even though Metalclad's project had federal support. As a Metalclad spokesman stated: "I don't know of anything the federal government could have done and didn't do, short of sending the army in." Now the state government and local people must count on that same federal government to defend the local law!

Secrecy: NAFTA investment cases operate under secretive procedures. People concerned with the environmental impacts of Metalclad's site cannot give testimony, observe the court proceedings, or even see the arguments filed by Metalclad.

Attack on Environmental Zoning: Land use controls to promote environmental preservation and other goals are common local and state level policies. Federal governments should not be forced to pay investors affected by zoning laws.

The SD Myers PCBs Case

CORPORATION

S.D. Myers is an Ohio based waste treatment company S. D. Myers was prevented from importing waste contaminated with PCBs from Canada by a temporary Canadian ban on exports of PCB-contaminated waste. The ban lasted from November 1995 to February 1997—the brief period during which the U.S. had opened its borders to PCBs. The U.S. EPA rule opening the border to PCBs was struck down by a federal judge in July 1997.

PUBLIC INTEREST

PCBs are among the most toxic industrial chemicals known to man. Trade in toxic waste such as PCBs is governed by an international agreement, the Basel Convention, to which Canada is party. The Basel convention encourages countries to limit exports of hazardous waste and to adopt strong controls. Canada was doing just this when it imposed the temporary ban and issued new regulations requiring PCBs wastes exported to the U.S. to be disposed in accordance with the more rigorous Canadian standards (for instance, Canada bans landfilling of PCBs, while the U.S. allows it).

LEGAL ATTACK

S.D. Myers is claiming that the temporary ban deprived it of its right to invest in the Canadian PCB disposal market, and that the ban expropriated its potential Canadian business. It is claiming damages to cover lost profits during time that the U.S. allowed the import of PCBs.

"Pollution Crossing Borders"

OUTCOME

S.D. Myers is pressing its lawsuit under the United Nations Commission for International Trade and Law (UNCITRAL) rules. Given that UNCITRAL is a set of rules and not an institution with a Secretariat, the most basic information, such as the timeline, the panelists, etc. will remain completely unknown to the public (unless, of course, either S.D. Myers or the government of Canada is forthcoming with the information).

"hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated"

From Preface of Basel Convention on Hazardous Wastes, 1989

IMPLICATIONS

Use of NAFTA to trump International Environmental Agreements: Canada's ban is consistent with its obligations under the Basel Convention, which urges countries that export hazardous waste to ensure that the disposal rules of the importing countries are environmentally sound. This case raises the specter that environmental agreements that attempt to minimize trade in hazardous materials can be trumped by free trade agreements. While NAFTA contains a provision that says that the Basel Convention shall prevail in the case of an inconsistency between the two agreements, internal memos from the Canadian government reveal that Canada suspected the ban may be NAFTA-illegal, indicating that Canada had very little faith that NAFTA would be compatible with environmental agreements.

The Loewen Funeral Home Trial Case

CORPORATION

The Loewen Group is a Canadian-based funeral conglomerate that has aggressively acquired funeral homes across Canada and the U.S.

PUBLIC INTEREST

Loewen was sued by a small funeral home owner in Mississippi for gross business misconduct. In 1995, a Mississippi jury found the company liable for fraud and other misconduct and imposed heavy punitive damages. The U.S. justice system allows juries to assess punitive damages to deter companies from engaging in misconduct in the future.

LEGAL ATTACK

Loewen is claiming $725 million from the U.S. government, arguing that the trial judge, the jury verdict, the punitive damages, and a Mississippi bond requirement upheld by the Mississippi Supreme Court all violated its new investor rights guaranteed under NAFTA. Specifically, it claims that the judge allowed the plaintiff's attorney to appeal to the "anti-Canadian bias" of the Mississippi jury and that the bond requirement that Mississippi shares with at least 20 other states effectively denied Loewen its right to appeal its case and so constituted an attempted expropriation of its assets. The bond requirement obligates those found liable for damages to post bond while appealing so they don't use the often lengthy appellate process to hide assets.

"Deep-Sixing the Justice System"

OUTCOME

The case is being heard in ICSID, and the panel is currently being constituted.

"What does this have to do with international trade? What we're talking about is burying people."

Mike Allred, attorney for plaintiffs, November 1998

IMPLICATIONS

***NAFTA Business Strategy*:** Loewen decided to sue three years after the jury verdict -- at a time when its aggressive acquisition strategy has left it overleveraged and its stock has plunged in value. It could use the $725 million to appease nervous shareholders, thus driving up the value of its stock.

***Using NAFTA to evade liability -- a special right of appeal*:** The Loewen case could send the powerful message to foreign businesses that they can evade justice by challenging the workings of state, local and federal courts in NAFTA's tribunals. In contrast, U.S. citizens and businesses must comply with the rulings of the U.S. courts.

Advancing a rear attack on the U.S. legal system: The U.S. justice system guarantees a strong role for citizen juries. Many in the public interest community see it as an important way to equalize the power imbalance between citizens and deep-pocketed corporations. It allows juries to send strong messages to businesses who abuse their power and resources to rip-off consumers, pollute, or evade the law. Loewen is arguing that the U.S. tort system is illegal under NAFTA. Domestic and foreign corporations and their political allies could use the threat of liability under NAFTA to fuel efforts to enact tort "reform" that restricts citizens' access to the court system.

The Sun Belt Water Export Case

CORPORATION

Sun Belt is a California-based corporation. Sun Belt, with a Canadian joint venture partner named Snowcap Waters Ltd, had planned to take the unprecedented step of exporting British Columbia water to California in oil tankers.

PUBLIC INTEREST

In 1993, soon after Sun Belt entered into a joint venture with Snowcap, the province of British Columbia imposed a moratorium on water exports. The Canadian public and government believe they have a responsibility to regulate the use of natural resources, especially water, and the federal government has recently enacted a country-wide moratorium on bulk water exports.

LEGAL ATTACK

Sun Belt is making two distinct claims against Canada. First, that by settling with its Canadian joint venture partner (Snowcap) and refusing to settle with Sun Belt, the Canadian government discriminated against it. Second, it is arguing that the water export moratorium violated the Canada-U.S. Free Trade Agreement (CUFTA), which is grandfathered into the NAFTA.

"Canada Dry"

OUTCOME

Sun Belt filed its Notice of Intent in early December 1998 and the case is ripe for arbitration. Press reports indicate that Canada has no intention of settling the claim, but Sun Belt has not yet filed its claim in any NAFTA arbitration body.

"What difference does it make to the stream if you take it to Vancouver or Seattle?'

John Carten, lawyer for Sun Belt

"Water is different. Water is a public trust - not something to trade for profit."

Jo Dufay, Council of Canadians

IMPLICATIONS

***Using NAFTA Chapter 11 to Enforce other Agreements*:** The BC water moratorium occurred before NAFTA went into effect. Sun Belt is arguing that the moratorium violated CUFTA. Because CUFTA was grandfathered into NAFTA, Sun Belt claims that it can use NAFTA to enforce CUFTA, enhancing the possibility that NAFTA Chapter 11 claims would proliferate by applying retroactively to CUFTA claims from the late 1980s and early 1990s.

***Decreasing Control over Natural Resources*:** Under NAFTA, water is merely a commodity and governments must protect investor claims to it. Yet nations have a competing responsibility to conserve natural resources and protect the environment. Sun Belt claims that NAFTA gives it the right to ship massive amounts of what it terms "surplus" water by tanker out of Canada. If Sunbelt can enforce an old contract to export water by tanker, other companies could use NAFTA's "non-discrimination" provisions to argue that they too, have a right to invest in the Canadian water sector and turn on the spigot of fresh water exports.

The Pope & Talbot Softwood Lumber Case

CORPORATION

Pope & Talbot is an Oregon-based timber company that operates three sawmills in British Columbia, Canada. The company exports timber from British Columbia into the United States. A portion of these shipments enter duty free up to a limit set by the Governments of British Columbia under an overall quota determined by a US-Canada Agreement on Trade in Softwood Lumber.

PUBLIC INTEREST

The Softwood Lumber Agreement is a managed trade deal that sets a maximum quota of softwood lumber imports that can enter the US duty-free from the four major timber exporting Canadian provinces. The agreement was signed in 1996 to avert a trade war over US industry complaints that Canada was unfairly subsidizing logging companies. While some companies operating in Canada argue that the quotas are excessively restrictive, environmental groups believe that the duty free quotas in fact encourage *too much* logging in British Columbia.

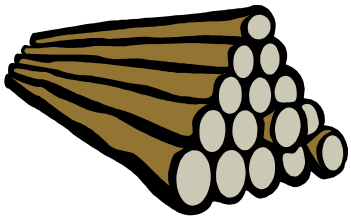
LEGAL ATTACK

Pope & Talbot claims that the quota set under the Softwood Lumber Agreement violates the National Treatment and Most Favored Nation rules of NAFTA, which oblige Canada to treat investors from the U.S. at least as favorable as Canadian companies and investors from other countries. The argument is that while Pope & Talbot gets similar treatment to companies in British Columbia, it is treated worse than logging companies that operate in parts of Canada not subject to the quotas of the Softwood lumber agreement. Pope & Taylor alleges $507 million in damages.

"Soft in the Head?"

OUTCOME

In December 1998, Pope & Talbot gave notice of their intent to bring a case against Canada. On March 24, 1999, Pope & Talbot initiated a binding arbitration case



"The US is importing cheap lumber but exporting extinction"

Joe Scott, Northwest Ecosystem Alliance, December 1998

IMPLICATIONS

Attack on Federalism: Pope & Talbot is claiming that the existence of different standards for British Colombia exporters and exporters in other provinces violates NAFTA. This comes close to arguing that federalism violates NAFTA. Canada, Mexico and the United States all have federal systems of government in which each state or province can set their own laws on a broad range of issues.

***Attack on an international agreement*:** The quotas that Pope & Talbot allege violate NAFTA were established by an international agreement entered into by two NAFTA countries after they signed NAFTA. This raises questions of whether NAFTA's investment rules override other international treaties and agreements.

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What You can Do

Governments are Reviewing NAFTA's Investment Rules

In the fall of 1998 Canada requested that the three NAFTA countries review NAFTA's investment chapter as part of an ongoing overall review of NAFTA. Canada's request was prompted in part by concern over the Ethyl case and other cases brought against Canada. The three governments have apparently agreed that the review will not result in any changes to the language of NAFTA. Instead, they are trying to reach consensus on a common interpretation of the expropriation clause of NAFTA, as well as on the transparency of the dispute process.

The Public Should Demand that Governments Re-negotiate NAFTA's Investment Rules

From a public interest perspective, an interpretation would not solve the concerns raised by the cases. As described in this briefing paper, the implications of the cases include such fundamental questions as the wisdom of giving foreign corporations a special avenue to challenge democratically implemented laws. Only a re-negotiation of NAFTA's investment rules would give the public an opportunity to discuss these issues; and governments the opportunity to fully address them.

Let Lawmakers and Negotiators Know We Want a Full Review and Re-negotiation of NAFTA's Investment Rules

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E-mail– look up addresses at:
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