What Does NAFTA 2.0 Mean for Investor-State Dispute Settlement?

Infamous NAFTA ISDS Payouts to Corporations Attacking Environmental, Health Policies Would Not Have Been Possible Under NAFTA 2.0 Terms

The proposed new NAFTA 2.0 Investment Chapter eliminates Chapter 11-B, NAFTA's Investor-State Dispute Settlement (ISDS) regime under which hundreds of millions have been awarded to corporations that attacked domestic laws and actions before tribunals of three corporate lawyers.

ISDS between the U.S. and Canada is terminated. This would eliminate 92 percent of U.S. ISDS liability under NAFTA and much of the total, overall U.S. ISDS exposure. A scandalous aspect of NAFTA ISDS is that, despite the United States and Canada having reliable court systems, all but three of 61 ISDS cases against the two nations were instigated by the other's investors.

This change would immediately remove from challenge or review outside domestic processes almost 90 percent of total investment between the NAFTA nations that is now exposed to ISDS.

This change would foreclose a broad array of new ISDS attacks given the large amount of U.S.-Canada cross investment. The 24,751 U.S. firms now in Canada and 8,216 Canadian firms now in the U.S. would no longer be able to use ISDS to attack the other nation's policies or actions.

Almost all NAFTA ISDS payouts after attacks on environmental and health policies have involved U.S. firms challenging Canadian toxics bans and water, timber, energy, mining and other policies.

Canadian investors brought 19 of 21 NAFTA ISDS cases against the U.S. and U.S. investors brought 39 of 40 cases against Canada. Canadian firms have $453 billion in investment here versus $18 billion from Mexico. U.S. investment in Canada is $391 billion versus $2 billion from Mexico.

With respect to Mexico, ISDS is replaced by a new approach that reflects many longstanding progressive demands. The main U.S.-Mexico investment annex excludes the extreme investor rights relied on for almost all ISDS payouts: Minimum Standard of Treatment, Indirect Expropriation, Performance Requirements and Transfers. The pre-establishment "right to invest" is also removed. A new process requires investors to use domestic courts or administrative bodies and exhaust domestic remedies or try to for 30 months. Only then may a review be filed and only for Direct Expropriation, defined as when "an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure," and post-establishment discrimination (National Treatment, Most Favored Nation). The new process bans lawyers from rotating in the system between "judging" cases and suing governments for corporations, and forbids "inherently speculative" damages to counter the outrage of corporations being awarded vast sums based on claims of lost future expected profits.

The new annex eliminates the rights corporations used to get compensation from taxpayers after attacking public interest policies in these infamous NAFTA cases:

Mining – Bilcon v. Canada
Elimination of the Minimum Standard of Treatment and pre-establishment National Treatment ("right to invest") ends the bases for this successful attack on Canada's environmental impact review process that led to denying a permit to open a large, open-pit blasting quarry at a pristine Nova Scotia bay.

Toxic Waste – Metalclad v. Mexico
Elimination of Indirect Expropriation and Minimum Standard of Treatment ends the bases for a $16.2 million payout to a U.S. firm over denial of a permit to expand a toxic waste facility that threatened to contaminate an aquifer on which a city's water supply relied.

Energy – Exxon Mobil and Murphy Oil v. Canada
The elimination of Performance Requirements ends the basis for the U.S. oil companies' successful grab of $59 million after challenging a Canadian province's requirements applicable to all firms with extraction concessions that a portion of earnings must go to R&D and worker training programs.

Timber & Water – Abitibi-Bowater v. Canada
Elimination of the Minimum Standard of Treatment removes the basis for a $123 million settlement the U.S. firm got after challenging termination of timber and water rights it got in a government contract conditioning those valuable concessions on the firm continuing to operate a paper mill that it closed.

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The annex eliminates the rights under which investors in these infamous cases based their claims, which are either pending or were dismissed after lengthy, costly ISDS processes:

Medicine – Eli Lilly v. Canada
The elimination of Indirect Expropriation and Minimum Standard of Treatment removes the bases for the U.S. pharmaceutical company's challenge to Canada's patent standards after Canada's courts invalidated two patents on grounds the company did not prove the drugs' utility. The claim ultimately was dismissed, but not before costing Canadian taxpayers $1.2 million in government legal expenses as well as the opportunity costs of those lawyers not being able to do other work for four years.

Municipal Services – Waste Management v. Mexico
Elimination of Indirect Expropriation and Minimum Standard of Treatment removes the investor rights used to challenge a city's decision to terminate a garbage disposal concession and related actions by Mexican courts and government banks. While the U.S. firm lost, Mexico was ordered to pay half of the large tribunal expenses. And the tribunal invented a broad, loose interpretation of investors' rights under the Minimum Standard of Treatment, a standard now often used by other tribunals to rule for investors.

Energy (Fracking) – Lone Pine Resources v. Canada
Elimination of Fair and Equitable Treatment and Indirect Expropriation removes the bases used by the U.S. oil and gas company to initiate a $250 million challenge against Quebec's moratorium on fracking beneath the St. Lawrence River until the government could assess impacts on groundwater and air quality.

Proposed Terms That Must Not Be Included in Any Future Agreement

A secondary U.S.-Mexico investment annex is highly problematic, although it is limited in its practical application. This annex would allow the nine U.S. investors that have obtained 13 oil and gas concession contracts from the Mexican federal government during the outgoing Mexican administration's partial privatization of the sector to bring disputes related to those contracts using the full set of substantive investor protections found in past agreements, if Mexico continues to provide these rights under other agreements. Procedural reforms on tribunalists and damages would apply. At a minimum, this annex should be altered so as to limit the scope of the rights available to the firms that are covered by this supplemental annex.

No past NAFTA ISDS cases would have qualified for the carve-in. Nor have the nine oil and gas firms used NAFTA ISDS against Mexico to date. But three of the firms have used ISDS previously: Murphy Worldwide and ExxonMobil did so against Canada under NAFTA. Murphy and Chevron used ISDS against Ecuador, and ExxonMobil used ISDS against Argentina relying on U.S. Bilateral Investment Treaties. The other firms under the "carve-in" are American Oil Tools, Fieldwood Energy, Gx Geoscience Corporation, Roma Energy, Talos Energy, and Verdad Exploration.

Narrow carve-in, but problematic. Qualification for the carve-in is based on an investor having a contract with a federal government in a listed economic sector. Beyond the Mexican contracts in oil and gas, neither federal government now uses contracting in the other sectors, nor are there U.S. federal contracts for oil and gas concessions. Government permits, authorizations, and the like are excluded, clarifying a limited scope of covered contracts. But one of the listed sectors has vague language that could be exploited by investors to try to expand the scope of this carve-in.

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