Spring 2013 Newsletter — Investor-State Treaties

Why should Canadians care about investor-state treaties?

One of the issues that was frequently raised in the last round of town hall meetings I held with constituents in January 2013 was the threat of the Canada-China Investment Treaty. As I write this, the treaty has still not been ratified. While this is very good news, the treaty could be ratified at any time by a decision of the Prime Minister and his Cabinet. If ratified, the treaty would be binding on Canada and on future Canadian governments for a minimum of 31 years.

Meanwhile, there have been a number of interesting developments in countries around the world related to this type of treaty, often called a Foreign Investment Protection and Promotion Agreement (FIPPA or FIPA). Australia recently undertook a cost-benefit study of investment treaties, which showed that these treaties create far greater costs than benefits. Since this study, Australia has taken a new and strong position: they have decided not to enter into any new FIPAs. Similarly, India also recently decided that it would not only reject any new investor-state treaties, it would also attempt to re-negotiate any existing treaties that contained investor-state clauses. India’s new stance may come as a surprise to the PM as it was just last fall that Stephen Harper returned from India claiming a Canada-State Agreement was just around the corner. Meanwhile, South Africa is also reconsidering its investor-state agreements, and a recent international report which makes clear the social and monetary costs of these agreements is likely to influence other nations to also reconsider entering into investor-state agreements.

I am writing this newsletter in response to the large number of my constituents who have asked for more information on these types of treaties, and I hope you find this information helpful and will share it with others.

What is an Investor-State Agreement?

While investor-state agreements are sometimes associated – or even confused – with free trade agreements, they are not the same. A trade agreement opens up areas, or sectors, of national economies to allow other countries access. An investor-state agreement is different. For example, the Canada-China Investment Treaty does not open any new sectors to trade. China still refuses foreign investment in its energy sector – while at the same time it makes major purchases of Canadian energy companies.

An investor-state agreement gives a foreign company (an “investor”) the right to seek damages from a country (a “state”) in private arbitrations. These are not court actions, although the word “suit” is often used. These are claims for damages arbitrated by a panel of three arbitration lawyers – usually in a posh hotel room somewhere. The first investor-state agreement in the world was Chapter 11 of NAFTA. In the late 1990s, an attempt was made through the Organisation for Economic Co-operation and Development (OECD) to extend Chapter 11 principles to all industrialized countries. The OECD proposal was called the Multilateral Agreement on Investment (the MAI). In what is viewed as the first global citizens’ campaign using the internet effectively, the MAI was defeated. The pro-MAI community then turned to advancing bi-lateral investment treaties. The Canada-China Investment Treaty is one such effort.

Is an Investor-State Agreement necessary to pursue trade?

No. Even though Australia does not have an investor-state treaty with China, they lead the globe in Chinese investment.

In 2012, investment from China to Australia stood at $51 billion (US), eclipsing the United States ($50.7 billion) and far surpassing Canada ($36.7 billion).

Source: KPMG – Demythifying Chinese Investment, August 2012

Why is the Canada-China Investment Treaty worse than NAFTA Chapter 11?

1. NAFTA can be exited with six months written notice; the investment treaty with China is in force for 15 years, then Canada or China could give a one year written notice to exit, but all existing investments would be grandfathered for a further 15 years (31 year “lock-in”);

2. Even though it is egregious that US (or theoretically Mexican) corporations can bring multi-million dollar claims against Canada for laws passed with no intent to discriminate in trade terms, the “investors” from China are not individual corporations. State Owned Enterprises (SEOs) of the Peoples Republic of China are all branches of the government, with boards and CEOs appointed by the politburo of the Communist Party of China;

3. Under the Canada-China FIPA all claims begin with six months of operation and, in any event, a diplomatic process is not part of NAFTA.
Chapter 11 of the North American Free Trade Agreement (NAFTA) was the first investor-state agreement in the world. There is much to learn from analysis of this new type of agreement, but insufficient analysis has been completed of the arbitrations under Chapter 11 of NAFTA. Far from being of benefit to governments and their citizens, Chapter 11 has proven to fundamentally erode a government's ability to enact laws, regulations and policies that protect its environment or the health of its citizens.

What is now so sanguinely defended as a “typical FIPA provision” was not the intent of the NAFTA negotiators. I have spoken to a number of them who believed that the Chapter 11 language was only to codify what was clear in international law: that if a nation-state nationalized and expropriated the assets of a foreign corporation, then compensation was owed.

NAFTA Chapter 11: The Ethyl Corporation Example

The first of the Chapter 11 suits was in 1997, when Ethyl Corporation of Richmond, Virginia, challenged a Canadian statute that had been democratically enacted to protect Canadians from Methylcyclopentadienyl Manganese Tricarbonyl (MMT). Ethyl said its investor rights had been violated, and even claimed damages for the debate in the House of Commons, which it claimed had hurt its reputation.

MMT is a neuro-toxic gasoline additive that posed both health and environmental problems. It was compromising the catalytic converters on Canadian cars, alarming car makers about the potential for voiding their warranties, while also increasing air pollution. As well, its impact in the atmosphere raised concerns it could have neuro-toxic effects on particularly vulnerable populations — children, pregnant women and the elderly. The same company had manufactured leaded gasoline since the 1920s.

The public health experience with leaded gas demonstrated conclusively that if one wanted to increase absorption to the brain of a toxic heavy metal, adding it to gasoline was an effective delivery method. The public health toll of Ethyl Corporation's core business has never been fully calculated, but certainly includes a multi-generational impact of lowered IQ, particularly in urban centres. A recent study on the phenomenon of a widespread drop in violent crimes suggests it was due to finally banning leaded gasoline. In other words, a likely side-effect of the use of leaded gasoline was violent urban crime.

First Use of Chapter 11

Ethyl Corporation’s creative use of the “tantamount to expropriation” language of Chapter 11 was a surprise to the trade and investment community. At the same time that Ethyl Corporation issued its Chapter 11 challenge, there was an effort through the Organization for Economic Cooperation and Development (OECD) to adopt an international version of Chapter 11 under the name “Multilateral Agreement on Investment.” The OECD chose to consult with global civil society and, as Executive Director of Sierra Club of Canada, I attended a 1997 session with OECD negotiators in the palatial Paris headquarters of the OECD.

The session was under “Chatham House Rules,” meaning what was said can be repeated, but not who said it. It was clear that the negotiators within the OECD working on the MAI were shocked that a US-based corporation could use Chapter 11 “tantamount to expropriation” language to claim damages from Canada for the decision to remove a toxic product from trade. The collapse of the MAI negotiations was proximately related to concern of the French government for protection of its culture, as well as a massive international citizen mobilization, but the Ethyl MMT complaint was a warning of the way the language had morphed into something with the potential to undermine democratic decision-making.

Sensing a defeat in arbitration, and, in my view making a serious mistake, former Prime Minister Jean Chretien ordered Canada to learn from analysis of this new type of agreement, but insufficient analysis has been completed of the arbitrations under Chapter 11 of NAFTA. Far from being of benefit to governments and their citizens, Chapter 11 has proven to fundamentally erode a government's ability to enact laws, regulations and policies that protect its environment or the health of its citizens.

In the House of Commons - How did Benin get better terms than Canada?

March 21, 2013

Elizabeth May, Mr. Speaker, my question for the Prime Minister is about an investor-state agreement that was tabled with the House in February. It is with the west African country of Benin. Benin has a gross domestic product of $7 billion. We can compare and contrast it to the People's Republic of China, which is $7 trillion, yet this tiny West African country has negotiated far better terms that are much more protective of domestic health, environment and labour legislation in an investor-state conflict than what Canada negotiated.

Why is this? Why could we not negotiate as good a deal as Benin got from us?

Right Hon. Stephen Harper, Mr. Speaker, once again, as I think I have said many times before, Canada's economic relationship with China is very important. China is the second-largest economy in the world and growing. I note that Canadian businesses, Canadian investors and Canadians generally have welcomed the fact that we will have legal protections in our dealings with China.

(Video available online at www.elizabethmaymp.ca/video)
What happened under Chapter 11 of NAFTA?? (Continued…)

As a result, where the US Environmental Protection Agency (EPA) had refused to permit its use based on health concerns, Ethyl Corporation won a court case on a technicality calling for its registration. The head of the US EPA announced she was allowing its use “under protest.” US law makers continued to fight against use of MMT there, and US refineries pledged to reject its use. But Canada had apologized for doing what the US government had also done.

Barry Appleton, Canadian lawyer for Ethyl Corp, said at the time, “It wouldn’t matter if a substance was liquid plutonium destined for a child’s breakfast cereal. If the government bans a product and a U.S.-based company loses profits, the company can claim damages under NAFTA.”

S.D. Myers

Following the decision of former Prime Minister Jean Chretien to push the MMT matter to a settlement prior to the arbitrators’ ruling, a second Chapter 11 case was brought by S.D. Myers of Ohio, complaining of the impact of the ban on export of PCB contaminated waste from Canada. S.D. Myers, also represented by Barry Appleton, had hazardous waste incinerators in the US. It had none in Canada, so the term “investor” was a stretch. This matter went to arbitration and Canada lost.

The S.D. Myers ruling is notable for several reasons:

1. It was a law of general application, i.e. PCB exports were banned. There was no way in which the move was discriminatory towards the United States in general, nor to S.D. Myers in particular.

2. It was a move taken consistent with Canada’s obligations under the Basel Convention on Hazardous and Toxic Materials. Further, the Basel Convention is specifically referenced in NAFTA as a pre-existing multi-lateral obligation of Canada, exempt from NAFTA requirements.

3. At all material times when Canada banned the export of PCB contaminated waste, it would have violated US law to import the PCB waste to the United States.

I always felt that last point suggested that required reading for understanding these investment deals was Lewis Carroll. How could Canada lose for banning PCB exports to the US when importing PCBs to the US was illegal? However, lose we did.

Lessons Learned?

The S.D. Myers case should be a clear warning to anyone looking at the Canada-China Investment Treaty that international arbitration can come to bizarre conclusions. Chapter 11 of NAFTA has had a higher proportion of environmental law challenges than in other areas of public policy. Mexico lost to Metalclad, a US-based hazardous waste disposal company that wished to locate a large toxic facility in San Luis Potosi. The state level government rejected the application and the federal government of Mexico was successfully sued.

It must be stressed that the nature of the full environmental impacts of Chapter 11 of NAFTA has never been assessed. The chilling effect of the Ethyl Corporations and S.D. Myers was profound. I am aware of a letter warning Alan Rock when he was Health Minister that removing the registration of pesticides for use in lawns for cosmetic purposes could give rise to Chapter 11 suits, so the move was not made. We have no way of assessing the “chilling effect” of the Chapter 11 cases that Canada has lost. In my opinion, there is a compelling case that the Ethyl and S.D. Myers case have resulted in failures of the Canadian government to regulate and/or ban toxic substances that they would have in the pre-Chapters 11 era.

www.elizabethmaymp.ca/investor-state-treaties

Your opinion matters!

What matters to you is important to me, and I want to know your priorities!

Please take a moment to answer the question on the right, cut along the dotted line, and mail your opinion back to me postage free. You can also go to my MP website and complete the survey online.

http://www.elizabethmaymp.ca/survey

If you have more than one person in your home, feel free to contact my constituency office in Sidney at 250-657-2000 to get additional copies of the survey mailed to you. Thank you!

Are investor-state treaties good for Canada?

☑ Yes ☐ Depends on treaty ☐ No ☐ Not Sure

Should the Canada-China Investment Treaty be ratified?

☑ Yes ☐ No ☐ Not Sure

Comments:

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☐ You may use my comments. (Comments, if used, will be anonymous.)

☐ Please keep me up to date on these and other issues.
No. They go to an arbitration. Three international lawyers hear the case, usually in a hotel room. There are no appeals. There is no access to a Canadian court before being thrust into arbitration.

While "international arbitration" may sound fair and neutral, the reality is different. A recent report, "Profiting from Injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom," (Corporate Europe Observatory, Transnational Institute, Brussels, Amsterdam, November 2012), provides some disturbing details of the world of global arbitration.

The report concluded that:

"Rather than acting as fair and neutral intermediaries, it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments..."

Here are some of the report's key findings:

- There is a huge increase in the number of such cases -- from 38 cases in 1996, to 450 in 2011;
- The cost to a country of fighting an investor challenge is on average $8 million (US$), and rise to over $30 million (US$) in some cases;
- Elite arbitration lawyers charge as much as $1,000/hour;
- Poor countries have to spend scarce resources on lawyers to battle global multi-nationals. For example, the Philippines spent $58 million defending a claim by German airport operator Fraport. That amount of money could have paid the salaries of 12,500 school teachers for the year;
- A small group of elite international lawyers handle a large proportion of the cases. 15 lawyers alone decided 55% of all known investor-state disputes; and
- They are often associated with firms that advise governments to enter into such treaties.

After I read this report, I raised the issue on the floor of the House, suggesting international investment treaties put us in the hands of "global ambulance chasers." I think most MPs simply do not understand what we are granting the People's Republic of China in this investment treaty. But the decision to ratify will not be made by Parliament. The Prime Minister and his Cabinet can decide through an Order in Council.

"When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."

- Juan Fernandez-Armesto, arbitrator from Spain

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**In the House of Commons - Hearings on the Canada-China Investment Treaty**

April 22, 2013

Elizabeth May, Mr. Speaker, I would like to wish all members of this House a happy Earth Day. Today is the 43rd anniversary of that celebration, but please excuse me if I do not feel like celebrating. The only motion before us today that has any environmental content is the NDP motion from its last opposition day to block ratification of the Canada–China Investment Treaty.

We should all be voting to block ratification, but I can predict as of now that the motion will be defeated, and that is going to be a terrible shame because it will mean that this House has not had a single proper day of hearings, not one day of expert witnesses coming here to tell us what we need to know about this extraordinary treaty that will give the People's Republic of China and its Communist Party government the right to sue us and lock us in for 31 years.

NAFTA locks us in for six months. The new treaty that was tabled after the Chinese treaty locks us in for 16 years. However, there was not one day of hearings on this. I urge members, before it is too late, to let us find a way to have hearings.

(Video available online at www.elizabethmaymp.ca/video)