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The Carlisle quarry and NAFTA

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August 14, 2011

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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