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AMERICAN TRADE NEWS HIGHLIGHTS FOR SUMMER, 2013
THE RISE OF THE INVESTOR-STATE SUIT AND THE CALL FOR REFORM

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INVESTOR-STATE suits are on the rise and their dramatic increase doesn't appear to be slowing down any time soon. Last year saw the number of known investor-state disputes grow by fifty-eight cases—the greatest number of known "treaty-based disputes" to be filed in a single year.[1] The provisions in trade treaties that allow for these suits, however, are not a new development. These provisions essentially allow investors—including corporations or individuals—to take action against a party country for violations of provisions of the applicable trade treaty. These clauses aim to "protect investors from surprise action by governments that go against those companies' [expectations] and undermine their investment."[2] This report will provide a background of the investor-state challenge, including the applicable NAFTA provision. Further, it will look at the numbers representing the increase of the investor-state suit. It will conclude by examining two recent investor-state suits brought under NAFTA and examining the criticisms of the investor-state suits.

I. BACKGROUND ON THE INVESTOR-STATE CHALLENGE

Canada, Mexico, and the United States have all been affected by the increase of investor-state suits, with those based on NAFTA contributing to the overall rise of these cases; Chapter 11 of NAFTA allows for these suits.[3] This provision allows corporations or individuals to sue Canada, the United States, or Mexico when those governments, or those for whom

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1. United Nations Conference on Trade and Development, May 28–29, 2013, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.
2. William New, *Questions Follow Sharp Rise in Investor-State Disputes, Far-Reaching Cases*, INTELLECTUAL PROPERTY WATCH (Apr. 10, 2013, 11:43 PM), http://www.ip-watch.org/2013/04/10/questions-follow-sharp-rise-in-investor-state-disputes-far-reaching-cases/.
3. North American Free Trade Agreement, U.S.-Can.-Mex., ch. 11, Dec. 17, 1992, 32 I.L.M. 289, Chapter 11 (1993).

the government is responsible, takes actions violating international law.[4] Failure to provide non-discriminatory treatment of the foreign investor and expropriating investments are commonly alleged violations.[5] Chapter 11 serves to prohibit the state from expropriating investments except when done for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and on payment of "prompt, adequate and effective compensation."[6] The result is a means to settle investment disputes that "assures both equal treatment among investors of the [p]arties in accordance with the principle of international reciprocity and due process before an impartial tribunal."[7] These investor-state suits protect cross-border investors and provide investment dispute settlement.[8]

A typical investor-state dispute, under NAFTA or otherwise, begins when an investor believes its rights under the applicable treaty have been violated.[9] The investor may then bring a cause of action against the appropriate government before an impartial tribunal in an international arbitration forum.[10] The tribunal is created for each individual dispute under the respective treaty rules or the rules of the International Centre for Settlement of Investment Disputes (ICSID).[11] Compensation to cover damages incurred by the investor may be awarded if the tribunal finds the state violated rights granted by the treaty.[12]

NAFTA provides procedures for settling a dispute in section B of Chapter 11.[13] This section provides procedure for claims by investors on their own behalf and claims by investors on behalf of an enterprise.[14] Step one of the dispute requires the investor to serve notice of intent to submit a claim to arbitration at least ninety days before formally serving the claim.[15] But the treaty states the parties "should first attempt to settle a claim through consultation or negotiation," reflecting a policy that the arbitration claim should be a last resort.[16] An investor is barred from making a claim more than three years after the investor knew or should

4. *See id.*
5. *NAFTA Investor-State Arbitrations*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/c3439.htm (last visited Sept. 30, 2013) [hereinafter *NAFTA Investor-State Arbitrations*].
6. *See* North American Free Trade Agreement, *supra* note 3, art. 1110; Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 159 (2012).
7. *See* North American Free Trade Agreement, *supra* note 3, art. 1115.
8. *NAFTA Investor-State Arbitrations*, *supra* note 5.
9. Press Release, United Nations Conference on Trade and Development, Number of International Investment Disputes Mushroomed in 2012, UNCTAD Reports, U.N. Press Release 2013-007 (Apr. 10, 2013) [hereinafter UNCTAD Press Release].
10. *Id.*; New, *supra* note 2.
11. UNCTAD Press Release, *supra* note 9.
12. *Id.*
13. North American Free Trade Agreement, *supra* note 3, arts. 1116–1120; NAFTA - Chapter 11 - Investment, GOV. OF CAN., http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-general-alena-generale.aspx?lang=eng (last modified Mar. 4, 2013).
14. North American Free Trade Agreement, supra note 3, arts. 1116–20.
15. *Id.* art. 1119–17; GOV. OF CA., *supra* note 13.
16. North American Free Trade Agreement, *supra* note 3, art. 1118.

have known of the alleged breach and of the loss or damage.[17] This applies to claims by investors on their own behalf and claims on behalf of an enterprise.[18] Once the ninety day notice period has passed, and after six months from the date of the events giving rise to the claim, the investor may submit the claim for arbitration.[19] The arbitration is governed by the ICSID rules, as long as both parties are subject to ICSID; the Additional Facility Rules of ICSID, where one of the parties is not subject to ICSID; or the UNCITRAL Arbitration Rules.[20] Thereafter, an impartial tribunal hears the claims and makes a decision.[21]

II. THE RISE SEEN THROUGH THE NUMBERS

A study released by the UN Conference for Trade and Development (UNCTAD) reveals the "unprecedented rate"[22] at which investor-state suits are rising.[23] The study found fifty-eight new cases were started in 2012, representing the highest number of such suits ever filed within a year.[24] Additionally, the total of known treaty-based cases rose to 514 and the number of concluded cases reached 244 in 2012.[25] Of those concluded cases, at least forty-two arbitration decisions were issued in 2012.[26] The majority of claims are filed by U.S. claimants against foreign nations.[27]

These claims involved a broad range of government measures, including "revocations of licenses, breaches of investment contracts, irregularities in public tenders, changes to domestic regulatory frameworks, withdrawal of previously granted subsidies, direct expropriations of investments, [and] tax measures," among others.[28] Beyond the bare increase of numbers, 2012 saw other developments in investor-state suits. For example, in *Occidental v. Ecuador*, a case arising out of the state's unilateral termination of an oil contract, a damages award in the amount of $1.77 billion represented the highest damages award in the history of these suits.[29]

III. RECENT CHALLENGES BROUGHT UNDER NAFTA

NAFTA represents the most frequently used investment instrument for the investor-state suits, with forty-nine cases in 2012 based on NAFTA.[30]

17. *Id.* arts. 1116–17.
18. *Id.*
19. *Id.* art. 1120.
20. *Id.*
21. *Id.* arts. 1115, 1121
22. New, *supra* note 2.
23. United Nations Conference on Trade and Development, *supra* note 1.
24. *Id.* at 1.
25. *Id.*
26. *Id.*
27. *Id.* at 4.
28. *Id.* at 1.
29. *Id.*
30. *Id.* at 4.

In order to better understand the effect of these suits, it is important to examine recent challenges brought under NAFTA.

A. LONE PINE RESOURCES, INC. V. CANADA

Lone Pine Resources, Inc., an American based oil and gas company with operations in Canada filed a Notice of Intent to Submit a Claim to Arbitration against Canada in November 2012.[31] The suit was filed pursuant to NAFTA Chapter 11.[32] Lone Pine alleges Quebec violated NAFTA Article 1117[33] when Quebec suspended all oil and gas exploration. Specifically, it passed a moratorium on hydraulic fracturing, known as fracking, in order to complete an environmental review of the controversial technique.[34] The study results are scheduled to be presented in 2014.[35] Fracking involves injecting liquids at pressure deep underground in order to release petroleum from the rock.[36] Opponents argue it may have negative effects on drinking water.[37] The process has already been outlawed in several European countries, but the energy industry supports it as a safe process when done properly.[38]

The moratorium not only completely halted exploration, but it also completely revoked permits for oil and gas activity in the St. Lawrence River Valley.[39] Lone Pine's permits were revoked with this action.[40] In its Notice of Intent, Lone Pine alleges it "expended millions of dollars and considerable time and resources" in its effort to obtain the required permits and approvals from Quebec to mine for oil and gas.[41] This included permits for the St. Lawrence River Valley.[42] Lone Pine alleges it was not given any opportunity to be heard, given any notice of the moratorium, or provided with any reason for the action; the company was sim-

31. Lone Pine Resources, Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Nov. 8, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf.
32. *Id.* at 1.
33. North American Free Trade Agreement, *supra* note 3 art. 1117.
34. Jeff Gray, *U.S. Firm to Launch NAFTA Challenge to Quebec Fracking Ban*, THE GLOBE AND MAIL (Nov. 15, 2012, 2:17 PM), http://www.theglobeandmail.com/globe-investor/us-firm-to-launch-nafta-challenge-to-quebec-fracking-ban/article5337929/; Canadian Press, *Quebec Fracking Ban Lawsuit: Lone Pine Resources Wants $250M From Ottowa*, HUFFINGTON POST CAN. (Nov. 23, 2012, 8:05 AM), http://www.huffingtonpost.ca/2012/11/23/quebec-fracking-ban-lawsuit-lone-pine_n_2176990.html.
35. *Quebec Seeks Fracking Moratorium in Shale Gas Rich Area*, REUTERS (May 15, 2013, 4:33 PM), http://www.reuters.com/article/2013/05/15/canada-quebec-fracking-idUSL2N0DW33620130515.
36. Gray, *supra* note 34; Canadian Press, *supra* note 34.
37. Gray, *supra* note 34.
38. *Id.*
39. *Id.*
40. *Id.*
41. Lone Pine Resources, Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Nov. 8, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf.
42. *Id.*

ply told it was a "political decision" and they could not prevent it from passing.[43] In its Notice of Intent, Lone Pine alleges the action violated NAFTA Article 1105[44] and Article 1110.[45]

Recently, however, the Government of Quebec has taken things a step further by introducing legislation that would ban fracking, "drilling[,] and testing for natural gas in the St. Lawrence River Valley."[46] The bill was introduced May 15, 2013, and would last until a law establishing new rules for this type of energy exploration comes into force, or for a maximum of five years.[47] The bill also suspends the authorization of licenses for fracking exploration.[48] The proposed bill is a clear indicator of Canada's stance on fracking.

As of the date of this publishing, it remains to be seen how Lone Pine's investor-suit against Canada will develop, as well as the ultimate result of the proposed bill. A win for Lone Pine would be difficult because the policy has a "legitimate purpose, and does not appear to discriminate against foreign firms."[49] But even if Lone Pine is successful in its suit for damages against Canada, it is unlikely it will engage in fracking in the St. Lawrence River valley again given the proposal of the bill. No matter the ultimate result of the case, Canada will certainly face more investor-state suits, as it is the sixth most sued country under these investor-state suit provisions like the one found in NAFTA Chapter 11.[50]

B. APOTEX HOLDINGS, INC. & APOTEX INC. V. UNITED STATES

In *Apotex Holdings Inc. & Apotex Inc. v. United States*, the Canadian pharmaceutical companies, Apotex Holdings and Apotex, have filed

43. *Id.* para. 4.
44. North American Free Trade Agreement, *supra* note 3, art. 1105 (requiring Canada to treat U.S. investors "in accordance with international law, including fair and equitable treatment and full protection and security."); Lone Pine Resources, Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (Nov. 8, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf.
45. North American Free Trade Agreement, *supra* note 3, art. 1110 (Canada may not expropriate investments of U.S. investors without a public purpose, due process, and compensation); Lone Pine Resources, Inc. v. Canada, Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement, para. 30 (Nov. 8, 2012), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf.
46. An Act to Prohibit Certain Shale Natural Gas Exploration and Production Activities, paras. 1–3, Bill No. 37, 40th Leg., 1st Sess. (2013) (Can.), *available at* http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-37-40-1.html; Frederic Tomesco, *Quebec Proposes Law to Ban Fracking for Up to 5 Years*, BLOOMBERG (May 15, 2013, 3:30 PM), http://www.bloomberg.com/news/2013-05-15/quebec-proposes-law-to-ban-fracking-for-up-to-5-years.html.
47. *Quebec Seeks Fracking Moratorium in Shale Gas Rich Area*, *supra* note 35.
48. An Act to Prohibit Certain Shale Natural Gas Exploration and Production Activities, para. 2.
49. Gray, *supra* note 34.
50. Stuart Trew, *NAFTA Challenge to Fracking Ban Reason to Avoid Investor-State Dispute Settlement: Australian Trade Minister*, RABBLE.CA (Apr. 16, 2013), http://rabble.ca/blogs/bloggers/council-canadians/2013/04/nafta-challenge-to-fracking-ban-reason-to-avoid-investor-st.

claims against the United States.[51] They claim to have suffered injuries from the U.S. FDA's import alert adopted in August 2009 that prevented Apotex's U.S. branch from receiving any products produced by two of Apotex's Canadian manufacturing plants.[52] The import alert was in effect from August 2009 until July 2011 and Apotex alleges "it lost hundreds of millions of dollars of sales and was prevented from bringing any new drug to the [U.S.] market."[53] Further, the suit alleges the alert violated NAFTA Article 1102,[54] Article 1103,[55] and Article 1105.[56] Apotex seeks at least $520 million in damages for these alleged violations.[57]

According to Apotex's Request for Arbitration,[58] the FDA inspected Apotex manufacturing plants in Canada and issued observations to Apotex.[59] According to Apotex, the company responded to the observations and "enhanced its quality and manufacturing processes and equipment" and received no further FDA communication for several months.[60] The FDA then issued the import alert, which Apotex alleges was issued without notice or reasons.[61] The alert was not lifted until July 2011.[62]

Apotex alleges that it was discriminated against, by citing examples of comparable corporations, either U.S.-owned or foreign owned, that were also cited with similar violations to Apotex.[63] These corporations, however, were not subject to the import alert.[64] The United States' response argues that the tribunal lacks jurisdiction over Apotex's claims because Apotex's transactions with the United States do not fall under the covered investments in NAFTA.[65] This argument focuses on the fact that Apotex conducts all production in Canada and it incurs all FDA-imposed costs in Canada.[66] As such, this is simply "cross-border commercial sales" of Apotex's drugs, rather than an investment in the United States.[67] But the ultimate decision remains with the tribunal, with oral

51. Apotex Holdings Inc. & Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Request for Arbitration (Feb. 29, 2012).
52. *Id.* para. 2.
53. *Id.* para. 3.
54. North American Free Trade Agreement, *supra* note 3, art. 1102.
55. *Id.* art. 1103.
56. *Id.* art. 1105.
57. Request for Arbitration, *supra* note 51, para. 5.
58. *Id.*
59. *Id.* para. 26.
60. *Id.* para. 30.
61. *Id.* paras. 37–38.
62. *Id.* para. 2.
63. *Id.* paras. 58–68.
64. *See id.* para 67.
65. Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America, ¶ 220, Apotex Holdings Inc. & Apotex Inc. v. United States, ICSID Case No. ARB(AF)/12/1, (Dec. 14, 2012).
66. Jarrod Hepburn & Luke Eric Peterson, *As United States is Hit with Another Arbitration Claim, Pharma Companies are Growing Creative in Their Use of Investment Treaties*, IA REPORTER (Mar. 13, 2012), http://www.iareporter.com/articles/20120314.
67. *Id.*

hearing before the tribunal scheduled for November 18–26, 2013.[68] Until then, the final result of the suit is unknown.

IV. CONCLUSION—THE CONTROVERSIES SURROUNDING INVESTOR-STATE CHALLENGES AND THEIR FUTURE

The rise of the investor-state suit in the past year has not been met with silence. In fact, NAFTA Chapter 11 and provisions like it in other trade agreements are receiving heavy criticism. For example, in a 2011 trade policy review, Australia stated it would discontinue the practice of including investor-state dispute resolution procedures in trade agreements.[69] This would exclude suits from foreign investors against the Australian government, as well as suits by Australian investors against foreign governments that Australia has a trade agreement with.[70] This announcement came as a result of the Australian government, while supporting equal treatment of foreign and domestic businesses under law, opposing provisions that "confer greater legal rights on foreign businesses than those available to domestic businesses."[71]

Australia's announcement is in line with the common criticism that these provisions allow a foreign investor to make a claim against the government where sovereign investors may not be able to do the same.[72] These opponents argue NAFTA's investor protections "give business investors new power over sovereign nations and provide a new, broader definition of property rights."[73] Further criticism of these provisions is the threat they present to a country's sovereignty by "giving foreign companies the right to take a national government to an international court."[74] NAFTA Chapter 11 has been referred to as a means for multinational corporations to "challenge democracy."[75]

These criticisms, however, have been described as "alarmist" by trade experts.[76] One such expert, Lawrence Herman, "a former diplomat and now a trade lawyer . . . in Toronto, says 'many NAFTA cases go nowhere'" and argues that NAFTA and other trade agreements do not, in

68. Apotex Holdings Inc. & Apotex Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, para. 6 (Jan. 25, 2013).
69. GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY, AUSTL. GOV'T DEP'T OF FOREIGN AFFAIRS AND TRADE, 14 (2011).
70. *Id.*
71. *Id.*
72. John Daly, *Ontario Smacked by U.S. Lawsuit on Fracking*, OILPRICE.COM (Nov. 22, 2012, 11:31 PM), http://oilprice.com/Energy/Energy-General/Ontario-Smacked-by-U.S.-Lawsuit-on-Fracking.html.
73. *Id.*
74. Trew, *supra* note 50.
75. *NOW with Bill Moyers: Trading Democracy–a Bill Moyers Special* (PBS television broadcast Feb. 1, 2002) (transcript *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB65/transcript.html) (last visited Oct. 2, 2013).
76. Gray, *supra* note 34.

fact, restrict a government in enacting legislation.[77] But the criticisms should not be so easily dismissed. James Zhan, Director of UNCTAD's Division on Investment and Enterprise, stated that the recent increase has "amplified a number of cross-cutting challenges that are facing the ISDS mechanism, which gives credence to calls for reform of the investment arbitration system."[78] The increased number of suits brought has revealed inherent problems in the investor-state suit system, including a "trend of investors challenging generally applicable public policies, contradictory decisions issued by tribunals, an increasing number of dissenting opinions, [and] concerns about arbitrators' potential conflicts."[79]

The increase of investor-state suits has brought about an increase in discussion surrounding the provisions that allow for them. As far as the future of the investor-state suit, a good indicator of their survival will be seen in future trade agreements. Whether these agreements choose to include the provisions allowing for suit or choose to go the route argued by Australia in 2011, they will have an impact on the continued use of these suits. Whatever the case, reform seems imminent and necessary.

77. *Id.*
78. UNCTAD Press Release, *supra* note 9.
79. United Nations Conference on Trade and Development, *supra* note 1, at 26.

Comment