Distinguishing Investors from Exporters under Investment Treaties

Mark Feldman

Multinational corporations “are increasingly able to fine-slice activities and operations in their value chains, and place them in the most cost-effective location, domestically and globally.”¹ When engaging in such activities and operations, corporations often act both as investors and exporters. Such intertwined investment and export operations can significantly complicate the application of investment treaty protections, which generally are intended to apply to investors, but not to exporters.

Many claims submitted to arbitration under the investment chapter of the North American Free Trade Agreement (NAFTA) illustrate these complexities. In NAFTA investor-State disputes, respondents repeatedly have asserted that claimants were attempting to expand the reach of NAFTA investment chapter protections beyond their intended scope, to cover not only investment activities but also export and/or cross-border services activities. Claimants have offered a range of arguments in response. Some have maintained that export or cross-border services damages were recoverable under the NAFTA investment chapter so long as the damages were caused by a breach of a NAFTA investment chapter obligation. Others have asserted that their operations outside the host State were undertaken to support a host State investment and thus should be protected under the NAFTA investment chapter.

The considerable NAFTA Chapter Eleven jurisprudence on these issues—although varied and, arguably, contradictory—offers valuable insights into the

relationship between investment treaty protections and the international production and distribution networks of multinational corporations. The nature of that relationship carries significant financial consequences for investors and States under investment treaties. As one example, of the approximately $77 million awarded in the *Cargill v. Mexico* NAFTA Chapter Eleven case, more than $41 million compensated the claimant for lost sales of high-fructose corn syrup (HFCS) that it manufactured in the home State and would have sold to its investment—an HFCS distributor—located in the host State.²

When considering claims involving operations both within and outside of the host State, NAFTA Chapter Eleven tribunals have considered three kinds of limits on recovery: (i) a causation limitation, (ii) a territorial limitation, and (iii) a capacity limitation. As discussed below, of these three alternatives, the capacity limitation—which limits recovery to damages suffered by a claimant in its capacity as an investor—has the greatest potential to serve as an adaptable, effective criterion for ensuring full treaty protections for foreign investment while safeguarding against the exploitation of the NAFTA investment chapter by exporters.

Arguably, the greatest weakness of the capacity limitation concerns the unsettled nature of its content. This chapter addresses that weakness by recommending that one factor serve as the principal guide for determining when activities have, or have not, been undertaken by a claimant in its capacity as an investor: the nature of a claimant’s global business. By focusing on the nature of a multinational corporation’s business, tribunals can be better equipped to identify when a claimant’s activities outside the host State should be considered activities of an investor that has made or seeks to make an investment in the host State. Specifically, as discussed below, the argument that a claimant’s “investor” activities include activities undertaken outside the host State will be far more supportable in cases where the claimant’s host State activities play a defining, rather than supporting, role within the claimant’s global business structure.

This chapter makes two recommendations. First, when distinguishing investors from exporters, tribunals should look primarily to the capacity limitation, rather than the causation limitation (which lacks effectiveness) or the territorial limitation (which lacks flexibility). Second, when applying the capacity limitation, tribunals should be guided by the nature of a claimant’s global business.