Urquhart

Subject: Negligible Risk of Successful NAFTA Expropriation Claim in Response to Nortel Group LTD Benefit Plan Becoming a Retroactive Eligible Financial Contract

Attachments: NAFTA Arbitration Claim on Expropriation of US Investor's Investment in Canada.pdf

-----Original Message-----
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Subject: Negligible Risk of Successful NAFTA Expropriation Claim in Response to Nortel Group LTD Benefit Plan Becoming a Retroactive Eligible Financial Contract

Navdeep Bains
Minister of Innovation Science and Economic Development
CC: Mark Schaan and Paul Morrison, Ministry of Innovation, Science and Economic Development

At our August 25, 2016 meeting with Mark Schaan, Director General of the Marketplace Framework Policy Branch and Paul Morrison from the Corporate, Insolvency and Competition Policy Directorate, we discussed Ministry concerns about the risk of a NAFTA<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/text-texte/toc-tdm.aspx?lang=eng> arbitration claim from US entities against the Federal Government if it made a retroactive legislative or regulatory change to force the Nortel Canada estate to make full top priority payment of the Nortel self-insured group long term disability plan actuarial liabilities owed to the Nortel long term disabled ("LTD").
I have attached a report I prepared called NAFTA Arbitration Claim on Expropriation of US Investor's Investment in Canada. In this report, I conclude the risk of a successful NAFTA arbitration claim in response to the Nortel self-insured group LTD benefit plan becoming a retroactive Eligible Financial Contract is negligible. Here are my three reasons:
Firstly, NAFTA arbitration decisions on expropriation to date indicate that investors must surmount a high jurisdictional threshold in order to bring claims before a NAFTA tribunal.
Analysis in Table 2 of this report concludes that U.S. Nortel Networks Inc. ("NNI") and U.S. bond owners of bonds issued by the Canadian entities, Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL") and Nortel Networks Capital Corporation do not have jurisdiction to make NAFTA arbitration claims for unpaid expropriation because they do not meet the Table 1 NAFTA Article 1139 definitions for investor and investment.
U.S. owners of bonds issued by NNC&NNL are specifically precluded from NAFTA protection because they are not affiliates of NNC&NNL. U.S. bond owners and NNC&NNL do not own shares in each other and do not have common parents.
Table 3 has a Nortel organization chart that shows that NNL wholly owns NNI, and that NNI does not have any ownership interest in a NNC&NNL either directly or through portfolio investments in their equity, debt securities or loans. We argue that NNI direct and indirect interests in the Canada estate are claims for money owed, rather than any investments in Canada.
Secondly, and in any case, the Chemtura Corp., Merrill & Ring Forestry L.P. and Pope & Ring Talbot Inc. NAFTA arbitration decisions set the precedent for Canadian government legislative or regulatory changes not constituting or being tantamount to expropriation, when the loss impact does not substantially deprive the investor of its investment.

All the other unsecured creditors in the Canada estate would have a cash settlement ratio of 44.5% without the EFC change, compared to the estimated 45%, or 1% loss impact, than what they would get without the self-insured group long term disability benefit plan being prescribed as an EFC on a retroactive basis. NNI's direct interest in CCAA claims for the IRS Advanced Pricing Agreement and net accounts receivable and its indirect interest in the NNC&NNL bond owners' CCAA claims due to its own NNI bond guaranties would therefore represent a loss of about 1% of its amount of money owed from the Canada estate. If these NNI claims were considered an investment under investment (f) contrary to the opinion in this report, the EFC proposal represents a loss of about 1% of NNI's investment in Canada. This amount fails the substantive deprivation test and therefore does not constitute and is not tantamount to expropriation.
Thirdly, implementation of our EFC proposal serves the public purpose of justice, humanity and compassion for the Nortel LTD and other LTD within self-insured group long term disability benefit plans at corporations currently not in bankruptcy proceedings.
The only successful NAFTA expropriation arbitration claim to date is AbitibiBowater, which the Federal Government settled for $130 million. This case is vastly different than the circumstances of a retroactive EFC and deemed financial collateral for the Nortel self-insured long term disability benefit plan. This NAFTA arbitration claim settlement cannot be a bona fide reason for the Federal Government deciding to not implement our EFC proposal.
In closing, we want self-insured group long term disability benefit plans to be prescribed as an EFC on a retroactive basis and with a deemed financial collateral clause, on an urgent basis. We are asking for an exceptional remedy, under exceptional circumstances, to a deserving case. This is one of those rare cases in which consideration of justice, humanity and compassion override the normal administration of justice. Any NAFTA expropriation arbitration claims against the Federal Government by US entities with interests in the Nortel CCAA proceedings would have negligible chances of success.

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