

Canada's Track Record Under NAFTA Chapter 11

North American Investor-State
Disputes to January 2018

Scott Sinclair





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Introduction

In late January, trade officials from Canada, the United States and Mexico will meet in Montreal to continue their troubled renegotiation of the North American Free Trade Agreement (NAFTA). The talks, launched at the insistence of the Trump administration in the summer of 2017, have drawn concern from Canadian exporters and politicians that certain U.S. proposals will disrupt North American trade and investment, and consternation that President Trump could pull the U.S. out of the deal altogether.

In response to Trump's aggressive posturing, the Canadian government has highlighted its intent to make NAFTA more "progressive," in order to more equally share the gains from globalization. One of the most glaringly regressive parts of the deal is surely its investment chapter. NAFTA Chapter 11 includes an investor-state dispute settlement (ISDS) process that gives foreign corporations the extraordinary right to sue governments for compensation when public policy—including non-discriminatory environmental, public health or resource management decisions—disrupts their investment expectations.

As in past years, this report documents these investor claims against North American governments as a caution against the rising costs of ISDS, both financial and to the fabric of our democracies. Canada has been sued 41 times under the investment provisions in NAFTA—more than either Mexico or the U.S. Among the decided or settled cases, Canada has lost eight and won nine, and has paid out more than \$219 million in damages and settlements. To this amount we can now add \$95 million in unrecoverable legal costs, thanks to new data acquired through an access to information request.

The latest investor-state claim against Canada, from U.S. rail company Omnitrax, exemplifies much of what is wrong with NAFTA's imbalanced ISDS process, and why Canada should grasp the opportunity to eliminate it in the NAFTA renegotiation.

Omnitrax is the U.S. owner of the Churchill port terminal and the rail line to it. The railway is the only

land-link to the port located on Hudson's Bay in northern Manitoba and an essential lifeline to the 900-person town as well as Indigenous communities in neighbouring Nunavut. The company is contractually obliged to keep the line in good working order as a condition of the \$18.8 million in subsidies it received from Ottawa for upgrading and maintenance.¹ Yet Omnitrax has refused to repair the rail line since it was seriously damaged by flooding in the spring of 2017.

After months of inaction on the repairs and increasing hardship in Churchill, the federal government declared the company in default of its contribution agreements

Canada has spent more than \$95 million in legal costs defending itself against investor-state claims under NAFTA Chapter 11.

and took Omnitrax to court. The company filed its NAFTA claim shortly afterward. Omnitrax is putting the blame for its failure to repair the line on federal and provincial government actions that have allegedly harmed the company.²

In its notice of intent to submit a claim to NAFTA arbitration, Omnitrax argues that the Harper government's dismantling of the Canadian Wheat Board (CWB) in 2012 damaged the company's main line of business (transporting Western grain for export) and sabotaged the economic viability of its investment in the railway and port. Ironically, Omnitrax Canada's current president, Merv Tweed, was a Conservative backbencher and

one-time chair of the parliamentary transportation committee who voted for the 2011 legislation abolishing the CWB's single desk.³ Omnitrax's NAFTA claim also attacks the Manitoba government for blocking the company's proposals to transport oil by rail for export from the northern port. Omnitrax is demanding \$150 million in compensation.

This strange turn of events highlights the deeply one-sided, corporate bias inherent in NAFTA's investment protections. The investor-state system gives special rights to foreign investors, but without applying any corresponding responsibilities. NAFTA provides no recourse whatsoever for the federal government or the Canadian public to oblige Omnitrax to fulfil its legal commitments to repair the railway. For that, we must rely on our domestic courts. NAFTA Chapter 11 is purely an investor rights agreement.

Even worse, Canadian taxpayers are put in the absurd situation where if the federal government were to win in court, and oblige Omnitrax to repair the rail line or forfeit its subsidies, the company could be able to recover the costs of complying with the court's decision through its NAFTA arbitration. In effect, ISDS potentially indemnifies foreign investors from facing the domestic legal consequences of their own misconduct.

As British journalist George Monbiot has argued, ISDS also undermines a fundamental tenet of democratic legal systems: equality before the law.⁴ While the dismantling of the CWB undoubtedly eroded the viability of the Hudson's Bay Railway, it also damaged other parties, many far more directly than Omnitrax. Prairie wheat and barley producers, for example, have experienced serious transportation and marketing problems since the dismantling of the single desk and the privatization of the CWB. Yet these parties must pursue any claims for relief through the domestic courts. Only foreign investors have the right—in NAFTA and other agreements containing ISDS—to bypass the courts and bring claims directly to private international arbitration.

Omnitrax's NAFTA case is weak. The company acquired the railway and port in 1997; the CWB's single desk was dissolved 15 years later. The Harper government's attack on the CWB was rash and ideologically driven, but it is simply not reasonable for a foreign investor to expect the regulatory framework to remain unchanged for decades. Likewise, the provincial government's reluctance to approve the transport of oil by rail over the fragile northern

terrain seems eminently defensible, especially in light of the recent flooding and damage to the line. It is perverse for a foreign investor to expect to be compensated for risks it freely assumed when it made its investment, or for governments to have to pay for exercising their right to regulate in the public interest.

Even though Omnitrax's legal case appears shaky, as discussed in more detail below, Canada has lost seemingly flimsy cases before. The company will be represented by one of the world's top international arbitration firms.⁵ It is even possible, given the growing prevalence of third-party financing of investor-state arbitration, that the company's legal costs could be covered by outside investors in return for a share of any potential winnings.⁶

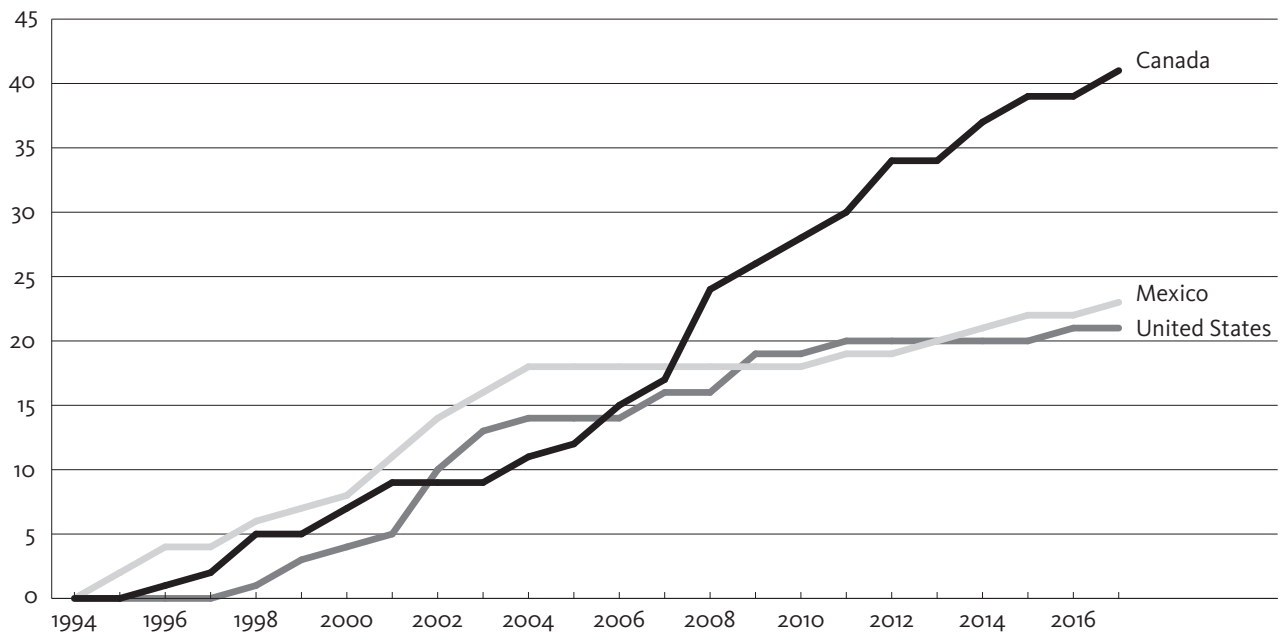
Whatever the outcome, the NAFTA lawsuit, with its potential to impose a large fine against Canada, enhances Omnitrax's bargaining position in its contractual disputes with the federal and Manitoba governments. The case underlines how ISDS in NAFTA and deals like it shifts the power dynamic in favour of foreign investors to the detriment of the Canadian taxpayer and the public interest. Unfortunately, it is only the latest example in a sorry history of claims against Canada—a track record the Liberal government should try to end in the NAFTA renegotiations by removing ISDS from any new agreement.

Background

NAFTA's controversial ISDS mechanism allows foreign investors to bypass the domestic courts and sue governments directly before private international arbitration tribunals. Historically, ISDS had been a feature of bilateral investment treaties between developed and developing countries, but the signing of NAFTA marked the first time investment arbitration was integrated into a comprehensive regional trade agreement. While national governments alone are responsible for defending ISDS cases, government measures at the federal, provincial, state and local levels can and frequently have been targeted by investors.

Arbitration can be invoked unilaterally by foreign investors from the three NAFTA countries. Investors do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system before launching a NAFTA

Figure 1 NAFTA ISDS Cases by Country (Running Total)



claim. Under Chapter 11, all three parties have given their “unconditional, prior consent” to submit investor claims to binding arbitration, allowing investors to simply bypass the domestic courts. Cases are decided by tribunals of three members: one chosen by the investor, one chosen by the challenged government and a third selected by mutual agreement. Tribunal decisions are final and not appealable through any court.

Investors can challenge not only discriminatory actions by governments but even non-discriminatory policies they allege are unfair or frustrate their legitimate expectations of profit. In fact, NAFTA Article 1105, which enables investors to challenge non-discriminatory measures that allegedly fall short of minimum standards of treatment under customary international law, has been invoked by investors in over 90% of all NAFTA claims (78 of 85).

Claimants can seek compensation for government measures that are allegedly unfair or inequitable (NAFTA Article 1105), discriminatory (NAFTA Article 1102 and 1103), constitute direct or indirect expropriation (NAFTA Article 1110) or apply performance requirements such as local development benefits (NAFTA Article 1106). While tribunals cannot force a government to change NAFTA-inconsistent measures, they can award monetary damages to investors. These damage awards are fully enforceable in the domestic courts of any NAFTA party.⁷

The significant number and variety of claims under Chapter 11 underscores how making such broadly framed investment rights enforceable through investor-state arbitration greatly increases both the frequency and controversy of disputes. Governments tend to be more cautious about bringing matters to formal dispute settlement. They must consider diplomatic relations and weigh the consequences for their own similar domestic policies if the challenge should succeed.⁸ Private investors, on the other hand, have been far quicker to invoke dispute settlement and are much more aggressive in their interpretation of investment rights.

Canada’s experience with NAFTA ISDS

As of January 1, 2018, 48% of the 85 known NAFTA claims were made by foreign investors against Canada. Canada has attracted significantly more investor-state claims (41) than either Mexico (23) or the U.S. (21), even though the latter’s economy is 10 times larger than Canada’s (see Figure 1).

The trend in recent years is even more disquieting. The number of challenges against Canada has risen sharply, more than tripling (from 12 to 41) since 2005. Moreover, Canada is attracting the lion’s share of new NAFTA

Figure 2 NAFTA ISDS Cases by Country, by Decade

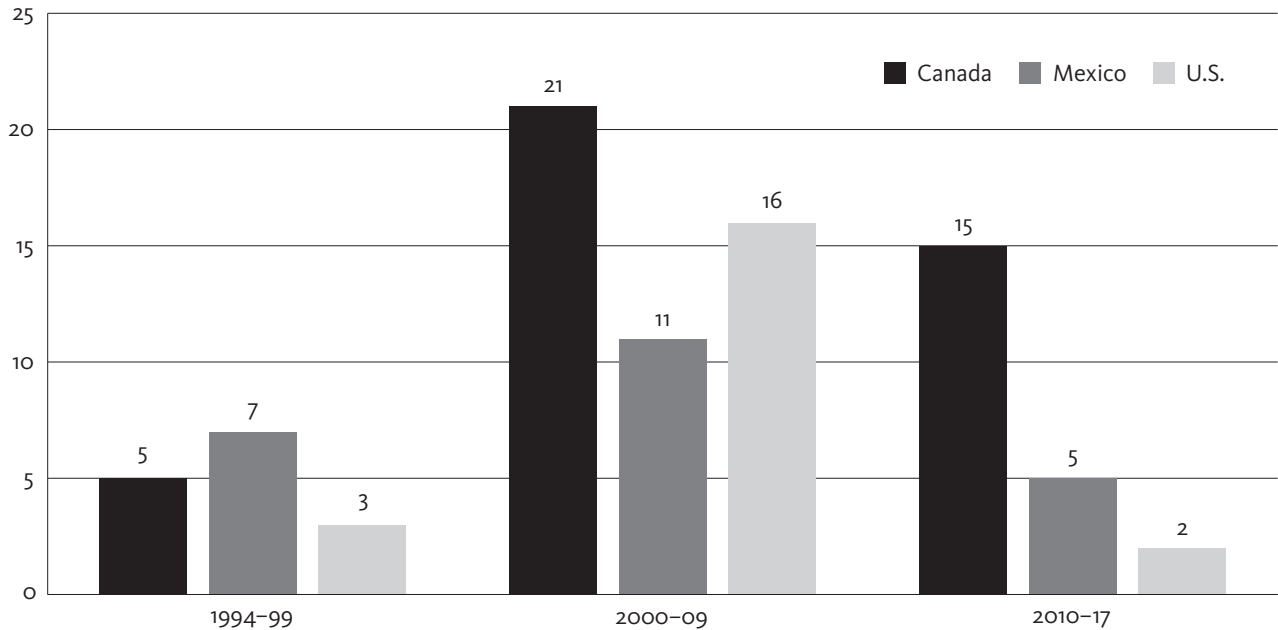
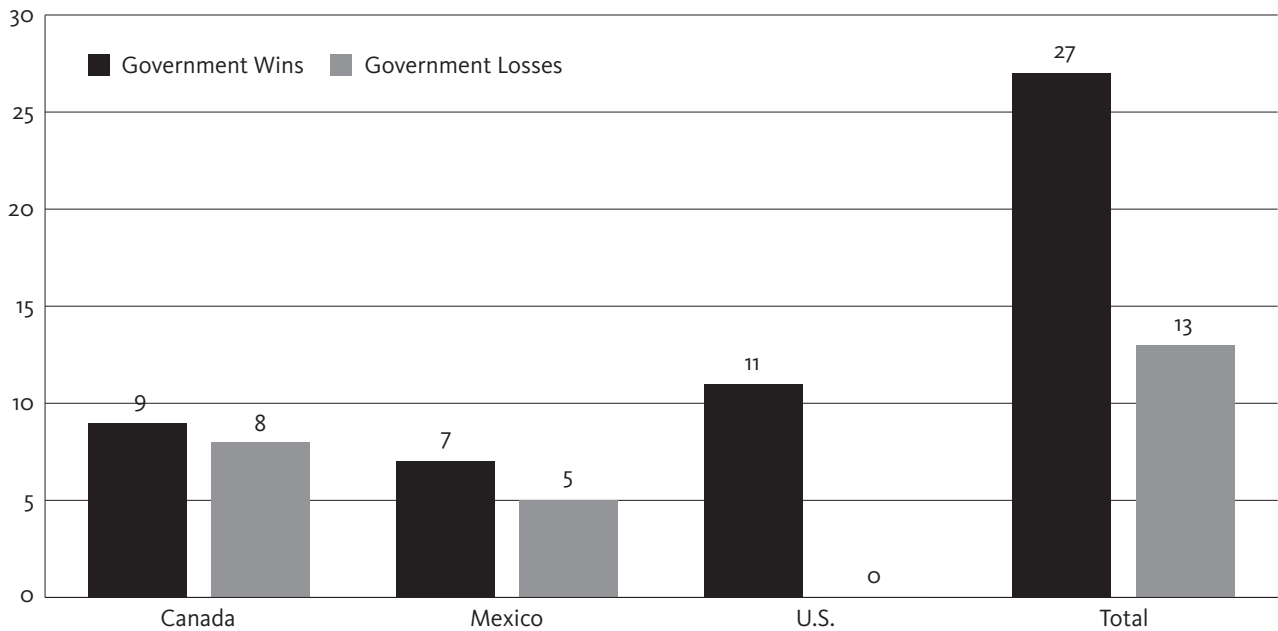


Figure 3 Wins and Losses by Country



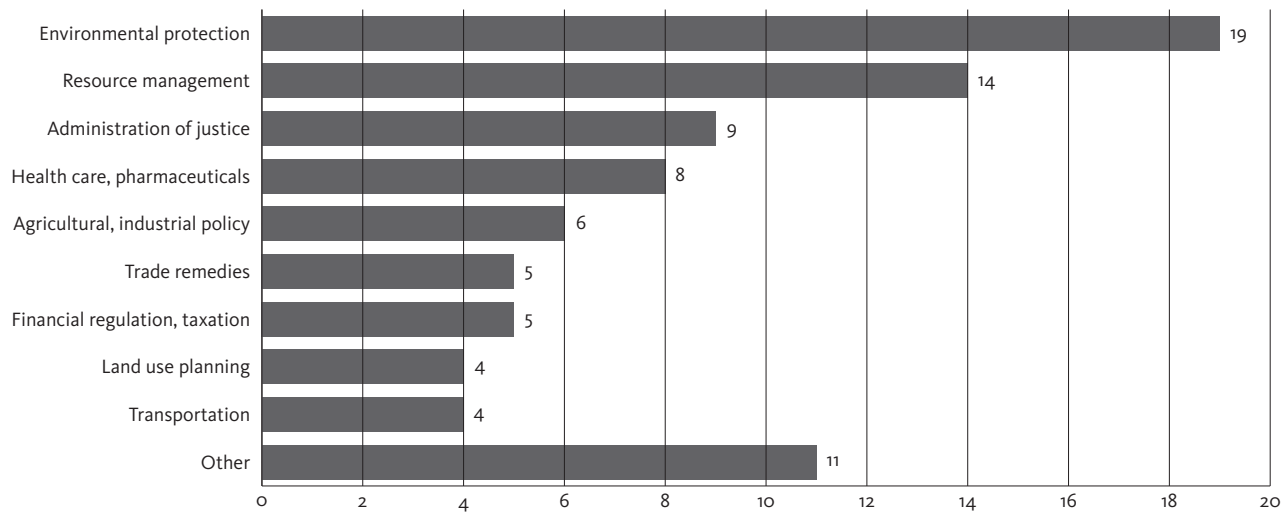
challenges. Since 2010, Canada has been sued over twice as many times (15) as Mexico (5) and the U.S. (2) combined (see Figure 2).

Of concluded cases—those which ended either in an award by the tribunal or a negotiated settlement (with investor compensation)—governments have won 27 and

lost 13.⁹ But breaking these down by countries is revealing. Canada has won nine and lost eight concluded cases.¹⁰ Mexico has won seven and lost five of concluded cases. Only the U.S. has an unbroken winning record, having won 11 concluded cases and lost none (see Figure 3).

Canada has already paid out NAFTA damages totalling

Figure 4 NAFTA Claims by Measure Challenged



\$219 million. This financial toll is certain to increase, since Canada has already lost the Bilcon case on its merits and is awaiting the tribunal’s decisions on the amount of damages.¹¹ Currently, Canada faces eight active investor-state claims, with claimants seeking more than \$475 million in damages.¹² Mexico has incurred the highest monetary damages, paying out more than US\$205 million to foreign investors. Mexico currently faces three active claims, with investors seeking over US\$300 million in damages. Having never lost a case, the U.S. has paid no damages. There are currently no active claims against the U.S.

Canadian losses

NAFTA’s investor rights system has been used repeatedly to attack regulations in all three countries (see Figure 4). With Canada and Mexico such challenges succeed far too often. All of Canada’s losses concern important public policy issues or regulatory matters. It is worth briefly reviewing Canada’s eight losses to appreciate how seriously NAFTA Chapter 11 interferes with sovereign regulatory authority.

In the *Ethyl* case (1997), a U.S. chemical company used NAFTA’s investor-state mechanism to successfully challenge a Canadian ban on the import and interprovincial trade of the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT). MMT is a suspected neurotoxin that automakers also claim interferes with

automobile on-board diagnostic systems. Under the terms of the NAFTA settlement, Ethyl won damages totalling \$19.5 million while the Canadian government was compelled to overturn the regulatory ban and issue a formal apology.

In the *S.D. Myers* case (1998), a U.S. investor successfully challenged a temporary Canadian ban on the export of toxic PCB wastes in response to the short-term opening of the U.S. border to PCB imports. The ban was applied impartially to all PCB wastes. Nevertheless, the tribunal concluded that the ban was discriminatory and that it violated NAFTA’s minimum standard of treatment.

The NAFTA tribunal rebuffed Canada’s arguments that an international treaty, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, obliged it to dispose of its toxic wastes within its borders. The tribunal awarded *S.D. Myers* \$6 million in damages plus \$850,000 in legal costs.

The *Pope and Talbot* dispute (1998) arose after Canada had been pressured into addressing the long-running softwood lumber dispute by restricting its lumber exports to the U.S. The Pope and Talbot claim added insult to injury when the U.S. forestry company successfully challenged the administrative measures taken by Canada to implement these lumber export quotas.

The tribunal interpreted NAFTA’s provisions related to minimum standards of treatment in an expansive way to impugn rather mundane government conduct (e.g., rejecting the investor’s request that meetings be held

outside Ottawa). The tribunal's controversial ruling disregarded explicit representations by all three NAFTA parties that the minimum-standard-of-treatment obligations were intended to be read narrowly, applying only to truly egregious government conduct.

The U.S. investor was awarded damages totalling \$870,000, but the legal issues at stake were more critical. The tribunal's defiant attitude toward binding interpretations accepted by all three governments underscores the lack of accountability inherent in the ISDS procedure.

The *AbitibiBowater* case (2009) involved a bankrupt investor that had closed its last lumber mill in the province of Newfoundland and Labrador, leaving behind a host of problems including unpaid bills, unemployed workers, unhonoured pension obligations and highly contaminated industrial sites. Provincial legislation expropriating the abandoned mill provided a process for determining compensation for the expropriated assets, but the investor did not avail itself of this process.

Instead, *AbitibiBowater* (now *Resolute Forest Products*) turned to NAFTA Chapter 11 and successfully wrested a \$130-million payout from the federal government, the largest single NAFTA-related monetary settlement to date. The company was compensated, in large part, for the loss of water and timber rights on Crown lands, which are generally not considered compensable property rights under Canadian law.

While the federal government stated it will not seek to recover the costs of the settlement from the Newfoundland and Labrador government in this instance, in future it intends to hold provincial and territorial governments liable for any NAFTA-related damages paid by the federal government in respect of provincial measures.

The *St. Marys* claim (2011) involved a U.S.-based (but Brazilian-owned) company that attempted to open a quarry near Hamilton, Ontario. Local residents campaigned against the quarry on environmental and social grounds. In response to this public pressure, and due to concerns related to groundwater, the Ontario government issued a zoning order that prevented the site from being converted from agricultural to extractive industrial use.

The parties in this case (Canada and *St. Marys*) reached a settlement on February 28, 2013, which saw the company withdraw the claim in exchange for \$US15 million in compensation from the Ontario government.

This case is part of a deeply concerning trend where foreign investors turn to NAFTA when their proposals for environmentally controversial projects do not receive regulatory approval.¹³

In the *Mobil Investments/Murphy Oil* case (2015), one of the world's largest and most profitable companies (ExxonMobil) challenged requirements that energy companies active in Atlantic offshore production carry out research and development within Newfoundland and Labrador.¹⁴ The province has a history of massive resource projects that bring few benefits to its residents. Determined not to repeat this history in the offshore oil sector, the province had negotiated an accord with the federal government to ensure benefits would accrue regionally. These economic development provisions, which included local research and development requirements,

Bilcon, *St. Marys* and *Windstream* are part of a worrying trend of foreign investors turning to NAFTA when their proposals for environmentally controversial projects do not get approved.

were duly exempted under NAFTA. Yet the ExxonMobil claim was successful despite this explicit exemption, or reservation, from the agreement's investment protections.

The tribunal, with one dissenting opinion, rejected Canada's legal arguments that the guidelines fell within the scope of the Canadian reservation with respect to Article 1106 for benefits plans under the authority of the Canada–Newfoundland Atlantic Accord Implementation Act. The majority took a very narrow view that the accord and any subordinate measures were reserved only exactly as they existed in 1994 when NAFTA took effect. No changes could be made to strengthen them, and the discretionary authority under the act, which both Canada

and the provincial government had reasonably assumed was protected, could not be exercised to make the R&D requirements more effective.

Canada was ordered to pay \$13.9 million plus interest to Mobil Investments Canada Inc. and \$3.4 million plus interest to Murphy Oil Corporation for damages allegedly incurred from 2004 to 2012. The two oil companies have since launched additional claims to collect damages from 2012 onward. It is very likely that as long as the R&D measures remain in place, Canada will be considered in continuous violation of NAFTA and damages will continue to accumulate.

In the *Bilcon* case (2015), a NAFTA arbitration tribunal ruled that a federal-provincial environmental review process violated NAFTA's investment protection rules. Bilcon, a U.S. company, wanted to build a large quarry and marine terminal in an ecologically sensitive coastal area of Nova Scotia. After extensive study and public consultation, the environmental panel recommended against the project due to its negative environmental impacts.

But, in a 2-1 ruling, the NAFTA tribunal decided in Bilcon's favour. It said the investor had been encouraged by provincial government officials to pursue the quarry project, which was later "arbitrarily" rejected upon the advice of the federal-provincial environmental assessment panel. The tribunal held that this treatment frustrated the investor's "legitimate expectations."

The tribunal majority also objected to the panel's consideration of "community core values" in its environmental assessment. The ruling provides further evidence that the much-abused minimum-standard-of-treatment provisions give arbitrators far too much discretion to second-guess the legitimacy of non-discriminatory government actions.

The Bilcon majority also ruled that the federal and Nova Scotia governments violated NAFTA's national treatment (non-discrimination) rule. The tribunal scrutinized examples of what it considered to be comparable projects involving Canadian investors in quarries or marine terminals that had either not been subject to full environmental assessment, approved with mitigation measures or approved outright. This satisfied two arbitrators, with the third again disagreeing, that Bilcon had been treated less favourably in violation of the national treatment rule.

Deciding if prospective investors in completely

unrelated projects were treated better or worse is difficult and inherently subjective. Governments frequently treat investors differently for perfectly legitimate reasons. An investment in an environmentally sensitive region, for example, may be treated differently than an investment in another less fragile or more highly industrialized area, regardless of whether the investment is foreign-owned or Canadian.

The Bilcon tribunal's decision to equate different, allegedly less favourable treatment with nationality-based discrimination is highly problematic, holding governments to unattainable and undesirable standards of consistency.¹⁵

Most recently, Canada lost a NAFTA claim brought by *Windstream* (2016). The case revolved around a moratorium on offshore wind projects on Lake Ontario, which precluded a huge wind farm proposed by the U.S.-owned company. In its ruling, the tribunal dismissed Windstream's allegations that it had suffered expropriation and discrimination, but ruled that Ontario had violated NAFTA's minimum standard of treatment. The tribunal did not find that the moratorium itself violated NAFTA's investment protections, but found fault with the Ontario government's alleged slowness in pursuing the scientific research necessary to dispel regulatory uncertainty, which left the investor's project hanging in the balance.

To equate Ontario's lack of vigour in pursuing scientific research to a breach of minimum standards of treatment under customary international law is yet another troubling NAFTA judgement. Given the novelty and controversy surrounding offshore wind power on the Great Lakes, any investor should have reasonably foreseen there could be problems getting such a project approved. Yet the tribunal awarded the U.S. investor \$25 million and ordered the Canadian government to pay the claimant's legal costs.

When NAFTA's Chapter 11 was put in place over two decades ago, neither governments nor the public grasped that it would be used to successfully attack the regulation of harmful chemicals or toxic waste exports, to second-guess routine bureaucratic and administrative decisions, to expand private property rights to encompass publicly owned water and timber, to compensate investors when governments refuse to approve contentious proposals, or to restrict the ability of governments to enforce local economic development requirements in return for

an investor's access to resources. Buoyed by their past successes, foreign investors and their legal advisors are turning to NAFTA Chapter 11 with increasing frequency and aggressiveness.

Unrecoverable legal costs

All three NAFTA parties have incurred tens of millions of dollars in unrecoverable legal costs defending themselves against claims. The cost of administering a full NAFTA arbitration panel typically runs between \$1 and \$3 million depending on the length and complexity of the case. Serving on an arbitration panel is lucrative work, with arbitrators charging fees of up to US\$3,000 per day plus expenses.¹⁶

But the costs of legal advice and representation are much higher than the costs of administering the panel itself. Respondent governments routinely incur costs of \$5 million or more to defend themselves before a NAFTA tribunal.¹⁷ Even in frivolous or nuisance claims that never get to a full hearing, the defending government incurs costs investigating the charges and preparing its defence.¹⁸ Tribunals have complete discretion regarding how to apportion legal costs between the parties, but only rarely award a winning government its full costs.¹⁹

As of mid-2017, Canada had incurred approximately \$95 million in legal costs defending itself against NAFTA Chapter 11 claims. This figure, obtained through an access-to-information request, includes “the value of legal staff devoted to case-work, disbursements, arbitral fees, and [legal] costs paid by Canada to investors.” The total deducts the portion of Canada's legal costs that have been paid by investors where directed by tribunals. It does not include the amounts paid to investors to settle cases or to pay damage awards.²⁰

To date, Canada has paid out more than \$314 million (\$219 million to investors and \$95 million in legal costs) related to NAFTA Chapter 11 claims. Because of pending damage awards, continuing legal costs, and the prospect of future losses, this amount will inevitably rise. Three hundred million dollars is a large amount of public money—seven times higher than Environment and Climate Change Canada's annual pollution compliance and enforcement budget and enough to refurbish all wastewater treatment facilities in Canada's First Nations

communities.²¹

But the real costs of NAFTA Chapter 11 are much larger than the financial payouts to foreign investors and legal costs. These direct legal costs do not include the value of time spent by non-legal staff at all levels of government who vet government regulations against potential claims, or who must respond to NAFTA complaints or threats. They do not include legal fees incurred by provincial governments. Nor do they include additional costs related to domestic legal proceedings, such as judicial reviews of tribunal awards and set-aside hearings.

The headline amounts of the awards do not include interest payments, which are usually back-dated to accrue from the time of the NAFTA infraction. Also, the nominal amounts of the past awards are considerably greater when adjusted for inflation to today's dollars, which gives a more accurate picture of their value. For example, the \$19.5-million payment to the Ethyl Corporation in 1998 is equal to \$28.6 million in 2017 dollars. Canada's payouts to foreign investors of \$219 million would exceed a quarter of a billion dollars in today's money.

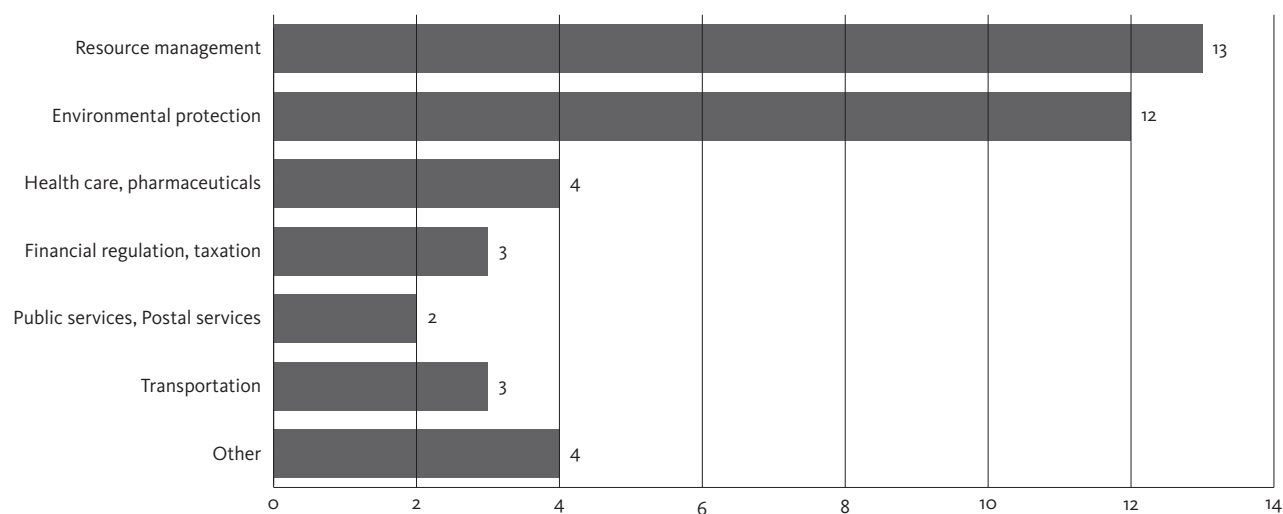
Most importantly, the direct financial payments to investors do not reflect the costs of government regulatory inaction due to investor threats delaying or deterring beneficial regulation (such as the public health costs associated with the continued use of MMT after the NAFTA settlement). Regulators are inherently cautious. The prospect of provoking a NAFTA lawsuit and exposing the government to potential monetary damages is now a factor in every major regulatory decision at all levels of government in Canada. It can be enough to tip the balance against needed regulatory action. This corrosive effect on public interest regulation is the most insidious cost associated with ISDS and NAFTA Chapter 11.

The chilling effect

A long-standing concern about NAFTA Chapter 11 and ISDS is that the threat of corporate retaliation exerts a “chilling effect” on public policy and regulation. The risk of investment treaty litigation and fines, even if uncertain, can deter governments from acting in the public interest or distort policy choices towards options that are more amenable to foreign commercial interests.

Multinational corporations have repeatedly invoked

Figure 5 NAFTA Claims Against Canada by Measure Challenged



NAFTA Chapter 11 to challenge policy and regulatory proposals (see Figure 5). Over the last two decades, some of these contested proposals were subsequently abandoned or weakened to assuage corporate concerns.

In one of the starkest examples, the Canadian government repealed its ban on the import and interprovincial trade of the gasoline additive MMT (a suspected neurotoxin) after being sued by the Ethyl Corporation. After a preliminary NAFTA tribunal judgment sided with the company, the Canadian government reversed the MMT ban, paid Ethyl \$19.5 million to settle the case and formally apologized.

In the mid-1990s, as part of intensive lobbying against proposed federal regulations to require plain packaging of cigarettes, the tobacco industry procured a legal opinion by former NAFTA chief negotiator Carla Hills that asserted such regulations infringed NAFTA's intellectual property rules and constituted expropriation in violation of NAFTA's investment chapter. The multinational tobacco industry repeatedly threatened the Canadian government with trade treaty action, including an investor-state challenge. The federal government's proposals for plain packaging were abandoned and replaced with watered-down requirements to increase the size of health warning labels on packages.²²

Another documented example of policy chill concerns the fate of proposals for public automobile insurance in New Brunswick in 2004.²³ Spurred by excessive private insurance rates—especially for the young and seniors—and attracted by the success of public automobile

insurance programs in other Canadian provinces, the New Brunswick government pledged to pursue public insurance. The private insurance industry, which vigorously opposes public insurance plans, threatened to take action under NAFTA's investment chapter to gain compensation for lost profits.²⁴ Despite a unanimous recommendation to proceed from an all-party legislative committee, and widespread political and public support, the proposed policies never went ahead.

While the extent of regulatory chill is difficult to prove conclusively, it is increasingly evident that the threat of legal action can inhibit or discourage legitimate public policy or regulation. A 2016 Osgoode Hall Law School study of environmental protection policy-making in Canada found that trade concerns including ISDS had led to changes in the decision-making process, including significantly increased internal vetting by trade lawyers and trade specialists for potential trade treaty risks. Through research interviews with over 50 policy-makers, the study also uncovered evidence that policy choices had been distorted and sometimes changed because of the risks of trade treaty litigation.²⁵

The problem of regulatory chill was highlighted by Canada's recent loss in the *Bilcon* case. Although no Canadian court had ruled on the matter, the NAFTA tribunal presumptuously concluded that the environmental assessment panel had violated Canadian law (and therefore NAFTA's guarantees of minimum standards of treatment under customary international law).²⁶ The majority

felt the criterion of “community core values,” which it construed as the primary basis of the environmental assessment panel recommendation against the project, was outside the environmental review panel’s legal mandate. They also condemned the environmental panel’s decision to recommend against the project outright without suggesting changes that might have mitigated its negative impacts and allowed Bilcon to proceed.

The prospect of NAFTA tribunals second-guessing decisions and ordering punitive monetary damages will constrain future environmental assessment panels and weaken an essential Canadian policy tool for protecting the environment. Dissenting Bilcon tribunal member Donald McCrae drove this point home forcefully when he objected to the majority’s ruling as being a “significant intrusion into domestic jurisdiction [that] will create a chill on the operation of environmental review panels.” Fittingly, he described this disturbing ruling as “a remarkable step backwards” for environmental protection.⁷

These and other publicized examples of regulatory chill are undoubtedly just the tip of the iceberg. Many threats of investor-state litigation against proposed or contemplated measures never become public knowledge. In some instances, risk-averse public officials may avoid even proposing initiatives for fear of attracting investor-state litigation.

The insidious nature of policy chill underlines the fact that democratic governance is as much about what does not happen, or is not even contemplated as an option for policy, as it is about the specific policy initiatives that are undertaken.²⁷ The ubiquitous threat of investor-state challenge under NAFTA has warped the relationship between multinational corporations and democratically elected governments to the detriment of other social groups and the broader public interest.

Why has Canada been sued so often?

Canada has been sued more times and faces more active claims than any other NAFTA party. Indeed, according to the latest figures on ISDS disputes from the United Nations Conference on Trade and Development (UNCTAD), Canada is now the sixth most sued country in the world and the second most sued developed country after Spain.²⁸ With only one exception (Wind Mobile’s 2016 claim against Canada under the Canada-Egypt Foreign

Investment Protection Agreement) these investor lawsuits against Canada have all occurred under NAFTA Chapter 11.

It is hard to determine exactly why Canada is a favoured target of foreign investors and their lawyers. But it is reasonable to conclude that the federal government’s persistent ideological commitment to ISDS and its demonstrated willingness to settle and pay compensation encourages investor-state claims against Canada. Just as Ottawa’s regrettable 1998 settlement with Ethyl Corporation triggered a wave of NAFTA claims related to environmental regulations,²⁹ the federal government’s 2010 decision to pay off AbitibiBowater unleashed a rash of new investor-state compensation claims and threats.³⁰

The success rate of foreign investors in cases against Canada has been high, with claimants being successful in 47% of concluded cases (8 of 17 cases). When looking at all concluded ISDS cases on a global basis, UNCTAD found that approximately 27% were decided in favour of the investor and 37% in favour of the state, while 23% of cases were settled.³¹ Of those cases that were decided on their merits, 59% ruled in favour of the investor and the remaining 41% in favour of the state.³²

Canada’s recent experience under NAFTA Chapter 11 must also be viewed within the rapidly rising number of ISDS claims globally. In the mid-1990s, when NAFTA was signed, there were only a handful of known ISDS cases each year in the entire world. By 2017, recourse to ISDS—a process now found in thousands of bilateral investment treaties and free trade agreements—had grown dramatically to over 60 new claims annually.³³

As UNCTAD has noted, in recent years “an unusually high number of cases (almost half of the total) were filed against developed States,” the majority by investors based in other developed countries.³⁴ This trend reflects a growing awareness among investors and corporate trade lawyers of investment rights, and an increasing willingness to invoke them to contest public policy measures in rich and poor countries alike.

ISDS can no longer be rationalized as simply a mechanism to protect foreign investors in developing countries with spotty investment protection records or unreliable court systems. In fact, it is a coercive tool with which multinational corporations can attack government regulation in both developing and developed countries. ISDS has truly evolved into a private, parallel system of justice for foreign investors—one that is being used with increasing frequency.

NAFTA renegotiation and prospects for ISDS reform

Canada has clearly had a negative experience under NAFTA Chapter 11. It has lost eight cases and paid out approximately \$220 million and counting to foreign investors. No Canadian investor has ever won a NAFTA case.³⁵ In addition, the federal government has incurred nearly \$100 million dollars in unrecoverable legal costs, a toll that is rising daily. There are currently more than twice as many active claims against Canada as the U.S. and Mexico combined, with investors seeking over \$475 million in damages.

Worst of all, since NAFTA Chapter 11 was put in place, Canada has lost multiple cases involving challenges to non-discriminatory public policies, including environmental assessments and bans on harmful substances. The current investor-state claims against Canada, from Lone Pine's challenge of Quebec's fracking moratorium to Omnitrax's brazen NAFTA countersuit, have empowered corporations to attack public policy or regulatory measures that were taken in good faith and with the public interest in mind. Corporations are using Chapter 11 to frustrate and subvert the exercise of democratic regulatory authority.

Despite these facts, the government of Canada and its trade officials have repeatedly insisted that NAFTA's investor protections and investor-state dispute settlement do not interfere with the right to regulate.³⁶ Canada's experience demonstrates otherwise. While NAFTA arbitration cannot force governments to change a law or regulation, it can compel them to pay to regulate, which acts as a powerful disincentive.

Unless something is done, the problems with ISDS will continue to get worse. The rising number of cases attest to the fact that action must be taken.

Pressure for reform will not come from the corporate sector. When faced with a public policy measure or regulation that impairs their profits, foreign investors have little reason *not* to roll the dice with a NAFTA claim—especially when speculative financing is so readily available. Investment lawyers and arbitrators, who profit handsomely from the existing system, will also fight to preserve it.

In fact, ISDS is most vigorously supported by firms and investors in those sectors where controversial investments are very likely to face grassroots opposition:

mining, energy and privatized public infrastructure.³⁷

Governments face strong public pressure to protect the environment, fight climate change and preserve public services and are far more likely to regulate in these sectors. Such public policy measures may well impair private profits. But if they advance the broader public interest, these measures ought to be immune from challenge through an unaccountable international arbitration system—especially one operating beyond the reach of domestic courts and legislatures.

The current NAFTA renegotiations present an unprecedented opportunity to curb or even eliminate ISDS within North America. Whether or not the talks result in a new deal, the prospects for getting rid of Chapter 11's investor-state process have never been better. In a

The current NAFTA renegotiations present an unprecedented opportunity to curb or even eliminate ISDS within North America.

strange twist, it is U.S. negotiators who are pressing to neuter ISDS by making it optional.

The Trump administration objects to ISDS primarily on the grounds that it impinges on U.S. sovereignty. Testifying before the U.S. Senate, United States Trade Representative Robert Lighthizer stated, "I'm always troubled by the fact that nonelected non-Americans can make the final decision that the United States law is invalid. This is a matter of principle I find...offensive."³⁸ As an alternative to ISDS, which he derides as a public subsidy to overseas investors, Lighthizer advocates a "market-based" approach, enjoining investors to purchase any required political risk insurance in the private market.

In recent parliamentary testimony, Steve Verheul, Canada's chief NAFTA negotiator, summed up the current negotiating state of play and how it could lead to the

end of investor-state dispute settlement in NAFTA:

The U.S....has put forward a proposal that would allow parties to either opt in or opt out of investor-state dispute settlement. At the table, the U.S. promptly said they would opt out. Both Canada and Mexico have said that if this were to be the case, if the U.S. is going to opt out, Canada would opt out as well, and Mexico said they also would opt out. If the U.S. proposal were to be adopted—at this point, we are still opposing it—there would be no ISDS between NAFTA members.³⁹

Under this scenario, ISDS would not be eliminated altogether. But by effectively suspending recourse to ISDS among the NAFTA countries, the proposed opt-out could produce the same result. This outcome would block challenges from the home jurisdiction (the United States) that has accounted for nearly all of the ISDS claims against Canada.⁴⁰

One can only hope that Canadian opposition to this U.S. proposal is tactical. In fact, because the U.S. is the demandeur on this issue, Canada could gain valuable negotiating coinage by withdrawing its opposition to the U.S. opt-out proposal. This leverage could help negotiators advance key Canadian interests, such as safeguarding affordable access to medicines or securing meaningful continental labour standards. Canadian negotiators should not let this opportunity slip through their hands.⁴¹

The second scenario that could lead to the end of ISDS occurs if no new NAFTA deal can be reached and the Trump administration makes good on its repeated threats to terminate the deal. In this case, the governance of Canada-U.S. trade and investment would fall back to either the Canada-U.S. Free Trade Agreement, or more likely to multilateral (World Trade Organization) trade

rules. Neither of these frameworks provides for ISDS.⁴²

Unlike many other investment protection treaties, NAFTA does not contain a “survival clause” that would allow previously established investors to bring claims for an extended period if the agreement is ever cancelled. Under the (still unratified) investment protection provisions of the Canada-EU Comprehensive Economic and Trade Agreement, for example, foreign investors would be entitled to bring investor-state claims related to established investments for up to 20 years after termination. By contrast, because it contains no such provision, NAFTA termination would immediately eliminate recourse to ISDS.

Even without ISDS, a revamped NAFTA would not necessarily be a good agreement. It could very well require Canada to embrace U.S.-style intellectual property rights that threaten privacy, stifle innovation and increase the costs of medicines, or to abandon supply management. It could also weaken North American health, safety and environmental standards by setting the bar at the lowest, rather than the highest, levels that exist within the three countries.

Facing any of these unacceptable outcomes, as a growing body of research shows, the Canadian government can afford to walk away from a bad deal and fall back on multilateral rules. While such a step would be disruptive, the trade and tariff impacts are surprisingly modest and the risks manageable.⁴³

Canada should grasp this opportunity to rid itself of NAFTA’s ISDS mechanism. Under either scenario, deal or no deal, the prospects for eliminating the unacceptable threat that NAFTA Chapter 11 poses to democratic regulation have never been better.

Endnotes

- 1 Steve Lambert, "Ottawa files lawsuit in dispute over broken northern Manitoba rail line," *The Canadian Press*, <https://www.ctvnews.ca/canada/ottawa-files-lawsuit-in-dispute-over-broken-northern-manitoba-rail-line-1.3677635>.
- 2 Elisha Dacey and Cameron MacLean, "Omnitrax threatens NAFTA challenge as Ottawa files lawsuit." *CBC News*, Nov. 14, 2017. <http://www.cbc.ca/news/canada/manitoba/omnitrax-files-notice-nafta-sabatoge-1.4401393>.
- 3 Mary Agnes Welch and Jillian Austin, "Railway job raises ethics issue: Tory MP Tweed quits to take plum job with Omnitrax." *Winnipeg Free Press*, August 13, 2013. <https://www.winnipegfreepress.com/local/railway-job-raises-ethics-issue-219365611.html>.
- 4 George Monbiot, "The TTIP trade deal will throw equality before the law on the corporate bonfire." *The Guardian*, Jan. 13, 2015. <https://www.theguardian.com/commentisfree/2015/jan/13/ttip-trade-deal-transatlantic-trade-investment-treaty>.
- 5 In March 2016, the industry publication *Global Arbitration Review* ranked Denton's, the firm representing Omnitrax, as one of the top 15 specialist international arbitration firms in the world. <https://www.dentons.com/en/find-your-dentons-team/practices/arbitration/investment-treaty-arbitration>.
- 6 The global market for third-party financing of international arbitration disputes is estimated to exceed US\$4 billion, and to be growing. "Draft Report for Public Discussion of the ICCA -Queen Mary Task Force on Third-Party Funding in International Arbitration", International Council for Commercial Arbitration and University of London, September 2017, p. 11. http://www.arbitration-icca.org/media/10/14053115930449/submission_version_for_public_comment_finalversion.pdf.
- 7 "The award is given the force of domestic law through existing structures of international commercial arbitration – represented primarily by the New York Convention – which enshrine the principle of judicial deference to arbitration tribunals." Gus Van Harten, "Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?." Draft of version appearing in: (2005) 21 *Arbitration International* 493, page 1. Accessible at <http://ssrn.com/author=638855>.
- 8 To date, there have been only three formal disputes under Chapter 20 of the NAFTA, which handles government-to-government dispute resolution. See NAFTA Secretariat, "Dispute Settlement," www.nafta-sec-alena.org.
- 9 A win for government is a concluded case that ends with no compensation to the investor, while a loss is a concluded case that ends in payment to the investor.
- 10 Three claims against Canada (Ethyl, AbitibiBowater, and St. Mary's) were settled with compensation paid to the investor, and are counted as Canadian losses. Another claim (Dow Chemical) was settled without paying any compensation, and is counted as a Canadian win, although some might argue neither side prevailed. At least one claim against Canada (Trammel Crow) was settled on undisclosed terms. Certain other claims against Canada reported as "withdrawn" may also have been subject to confidential settlements.
- 11 Also, Canada is certain to lose the Exxon and Murphy cases, which are continuations of previous cases that Canada lost.
- 12 This total excludes CEN Biotech, which is seeking an implausible \$4.8 billion in damages.
- 13 See Metalclad (1996), Gallo (2006), Clayton/Bilcon (2008), and Windstream (2012).
- 14 In 2008, the year in which its NAFTA arbitration commenced, Exxon Mobil reported a profit of \$USD45.22 billion, the largest annual profit ever reported by any corporation. Associated Press (2013) "Exxon's 2012 profit of \$44.9B just misses record: Exxon Mobil annual profit hits \$44.9 billion, just short of company's 2008 record." February 1, 2013. Accessible at: <http://news.yahoo.com/exxons-2012-profit-44-9b-170340809.html>.
- 15 In submissions filed in the subsequent Mesa case, all three NAFTA governments criticized the Bilcon tribunal's interpretation of both national treatment and minimum standards of treatment. "The three NAFTA Parties have stated that the Tribunal failed to adequately address nationality-based discrimination in its analysis of Bilcon's Article 1102 claim, failed to properly assess customary international law for the purposes of determining the content of Article 1105 and incorrectly concluded that alleged violations of Canadian law amounted to a violation of the customary international law minimum standard of treatment." *Global Affairs Canada. Summary of Bilcon case*, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng>. Accessed Dec. 19, 2017.
- 16 International Centre for the Settlement of Investment Disputes (ICSID) arbitrators "receive reimbursement for any direct expenses reasonably incurred in the course of the arbitration, and unless otherwise agreed between them and the parties, a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings." Kyla Tienhaara, Regulatory Institutions Network, Australian National University "Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement", Submission to the Australian Department of Foreign Affairs and Trade, May 19, 2010. Accessible at http://www.dfat.gov.au/trade/fta/tpp/subs/tpp_sub_tienhaara_100519.pdf.
- 17 For example, in the Eli Lilly arbitration Canada's legal costs amounted to nearly \$6 million (the tribunal ordered Eli Lilly, which lost its case, to pay three-quarters of Canada's legal costs (\$4.5 million). *Eli Lilly v. Government of Canada. Final Award of the Arbitral Tribunal*. March 16, 2016. Accessible at: http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3544/DC10133_En.pdf. The U.S. federal government estimated its costs in the Grand River arbitration at \$US2,792,000. *Grand River Enterprises Six Nations Ltd., et. al. v. the United States of America, "U.S. Submissions on Costs,"* March 31, 2010. Accessible at <http://www.state.gov/s/l/c11935.htm>.
- 18 The government of Canada estimated its legal costs in the aborted Centurion Health case at \$228,000, expenses which were never recovered. *Centurion Health Corporation v. Government of Canada, Government of Canada's motion on termination and costs*, April 29, 2010. Accessible at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/centurion_archive.aspx?lang=en.
- 19 In certain instances, tribunals have ordered investors to cover all or part of responding governments' legal expenses. For example, in the Eli Lilly case the tribunal ordered the claimant to pay 75 per cent of Canada's legal costs and Canada's share of the arbitration costs. In the Chemtura case, the claimant was ordered to pay 50% of Canada's legal costs.
- 20 "Response to request for information concerning the legal costs attributable to Canada defending itself against NAFTA Chapter 11 dispute resolution cases." Department of Justice Canada, Access to Information and Privacy, (File number A-2016-02054/SS), June 28, 2017.
- 21 Parliamentary Budget Officer, "Budget Sufficiency for First Nations Water and Wastewater Infrastructure," December 7, 2017. p. 8, table 1.

- 22** Physicians for a Smoke-free Canada. "Packaging Phoney Intellectual Property Claims." June 2009. Accessible at: <http://www.smoke-free.ca/plain-packaging/documents/2009/packagingphoneyiplclaims-june2009-a4.pdf>.
- 23** David Schneiderman. 'Banging Constitutional Bibles: Observing Constitutional Culture in Transition.' *University of Toronto Law Journal* 55(3). 2005. pp. 848-50. See also Shyrbman, Steven and Scott Sinclair, "Public Auto Insurance and Trade Treaties." *Canadian Centre for Policy Alternatives*. (2004).
- 24** The industry made threats of trade action not only under NAFTA, but also the WTO General Agreement on Trade in Services (GATS). When it made its GATS commitments covering financial services, the Canadian federal government exempted existing programs of public auto insurance in four provinces. These not-for-profit public insurance systems provided superior coverage, lower administration costs and more affordable premiums (particularly for youth, seniors and rural drivers), than the private, for-profit insurance systems operating in most provinces (Legislative Assembly of New Brunswick, 2004). But Canada's GATS limitations did not provide future policy flexibility to adopt similar programs in other provinces and territories. Unlike NAFTA Chapter 11, however, the WTO Dispute Settlement system is strictly government-to-government.
- 25** Gus Van Harten and Dayna Nadine Scott, "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada," *Osgoode Hall Law School Legal Studies Research Paper*, 2016. <http://ssrn.com/abstract=2700238>.
- 26** According to environmental law professor Meinhard Doelle, the tribunal "lacked, with the exception of the dissenting member, even a basic understanding of the legal context within which the decisions it was asked to rule on were made." Meinhard Doelle, "Clayton Whites Point NAFTA Challenge Troubling," <https://blogs.dal.ca/melaw/2015/03/25/clayton-whites-point-nafta-challenge-troubling/>
- 27** Cf. Scott Sinclair. "Trade agreements, the new constitutionalism and public services." in Stephen Gill and A. Claire Cutler, eds. *New Constitutionalism and World Order*. Cambridge University Press. 2014. p. 184.
- 28** Canada has been sued more than any other developed country except Spain and is the sixth most sued country overall (after Argentina, Venezuela, the Czech Republic, Spain and Egypt). UNCTAD, "Special Update on Investor-State Dispute Settlement: Facts and Figures," IIA Issues Note, November 2017. <http://investmentpolicyhub.unctad.org/Publications/Details/180>.
- 29** Under the terms of a 1998 settlement with U.S. investor Ethyl Corporation, Canada agreed to repeal the challenged measure (a ban on the gasoline additive MMT, a suspected neurotoxin), issue an apology to Ethyl and pay the company damages of \$US 13 million (C\$19.5 million at 1998 exchange rates). The cash settlement to Ethyl exceeded the total 1998 Environment Canada budget for enforcement and compliance programmes (C\$16.9 million). See Ken Traynor, "How Canada Became a Shill for Ethyl Corp: NAFTA and the Erosion of Federal Environmental Protection," *Canadian Environmental Law Association, The Intervenor: Vol 23. No 3 July - September 1998*.
- 30** Because the Canadian government's settlement implicitly embraced an expansive notion of property rights in the resource sector, whenever natural resource concessions are revised or revoked - however legitimate the reasons - foreign investors can now be expected to invoke NAFTA Chapter 11.
- 31** UNCTAD's annual reviews do not track whether the settlements favoured the investor or the defendant state.
- 32** "Excluding cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons), and (iv) decided in favour of neither party (liability found but no damages awarded)." UNCTAD, "Special Update on Investor-State Dispute Settlement: Facts and Figures," IIA Issues Note, November 2017. p. 4.
- 33** UNCTAD, "Special Update on Investor-State Dispute Settlement: Facts and Figures," IIA Issues Note, November 2017. "In 2015, investors filed a record high of 77 known investor-State arbitrations pursuant to international investment agreements." In 2016, according to UNCTAD, there were 69 new arbitrations. p. 1.
- 34** UNCTAD, "Special Update on Investor-State Dispute Settlement: Facts and Figures," IIA Issues Note, November 2017.
- 35** Except for when the predominantly Canadian-owned firm AbitibiBowater won a NAFTA challenge against its own home government.
- 36** Global Affairs Canada, "Myths and Realities about Canada's FTAs," <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/facts-faits.aspx?lang=eng>.
- 37** Naomi Klein has coined the term "Blockadia" to describe global grassroots movements to fight extractive industries and privatisation. Naomi Klein, *This Changes Everything*, 2014.
- 38** Bob Davis, "U.S. Bid to Exit NAFTA Arbitration Panels Draws Ire From Businesses," *Wall Street Journal*, August 22, 2017.
- 39** Testimony of Steve Verheul, Canada's chief negotiator for NAFTA, Standing Committee on International Trade, December 4, 2017, <http://www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-92/evidence>.
- 40** U.S. multinational corporations, with foreign subsidiaries, might still be able to sue Canada by using the investor-state mechanism under other Canadian FTAs or bilateral investment agreements.
- 41** Hadrian Mertins-Kirkwood, "Canada's once-in-a-lifetime chance to end NAFTA's pro-corporate trade tribunal," *Toronto Star*, Oct. 23, 2017. <https://www.thestar.com/opinion/contributors/2017/10/23/canadas-once-in-a-lifetime-chance-to-end-naftas-pro-corporate-trade-tribunal.html>.
- 42** One of the CUSFTA top negotiators, Gordon Ritchie, said recently of ISDS, "I find it an unbelievable intrusion into sovereignty," ... which creates "super rights for foreign investors who, as a result of these provisions, have recourse that Canadian investors do not have." "I can make no case for it; I have never heard anyone make a case for it that was remotely convincing. In my view, it's a very, very bad provision", he added. <https://www.theglobeandmail.com/report-on-business/economy/investor-state-dispute-process-is-key-nafta-point-of-conflict/article35777863/>.
- 43** Pierre Laliberté and Scott Sinclair, "What is the NAFTA Advantage?" *Canadian Centre for Policy Alternatives*, June 29, 2017. <https://www.policyalternatives.ca/publications/reports/what-nafta-advantage>.

NAFTA Chapter 11 Investor-State Disputes to January 1, 2018

*Compiled by Scott Sinclair, Trade and Investment Research Project,
Canadian Centre for Policy Alternatives*

| CLAIMS AGAINST CANADA | | | | | |
|---|-----------------------------|--|---|--|---|
| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
| March 4, 1996 | Signa S.A. | Mexican generic drug manufacturer (a joint venture partner with Canadian firm Apotex) claims that Canada's Patented Medicines (Notice of Compliance) Regulations deprived it of Canadian sales for its drug ciprofloxacin hydrochloride. | Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | C\$50 million | Arbitration never commenced. Notice of intent withdrawn by investor. |
| April 14, 1997 | Ethyl Corporation | U.S. chemical company challenges Canadian ban on import and inter-provincial trade of gasoline additive MMT, which automakers claim interferes with automobile on-board diagnostic systems. Manganese-based MMT is also a suspected neurotoxin. | Art. 1102 (national treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$201 million | In 1998, after preliminary tribunal judgments against Canada, the Canadian government settled. It paid Ethyl US\$13 million, repealed the MMT ban and issued an apology to the company. |
| July 22, 1998 | S.D. Myers, Inc. | U.S. waste disposal firm challenges temporary Canadian ban (Nov. 1995 to Feb. 1997) on export of toxic PCB wastes. Canada argued the ban was taken for environmental protection reasons in accordance with its obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$20 million | Tribunal ruled that Canada violated NAFTA articles 1102 (national treatment) and 1105 (minimum standard of treatment). It awarded the investor C\$6.05 million, US\$850,000 in costs plus interest in compensation. Canada applied to the federal court to set aside the tribunal's award. On Jan. 13, 2004 the court dismissed Canada's application. |
| November 27, 1998 | Sun Belt Water, Inc. | U.S. water firm challenges British Columbia water protection legislation and moratorium on exports of bulk water from the province. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) | C\$50 million | Claim is inactive. |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|---|---|---|--|---|
| December 24, 1998 | Pope & Talbot, Inc. | U.S. lumber company challenges lumber export quota system put in place by Canadian government to implement Canada-U.S. softwood lumber agreement (SLA). | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$500 million | Tribunal ruled that Canada's implementation of the SLA violated NAFTA Article 1105 (minimum standard of treatment). Canada was ordered to pay US\$461,566 in compensation (incl. interest) and US\$120,200 of the investor's legal costs, for a total of US\$581,766. |
| January 19, 2000 | United Parcel Service of America, Inc. | Multinational U.S. courier company alleges that Canada Post's limited monopoly over letter mail and its public postal service infrastructure enable Canada Post to compete unfairly in express delivery. UPS also alleges that Canada Post enjoys other advantages denied to the investor (e.g., favourable customs treatment). | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1502(3) (monopolies and state enterprises) Art. 1503(2) (state enterprises) | \$160 million | On May 24, 2007 the tribunal, in a 2-1 decision, dismissed the investor's claims. One tribunal member dissented, in part. The tribunal determined that key NAFTA rules concerning competition policy could not be invoked by an investor under Chapter 11 dispute procedures. It also ruled that certain activities of Canada Post were essentially arms- length from the Canadian government and therefore not subject to challenge by the investor (such activities could be scrutinized in a government- to-government dispute.) It also rejected claims that Canada Post unduly benefited from more favourable treatment. |
| December 22, 2000 | Ketcham Investments, Inc. & Tysa Investments, Inc. | U.S. lumber companies challenge lumber export quota system put in place by Canadian government to implement Canada-U.S. softwood lumber agreement. | Art. 1102 (national treatment) Art. 1103 (most- favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | C\$30 million | Complaint withdrawn by investors in May 2001. |
| September 7, 2001 | Trammell Crow Co. | U.S. property management company alleges that Canada Post treated it unfairly in the outsourcing of certain real estate services. | Art. 1105 (minimum standard of treatment) | \$32 million | Complaint withdrawn by the investor in April 2002 after it reached an undisclosed settlement with Canada Post. |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|--|--|--|--|---|
| November 6, 2001 | Chemtura Corp. (formerly known as Crompton Corp.) | U.S.-based agro-chemical company challenges the Canadian government ban on the sale and use of lindane, an agricultural pesticide. Lindane is a persistent neurotoxin and suspected carcinogen now banned in more than 50 countries worldwide. Following a 1998 decision by the U.S. Environmental Protection Agency to close the border to Canadian canola treated with lindane, Canada restricted, and later banned, the domestic use of lindane. Since 2004, Crompton's seed treatment business in North America has been owned by Bayer Crop Sciences, a subsidiary of the German multinational corporation, Bayer AG. | Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$100 million | Chemtura filed its first notice of arbitration on Oct. 17, 2002 and a second on February 10, 2005. On August 2, 2010 the tribunal dismissed the investor's claims. Furthermore, the tribunal ordered the investor to pay the costs of the arbitration (US\$688,000) and to pay 50% of the Government of Canada's costs in defending the claim (C\$2.899 million). |
| February 26, 2004 | Albert J. Connolly (Brownfields Holding, Inc.) | U.S. investor claims that actions by Ontario's Ministry of Northern Development and Mines resulted in the forfeiture of the investor's interest in a quarry site that was subsequently protected under Ontario's Living Legacy Program, a natural heritage protection program. | Art. 1110 (expropriation and compensation) | Not available | Claim is inactive. |
| June 15, 2004 | Contractual Obligation Productions LLC | U.S. animation production company challenges decision that it is ineligible for Canadian federal tax credits available only to production firms that employ Canadian citizens or residents. It is further alleged that Canadian immigration and work rules restrict U.S. citizens from working on Canadian film and television projects and are NAFTA-inconsistent. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$20 million | Statement of claim submitted Jan. 31, 2005. Amended statement of claim submitted June 16, 2005. Claim is inactive. |
| July 26, 2005 | Peter Pesic | U.S. investor claims that a Canadian government decision not to extend his temporary work visa impairs his investments in Canada. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) | Not available | Notice of intent to submit a claim to arbitration subsequently withdrawn by investor. |
| February 28, 2006 | GL Farms LLC (USA) and Carl Adams | U.S. agribusiness challenges Canadian provincial and federal government restrictions on the export of milk. It also challenges requirements that milk producers in Ontario must obtain a quota authorized under Canada's supply management system for dairy products. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) Art. 1502(3) (monopolies and state enterprises) | \$78 million | Notice of arbitration received on June 5, 2006. Claim is inactive. |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|---|--|--|--|--|
| September 25, 2006 | Merrill and Ring Forestry L.P. | <p>Washington State forestry company alleges that Canadian federal and provincial regulations and policies restricting the export of unprocessed logs favour log processors in B.C. at Merrill and Ring's expense, expropriate its investment in B.C. timber lands, and violate minimum standards of treatment.</p> <p>Canadian log export controls are exempted from NAFTA obligations governing trade in goods (Annex 301.3., Section A.)</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1106 (performance requirements)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$25 million | <p>Final award issued on March 31, 2010. The panel dismissed all the investor's claims and ordered that the costs of the proceedings be split between the two parties.</p> <p>The tribunal members were divided on the appropriate benchmarks to be applied regarding Art. 1105. But they agreed that, whichever benchmarks were applied, the investor had not proven minimum standards of treatment had been violated.</p> |
| October 12, 2006 | V. G. Gallo | <p>A Canadian company (Notre) planned to dispose of Toronto's municipal waste by dumping it in a huge man-made lake located on a former open-pit mine in northern Ontario (Adams Lake). In 2002, following the breakdown of negotiations between the company and the City of Toronto, Notre allegedly transferred the ownership and control of the project to a numbered company involving a U.S. citizen, V.G. Gallo. In June 2004, the newly elected Ontario provincial government enacted legislation preventing the controversial project from proceeding by banning the dumping of garbage in Adams Lake or any other Ontario lake.</p> <p>The claimant argues that this measure, and others, were "tantamount to expropriation" without compensation and deprived it of the minimum standard of treatment under international law. The Ontario law provided for compensation of reasonable expenses incurred by investors related to the proposed project, while precluding compensation for any loss of goodwill or possible profits. Ontario came to terms with Notre on compensation, but the Gallo enterprise did not avail itself of compensation under the provincial law.</p> | <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | C\$105 million | <p>Statement of claim submitted June 23, 2008. Jurisdictional hearing held February 2011.</p> <p>On September 15, 2011 the tribunal dismissed the claim on jurisdictional grounds. The tribunal concluded that Mr. Gallo could not prove the date when he acquired ownership and control of the enterprise or that this transfer occurred prior to the enactment of the Ontario legislation.</p> <p>Mr. Gallo was ordered to pay Canada US\$450,000 for legal costs.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) ² | Status |
|---|--|---|--|--|--|
| August 3, 2007 | Mobil Investments Canada, Inc. & Murphy Oil Corporation (I) | <p>Mobil Investments is the U.S.-based holding company for the ExxonMobil group's investments in Canada. ExxonMobil, the world's largest oil and gas company, is a partner in the Hibernia and Terra Nova oil and gas fields off the coast of Newfoundland and Labrador. Murphy Oil Corporation is a U.S. oil and gas company also active in the Newfoundland offshore.</p> <p>The investors allege that Canadian guidelines stipulating that energy companies active in the offshore invest in research and development within Newfoundland and Labrador are NAFTA-inconsistent performance requirements. The claimants previously challenged these guidelines in the Canadian courts and lost.</p> <p>The investors contend that 2004 requirements that companies spend a fixed minimum amount on local research and development are more onerous than pre-existing local benefits agreements, which were expressly reserved from NAFTA by Canada (Annex I). The investors also allege that the provincial R&D guidelines represented a "fundamental shift" in regulation that undermined the investors' "legitimate expectations," in violation of minimum standards of treatment under customary international law.</p> | <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1106 (performance requirements)</p> | C\$66 million | <p>Notice of arbitration submitted November 1, 2007. Preliminary hearing held May 2009. Arbitral hearing on merits held October 2010.</p> <p>On May 22, 2012, the tribunal ruled that the local R&D requirements constituted a "prohibited performance requirement" under Article 1106. The tribunal rejected, with one dissenting opinion, Canada's arguments that the guidelines fell within the scope of the Canadian reservation with respect to Article 1106 for benefits plans under the authority of the Canada–Newfoundland Atlantic Accord Implementation Act.</p> <p>The tribunal dismissed the investors' claim that the R&D guidelines breached Article 1105.</p> <p>On February 20, 2015 the tribunal awarded monetary damages of C\$13.9 million to Mobil and C\$3.4 million to Murphy for the period 2004 to 2012. The tribunal majority found Canada in continuous violation of NAFTA Article 1106 since 2004, meaning that as long as the R&D guidelines remain in effect, damages will accrue. Mobil and Murphy have each filed additional claims (see below) to recover damages since 2012.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|---|--|---|--|---|
| October 30, 2007 | Gottlieb Investors Group | U.S.-based private investors allege that changes in the tax treatment of energy income tax trusts constituted NAFTA-inconsistent discrimination against U.S.-based energy trusts, were equivalent to expropriation of their investment in energy income trusts, and violated minimum standards of treatment, since the investors had relied on the Canadian Conservative government's promise not to change the rules governing income trusts. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$6.5 million | <p>NAFTA Article 2103(6) provides, in the case of an investor-state claim involving taxation measures, that national tax officials can vet the claim. Where the competent national authorities agree that a taxation measure is not an expropriation, the investor is precluded from invoking Article 1110 as a basis for a claim.</p> <p>In April 2008, Canadian and U.S. tax authorities determined that the taxation measures at issue in the Gottlieb claim were not an expropriation under NAFTA Article 1110.</p> <p>Although the investors could still proceed on the basis of the remaining allegations in their notice of intent, the claim is inactive.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) ² | Status |
|---|--|---|--|--|---|
| February 5, 2008 | Clayton/Bilcon Inc. | <p>Bilcon of Delaware, Inc., a U.S. company controlled by members of the Clayton family, proposed to construct and operate a massive quarry and marine terminal on the Digby Neck, an environmentally sensitive region in southwestern Nova Scotia. The company intended, for a period of 50 years, to mine basalt, crush it into aggregate, and ship it in post-Panamax-size freighters through the Bay of Fundy to the U.S. eastern seaboard. In 2007, a joint federal-provincial environmental assessment panel recommended that the proposed project be rejected because of its negative environmental impacts. Following the panel report, the Nova Scotia and Canadian governments notified Bilcon that they would not approve the controversial project. The investor alleges that the administration of the environmental assessment review, along with various provincial and federal government measures, were discriminatory and/or violated minimum standards of treatment.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> | \$101 million | <p>Notice of Arbitration received on May 26, 2008.</p> <p>On March 17, 2015 the tribunal majority ruled that the conduct of the Canadian environmental assessment review, along with various provincial and federal government measures, discriminated against the company and violated its minimum standards of treatment.</p> <p>The tribunal majority felt the investor had been encouraged by government officials to pursue the quarry project, which was later “arbitrarily” rejected upon the advice of the federal-provincial environmental assessment panel. The tribunal held that this treatment frustrated the investor’s “legitimate expectations.”</p> <p>The dissenting tribunal member described the majority’s ruling as a “significant intrusion into domestic jurisdiction” that “will create a chill on the operation of environmental review panels.”</p> <p>The damages phase of the proceedings continues. Concurrently, Canada has applied to the Federal Court to set aside the tribunal’s March 2015 award.</p> |
| February 5, 2008 | Georgia Basin Holdings L.P. | <p>Washington State forestry company alleges that Canadian federal and provincial regulations and policies restricting the export of raw (i.e., unprocessed) logs favour log processors in B.C. at the investor’s expense, expropriate its investment in B.C. timber lands, and violate minimum standards of treatment.</p> <p>The claimants’ allegations are very similar to those at issue in the Merrill & Ring arbitration (see above), in which the tribunal dismissed all the investors’ claims.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1106 (performance requirements)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$5 million | <p>In late 2007 counsel for Merrill & Ring requested that Georgia Basin Holdings be added as a party in the Merrill & Ring arbitration, which had already commenced (see above). On January 31, 2008 the tribunal decided not to allow Georgia Basin Holdings to participate in that arbitration.</p> <p>Claim is inactive.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US)² | Status |
|---|--|---|---|--|--|
| July 11, 2008 | Melvin J. Howard, Centurion Health Corporation | <p>U.S. investor alleges that its plans to establish private, fee-for-service health clinics in Vancouver, British Columbia and Calgary, Alberta were frustrated by various local, provincial and federal regulatory measures.</p> <p>The investor alleges that federal regulation, in particular the Canada Health Act, which prohibits extra billing for publicly insured medical services, adversely affected its planned investments.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1502 (monopolies and state enterprises)</p> <p>Art. 1503 (state enterprises)</p> | \$160 million | <p>Notice of arbitration submitted on January 5, 2009.</p> <p>Revised statement of claim submitted on February 2, 2009.</p> <p>In August 2010 the tribunal terminated the claim on the basis that the investor had not made a deposit required to cover its share of the initial arbitration costs. The claimant was ordered to pay Canada's share of arbitration costs.</p> |
| August 25, 2008 | Dow AgroSciences LLC | <p>Dow AgroSciences LLC is a wholly owned subsidiary of the U.S.-based multinational corporation, Dow Chemical Company. Dow AgroSciences manufactures 2,4-D, an active ingredient in many commercial herbicides.</p> <p>In 2006 Quebec banned the use of certain chemical pesticides, including 2,4-D, on lawns within the province. Several other provincial and municipal governments are considering or have already enacted similar bans on the use of pesticides for cosmetic lawn care purposes. The constitutional validity of such pesticide bans has been upheld by the Supreme Court of Canada.</p> <p>Dow AgroSciences alleges that the ban is without scientific basis and was imposed without providing a meaningful opportunity for the company to demonstrate that its product is safe. Dow further alleges that the ban is "tantamount to expropriation."</p> | <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$2 million + | <p>Notice of arbitration received on March 31, 2009.</p> <p>On May 25, 2011 the parties reached a settlement under which Dow withdrew its claim. In return, the Government of Quebec formally acknowledged that 2,4-D does not pose an "unacceptable risk" to human health. The disputed regulatory measures related to pesticides are maintained and no compensation has been paid to the claimant.</p> |
| September 16, 2008 | William Jay Greiner and Malbaie River Outfitters Inc. | <p>The investor, a U.S. citizen, owns and operates an outfitting business including a hunting and fishing lodge in the Gaspé region of Quebec.</p> <p>The investor alleges that conservation measures taken by the Quebec provincial government to reduce the number of salmon fishing licences and to restrict access to certain salmon fishing areas were tantamount to expropriation, discriminated against the investor in favour of Canadian-owned fishing lodges, and violated minimum standards of treatment.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$7.5 million | <p>Notice of arbitration submitted November 2, 2010. Amended notice of arbitration submitted December 2, 2010.</p> <p>The claim was withdrawn by the investors on June 10, 2011.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US)² | Status |
|---|---|--|--|--|--|
| October 14, 2008 | Shiell Family | U.S. family group of investors alleges that the Canadian courts and various Canadian government agencies treated them improperly during the bankruptcy proceedings of their Canadian firm. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Article 1109 (transfers) Art 1110 (expropriation and compensation) | \$21.3 million | Claim is inactive. |
| October 17, 2008 | David Bishop | The investor, a U.S. citizen, owns and operates an outfitting business in Quebec. The investor alleges that conservation measures taken by the Quebec provincial government to reduce the number of salmon fishing licences and to restrict access to certain salmon fishing areas were tantamount to expropriation, discriminated against the investor in favour of Canadian-owned fishing lodges, and violated minimum standards of treatment. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$1 million | Claim is inactive. |
| April 2, 2009 | Christopher and Nancy Lacich | U.S. private investors allege that changes in the tax treatment of energy income tax trusts were discriminatory, equivalent to expropriation of their investment in energy income trusts, and violated minimum standards of treatment. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$1,178.14 | Notice of intent subsequently withdrawn by investor. |

CLAIMS AGAINST CANADA

| Date Complaint Filed¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us)² | Status |
|---|---|---|--|--|--|
| April 23, 2009 | AbitibiBowater Inc. | <p>AbitibiBowater, one of the world's largest pulp and paper firms, was formed in 2007 from the merger of Bowater Inc. of the U.S. and Abitibi Consolidated Inc. of Canada. In 2009 AbitibiBowater filed for bankruptcy protection.</p> <p>In November 2008 AbitibiBowater announced it would close its last pulp and paper mill in Newfoundland and Labrador (NL). The company had operated mills in the province since 1905.</p> <p>In December 2008 the provincial government enacted legislation to return the company's water use and timber rights to the Crown and to expropriate certain AbitibiBowater lands and assets associated with the water and hydroelectricity rights.</p> <p>The NL legislation provided for compensation at fair market value for AbitibiBowater's expropriated assets, but the company spurned that process and launched a NAFTA claim.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$467.5 million | <p>Statement of claim submitted February 25, 2010.</p> <p>In August 2010 the Canadian federal government announced that it had agreed to pay AbitibiBowater C\$130 million to settle the claim.</p> <p>The decision to settle without litigating is controversial for several reasons. First, it is the largest NAFTA-related monetary settlement to date. Second, AbitibiBowater was compensated in large part for the loss of water and timber rights on Crown lands, which are generally not considered compensable rights under Canadian law. Finally, while the Canadian federal government stated it would not seek to recover the costs of the settlement from the Newfoundland government in this instance, it said it intended to hold provincial and territorial governments liable for any future NAFTA-related damages paid by the federal government in respect of provincial measures.</p> |
| January 25, 2010 | Detroit International Bridge Company | <p>Detroit International Bridge Company is the owner and operator of the Ambassador Bridge between Detroit and Windsor, one of the busiest crossings between Canada and the U.S. The investor objects to Canadian government plans to build a second bridge across the Detroit River.</p> <p>The dispute concerns Canadian federal legislation, the International Bridges and Tunnels Act of 2007, which gives the Government of Canada authority over the construction, operation and ownership of international bridges.</p> <p>The investor asserts that the act violates the Boundary Waters Treaty of 1909 and Canadian commitments to the investor made under the authority of that treaty. Canada contends that the arbitration should be "time-barred" because the investor filed the claim more than three years after learning about the alleged breaches.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$3.5 billion | <p>Notice of arbitration submitted April 28, 2011. Amended notice of arbitration submitted in January 2013.</p> <p>On April 2, 2015 the tribunal, with one arbitrator dissenting, dismissed the claim on jurisdictional grounds. NAFTA Article 1121 requires a disputing investor to waive their right to litigation in the domestic courts of any NAFTA party with respect to the same measure(s) being challenged under NAFTA. The tribunal ruled that the claimant, who continued to pursue a lawsuit against Canada in the U.S. federal courts on the same matter, had failed to meet this waiver requirement.</p> <p>The claimant was ordered to pay a portion of Canada's costs, amounting to C\$1,977,000.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|--------------------------------|---|---|--|--|
| March 19, 2010 | John R. Andre | <p>The investor, a Montana-based businessman, operates a hunting lodge on Aboriginal land in the Northwest Territories, one of Canada's northern territories.</p> <p>The investor alleges that conservation measures taken by the territorial government to decrease the number of caribou that can be hunted annually expropriated its investment in the hunting and outfitting lodge.</p> <p>The investor further alleges that the allocation of the quota for caribou and other regulatory measures favoured local and Aboriginal hunters and outfitters over non-residents.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1104 (standard of treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$4 million + | Claim is inactive. |
| May 13, 2011 | St. Marys VCNA, LLC | <p>St. Marys VCNA is a U.S.-based cement corporation, which is a subsidiary of the Brazilian-owned Votorantim Group. St. Marys VCNA alleges that its Canadian subsidiary, St. Marys Cement Inc., was the victim of political interference in its attempt to open a quarry at a site near Hamilton, Ontario.</p> <p>St. Marys Inc. took over the site in 2006 from Lowndes Holdings Corp., which since 2004 had been seeking approval for a quarry on land that was zoned agricultural. However, as early as 2005 local residents began campaigning against the quarry on environmental and social grounds. Due to concerns related to groundwater, and in response to public pressure, the Ontario Ministry for Municipal Affairs and Housing issued a zoning order that prevented the site from being converted from agricultural to extractive industrial use.</p> <p>St. Marys claims the 2010 zoning order was unfair, arbitrary, discriminatory and expropriatory.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$275 million | <p>Notice of arbitration submitted September 14, 2011.</p> <p>Canada attempted to have the claim dismissed pursuant to NAFTA Article 1113 (denial of benefits) on the grounds that St. Marys VCNA was a Brazilian-owned company without substantial U.S. business activities and therefore did not qualify as a U.S. investor. St. Marys challenged this move in an Ontario court, but abandoned the case before the court could rule.</p> <p>The parties reached a settlement on February 28, 2013, which saw St. Marys withdraw the claim in exchange for C\$15 million in compensation from the Ontario government.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us)² | Status |
|---|----------------------------------|--|--|--|--|
| July 6, 2011 | Mesa Power Group, LLC | <p>Mesa Power Group is a Texas-based energy company owned by billionaire T. Boone Pickens. Mesa controls four wind farm projects in southwestern Ontario.</p> <p>Ontario's 2009 Green Energy Act is intended to boost renewable energy production and create jobs in the green energy sector. The act's feed-in-tariff (FIT) program provides incentives for renewable energy producers. Under the FIT program, projects are ranked to determine priority for government power purchase agreements (PPAs) and access to the transmission grid.</p> <p>The claimant alleges that 2011 changes to the FIT program discriminated against Mesa by favouring other local and international investors, including Korea's Samsung C&T, which secured a PPA. According to the investor, these "sudden and discriminatory" changes cost them access to a number of lucrative contracts. Mesa also alleges that "local content" requirements related to the FIT program are NAFTA-inconsistent performance requirements.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1104 (standard of treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1106 (performance requirements)</p> <p>Art. 1503 (state enterprises)</p> | CAD \$775 million | <p>Notice of arbitration submitted October 4, 2011.</p> <p>On March 31, 2016 the tribunal, with one arbitrator dissenting, ruled that the FIT program constituted government procurement, which (by reason of NAFTA article 1108(8)) was excluded from challenge under NAFTA articles 1102, 1103 and 1004. Furthermore, the tribunal majority rejected Mesa's complaints that various Ontario government administrative measures breached NAFTA's minimum standard of treatment obligation.</p> <p>The claimant was ordered to pay 30 per cent of Canada's legal costs, amounting to C\$2,948,701.</p> |
| January 26, 2012 | Mercer International Inc. | <p>Mercer International is a U.S. investor which, through its Canadian subsidiary, owns and operates a pulp mill and biomass cogeneration facility in Castlegar, British Columbia. The mill is both a consumer and producer of electricity.</p> <p>The company alleges that it has been disadvantaged vis-a-vis other mills in the province with self-generating capabilities, which Mercer claims enjoy access to cheaper electricity from BC Hydro (a provincial energy utility) along with preferential rates for the power they produce. The company alleges that various regulatory and other measures by the provincial government, the B.C. Utilities Commission and BC Hydro are responsible for this unfavourable treatment. Mercer also claims that it has been denied "direct subsidies, low-interest loans or other financial incentives" available to its competitors.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1502(3) (monopolies and state enterprises)</p> <p>Art. 1503(2) (state enterprises)</p> | C\$232 million | <p>Notice of arbitration submitted April 30, 2012.</p> <p>The tribunal process continues.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|-----------------------------------|--|--|--|---|
| October 17, 2012 | Windstream Energy, LLC | <p>Windstream Energy is a U.S.-based wind power company, which in 2008 proposed an offshore wind farm in Lake Ontario: Windstream Wolfe Island Shoals Inc (wwis).</p> <p>In 2009 Windstream signed a 20-year feed-in-tariff (FIT) contract with a provincial government regulatory body, the Ontario Power Authority, for the purchase of renewable energy. The FIT contract was expressly subject to wwis receiving all the regulatory and environmental approvals required to proceed with the project.</p> <p>In February 2011 the Government of Ontario announced a moratorium on freshwater offshore wind development on the grounds that further scientific research was needed into the impacts.</p> <p>Windstream claims that the moratorium is discriminatory and tantamount to expropriation. Although other firms were also affected by the moratorium, Windstream claims it was discriminated against because it was the only offshore wind developer with a FIT contract.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art 1105 (minimum standard of treatment)</p> <p>Art 1110 (expropriation and compensation)</p> | C\$475 million | <p>Notice of arbitration submitted January 28, 2013.</p> <p>On Sept. 16, 2017 the tribunal dismissed the investor's claims related to national treatment, most-favoured-nation treatment and expropriation. But it ruled that certain Ontario government actions had breached NAFTA's minimum standard of treatment provision.</p> <p>In particular, the tribunal ruled that the Ontario government had not undertaken sufficient scientific studies to resolve the uncertainty around the environmental safety of offshore wind power. Those studies that were conducted did not lead to any regulatory changes either allowing offshore wind projects to proceed or to a permanent ban. The claimant was thus left, according to the tribunal, in a state of "regulatory limbo."</p> <p>Canada was ordered to pay the investor C\$25,182,900 in damages and C\$2,912,432 in legal costs. The Ontario government paid the award, plus interest, in March 2017.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|-------------------------------------|--|--|--|---|
| November 7, 2012 | Eli Lilly and Company | <p>Eli Lilly is a U.S.-based multinational pharmaceutical company that produces and markets the drugs Zyprexa (olanzapine) and Strattera (atomoxetine), among others.</p> <p>Zyprexa was first patented in Canada in 1980, but Eli Lilly received a patent extension in 1991 on the grounds that it had found new uses for the drug not covered by the original patent. In 2009, however, the Canadian Federal Court invalidated the patent extension because the drug had not delivered the promised utility. Olanzapine was subsequently made available to generic competition. Eli Lilly's 1996 patent for Strattera was invalidated on similar grounds in 2010.</p> <p>Eli Lilly is contesting the invalidation of its patents and the Canadian courts' application of the internationally accepted "utility standard," which stipulates that an innovation must be "useful" in order to merit patent protection.</p> <p>Eli Lilly claims that the Canadian courts' decisions denied it minimum standards of treatment under international law and constituted expropriation without compensation.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | C\$500 million | <p>First notice of intent subsequently withdrawn. Second notice of intent submitted June 13, 2013. Notice of arbitration submitted September 12, 2013.</p> <p>In its March 17, 2017 final award the tribunal dismissed Eli Lilly's claims.</p> <p>The tribunal unanimously dismissed the investor's claims on minimum standards of treatment and expropriation.</p> <p>The tribunal agreed with Canada that judicial decisions should be accorded a high degree of deference. But its reasoning left the door partly open to future NAFTA arbitral review of court decisions, even those that do not violate a gross denial of justice standard.</p> <p>The tribunal ordered the claimant to pay 75 per cent of Canada's legal costs and Canada's share of the arbitration costs, totalling approximately C\$4,800,000.</p> |
| November 8, 2012 | Lone Pine Resources Inc. | <p>Lone Pine Resources is a Calgary-based oil and gas developer. Between 2006 and 2011, Lone Pine acquired an exploration permit covering 11,600 hectares under the St. Lawrence River, with the intention of mining for shale gas. Hydraulic fracturing (or fracking) is highly controversial in Quebec and elsewhere.</p> <p>In 2011, after extensive public and legislative debate, the Government of Quebec passed Bill 18, an Act to Limit Oil and Gas Activities. The legislation revoked all permits for oil and gas development under the St. Lawrence River and prohibited further exploration by resource companies.</p> <p>Lone Pine, which is suing the Government of Canada through its U.S. affiliate, claims that it was not meaningfully consulted regarding Bill 18 or compensated for the revoked permit and loss of potential revenue.</p> | <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$119 million | <p>Notice of arbitration submitted September 6, 2013.</p> <p>The tribunal hearing on the merits was held in Toronto in October 2017.</p> <p>The tribunal process continues.</p> |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|--|--|--|--|---|
| February 14, 2014 | J. M. Longyear, LLC | U.S. investors in a forestry company that owns and operates a 63,000-acre woodlot in Ontario assert that the enterprise was improperly denied provincial tax incentives for sustainable forestry management. | Art. 1102 (national treatment) Art. 1103 (most-favoured- nation treatment) | C\$12 million | Notice of arbitration submitted May 20, 2014. On June 26, 2015 the investor formally withdrew its claim. |
| October 16, 2014 | Mobil Investments Canada, Inc. (II) | Mobil Investments is the U.S.-based holding company for the ExxonMobil group's investments in Canada, and a partner in the Hibernia and Terra Nova oil and gas fields off the coast of Newfoundland and Labrador. In 2012 a NAFTA tribunal (see above) ruled that Canadian guidelines stipulating that energy companies active in the offshore invest a certain percentage of their revenue in research and development within Newfoundland and Labrador are NAFTA-inconsistent performance requirements. Since the R&D guidelines remain in effect, Mobil is seeking ongoing damages for the period 2012 to 2014. | Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) | C\$20 million | Notice of arbitration submitted January 16, 2015. The tribunal process continues. |
| October 16, 2014 | Murphy Oil Corporation (II) | Murphy Oil Corporation is a U.S. oil and gas company active in the Newfoundland offshore. A NAFTA tribunal (see above) found that Canadian guidelines stipulating that energy companies active in the offshore invest in research and development within Newfoundland and Labrador are NAFTA-inconsistent performance requirements. Since the R&D guidelines remain in effect, Murphy is seeking ongoing damages for the period 2012 to 2014. | Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) | CAD \$5 million | Notice of arbitration submitted January 16, 2015. The tribunal process continues. |
| September 1, 2015 | CEN Biotech Inc. | U.S. investors in a planned medical marijuana production facility in Ontario allege that Canada breached NAFTA's non-discrimination and minimum-standard-of-treatment provisions when Health Canada denied the facility a licence. The company has been the object of numerous allegations of public misrepresentation and insider trading. | Art. 1102 (national treatment) Art. 1103 (most-favoured- nation treatment) Art. 1105 (minimum standard of treatment) | \$4.8 billion | Notice of arbitration has not yet been received but the case is active. |

CLAIMS AGAINST CANADA

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) ² | Status |
|---|--|--|---|--|--|
| September 30, 2015 | Resolute Forest Products Inc. | Resolute (formerly AbitibiBowater) owns several paper mills in Quebec that produce “supercalendered” paper used for magazines and brochures. Resolute alleges that provincial government financial assistance to a competing mill in Nova Scotia discriminated against Resolute, resulted in unfair competition and provoked U.S. trade remedy action, which ultimately led to the closure of one of Resolute’s Quebec mills. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$70 million | Notice of arbitration submitted December 30, 2015. The tribunal held jurisdictional hearings in August 2017. The tribunal process continues. |
| March 2, 2017 | Tennant Energy, LLC | U.S.-owned energy company alleges that it was treated unfairly by Ontario authorities administering the province’s feed-in-tariff program. As of December 2017, neither the notice of intent nor the notice of arbitration had been publicly released by the Canadian government. | Art. 1105 (minimum standard of treatment) | C\$116 million | Notice of arbitration submitted on June 1, 2017. Arbitration process has commenced. |
| November 20, 2017 | Omnitrax Enterprises Inc. | U.S. railway company that owns the only rail line to the port of Churchill, Manitoba alleges that the 2012 dismantling of the Canadian Wheat Board (CWB) damaged the company’s main line of business (transporting Western grain for export). It also alleges that the Manitoba government’s decision not to approve the company’s proposals to transport oil by rail for export from Churchill further undermined its investment, | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | C\$150 million | Notice of intent submitted November 20, 2017. Claim is active. |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$US) | Status |
|---|--|---|---|-----------------------------|---|
| October 30, 1998 | The Loewen Group, Inc. and Raymond Loewen | Loewen, a Canadian funeral home operator, challenges a civil case verdict by a jury in a Mississippi state court that awarded \$500 million in compensation against it. Loewen also alleges that bond requirements for leave to appeal were excessive. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$725 million | In June 2003 the tribunal determined that it “lacked jurisdiction” to determine the investor’s claims and dismissed them. During the course of the arbitration proceedings the Loewen Group went bankrupt and its assets were reorganized as a U.S. corporation. It assigned its NAFTA claims to a newly created Canadian corporation owned and controlled by the U.S. corporation. The panel ruled that this entity was not a genuine foreign investor capable of pursuing the NAFTA claim. On October 31, 2005 a U.S. court denied Raymond Loewen’s petition to vacate the tribunal’s award. |
| May 6, 1999 | Mondev International Ltd. | The investor is a Canadian real estate developer that had a contract dispute with the Boston Redevelopment Authority, a municipal government body. The investor alleges that a Massachusetts state law immunizing local governments from tort liability and a subsequent Massachusetts Supreme court ruling upholding that law violate minimum standards of treatment under international law and other NAFTA obligations. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$50 million | In October 2002 the tribunal dismissed the investor’s claims. The tribunal ruled that Mondev’s claims were time-barred because the underlying dispute pre-dated NAFTA. |
| July 2, 1999 | Methanex Corp. | Methanex is a Canadian manufacturer and distributor of methanol, an ingredient in the gasoline additive MTBE. The investor alleges that California’s 2002 phase-out of MTBE, which has contaminated ground and surface water throughout California, expropriated its investment and denied it minimum standards of treatment under international law. | Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$970 million | On August 3, 2005 the tribunal rejected the investor’s claims on the merits. It also dismissed the case on jurisdictional grounds, finding no “legally significant connection” between California’s regulatory measures and Methanex’s purported investment. The tribunal ordered Methanex to pay the U.S. government’s legal costs of approximately \$3 million and the full cost of the arbitration. |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|---------------------------|--|---|-----------------------------|---|
| February 29, 2000 | ADF Group Inc. | Canadian steel contractor challenges U.S. "Buy America" preferences requiring that U.S. steel be used in federally funded state highway projects. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) | \$90 million | In January 2003 the tribunal dismissed the investor's claim. The tribunal concluded that the measures in question were procurement measures exempted under NAFTA Article 1108. |
| November 5, 2001 | Canfor Corp. | Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and antidumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$250 million | Notice of arbitration submitted on July 9, 2002. On September 7, 2005, at the request of the U.S. government, the Canfor, Terminal and Kember claims were consolidated into a single arbitration. On June 6, 2006 the tribunal ruled that it had no jurisdiction on claims concerning U.S. antidumping and countervailing duty law, but that it does have jurisdiction to decide claims concerning the Byrd Amendment. Canfor withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the governments of Canada and the U.S. |
| January 14, 2002 | Kenex Ltd. | Canadian manufacturer of industrial hemp products challenges seizure of industrial hemp products under U.S. Drug Enforcement Agency (DEA) rules. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) | \$20 million | Notice of arbitration submitted on August 2, 2002. In February 2004 a U.S. court granted a petition by Kenex and others to prohibit enforcement of DEA rules barring non-psychoactive hemp products. Claim is inactive. |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|--------------------------------|---|--|-----------------------------|---|
| March 15, 2002 | James Russell Baird | Canadian investor challenges U.S. measures banning the disposal of radioactive wastes at sea or below the seabed. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$13.58 billion | Claim is inactive. |
| May 1, 2002 | Doman Inc. | Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and anti-dumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$513 million | Claim is inactive. |
| May 3, 2002 | Tembec Inc. | Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and antidumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$200 million | Notice of arbitration and statement of claim submitted on December 3, 2004. At the request of the U.S. government, the Canfor, Terminal and Kembec claims were consolidated into a single arbitration. In December 2005 Tembec withdrew its claim. It then unsuccessfully challenged the consolidation order in the U.S. courts. In July 2007, after a lengthy process, the tribunal awarded costs of the proceedings to the U.S. government, requiring a \$271,000 payment by Tembec. |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|--|---|---|-----------------------------|---|
| September 9, 2002 | Paget et al. & 800438 Ontario Limited | An Ontario numbered company operated three subsidiaries in Florida that sold or leased bingo halls. Between 1994 and 1995 the state of Florida accused it of violating the Racketeer Influenced and Corrupt Organizations Act and subjected it to a tax audit. As a result, the State of Florida seized the company's property. Ontario Ltd. claims that the state improperly refused to return its property and destroyed its financial records. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$38 million | Claim is inactive. |
| June 12, 2003 | Terminal Forest Products Ltd. | Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and antidumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$90 million | Notice of arbitration submitted on March 31, 2004. At the request of the U.S. government, the Canfor, Terminal and Kember claims were consolidated into a single arbitration. On June 6, 2006 the tribunal ruled that it has no jurisdiction on claims concerning U.S. antidumping and countervailing duty law, but that it does have jurisdiction to decide claims concerning the Byrd Amendment. Terminal Forest Products withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the governments of Canada and the U.S. |
| July 21, 2003 | Glamis Gold Ltd. | Canadian mining company alleges that regulations intended to limit the environmental impacts of open-pit mining and to protect Indigenous peoples' religious sites made its proposed gold mine in California unprofitable, thereby expropriating its investment and denying it "fair and equitable" treatment as required under NAFTA Article 1105. | Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$50 million + | Notice of arbitration submitted on December 9, 2003. On June 8, 2009 the tribunal issued its award, dismissing Glamis's claims. The tribunal found that the economic impact of the environmental regulations on the company's investment was not substantial enough to be deemed an expropriation. It also rejected the investor's claim that a range of state and federal government measures related to the mining project violated minimum standards of treatment. The tribunal ordered the company to pay two-thirds of the costs of the proceeding. |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|--|--|--|-----------------------------|---|
| September 15, 2003 | Grand River Enterprises Six Nations, Ltd., et al. | Canadian Indigenous-owned manufacturer of tobacco products based in Ontario and a Canadian Indigenous-owned tobacco wholesaler operating in the United States allege that their business was harmed by the treatment of “non-participating manufacturers” under the terms of a settlement agreement between 46 U.S. states and the major tobacco companies to recoup public monies spent to treat smoking-related illnesses. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$310 million+ | Notice of arbitration submitted on March 12, 2004. In January 2011, after protracted and fiercely contested proceedings, the tribunal dismissed the manufacturer’s claim on jurisdictional grounds and dismissed the wholesaler’s claim on its merits. The tribunal ruled that the costs of arbitration be split equally between the parties. |
| August 12, 2004 | Canadian Cattlemen for Fair Trade | Canadian cattle producers challenge the U.S. ban on imports of Canadian live cattle following the discovery in 2003 of a cow infected with bovine spongiform encephalopathy (BSE) from an Alberta herd. | Art. 1102 (national treatment) | \$235 million + | First notice of arbitration submitted on March 16, 2005. Approximately 100 claims were consolidated into a single arbitration. In January 2008 the tribunal dismissed the claims on jurisdictional grounds. It ruled that the Canadian cattle producers did not have standing to bring the claim because they “do not seek to make, are not making and have not made any investments in the territory of the U.S.” |
| April 16, 2007 | Domtar Inc. | Domtar Inc. is a large North American pulp and paper company with headquarters in Montreal, Quebec. Domtar alleges that the collection of U.S. antidumping and countervailing duties against Canadian softwood lumber exports was unlawful under U.S. law and inconsistent with the NAFTA obligations of the U.S. government. Furthermore, the investor challenges aspects of the Byrd Amendment authorizing the payment of countervailing and antidumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers. The investor also contests aspects of the 2006 Softwood Lumber Agreement between Canada and the U.S. It asserts that these measures discriminated against Domtar, denied it minimum standards of treatment under international law and prevented the timely transfer of profits from Domtar’s U.S. operations. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1109 (transfers) | \$200 million+ | Notice of arbitration and statement of claim submitted on April 16, 2007. Claim is inactive. |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|----------------------------|---|--|-----------------------------|--|
| September 21, 2007 | Apotex Inc. (I) | <p>Apotex Inc. is a Canadian pharmaceutical company that develops and manufactures generic drugs. In 2003 Apotex sought U.S. Food and Drug Administration approval to develop a generic version (sertraline) of Pfizer Inc.'s anti-depressant medication Zoloft once Pfizer's patent expired in 2006.</p> <p>Apotex later went to court to attempt to dispel uncertainty regarding the status of patents on Zoloft, thereby avoiding the possibility of a patent infringement lawsuit by Pfizer. The U.S. courts dismissed Apotex's suit for a declaratory judgment clarifying the patent situation. Meanwhile, a competing generic drug manufacturer was able to develop and market its own generic version of Zoloft, thereby allegedly causing further harm to Apotex. Apotex alleges that the U.S. court judgments discriminated against it, denied it minimum standard of treatment and expropriated its investment in sertraline.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$8 million | <p>Notice of arbitration submitted on December 10, 2008. Preliminary hearing held in February 2012.</p> <p>On June 14, 2013 the tribunal dismissed both the sertraline and pravastatin (see below) claims on jurisdictional grounds, ruling that Apotex did not have investments in the U.S. that qualified for protection under NAFTA Chapter 11.</p> <p>Apotex was ordered to pay the legal costs of the U.S. government (\$526,000) and the costs of the proceedings.</p> |
| April 2, 2009 | CANACAR | <p>CANACAR is the association representing Mexican independent truckers.</p> <p>The Mexican truckers assert that the U.S. has violated its NAFTA obligations by 1) not permitting the truckers to enter the U.S. to provide cross-border trucking services, and 2) barring them from investing in U.S. enterprises that provide cross-border trucking services. They further allege that the U.S. has violated minimum standards of treatment by refusing to comply with a 2001 NAFTA government-to-government panel ruling.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> | \$2 billion annually | <p>Notice of arbitration submitted on April 2, 2009.</p> <p>In 2011 the Mexican and U.S. governments agreed to a three-year memorandum that allowed Mexican trucks into the U.S. under certain conditions. In exchange, Mexico eliminated \$2.3 billion worth of tariffs on U.S. goods.</p> <p>Claim is inactive.</p> |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|-----------------------------|---|--|-----------------------------|---|
| June 4, 2009 | Apotex Inc. (II) | <p>Apotex Inc. is a Canadian pharmaceutical company that develops and manufactures generic drugs.</p> <p>Apotex sought U.S. Food and Drug Administration (FDA) approval to develop a generic version (pravastatin) of the heart medication marketed by Bristol Myers Squibb (BMS) under the brand name Pravachol once BSM's patent expired in 2006. Apotex subsequently became involved in court disputes over delays in the development of its product due to data exclusivity rights claimed by competing manufacturers of generic pravastatin.</p> <p>Apotex alleges that certain U.S. court judgments and FDA decisions discriminated against it, denied it minimum standard of treatment and expropriated its investment in pravastatin.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$8 million | <p>Notice of arbitration submitted on June 4, 2009. Preliminary hearing held in February 2012.</p> <p>On June 14, 2013 the tribunal dismissed both the sertraline (see above) and pravastatin claims on jurisdictional grounds, ruling that Apotex did not have investments in the U.S. that qualified for protection under NAFTA Chapter 11.</p> <p>Apotex was ordered to pay the legal costs of the U.S. government (\$526,000) and the costs of the proceedings.</p> |
| September 2009 | Cemex | <p>Cemex, a Mexican corporation, is one of the world's largest cement manufacturers. It is embroiled in a dispute with the state government of Texas over royalty fees on quarrying. The NAFTA claim is an attempt by Cemex to protect itself against potential losses in the Texan courts.</p> | Not available | Not available | <p>Notice of intent reportedly submitted in September 2009. Claim is inactive.</p> |

CLAIMS AGAINST THE UNITED STATES

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|---|---|--|-----------------------------|---|
| November 23, 2011 | Apotex Holdings Inc. and Apotex Inc. | <p>Apotex Holdings Inc. is a Canadian investor that owns and controls Apotex Inc., a Canadian pharmaceutical company specializing in generic drugs, and Apotex Corp., which distributes these drugs in the U.S.</p> <p>Following an inspection of Apotex's Canadian manufacturing facilities in 2009, the U.S. Food and Drug Administration (FDA) discovered deficiencies and issued an import alert on drugs produced in Apotex's Signet and Etobicoke facilities. The alert, which was in place from August 2009 to July 2011, prevented Apotex's U.S. distributor from importing the majority of its products from Canada.</p> <p>Apotex claims that the import alert "decimated" its American business resulting in "hundreds of millions of dollars" in lost sales. Apotex claims that similar measures were not taken by the FDA against Apotex's competitors and therefore the measures were discriminatory and violated minimum standards of treatment.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> | \$520 million (reported) | <p>Notice of arbitration submitted March 6, 2012.</p> <p>On August 25, 2014 the tribunal dismissed all claims. By a 2-1 majority, the tribunal ruled that it lacked jurisdiction over certain claims because Apotex was barred from revisiting the issue of whether Apotex Inc.'s "abbreviated new drug applications" constituted NAFTA-protected "investments." A previous NAFTA tribunal had ruled against Apotex on this matter (see cases above). On the remaining claims, the tribunal unanimously concluded that the import alert was a "lawful and appropriate" exercise of the FDA's regulatory authority. The tribunal ordered Apotex to pay the U.S. government's legal costs and three-quarters of the costs of the arbitration.</p> |
| January 6, 2016 | TransCanada Corp. & TransCanada Pipelines Ltd. | <p>Canadian energy company alleges that the delay and eventual rejection by the Obama administration of the Keystone XL pipeline discriminated against the company, denied it fair and equitable treatment and expropriated its investment. The Keystone XL pipeline is a planned 1,900-km pipeline to carry bitumen from the Alberta tar sands to refineries in the southern U.S. After the Trump administration approved the controversial project the investor and the U.S. government agreed to discontinue the NAFTA claim.</p> | <p>Art. 1102 (national treatment)</p> <p>Art. 1103 (most-favoured-nation treatment)</p> <p>Art. 1105 (minimum standard of treatment)</p> <p>Art. 1110 (expropriation and compensation)</p> | \$15 billion | <p>Notice of arbitration submitted June 24, 2016.</p> <p>On March 24, 2017, at the request of the parties, the ICSID secretary-general formally discontinued the arbitral proceeding.</p> |

CLAIMS AGAINST MEXICO

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|---|---|--|-----------------------------|---|
| April 21, 1995 | Amtrade International | U.S. company claims it was discriminated against by a Mexican company while attempting to bid for pieces of property, in violation of a pre-existing settlement agreement. | Not available | \$20 million | Arbitration never commenced. |
| August 1995 | Halchette Corp. | U.S./Canadian company files notice of intent against Mexico in dispute over airport concession. | Not available | Not available | Notice of intent has not been made public. Arbitration never commenced. |
| October 2, 1996 | Metalclad Corp. | U.S. waste management company alleges unfair treatment after a Mexican local government consistently refuses it a permit to construct and operate a hazardous waste treatment facility and landfill in La Pedrera, San Luis Potosí. Subsequently, several federal permits related to the project were issued and construction proceeded, even though no municipal permit had been obtained by the company and in the face of a municipal “stop work” order. Ultimately, the state government intervened to create an ecological preserve in the area where the facility and site were to be located, effectively ending the project. The investor alleges that these measures were tantamount to expropriation. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) Art. 1111 (special formalities and information requirements) | \$90 million | In August 2000 the tribunal ruled that Mexico's failure to grant the investor a municipal permit and the state decree declaring the area an ecological zone were “tantamount to expropriation” without compensation and breached the minimum standard of treatment in NAFTA Article 1105. Mexico was ordered to pay \$16.7 million in compensation plus interest. Mexico applied for statutory review of the tribunal award before the B.C. Supreme Court on the grounds that the tribunal had exceeded its jurisdiction. In a rare move, the Court set aside the parts of the award dealing with minimum standards of treatment and indirect expropriation, but allowed the part of the tribunal's original award relating to the ecological decree to stand. Mexico was ordered to pay \$15.6 million plus interest to Metalclad. |
| November 24, 1996 | Robert Azinian et al. (Desona) | U.S. waste management company challenges Mexican court ruling revoking its contract for non-performance of waste disposal and management in Naucalpan de Juarez. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$17 million + | Notice of arbitration received on March 10, 1997. On November 1 1999 the tribunal dismissed the investor's claims. The tribunal rejected the investor's contentions that it had been denied justice by the Mexican courts and that the annulment of the concession was tantamount to expropriation. |

CLAIMS AGAINST MEXICO

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|---|---|---|-----------------------------|---|
| February 16, 1998 | Marvin Roy Feldman Karpa (CEMSA) | U.S. cigarette exporter challenges Mexican government decision not to rebate taxes on its cigarette exports. | Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$50 million | <p>On December 16, 2002 the tribunal rejected the investor's expropriation claim but upheld the claim of a violation of national treatment. Mexico was ordered to pay compensation of \$0.9 million plus \$1 million in interest.</p> <p>Mexico initiated a statutory review of the award in the Ontario Superior Court of Justice to set aside parts of the tribunal's award. In December 2003 the judge dismissed Mexico's application. Mexico's appeal of this decision was rejected by the Ontario Court of Appeal on January 11, 2005.</p> |
| February 20, 1998 | USA Waste Management Inc. | U.S. waste management company challenges state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco. | Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$60 million | <p>In June 2000 the tribunal ruled that it lacked jurisdiction because Waste Management Inc. had not properly waived domestic legal claims as required by NAFTA. The investor then resubmitted its notice of intent. The tribunal subsequently confirmed its jurisdiction.</p> <p>In April 2004 the tribunal dismissed the investor's claims on their merits. The tribunal observed that a breach of contract did not rise to a breach of NAFTA's investment protections, especially since the claimant had judicial remedies available.</p> |

CLAIMS AGAINST MEXICO

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$ us) | Status |
|---|---|---|--|------------------------------|---|
| November 15, 1999 | Fireman's Fund Insurance Co. | U.S. insurance company alleges that the Mexican government discriminates against it by facilitating the sale by Mexican financial institutions of peso-dominated debentures, but not the sale of U.S. dollar-denominated debentures by Fireman's Fund. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) Art. 1405 (national treatment) | \$50 million | Notice of arbitration submitted on October 30, 2001. On July 17, 2006 the tribunal dismissed the investor's claim. A redacted version of the final award became publicly available during 2007. The tribunal determined that, while the investor had been subjected to discriminatory treatment, under the NAFTA financial services chapter rules only claims involving expropriation were open to investor-state challenge. The tribunal ruled that Mexico's treatment of the investor did not rise to the level of expropriation. |
| November 11, 2000 | Billy Joe Adams et al. | A group of U.S. property investors disputes a Mexican superior court decision regarding title to real estate investments and related matters. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$75 million | Notice of arbitration submitted on February 16, 2001. Claim is inactive. |
| August 28, 2001 | Lomas de Santa Fe | U.S. investor alleges that it was unfairly treated and inadequately compensated in a dispute over the expropriation of land by Mexican Federal District authorities. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$210 million | Claim is inactive. |
| October 1, 2001 | GAMI Investments Inc. | U.S. minority shareholders in a Mexican sugar company claim that their interests were harmed by Mexican government regulatory failures related to processing and export of raw and refined sugar, as well as the nationalization of failing sugar refineries. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$55 million | Notice of arbitration submitted on April 9, 2002. On November 15, 2004 the tribunal dismissed the investor's claims in their entirety. |

CLAIMS AGAINST MEXICO

| Date Complaint Filed ^a | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$ us) | Status |
|---|--|--|--|------------------------------|---|
| December 12, 2001 | Francis Kenneth Haas | U.S. investor in a small manufacturing company in the State of Chihuahua alleges unfair treatment by the Mexican courts and authorities in the investor's dispute with local partners in the company. | Art. 1105 (minimum standard of treatment) | \$35 million, approximately | Claim is inactive. |
| January 11, 2002 | Calmark Commercial Development Inc. | U.S. property development company challenges decisions of the Mexican courts in a property dispute in Baja, California. | Art. 1105 (minimum standard of treatment) Art. 1109 (transfers) Art. 1110 (expropriation and compensation) | \$0.4 million | Claim is inactive. |
| February 12, 2002 | Robert J. Frank | U.S. investor seeks compensation from Mexican government in dispute over development of a beachfront property in Baja, California. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$1.5 million | Notice of arbitration submitted on August 5, 2002. Claim is inactive. |
| March 21, 2002 | International Thunderbird Gaming Corp. | Canadian gaming company disputes the regulation and closure of its gambling facilities by the Mexican government agency that has jurisdiction over gaming activity and enforcement. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$100 million | Notice of arbitration submitted on August 1, 2002. On January 26, 2005 the tribunal dismissed the investor's claim. Thunderbird Gaming was ordered to pay Mexico's legal costs of approximately \$1.2 million and three-quarters of the cost of the arbitration. On February 14, 2007 a U.S. court rejected Thunderbird Gaming's petition to vacate the NAFTA tribunal's ruling. |
| January 28, 2003 | Corn Products International | U.S. company challenges a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup (HFCS), including a tax on soft drinks sweetened with high-fructose corn syrup. Mexico argues that it applied the 20% tax to protect its sugar cane industry, which is losing domestic market share to imported HFCS, while facing barriers in selling sugar in U.S. markets. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$325 million | In January 2008 the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. The tribunal dismissed the investor's claims that the tax was a prohibited performance requirement and tantamount to expropriation. The panel report was not publicly released until April 2009, more than a year after the award was rendered. Mexico was ordered to pay the investor \$58.38 million. |

CLAIMS AGAINST MEXICO

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$ us) | Status |
|---|--|---|---|------------------------------|--|
| October 14, 2003 | Archer Daniels Midland, Tate and Lyle Ingredients | A large U.S. agribusiness and the U.S. subsidiary of a British multinational company challenge a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup, including a tax on soft drinks sweetened with high-fructose corn syrup. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$100 million | In November 2007 the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. In contrast to the Corn Products International panel, the ADM tribunal ruled that the tax on HFCS also constituted a prohibited performance requirement. Mexico was ordered to pay the investors \$33,510,091 plus interest of approximately \$3.5 million. |
| August 27, 2004 | Bayview Irrigation District, et. al. | Seventeen Texas irrigation districts claim that the diversion of water from Mexican tributaries of the Rio Grande watershed discriminated against downstream U.S. water users, breached Mexico's commitments under bilateral water-sharing treaties and expropriated water "owned" by U.S. interests. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$554 million | On June 21, 2007 the tribunal dismissed the claim on jurisdictional grounds. The tribunal ruled that the claimants, who were U.S. nationals whose investments were located within the territory of the United States, did not qualify as foreign investors (or investments) entitled to protection under NAFTA's investment chapter, simply because their investments may have been affected by Mexico's actions. Significantly, however, the tribunal concluded that "water rights fall within [NAFTA's] definition of property." |
| September 30, 2004 | Cargill Inc. | A large U.S. agribusiness challenges a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup, including a tax on soft drinks sweetened with high-fructose corn syrup. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements) Art. 1110 (expropriation and compensation) | \$100 million + | Notice of arbitration submitted on December 29, 2004. The tribunal found against Mexico in an award rendered on September 18, 2009. The redacted award was publicly released 18 months later. The tribunal ruled that the Mexican tax on HFCS violated NAFTA's national treatment and constituted an illegal performance requirement. Mexico was ordered to pay the investor \$77.3 million plus \$13.4 million in interest for a total award of \$90.7 million. |

CLAIMS AGAINST MEXICO

| Date Complaint Filed ¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$ us) | Status |
|---|---|--|--|------------------------------|---|
| February 15, 2011 | Internacional Vision (INVISIA), et al. | A group of U.S. investors allege a decision not to renew a 10-year agreement to erect billboards on Mexican federal land near a U.S-Mexico border crossing constituted expropriation and abusive treatment. | Art. 1102 (national treatment) Art. 1104 (standard of treatment) Art. 1105 (minimum standards of treatment) Art. 1110 (expropriation and compensation) | \$7.5 million | Arbitration never commenced. Claim is inactive. |
| February 19, 2013 | Kellogg, Brown & Root (KBR) | A U.S. energy services company seeks damages against the government of Mexico related to a 2011 decision by the Mexican courts to annul a \$320 million arbitration award issued by the International Chamber of Commerce in December of 2009. The original arbitration related to a contract dispute between Pemex, the Mexican state energy company, and COMMISA, a KBR subsidiary. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standards of treatment) Art. 1110 (expropriation and compensation) Art. 1503(2) State enterprises | \$400 million + | Notice of arbitration submitted August 30, 2013. On April 30, 2015, in an unpublished award, the tribunal ruled that KBR had failed to waive their right to litigation in other fora with respect to the same measure being challenged through NAFTA (see Detroit International Bridge Co. v. Canada above). |
| May 23, 2014 | B-Mex, et al. | U.S. gaming investors allege that after parting ways with their Mexican business partner their five Mexican casinos were targetted and harassed by Mexican authorities. | Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$100 million | Claim is ongoing. |
| August 6, 2015 | Lion Mexico Consolidated (LMC) | Canadian real estate investment firm disputes the cancellation by Mexican courts of mortgages on three properties which secured loans provided by LMC to Mexican nationals. LMC alleges that its Mexican counterparties forged key legal documents and the Mexican courts have not provided their firm a fair opportunity to dispute this fraud and recover its investments. | Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation) | \$200 million | The jurisdictional phase of the tribunal process is underway. |

CLAIMS AGAINST MEXICO

| Date Complaint Filed¹ | Complaining Investor | Issue | NAFTA Articles Cited | Amount Claimed (\$us) | Status |
|---|--|---|---|--------------------------------------|-------------------|
| September 15, 2017 | Vento Motorcycles, Inc. | Vento was founded in Mexico but now assembles motorcycles in the U.S. for export to Mexico. Mexican trade authorities ruled that Vento's motorcycles are assembled with mostly foreign components and do not have sufficient North American content to qualify for preferential tariff treatment under NAFTA. Accordingly, Vento's vehicles are now subject to a 30% import duty. The company asserts its Mexican-owned competitors, whose assembly practices are allegedly similar, do not pay such a duty, resulting in discrimination against Vento. | Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) | Not available | Claim is ongoing. |

SUMMARY OF DISPUTES FILED UNDER **NAFTA CHAPTER 11** to January 1, 2018

| Respondent Country | Number of claims filed | Claimants' industries (top five) | Types of Measure Challenged (top five) | Total compensation awarded ³ | Disposition of cases |
|--------------------|------------------------|--|---|---|--|
| Canada | 41 | 12 Resources 7 Energy 4 Private Investor 3 Chemicals 3 Pharmaceuticals | 13 Resource management 12 Environmental protection 4 Health care, pharmaceuticals 3 Financial regulation, taxation 2 Energy | \$C219.4 million | 5 decided against Canada 3 settled, with damages 2 settled, without damages 7 dismissed 7 withdrawn 9 inactive 8 ongoing |
| United States | 21 | 7 Resources 3 Pharmaceuticals 1 Chemicals 1 Energy 1 Private investor | 5 Trade Remedies 4 Administration of justice 4 Health care, pharmaceuticals 3 Environmental protection 1 Agricultural policy | \$0 | 0 decided against U.S. 1 settled, without damages 11 dismissed 2 withdrawn 7 inactive 0 ongoing |
| Mexico | 23 | 4 Agrifood 4 Real estate 3 Private investor 3 Waste disposal 2 Energy | 5 Administration of justice 4 Agricultural, Industrial policy 4 Environmental protection 4 Land use planning 2 Financial regulation, taxation | \$US204.7 million | 5 decided against Mexico 0 settled out-of-court 7 dismissed 0 withdrawn 8 inactive 3 ongoing |
| Overall | 85 | 20 Resources 10 Energy 8 Private investor 6 Pharmaceuticals 6 Agrifood | 19 Environmental protection 14 Resource management 9 Administration of justice 8 Health care, pharmaceuticals 6 Agricultural, Industrial policy | \$US386 million | 10 decided against state 6 settled 25 dismissed 9 withdrawn 24 inactive 11 ongoing |

SOURCES Global Affairs Canada (<http://www.international.gc.ca>), U.S. Department of State (www.state.gov), Mexico's Secretaria de Economia (www.economia-snci.gob.mx), NAFTA Claims (www.naftaclaims.com), Investment Treaty News (www.iisd.org/investment/itn), Investment Arbitration Reporter (www.iareporter.com), and Public Citizen (www.citizen.org).

NOTES **1** Date of notice of intent, except where indicated. **2** All figures are in \$US except where indicated. **3** Including awards of legal costs and interest (where available) plus out-of-court settlements where compensation was paid and made public. **4** This figure is an estimate based on the average annual exchange rate (\$CAD to \$US) at the time of each award.