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NAFTA Chapter 11 Investor-State Disputes

to January 1, 2015

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CLAIMS AGAINST CANADA

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
March 4, 1996	**Signa SA**	Mexican generic drug manufacturer claims that Canadian Patent 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)	CAD $50 million	Notice of intent on March 4, 1996. Arbitration never commenced. Notice withdrawn by investor.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 auto-makers 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(expropriation and compensation)	$250 million	After preliminary tribunal judgments against Canada, Canadian government repealed the MMT ban, issued an apology to the company and settled out-of-court with Ethyl for US $13 million.
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.	Art 1102 (national treatment) Art 1105 (minimum standards 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 standards of treatment). It awarded CAD $6.05 million, 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.
December 2, 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 1105 (minimum standards of treatment) Art 1110 (expropriation and compensation)	$10.5 billion	Claim is inactive.

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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.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$508 million	Tribunal ruled that Canada violated NAFTA Article 1105 (minimum standards of treatment). Canada was ordered to pay $460,000 in compensation (plus interest) and part of the investor's legal costs, totaling CAD$870,000.
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 company challenges 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)	$30 million	Complaint withdrawn by investors in May 2001.
September 7, 2001	**Trammel 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 "out-of-court" settlement with Canada Post.

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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)	$83 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 (CAD $5.778 million).
February 19, 2004	**Albert J. Connolly (Brownfields Holding)**	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	Notice of intent received Feb. 26, 2004. 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	Notice of intent received June 15, 2004. 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 received in July, 2005. Notice subsequently withdrawn by investor.
February 28, 2006	**Great Lake Farms (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 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation) Art 1502(3) (monopolies and state enterprises)	$78 million	Notice of intent to submit a claim to arbitration received on Feb. 28, 2006. Notice of arbitration received on June 5, 2006. Claim is inactive.

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Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
September 25, 2006	**Merrill and Ring Forestry, L.P.**	Washington-state forestry company alleges that Canadian federal and provincial regulations and policies restricting the export of unprocessed logs favour log processors in BC at Merrill and Ring's expense, expropriate its investment in BC timber lands, and violate minimum standards of treatment. Canadian log export controls are exempted from NAFTA obligations governing trade in goods (Annex 301.a.)	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)	$25 million	Notice of intent to submit a claim to arbitration received on Sept. 25, 2006. 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. The tribunal members were divided on the appropriate benchmarks to be applied regarding Art. 1105, minimum standard of treatments, but agreed that, whichever benchmarks were applied, the investor had not proven minimum standards had been violated.
October 12, 2006	**V. G. Gallo**	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. 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.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	CAD $105 million	Notice of arbitration submitted March 30, 2007. Statement of claim submitted June 23, 2008. Jurisdictional hearing held February 2011. 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. Mr. Gallo was ordered to pay the full costs of the proceedings.

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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**	Mobil Investments is the U.S.-based holding company for the Exxon-Mobil group's investments in Canada. Exxon-Mobil, 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. 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. 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. 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.	Art 1105 (minimum standard of treatment) Art 1106 (performance requirements)	CAD $60 million	Notice of arbitration submitted November 1, 2007. Preliminary hearing held May 2009. Arbitral hearing on merits held October 2010. 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. The tribunal also dismissed the investors' claim that the R&D guidelines breached Article 1105. Canada is now liable to pay monetary damages, with the exact amount to be determined by the tribunal in a subsequent award. 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.

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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 1106 (performance requirements) Art 1110 (expropriation and compensation)	$6.5 million	Notice of intent received on October 30, 2007. 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. 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. Although the investors could still proceed on the basis of the remaining allegations in their notice of intent, the claim is inactive.
February 5, 2008	**Clayton/ Bilcon Inc.**	Bilcon 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 potentially significant adverse environmental impacts. Following the panel report, the NS 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.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment)	$101 million	Notice of intent received on February 5, 2008. Statement of claim submitted on January 30, 2009. Canada's statement of defence submitted on May 4, 2009. Investor's memorial submitted July 25, 2011 and Canada's counter-memorial on Dec. 9, 2011. Investor's reply submitted on Dec. 21 2013 and Canada's rejoinder on Mar. 21 2013. Final tribunal hearing on jurisdiction and liability held from October 22 to 31, 2013. The tribunal process continues.

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Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
February 5, 2008	**Georgia Basin Holdings LLC**	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 BC at the investor's expense, expropriate its investment in BC timber lands, and violate minimum standards of treatment. The claimants' allegations are very similar to those at issue in the Merrill and Ring arbitration (see above), in which the tribunal dismissed all the investors' claims.	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)	$5 million	Notice of intent received on February 5, 2008. In late 2007, counsel for Merrill and Ring requested that Georgia Basin Holdings be added as a party in the Merrill and 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. Claim is inactive.
July 11, 2008	**Melvin J. Howard, Centurion Health Corporation**	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. 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.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1502(3) (monopolies and state enterprises) Art 1503(2) (state enterprises)	$4.7 million	Notice of intent received on July 11, 2008. Notice of arbitration submitted on January 5, 2008. Revised statement of claim submitted on February 2, 2009. 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.
August 25, 2008	**Dow Agro Sciences LLC**	Dow Agro Sciences LLC is a wholly owned subsidiary of the U.S-based multinational corporation, Dow Chemical Company. Dow Agro Sciences manufactures "2,4-D", an active ingredient in many commercial herbicides. In 2006, the Province of 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. Dow Agro Sciences 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."	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$2 million +	Notice of intent received on August 25, 2008. Notice of arbitration received on March 31, 2009. 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.

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September 16, 2008	**William Jay Greiner and Malbaie River Outfitters Inc.**	The investor, a U.S. citizen, owns and operates an outfitting business including a hunting and fishing lodge in the Gaspé region of Quebec. The investor alleges that conservation measures taken by the Quebec provincial government to reduce the number of salmon fishing licenses 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 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$8 million	Notice of intent received on September 16, 2008. Notice of arbitration submitted November 2, 2010. Amended notice of arbitration submitted December 2, 2010. The claim was withdrawn by the investors on June 10, 2011 following an undisclosed settlement with the Government of Canada.
October 8, 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	Notice of intent received on October 8, 2008. 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 licenses 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	Notice of intent received on October 17, 2008. 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 received on April 2, 2009. Notice subsequently withdrawn by investor.

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April 23, 2009	**Abitibi-Bowater Inc.**	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. 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. 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. 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.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$467.5 million	Notice of intent received on April 23, 2009. Statement of claim submitted February 25, 2010. In August 2010, the Canadian federal government announced that it had agreed to pay AbitibiBowater CAD $130 million to settle the claim. 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 has stated that it will not seek to recover the costs of the settlement from the Newfoundland 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.
January 25, 2010	**Detroit International Bridge Company**	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. 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. 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.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$3.5 billion	Notice of intent received on January 25, 2010. Notice of arbitration submitted April 28, 2011. Amended notice of arbitration submitted in January 2013. Statement of claim submitted January 31, 2013. Procedural hearing held in March 2014. The tribunal process continues.

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March 19, 2010	**John R. Andre**	The investor, a Montana-based businessman, operates a hunting lodge on Aboriginal land in the Northwest Territories, one of Canada's northern territories. 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. 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.	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)	$4 million +	Notice of intent received on March 19, 2010. Claim is inactive.
May 13, 2011	**St. Mary's VCNA, LLC**	St. Mary's VCNA is a U.S.-based cement corporation, which is a subsidiary of the Brazilian-owned Votorantim Group. St. Mary's VCNA alleges that its Canadian subsidiary, St. Mary's Cement Inc., was the victim of political interference in its attempt to open a quarry at a site near Hamilton, Ontario. St. Mary's Inc. took over the site in 2006 from Lowndes Holdings Corp., which had begun the approval process for a quarry in 2004. 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. St. Mary's claims the 2010 zoning order was unfair, arbitrary, discriminatory and expropriatory.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$275 million	Notice of intent submitted May 13, 2011. Notice of arbitration submitted September 14, 2011. Canada attempted to have the claim dismissed pursuant to NAFTA Article 1113 (denial of benefits) on the grounds that St. Mary's VCNA was a Brazilian-owned company without substantial U.S. business activities and therefore did not qualify as a U.S. investor. St. Mary's challenged this move in an Ontario Court, but abandoned the case before the court could rule. The parties reached a settlement on February 28, 2013, which saw St. Mary's withdraw the claim in exchange for $15 million in compensation from the Ontario government.

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Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)[2]**	**Status**
July 6, 2011	**Mesa Power Group, LLC**	Mesa Power Group is a Texas-based energy company owned by billionaire T. Boone Pickens. Mesa controls four wind farm projects in southwestern Ontario. 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. The claimant alleges that 2011 changes to the FIT program discriminated against Mesa by favoring 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.	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 1503(2) (state enterprises)	CAD $775 million	Notice of intent submitted July 6, 2011. Notice of arbitration submitted October 4, 2011. The tribunal process continues.
January 26, 2012	**Mercer International Inc.**	Mercer International is a U.S. investor which, through its Canadian subsidiary, owns and operates a pulp mill and biomass co-generation facility in Castlegar, British Columbia. The mill is both a consumer and producer of electricity. 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 BC 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.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment) Art 1502(3) (monopolies and state enterprises) Art 1503(2) (state enterprises)	CAD $250 million	Notice of intent submitted January 26, 2012. Request for arbitration submitted April 30, 2012. The tribunal process continues.

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Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**[2]	**Status**
October 17, 2012	**Windstream Energy, LLC**	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). 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. 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. Windstream claims that the moratorium is discriminatory and tantamount to expropriation. Although other firms were also affected by the moratorium, Windstream claims it was uniquely discriminated against because it was the only offshore wind developer with a FIT contract.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	CAD $475 million	Notice of intent submitted October 17, 2012. Notice of arbitration submitted January 28, 2013. Amended notice of arbitration submitted November 5, 2013. The tribunal process continues.

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November 7, 2012	**Eli Lilly and Company**	Eli Lilly is a U.S.-based multinational pharmaceutical company, which produces and markets the drugs Zyprexa (olanzapine) and Strattera (atomoxetine), among others. 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. 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. Eli Lilly claims that the Canadian courts' decisions denied it minimum standards of treatment under international law and constituted expropriation without compensation.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	CAD $500 million	Notice of intent submitted November 7, 2012 but subsequently withdrawn. Second notice of intent submitted June 13, 2013. Notice of arbitration submitted September 12, 2013. Canada's statement of defence filed June 30, 2014. Claimant's memorial filed September 29, 2014. The tribunal process continues.
November 8, 2012	**Lone Pine Resources Inc.**	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. In 2011, the Government of Quebec passed, after extensive public and legislative debate, 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. 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.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	CAD $250 million	Notice of intent submitted November 8, 2012. Notice of arbitration submitted September 6, 2013. The tribunal process continues.

CLAIMS AGAINST CANADA					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)[2]**	**Status**
February 14, 2014	**J. M. Longyear**	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)	CAD $250 million	Notice of intent submitted February 14, 2014. Notice of arbitration submitted May 20, 2014. The tribunal process continues.

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	Notice of arbitration submitted on October 30, 1998. 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 which 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.
June 15, 1999	**Methanex Corp.**	Canadian chemical company challenges California's phase-out of MTBE, a gasoline additive which has contaminated ground and surface water throughout California.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$970 million	On August 9, 2005, the tribunal dismissed the investor's claims. The tribunal ordered Methanex to pay the U.S. government legal costs of approximately $3 million and the full cost of the arbitration.
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 Article 1108.

CLAIMS AGAINST THE UNITED STATES

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
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 Kembec 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.
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	Notice of intent submitted on March 15, 2002. Claim is inactive.

CLAIMS AGAINST THE UNITED STATES

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
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	Notice of intent submitted on May 1, 2002. 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.
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	Notice of intent to submit a claim to arbitration on September 9, 2002. Claim is inactive.

CLAIMS AGAINST THE UNITED STATES

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
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 Kembec 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. The first session of the arbitral hearing on merits was held from August 12–17, 2007 and the second session from Sept. 17–19, 2007. 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 2/3 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 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$340 million	Notice of arbitration submitted on March 12, 2004. Preliminary hearing on jurisdiction held in March 2006. The arbitral hearing on merits was held in February 2010. 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 (or 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 anti-dumping 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.**	Apotex Inc. is a Canadian pharmaceutical company which 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. 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.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$8 million	Notice of intent submitted on September 21, 2007. Notice of arbitration submitted on December 10, 2008. Preliminary hearing held in February 2012. 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. Apotex was ordered to pay all costs of the proceedings.
April 2, 2009	**CANACAR**	CANACAR is the association representing Mexican independent truckers. 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.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment)	$2 billion annually	Notice of arbitration submitted on April 2, 2009. 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. CANACAR's NAFTA claim is unresolved. Depending on the permanent outcome of the temporary Mexico-U.S. agreement, which expires in mid-2014, the claim could be abandoned or renewed by CANACAR.

CLAIMS AGAINST THE UNITED STATES					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**	**Status**
June 4, 2009	**Apotex Inc.**	Apotex Inc. is a Canadian pharmaceutical company which develops and manufactures generic drugs. 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 (BSM) 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. 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.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$8 million	Notice of arbitration submitted on June 4, 2009. Preliminary hearing held in February 2012. 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. Apotex was ordered to pay all costs of the proceedings.

CLAIMS AGAINST THE UNITED STATES					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**	**Status**
September, 2009	**Cemex**	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 indemnify itself against potential losses in the Texan courts.	Not available	Not available	Notice of intent reportedly submitted in September 2009.
November 23, 2011	**Apotex Holdings Inc. and Apotex Inc.**	Apotex Holdings Inc. is a Canadian investor, which owns and controls Apotex Inc., a Canadian pharmaceutical company specializing in generic drugs, and Apotex Corp., which distributes these drugs in the U.S. 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. 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.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment)	$520 million (reported)	Notice of arbitration submitted March 6, 2012. A hearing on jurisdiction and merits was held in November 2013. 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.

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.**	No details available.	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 challenges decisions by Mexican local government to refuse it a permit to operate a hazardous waste treatment facility and landfill in La Pedrera, San Luis Potosi and by the state government to create an ecological preserve in the area where the facility and site were to be located.	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)	$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. Mexico applied for statutory review of the tribunal award before the BC Supreme Court on the grounds that the tribunal had exceeded its jurisdiction. The court set aside part of the award dealing minimum standards of treatment, but allowed most of the tribunal's original award to stand. Mexico was eventually ordered to pay $15.6 million plus interest to Metalclad.
December 10, 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 November 10, 1997. On November 1 1999, the tribunal dismissed the investor's claims.

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	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. 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.
June 30, 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	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 resubmitted its notice of intent. The tribunal subsequently confirmed its jurisdiction. In April, 2004 the tribunal dismissed the investor's claims.
May 21, 1999	**Scott Ashton Blair**	U.S. citizen who purchased a residence and restaurant in Mexico claims he was victimized by Mexican government officials on the basis of his nationality.	Not available	Not available	Arbitration never commenced.
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 tribunal dismissed the investor's claim. A censored 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.

CLAIMS AGAINST MEXICO

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
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	Notice of intent submitted on August 28, 2001. Claim is inactive.
October 1, 2001	**GAMI Investments Inc.**	U.S. shareholders in a Mexican sugar company claim that their interests were harmed by Mexican government regulatory measures 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 intent submitted on October 1, 2001. On November 15, 2004, the tribunal ruled that it had no jurisdiction and dismissed the investor's claim.
December 12, 2001	**Francis Kenneth Haas**	U.S. investor in a small manufacturing company in the State of Chihuahua challenges alleges unfair treatment by the Mexican courts and authorities in a dispute with local partners in the company.	Art 1105 (minimum standard of treatment)	$35 million, approximately	Notice of intent submitted on January 9, 2002. 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	Notice of intent submitted on January 11, 2002. Claim is inactive.

CLAIMS AGAINST MEXICO

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
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 1106 (performance requirements) 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 challenges 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. agri-business 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	Notice of intent submitted on October 14, 2003. In November 2007 the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. In contrast to the Corn Products International panel, the tribunal ruled that the tax on HFCS also constituted a prohibited performance requirement. Mexico was ordered to pay the investors $33,510,091.
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	Notice of intent submitted on August 27, 2004. On June 21, 2007 the tribunal dismissed the claims. 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. agri-business 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 intent submitted on September 30, 2004. Notice of arbitration submitted on December 29, 2004. The tribunal found against Mexico in an award rendered on September 18, 2009. The award has not yet been publicly released. The tribunal reportedly ruled that the Mexican tax on HFCS violated NAFTA's national treatment and minimum standards of treatment obligations, 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 (INVISA), 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	Notice of intent submitted February 15, 2011. Arbitration never commenced. Claim is inactive.
February 19, 2013	**Kellogg, Brown & Root (KBR)**	A U.S. energy services company is seeking 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) Article 1503(2) State enterprises	$400 million+	Notice of intent submitted February 19, 2013. Notice of arbitration submitted August 30, 2013. The tribunal process continues.
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	Notice of arbitration on May 23, 2014. Claim is ongoing.

SUMMARY OF CASES FILED UNDER **NAFTA CHAPTER 11**
to January 1, 2015

Respondent Country	Number of Cases Filed	Claimants' Industries	Types of Measure Challenged	Total Compensation Awarded[3]	Disposition of Cases
Canada	35	11 Resources (lumber, water, etc.) 4 Private investors 4 Energy (oil, gas, renewables, etc.) 3 Chemicals 3 Leisure & tourism 2 Pharmaceuticals 2 Waste disposal 6 Other	12 Environmental protection 10 Resource management 3 Financial regulation, taxation 3 Health care, pharmaceuticals 2 Postal services 1 Agriculture 4 Other	CAD $172.7 million	3 decided against Canada 6 settled out-of-court 6 dismissed 4 withdrawn 8 inactive 8 ongoing
United States	20	7 Resources (lumber, water, etc.) 3 Pharmaceuticals 2 Agriculture & food processing 8 Other	3 Trade remedies 4 Administration of justice 3 Health care, pharmaceuticals 2 Environmental protection 4 Resource management 1 Agriculture 3 Other	$0	0 decided against U.S. 0 settled out-of-court 11 dismissed 2 withdrawn 5 inactive 2 ongoing
Mexico	22	4 Agriculture & food processing 4 Private investors 3 Waste disposal 4 Real estate 7 Other	5 Land use planning 4 Environmental protection 4 Agriculture 3 Administration of justice 2 Financial regulation, taxation 4 Other	US $204.2 million	5 decided against Mexico 0 settled out-of-court 6 dismissed 0 withdrawn 9 inactive 2 ongoing
Overall	77	20 Resources (lumber, water, etc.) 9 Private investors 7 Agriculture & food processing 5 Waste disposal 5 Energy (oil, gas, renewables, etc.) 5 Pharmaceuticals 26 Other	18 Environmental protection 11 Resource management 7 Administration of justice 6 Agriculture 6 Health care, pharmaceuticals 5 Trade remedies 5 Land use planning 5 Financial regulation, taxation 2 Postal services 11 Other	Approx. US $341 million[4]	8 decided against state 6 settled out-of-court 23 dismissed 6 withdrawn 22 inactive 11 ongoing

SOURCES Foreign Affairs, Trade and Development 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 $US except where indicated. **3** Including awards of legal costs and interest (where available) plus out-of-court settlements where compensation was paid and made public. **4** This figure is an estimate based on the approximate exchange rate ($CAD to $US) at the time of each award.

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Democracy Under Challenge

Canada and Two Decades of NAFTA's Investor-State Dispute Settlement Mechanism

By Scott Sinclair, Canadian Centre for Policy Alternatives

When NAFTA came into force 21 years ago, there was plenty of debate about its impact on jobs, energy and sovereignty. Unfortunately, little attention was paid to an obscure provision in the treaty that allowed foreign investors to invoke binding investor-state arbitration to challenge government measures that allegedly diminish the value of their investments. The dubious rationale for granting this extraordinarily sweeping right to foreign investors was that the Mexican courts of the day were prone to corruption and political interference.

Over two decades later, NAFTA's Chapter 11 and its investor-state dispute settlement (ISDS) system have become notorious. Of the 77 investor-state claims filed to date under NAFTA, only a handful pertain to the administration of justice in the Mexican courts. Instead, foreign investors have used Chapter 11 to target a broad range of government measures, especially in the areas of environmental protection and natural resource management, which allegedly impaired corporate profits (see Figure 1, NAFTA claims by measure challenged).

Since most government regulations or policies affect property interests, NAFTA's investor-state mechanism and similar investment rules in other international treaties have been rightly criticized for giving multinational corporations too much power while constraining the fundamental role of democratic governments. Around the world, this private, parallel justice system for foreign investors is coming under increasing fire for its structural biases, conflicts of interest, legal capriciousness and lack of independence.[1]

Background

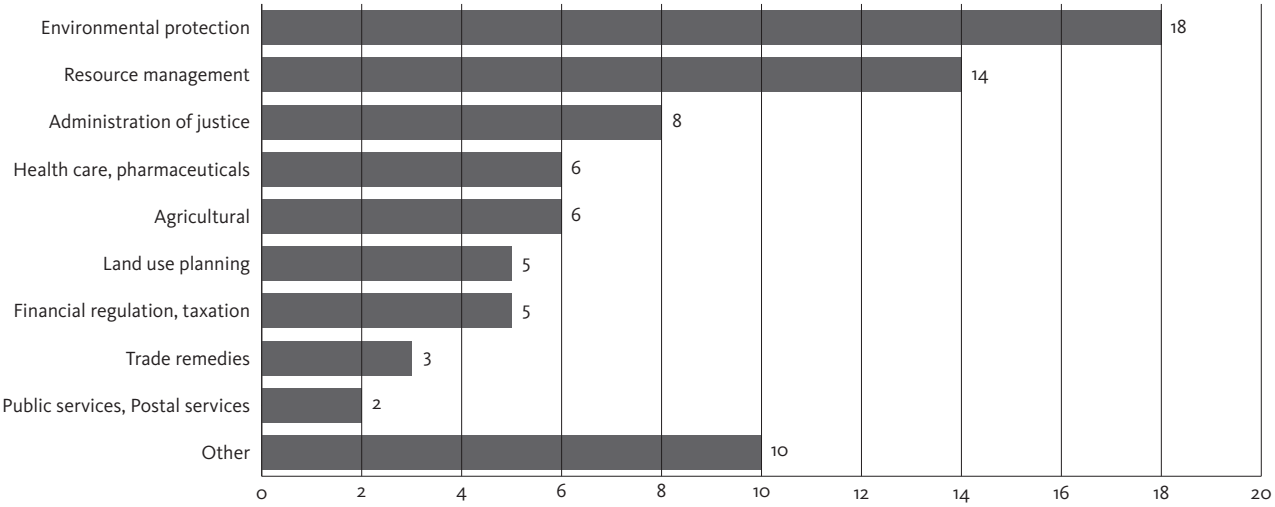
NAFTA's controversial ISDS mechanism allows foreign investors to bring claims directly against governments in the three signatory countries. Previously, ISDS had been a feature of bilateral investment treaties between developed and developing countries, but the signing of NAFTA marked the first time ISDS was integrated into a comprehensive regional trade agreement. While national governments alone are responsible for defending challenged measures, measures at the federal, provincial, state and local levels can, and 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 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 beyond the reach or review of domestic courts.

Claimants can challenge government measures that are allegedly unfair or inequitable (NAFTA Article 1105), discriminatory (NAFTA Articles 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.[2]

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.[3] 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.

Figure 1 NAFTA Claims by Measure Challenged



Canada's Experience With NAFTA ISDS

Canada has been the target of 35 investor-state claims, significantly more than either Mexico (22 claims) or the U.S. (20 claims), despite the fact that the latter's economy is 10 times larger than Canada's. (See Figure 2, NAFTA ISDS cases by country.)

The trend in recent years is even more disquieting. The number of challenges against Canada is rising sharply. From 1995–2005, there were 12 claims against Canada, while in the last ten years there have been 23. Moreover, Canada is attracting the lion's share of new NAFTA challenges. Over 70% of all NAFTA investor-state claims since 2005 were brought against the Canadian government (see Figure 3, NAFTA ISDS claims by country, 5-year blocks).

Of decided cases — those which ended either in an award by the tribunal or a negotiated settlement — governments have won 24 (69%) and lost 11 (31%). But breaking these down by countries is revealing. Canada has won seven and lost six decided cases.[4] Mexico has won six and lost five of decided cases. Only the U.S. has an unbroken winning record, having won 11 decided cases and lost none.[5] (See Figure 4, Decided NAFTA cases by country).

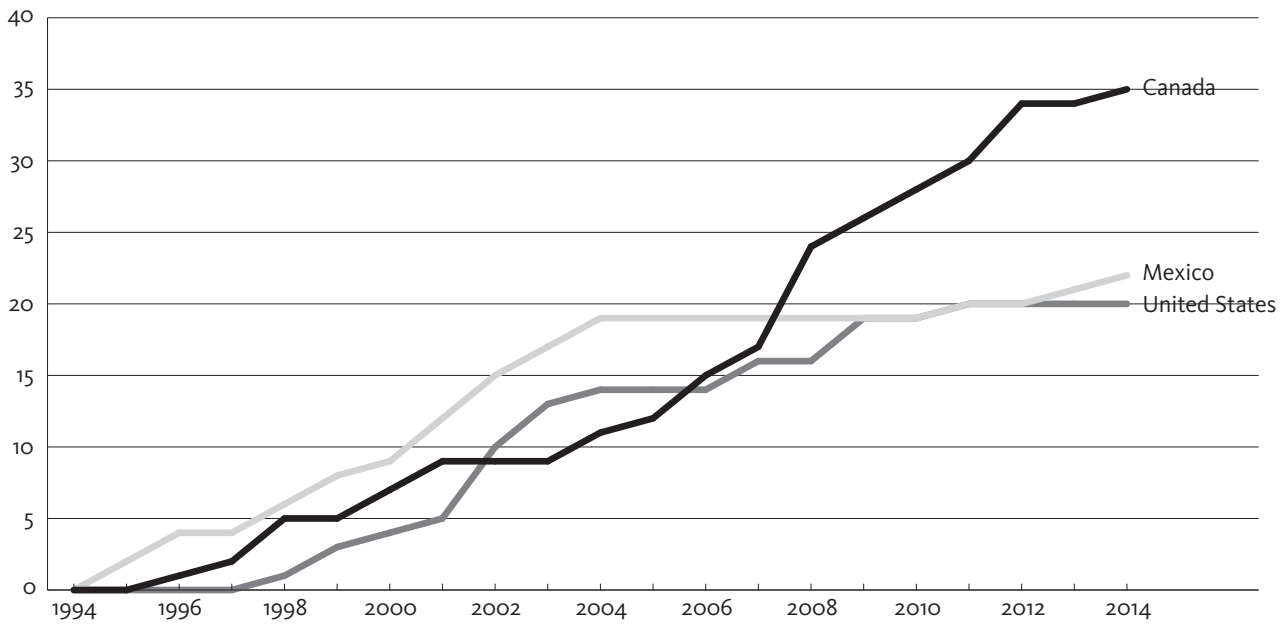
Canada has already paid out NAFTA damages totalling over $172 million. With nine active investor-state claims outstanding (and one damages award in a case Canada has already lost still outstanding) this financial toll will certainly increase. Mexico has incurred the highest monetary damages, paying out more than US$204 million ($238 million) to foreign investors. Having never lost a case, the U.S. has paid no damages.

All three parties have incurred tens of millions of dollars in legal costs defending themselves against NAFTA claims. The cost of administering a NAFTA arbitration panel typically runs over $1 million (and sometimes more).[6] Serving on an arbitration panel is lucrative work, with arbitrators charging fees of up to $3,000 per day, plus expenses.[7] The costs of legal advice and representation are usually much higher than the costs of the panel itself. Governments routinely incur costs of several million dollars or more to defend themselves before a NAFTA tribunal.[8] 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.[9] Tribunals have complete discretion regarding how to apportion legal costs between the parties, but tribunals usually don't award winning governments their full costs.[10] A conservative estimate of legal costs incurred by Canada alone over the last two decades is more than $65 million.

Canadian Losses

NAFTA's investor rights system has been used repeatedly to attack regulations in all three countries. In the

Figure 2 NAFTA ISDS Cases by Country (Running Total)



cases of Canada and Mexico, such challenges have succeeded far too often. All of Canada's losses concerned important public policy issues or regulatory matters. It is worth briefly reviewing each of Canada's six losses to appreciate how profoundly NAFTA chapter 11 impinges on sovereign regulatory authority.

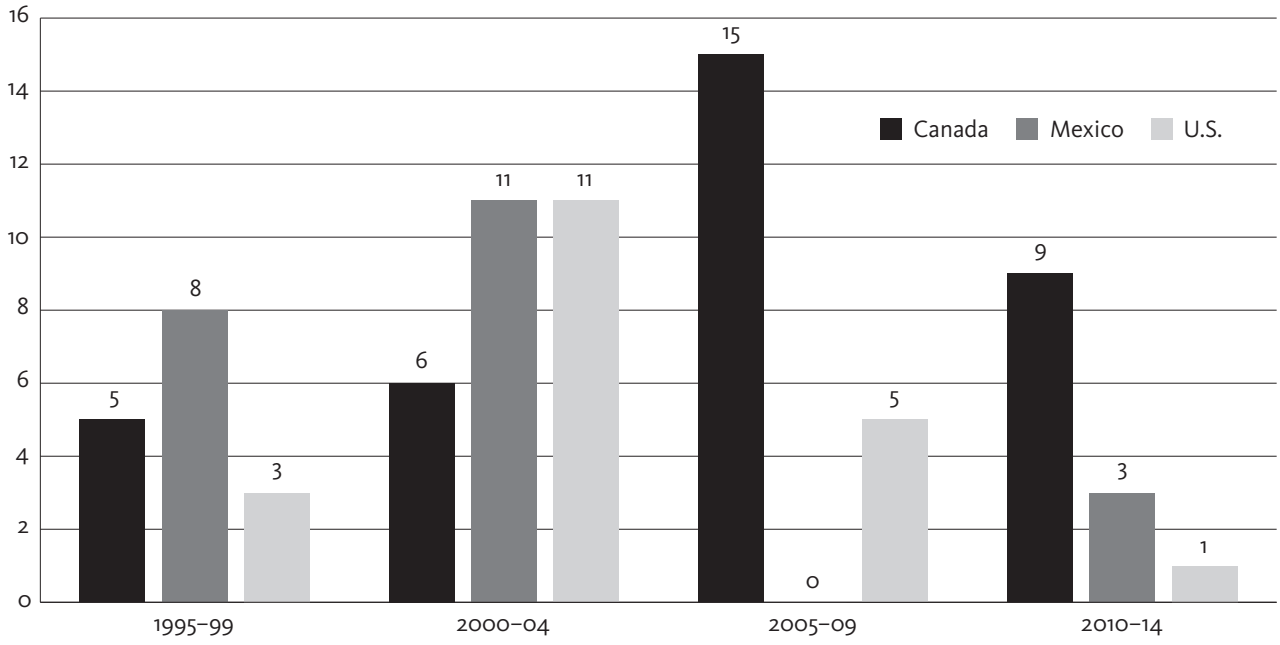
In the Ethyl case (1997), a U.S. chemical company used NAFTA's investor-state mechanism to successfully challenge a Canadian ban on the import and interprovincial trade of the gasoline additive MMT, a suspected neurotoxin which automakers also claim interferes with automobile on-board diagnostic systems. The company won damages of US$13 million ($15 million) and, disturbingly, 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 opening of the U.S. border to toxic wastes for a short period. 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 standards of treatment requirements. 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 $1.1 million in 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 minimum standards of treatment provisions expansively to impugn rather mundane government conduct (for example, 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 standards 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. In particular, the tribunal's defiant attitude towards 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 timber mill in the province

Figure 3 NAFTA ISDS Claims by Country (5-Year Totals)

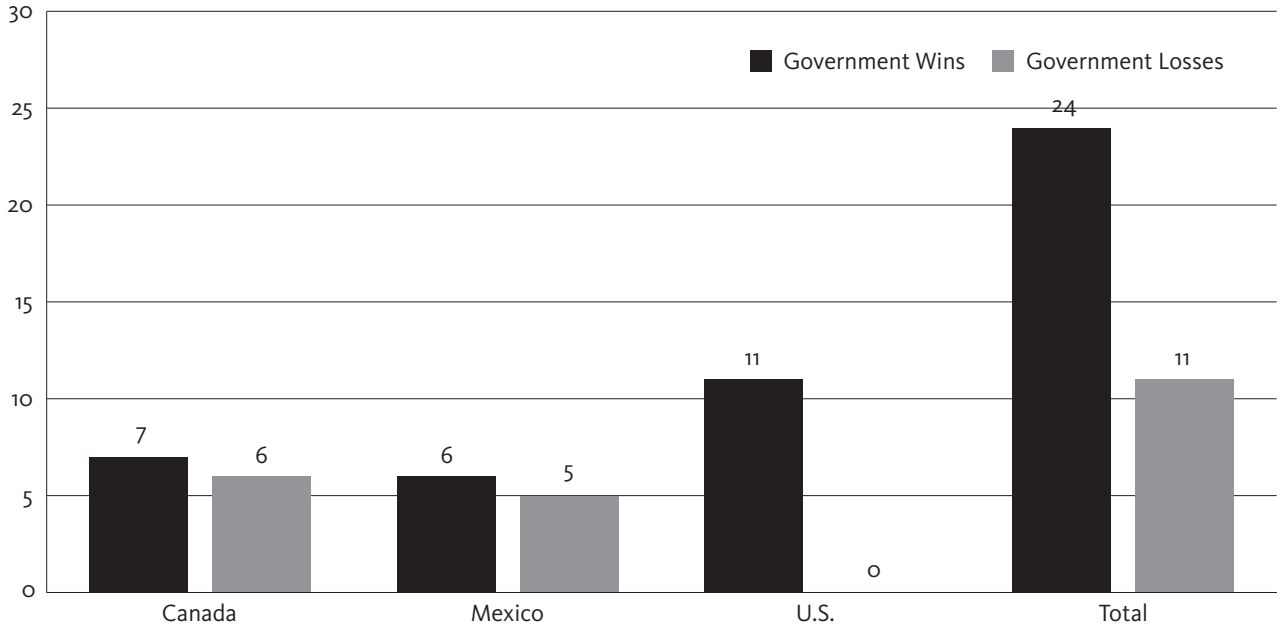


of Newfoundland and Labrador, leaving behind a host of problems including unpaid bills, unemployed workers, unhonoured pension obligations, and highly contaminated industrial sites. Provincial legislation expropriating the abandoned mill provided a process for determining compensation for the expropriated assets, but the investor did not avail itself of this process. Instead, it turned to NAFTA chapter 11 through which it was successful in wresting a $130 million payout from the federal government, the largest single NAFTA-related monetary settlement to date. AbitibiBowater (now Resolute Forest Products) 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. And 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 reached a settlement on February 28, 2013, which saw St. Marys withdraw the claim in exchange for $15 million in compensation from the Ontario government. This case is part of a deeply concerning trend[11] where foreign investors turn to NAFTA chapter 11 simply when their proposals for environmentally controversial projects do not receive regulatory approval.

In the Mobil Investments/Murphy Oil (2007) case, one of the world's largest and most profitable companies (ExxonMobil)[12] challenged requirements that energy companies active in Atlantic offshore production carry out research and development within Newfoundland and Labrador. The province has a history of massive resource projects that bring few benefits to the province and 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 to the local economy. These economic development provisions, which included local research and development requirements, 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

Figure 4 Decided Cases & Settlements by Country



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 is now liable to pay monetary damages, with the exact amount to be determined by the tribunal in a subsequent award. It is likely that the tribunal will find Canada in continuous violation and subject to ongoing monetary damages from 2004 onwards.

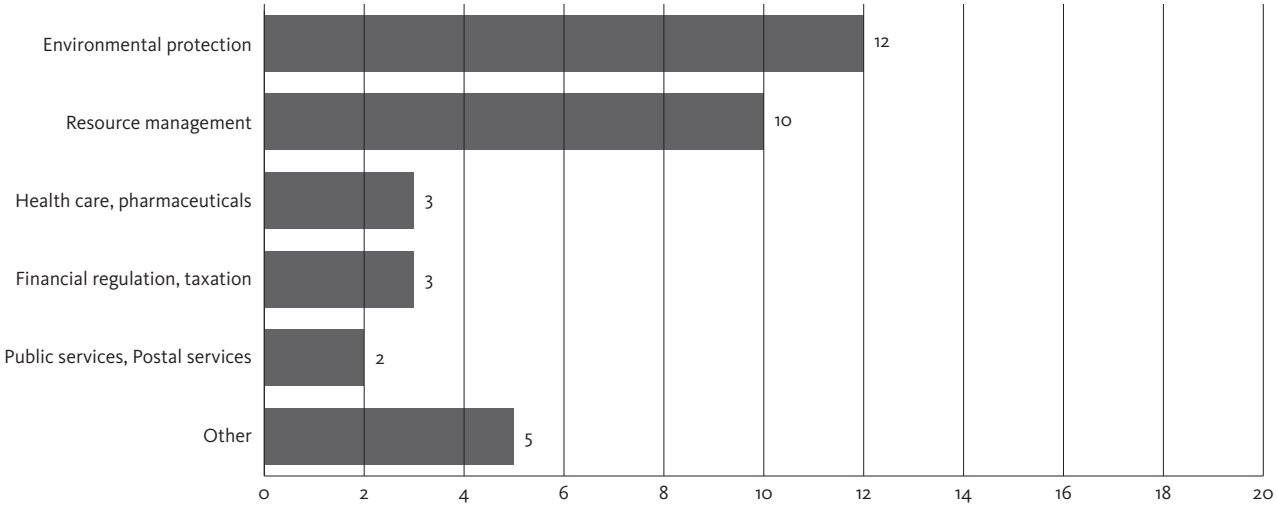
Two decades ago, when NAFTA's chapter 11 was put in place, neither governments nor the public grasped that it would be used to successfully attack the regulation of harmful chemicals or toxic waste exports, to second-guess routine bureaucratic and administrative decisions, to expand private property rights to encompass publicly-owned water and timber, to compensate investors when governments refuse to approve contentious proposals, or to restrict the ability of local 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 now turning to NAFTA chapter 11 with increasing frequency and assertiveness.

Ongoing Claims Against Canada

Currently, Canada faces nine active ISDS claims challenging a wide range of government measures that allegedly impair the expected value of foreign investments. While it is difficult to predict the outcome of these arbitrations, in several of these claims foreign investors stand a realistic chance of success. In fact, extrapolating from Canada's past track record in defending claims, foreign investors can reasonably be expected to win nearly half of these ongoing cases.

Cumulatively, foreign investors are seeking over $6 billion in damages from the Canadian government. Based on previous arbitrations, investors can only expect to gain a small percentage of this amount. Nevertheless, from the perspective of the investors, the modest legal costs of bringing a claim, the negligible adverse consequences for claimants of losing, the decent odds of winning and the lure of a financial payout make rolling the

Figure 5 NAFTA Claims Against Canada by Measure Challenged



dice on NAFTA chapter 11 an attractive option.

While none of the nine claims should be taken lightly, two in particular are deeply troubling. These cases relate to a ban on fracking under the St. Lawrence River by the Quebec provincial government (Lone Pine) and a decision by a Canadian federal court to invalidate a pharmaceutical patent on the basis that it was not sufficiently innovative or useful (Eli Lilly).

Lone Pine

Lone Pine Resources is a Calgary-based oil and gas developer incorporated in the state of Delaware. Between 2006 and 2011, Lone Pine acquired an exploration permit covering 11,600 hectares under the St. Lawrence River. The company intended to mine for shale gas by drilling horizontally under the St. Lawrence River, the province's largest river connecting the Great Lakes to the Atlantic Ocean.

Hydraulic fracturing (or fracking) is highly controversial in Quebec, as it is elsewhere. In 2010, after extensive public hearings, consultation and debate, a government-appointed commission recommended that shale gas activities be halted until further study of the environmental consequences. In 2011, the Government of Quebec acted on this recommendation by passing Bill 18 (An Act to Limit Oil and Gas Activities). The legislation suspended all permits for oil and gas development under the St. Lawrence River and halted further exploration by resource companies.

At the time Bill 18 was passed, Lone Pine had not received the full authorization required to commence fracking in the St. Lawrence River basin. In Quebec, mining exploration permits are granted by the Ministry of Natural Resources, at minimal cost, on a first-come, first-served basis. While exploration permit holders acquire priority rights if a long-term exploitation licence is approved for their holding, this step is by no means automatic. Mining projects are subject to further authorizations and approvals. In the case of the embryonic shale gas industry, the Ministry of Environment also has to grant approval, which in the Lone Pine case was never done.[13]

Given the high levels of public debate and concern over fracking, any prudent investor should have been well aware that gaining full regulatory approval would be far from certain. This type of business risk is integral to operating within a democratic society. Yet Lone Pine's chief executive has publicly characterised the Quebec government's easily anticipated and broadly supported regulations as "the summary expropriation of its asset for no reason other than political expediency."[14] In its NAFTA claim, Lone Pine asserts that Quebec's actions violated the company's "legitimate expectation of a stable business and legal environment" and expropriated its investment without compensation. It is seeking $250 million in damages, including for the loss of future revenue.

Eli Lilly

In another highly controversial claim, Eli Lilly, the U.S.-

based multinational pharmaceutical company, is challenging Canadian court decisions that invalidated extended patents on two of its products, Zyprexa (olanzapine) and Strattera (atomoxetine). Zyprexa was first patented in Canada in 1980, but Eli Lilly was provisionally granted a second patent in 1991 on the grounds that it had found new uses for the drug not covered by the original patent. In 2009, the Canadian Federal Court invalidated the second patent on olanzapine because Eli Lilly failed to produce compelling evidence supporting its claims regarding new uses. Eli Lilly's patent for atomoxetine, first granted in 1996, was invalidated on similar grounds in 2010. Following the rulings, both drugs were opened to generic competition, thereby reducing costs to Canadian consumers and the public health care system.

Eli Lilly took its loss to the Federal Court of Appeal, which upheld the lower court's ruling. The company then applied for leave to appeal to the Supreme Court of Canada, which was rejected. The company, a well-resourced and well-represented litigant, was clearly accorded due process.

Yet, having lost repeatedly in the domestic courts, Eli Lilly has now turned to the NAFTA investor-state tribunal as a "supranational court of appeal."[15] This legal option is available only to foreign investors, raising basic concerns about equality before the law. More tellingly, by asserting that they were denied minimum standards of treatment, Eli Lilly expresses contempt for the Canadian federal court system. Unfortunately, NAFTA chapter 11 enables, even invites, such arrogance and a sense of entitlement on the part of multinational corporations.

Eli Lilly's second key legal argument — that its patents were expropriated without compensation — is similarly contentious. As the Canadian government succinctly observes in its statement of defence, "Court decisions invalidating an initial patent grant do not amount to a taking of 'property', either direct or indirect: rather, they amount to determinations whether or not property rights exist at all."[16]

Patents are monopoly privileges, granted by the state, in order to encourage innovation. To qualify for patent protection, a product or invention must be useful. Eli Lilly vehemently disagrees with the Canadian courts' application of the internationally accepted "utility standard," which stipulates that an innovation must be "useful" in order to merit patent protection. Under domestic law, the court's well-reasoned decision on the validity of a patent could not be construed as an expropriation. But with a NAFTA tribunal, all bets are off.[17]

Other Notable Cases

The other measures being challenged in ongoing NAFTA chapter 11 claims include provisions under the Ontario Green Energy Act to promote the rapid adoption of renewable energies; a moratorium on offshore wind projects in Lake Ontario; the decision, based on the recommendation of a federal-provincial environmental assessment panel, to block a controversial mega-quarry in Nova Scotia; and a mixed bag of other grievances and complaints by investors who have been disappointed by policy decisions or regulatory initiatives that didn't meet their expectations.

While the high-profile Lone Pine and Eli Lilly cases, in particular, raise fundamental issues concerning the right to regulate and the rule of law in a democratic society, the sheer number of other challenges and wide variety of investor complaints underscore deeper concerns about NAFTA chapter 11 and ISDS.

Is Canada an Easy Mark?

Canada has been sued more times and faces more active claims than any other NAFTA party. Indeed, according to the latest figures on ISDS claims from the United Nations Conference on Trade and Development (UNCTAD) Canada is now the most sued developed country in the world.[18] This dubious distinction is entirely due to lawsuits 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 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,[19] the federal government's 2010 decision to pay off AbitibiBowater has unleashed a rash of new investor-state compensation claims and threats.[20]

The success rate of foreign investors in cases against Canada has been fairly high, with claimants being successful in 46% of decided claims. When looking at all concluded ISDS cases on a global basis, UNCTAD found that

approximately 31% were decided in favour of the investor, 43% in favour of the state, and the remaining 26% of cases were settled.[21]

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 2013, recourse to ISDS, a process now found in thousands of bilateral investment treaties and free trade agreements, had grown dramatically to nearly 60 new claims annually.[22]

The increase in NAFTA investment claims against Canada is part of a large global jump (57%) in investment treaty arbitrations initiated over the last five years.[23] As UNCTAD notes, in 2013, "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.[24] This trend reflects a growing awareness among foreign investors and corporate trade lawyers of NAFTA investment rights, and an increasing willingness to invoke them to contest public policy measures.

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 truth, it is a coercive tool with which multinational corporations can assail and frustrate government regulation in both developing and developed countries. ISDS has truly evolved into a private, parallel system of justice for foreign investors — to which they are resorting with increasing alacrity.

The Chilling Effect

A persistent concern about NAFTA chapter 11 in particular and ISDS in general is that the threat of corporate retaliation exerts a "chilling effect" on public policy and regulation. The risk of investment treaty litigation and sanctions, 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.

While policy chill is difficult to prove conclusively, it is evident that the threat of legal action can inhibit or discourage legitimate public policy or regulation. Multinational corporations have repeatedly invoked NAFTA chapter 11 to contest policy and regulatory proposals. Over the last two decades, certain of these contested proposals were subsequently abandoned or weakened to assuage corporate concerns.

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.[25]

Another documented example of policy chill concerns the fate of proposals for public automobile insurance in New Brunswick in 2004.[26] 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 investor-state dispute settle mechanism to gain compensation for lost profits.[27] Despite a unanimous recommendation to proceed from an all-party legislative committee, and widespread political and public support, the proposed policies never went ahead.

Currently, the Canadian federal government has proposed tough new anti-graft rules that would disqualify companies convicted of corruption or bribery anywhere in the world from receiving Canadian government contracts for up to ten years. These proposals are being vigorously attacked by multinational corporate lobbies on the grounds that they are inconsistent with international trade and investment treaty rules. A report prepared for Canada's chief big business lobby, the Canadian Council of Chief Executives, explicitly refers to the prospect of a NAFTA investor-state challenge if the new policy goes ahead.[28] While federal officials insist that the policy is fully compliant with NAFTA and other Canadian trade and investment treaties, time will tell if the policy proceeds in its current form.

These and other highly publicized examples are un-

doubtedly 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 in fear of attracting investor-state litigation. The insidious nature of policy chill underlines 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 actually undertaken.[29] The pervasive threat of investor-state challenge under NAFTA chapter 11 has warped the relationship between multinational corporations and democratically elected governments to the detriment of other social groups and the broader public interest.

Conclusion

There is a growing global backlash against ISDS. Alarmed by increasingly aggressive corporate recourse to investor-state arbitration to challenge public policy and regulatory measures, many governments around the world are seeking to extricate themselves from this anti-democratic feature of modern trade and investment treaties.

Opposition is strongest within Latin America, where Ecuador, Bolivia and Venezuela have withdrawn from the World Bank body responsible for administering investor-state arbitrations and are terminating their bilateral investment treaties. Brazil has never ratified a treaty that included ISDS, and Argentina, which still faces billions of dollars in unresolved claims from its 2001 financial crisis, is a vocal critic. South Africa intends to end the use of ISDS in its trade and investment treaties. After being hit with a series of contentious claims, India has expressed similar misgivings. Indonesia has also indicated it will let its existing treaties that include ISDS expire. The former Australian government, after a thorough independent review, officially spurned ISDS, although the newly elected conservative government has reversed that stand. Even in Europe, where ISDS was conceived in the post-colonial era, the German and French governments have indicated they would prefer that ISDS be left out of impending commercial treaties with the U.S. and Canada.

Despite a bruising experience under NAFTA chapter 11, Canada is moving in the opposite direction to much of the world and global public opinion on ISDS.

- The current federal government boasts that it has concluded or negotiated over two-dozen Foreign Investment Protection Agreements (FIPAs), including a controversial and highly imbalanced pact with China, which the federal cabinet quietly ratified in the fall of 2014.[30]
- New trade agreements inked with South Korea and the European Union include comprehensive investment protection chapters and ISDS, as does the impending Trans-Pacific Partnership Agreement.
- The federal government has pressured the provinces into agreeing to Canadian ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which will make tribunal awards even easier to enforce, in part by removing the right of domestic courts to review tribunal decisions on procedural grounds, such as conflict of interest or corruption.[31]

The inclusion of ISDS in pacts with major capital-exporting countries such as the EU, China and South Korea is especially troubling and will certainly accelerate the growth of ISDS claims against Canada. The Canada-EU Comprehensive Economic and Trade Agreement (CETA) actually contains expanded protections for investors regarding fair and equitable treatment, which is the most often–invoked article in NAFTA chapter 11 disputes, and the most successfully used in global investment disputes. The CETA also expands the grounds, beyond NAFTA, upon which foreign investors can challenge financial regulation.[32] Under NAFTA chapter 11's most-favoured nation obligation (NAFTA Article 1103), U.S. and Mexican investors will be able to take advantage of CETA's beefed-up investor protections.

Supporters of this aggressive expansion of investor rights and ISDS often point out that governments don't always lose, with respondent states prevailing in about half of cases. What they neglect to mention is that investment protection treaties and ISDS are completely one-sided. Governments can be sued, but there are no corresponding obligations for foreign investors or mechanisms to hold them — frequently wealthy multinational companies — accountable for their behaviour. In a brilliant analogy, Manuel Perez Rocha at the Institute for Policy Studies likens ISDS to, "playing soccer on half the

field. Corporations are free to sue, and nations must defend themselves at enormous cost — and the best a government can hope for is a scoreless game."[33]

Another commonly heard argument is that it would be impossible to persuade developing countries to accept ISDS if Canada and other developed countries did not fully embrace it as part of their overall trade agenda. In reality, Canadian investors have had very little success winning cases using ISDS, notably against the U.S. but also in cases involving developing countries. This is generally a good thing. High-profile cases pursued by Canadian investors abroad are bringing Canada and Canadian firms into disrepute. For example, Pacific Rim challenged the El Salvador government for its moratorium on gold mining, enacted to protect the country's scarce water, drawing global criticism. The threat from Gabriel Resources to use a Canada-Romania FIPA to sue over the Romanian government's decision to block the environmentally destructive Rosia Montana gold mine is similarly outrageous given the level of opposition to the project. There are far more appropriate options than ISDS for foreign investors to manage risk, including private and publicly-backed risk insurance.

ISDS supporters also argue that some NAFTA tribunals have ruled in favour of the state's right to regulate, proving concerns about regulatory chill are unjustified.[34] As previously noted, some NAFTA tribunals have rejected investor challenges to government regulation.[35] The Methanex ruling, in particular, has been praised even by critics of NAFTA Chapter 11 as a well-reasoned defence of the state's police powers and right to regulate.[36] The fact remains, however, that tribunals, unlike domestic courts, are not bound by the law of precedent. The basic defect in ISDS is that arbitral tribunals have complete freedom to interpret broadly worded investment protections as they see fit. And if they stray from reasonable interpretations, or concoct rationales to support their own biases or prejudices, they are completely beyond the reach of domestic courts and legislatures. This radical judicial autonomy may make sense in commercial arbitration, where both parties have provided explicit consent to submit a specific matter to dispute settlement. But it is perverse where states have unwisely provided unconditional consent to submit any matter, including those that concern public law, policy and regulation to final, binding arbitration.

We now have two decades of experience with NAFTA chapter 11. Clearly, the agreement's broadly worded investment rights, now reproduced in dozens of other Canadian treaties, give foreign investors a coercive tool to deter legitimate public interest regulation and to seek compensation when governments have the courage to proceed with regulation despite this intimidation. Democratically elected governments are being forced to pay to govern.

Canada is already one of the world's top targets under ISDS, and the number and frequency of claims are growing rapidly. The majority of these disputes deal with sensitive regulatory or policy matters. Current trends, unless checked politically and legally, will only worsen. Canadians and their elected officials should be deeply concerned. Unfortunately, in stark contrast to opinion in much of the world, there is surprisingly little political debate about the corrosive influence of NAFTA chapter 11 and ISDS on public policy and democracy in Canada. Instead, prevailing trade and investment policy is entrenching ISDS even more deeply.

As Naomi Klein argues persuasively in her latest book[37], meeting humanity's global challenges, including reining in multinational financial firms or addressing the existential threat posed by rapid climate change, will require more, and more assertive, government intervention and regulation. Extreme investor rights agreements are relics of an era when market fundamentalism — the belief in the virtues of fully liberalized markets — was the prevailing political wisdom. It is time to move on from NAFTA chapter 11 and ISDS.

About the Author

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Notes

1 For example, in a statement of concern leading experts in investment law, arbitration and regulation noted that: "awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations … that have prioritized the protection of the property of and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples." The experts, from 24 universities in nine countries, went on to say that the current international investment regime, typified by NAFTA's Chapter 11, "lacks fairness and balance, including basic requirements of openness and judicial independence." See "Public Statement on the International Investment Regime," August 31, 2010. Accessible at: http://www.osgoode.yorku.ca/public_statement/.

2 "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.

3 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.

4 Two claims against Canada were settled on undisclosed terms.

5 A win for government is a decided case or settlement that ends with no compensation to the investor, while a loss is a decided case or settlement that ends in payment to the investor.

6 The tribunal costs in the Merrill and Ring arbitration, for example, came to $959,500. Merrill and Ring v. Canada, Award, March 31, 2010, p. 107. Accessible at, http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill_archive.aspx?lang=en.

7 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.

8 For example, in the Chemtura arbitration Canada's legal costs amounted to nearly 6 million (the tribunal ordered Chemtura, which lost its case, to pay half of Canada's legal costs ($2.9 million). Crompton (Chemtura) Corp. v. Government of Canada. Award of the Arbitral Tribunal. August 2, 2010. Accessible at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-14.pdf. The U.S. federal government estimated its costs in the Grand River arbitration at $2,792,000. 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.

9 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.

10 In certain instances, such as Methanex and Chemtura, tribunals have ordered investors to cover all or part of responding governments' legal expenses.

11 See Metalclad (1996), Gallo (2006), Clayton/Bilcon (2008), and Windstream (2012).

12 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.

13 Dominique Neuman, LL.B. "Lessons learned from the contestation under NAFTA of the Fracking Moratorium in Quebec." Presentation to the National Caucus of Environmental Legislators (NCEL), Montpelier,Vermont. May 16–17, 2014.

14 Tim Granger, Chief executive, Lone Pine Resources, letter to the editor, *The Economist*, Oct. 25, 014. Accessible at: http://www.economist.com/news/letters/21627551-letters-editor.

15 "Eli Lilly and Company is a disappointed litigant. Having lost two patent cases before the Canadian courts, it now seeks to have this Tribunal … transform itself into a supranational court of appeal from reasoned, principled, and procedurally just domestic court decisions." Eli Lilly v. Canada, Government of Canada, "Statement of Defence", June 30, 2014. Paragraph 1. Accessible at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli-statement-declaration.aspx?lang=eng.

16 Eli Lilly v. Canada, Government of Canada, "Statement of Defence", June 30, 2014. Paragraph 9. Accessible at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli-statement-declaration.aspx?lang=eng.

17 The outcome is highly uncertain, especially if the investor-state panel assumes it has the authority to judge Canada's compliance with not only with the NAFTA's investment protection rules, but also to interpret the treaty's intellectual property obligations as it sees fit.

18 Canada has been sued more than any other developed country and is the sixth most sued country overall (after Argentina, Venezuela, the Czech Republic, Egypt and Ecuador). UNCTAD. *Recent Developments in Investor-State Dispute Settlement (ISDS).* April 2014. p. 8.

19 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 $US 13 million ($CAD 19.5 million at 1998 exchange rates). The cash settlement to Ethyl exceeded the total 1998 Environment Canada budget for enforcement and compliance programmes ($CAD 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.

20 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's Chapter 11.

21 UNCTAD's annual reviews do not track whether the settlements favoured the investor or the defendant state.

22 UNCTAD. *Recent Developments in Investor-State Dispute Settlement (ISDS).* April 2014. p. 1.

23 "In 2009, the number of known treaty-based investor–State dispute settlement cases filed under international investment agreements (IIAs) grew by at least 32, bringing the total number of known treaty-based cases to 357 by the end of 2009 (figure 1). Of those, 202 – or 57 per cent – were initiated during the last five years (starting 2005)." United Nations Conference on Trade and Development (UNCTAD), "Latest Developments in Investor-State Dispute Settlement," 2010, p. 2.

24 UNCTAD. *Recent Developments in Investor-State Dispute Settlement (ISDS)*. April 2014. p. 1.

25 Physicians for a Smoke-free Canada. "Packaging Phoney Intellectual Property Claims." June 2009. Accessible at: http://www.smokefree.ca/plain-packaging/documents/2009/packagingphoneyipclaims-june2009-a4.pdf.

26 Schneiderman, David. '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).

27 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.

28 Brian Stewart. "Ottawa's crackdown on foreign graft riles corporate Canada." CBC News, December 9, 2014. Link: http://www.cbc.ca/news/world/ottawa-s-crackdown-on-foreign-graft-riles-corporate-canada-1.2864622

29 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.

30 For a complete list, see Foreign Affairs, Trade and Development Canada. "Opening New Markets: Trade Negotiations and Agreements." September 2, 2014. Accessible at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/index.aspx.

31 Gus Van Harten. "Harper's Boon to the Arbitration Industry." 14 Nov 2013. *The Tyee*. Accessible at: http://www.thetyee.ca/Opinion/2013/11/14/Harper-Arbitration-Industry/.

32 See "Financial Services" in *Making Sense of the CETA: An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement*. Scott Sinclair, Stuart Trew and Hadrian Mertins-Kirkwood, eds. Canadian Centre for Policy Alternatives. September 25, 2014.

33 Manuel Pérez-Rocha. "When Corporations Sue Governments." *New York Times*. December 3, 2014. Accessible at: http://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html?partner=rss&emc=rss&_r=0.

34 See Barrie McKenna. "In free-trade deals, sovereignty rules." Globe and Mail. August 29 2014.

35 A sceptic, however, might observe that the most deferential rulings (such as Methanex and Apotex) have involved claims against the U.S. The Chemtura case, won by Canada, is an exception.

36 Howard Mann. "The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles." International Institute for Sustainable Development. August 2005. Accessible at: http://www.iisd.org/pdf/2005/commentary_methanex.pdf.

37 Naomi Klein. *This Changes Everything*. Alfred A. Knopf Canada. 2014.

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