Canadian Centre for Policy Alternatives
June 2023

Canada's options for intervening in the Keystone XL CUSMA lawsuit

A briefing paper from the Trade and Investment Research Project

Stuart Trew and Kyla Tienhaara

www.policyalternatives.ca RESEARCH ANALYSIS SOLUTIONS

CCPA
CANADIAN CENTRE for POLICY ALTERNATIVES
CENTRE CANADIEN de POLITIQUES ALTERNATIVES

CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES

ISBN 978-1-77125-646-9

This report is available free of charge at www.policyalternatives.ca.

PLEASE MAKE A DONATION...

Help us to continue to offer our publications free online.

With your support we can continue to produce high quality research—and make sure it gets into the hands of citizens, journalists, policy makers and progressive organizations. Visit www.policyalternatives.ca or call 613-563-1341 for more information.

The CCPA is an independent policy research organization. This report has been subjected to peer review and meets the research standards of the Centre.

The opinions and recommendations in this report, and any errors, are those of the authors, and do not necessarily reflect the views of the funders of this report.

UNIFOR
Local 567

ABOUT THE AUTHORS

Stuart Trew is a senior researcher with the Canadian Centre for Policy Alternatives, where he directs the Trade and Investment Research Project.

Kyla Tienhaara is Canada Research Chair in Economy and Environment and an assistant professor in the School of Environmental Studies and the Department of Global Development Studies at Queen's University.

ACKNOWLEDGMENTS

The authors thank Scott Sinclair, Melissa Blue Sky, and Hélionor De Anzizu for their comments on an earlier draft of this report. Any remaining errors are those of the authors.

Canada's options for intervening in the Keystone XL CUSMA lawsuit

Canada's options for intervening in the Keystone XL CUSMA lawsuit

A briefing paper from the
Trade and Investment Research Project

Summary

- TC Energy's $15 billion (USD) Canada-U.S.-Mexico Agreement (CUSMA) lawsuit against the United States—for the Biden administration's revocation of the Keystone XL pipeline permit—has attracted international condemnation while fuelling a backlash to investor-state dispute settlement (ISDS). Should the Canadian company prevail, it could add to the chilling effect of ISDS on global efforts to address the climate emergency.
- In its initial defence, the U.S. has proposed a novel and plausible interpretation of the CUSMA investment chapter. The U.S. claims that the treaty's three-year extension of NAFTA's ISDS rights for "legacy" investors, such as TC Energy, does not permit claims arising from government measures taken after July 2020, when NAFTA ceased

to exist. The executive order revoking TC Energy's permit for the Keystone XL project was signed in January 2021.

- At risk of annoying TC Energy, Canada should intervene in this CUSMA legacy ISDS dispute in support of the U.S. argument, which contests the arbitral tribunal's jurisdiction to hear the case. Canada could do this through a non-party submission to the tribunal backing the U.S. position, or it could seek a binding interpretation of the treaty's legacy provisions in Annex 14-C from the CUSMA Free Trade Commission. Ideally, Canada would do both.
- Canada and Mexico each face at least one multi-billion-dollar CUSMA legacy dispute that could be affected by the TC Energy tribunal's decision on jurisdiction. Earlier this year, U.S. investor Ruby River Capital filed a $20 billion (USD) claim against Canada for the rejection, in 2022, of a proposed LNG project in Quebec. If the U.S. interpretation of Annex 14-C is vindicated, this Canadian case, and an equally controversial $3 billion (USD) CUSMA legacy case against Mexico, could be thrown out.

Investor-state dispute settlement and the climate emergency

In January 2016, TransCanada initiated a $15 billion NAFTA lawsuit against the Obama administration for denying a key permit for the Keystone XL project. The case underlined the risk of investor-state dispute settlement (ISDS) to climate action. The Calgary-based firm had invested significantly less than $15 billion in the U.S. section of its pipeline expansion, which was hugely unpopular due to regular leaks in the existing north-south line and mass opposition to new tar sands infrastructure. It should have seen the writing on the wall. Yet NAFTA offered TransCanada (now TC Energy) a chance to recuperate its potential future profits from Keystone XL.

The idea that an investor's right to profit—even from socially or environmentally harmful activities—should trump our democratic right to set responsible climate policy is offensive. Acknowledging the problem, Canada, the U.S., and Mexico significantly constrained ISDS in the renegotiated NAFTA, dubbed the Canada-U.S.-Mexico Agreement (CUSMA) by the Trudeau government, and even removed it for Canadian firms in the U.S. and vice versa. According to Chrystia Freeland, Canada's deputy prime minister, this

outcome "strengthened our government's right to regulate in the public interest, to protect public health and the environment."

Since TC Energy's first claim against the U.S., climate-related ISDS cases have cropped up in countries around the world, including Canada. In 2018, Westmoreland Coal, a U.S. mining firm, challenged Alberta's plan to phase out coal-fired power by 2030. While its initial case was thrown out on jurisdictional grounds, Westmoreland recently filed another claim. A national coal phase out in the Netherlands sparked separate ISDS claims from two investors demanding over €1 billion ($1.45 billion) each.

Last year, Italy was instructed to pay €140 million (over $200 million) plus interest and costs to compensate a British oil and gas firm over a ban on offshore drilling near the Italian coastline. Most recently, Ruby River Capital filed an enormous $20 billion (USD) claim against Canada after both the provincial and federal government rejected the investor's proposed LNG terminal in Quebec due to concerns about increased greenhouse gas emissions and potential impacts on the marine environment.

Although it is difficult to prove that investor threats to launch ISDS cases have chilled climate policy efforts, there is some preliminary evidence to this effect. In 2017, the Canadian oil firm Vermillion threatened the French government with an ISDS case over a fossil fuel phase-out plan. The French law was subsequently weakened. It has also been reported that both Denmark, one of the initiators of the Beyond Oil and Gas Alliance, and New Zealand designed their oil and gas phase-out plans, at least in part, to minimize the impact on leaseholders that are protected by investment treaties.

Last year, the Intergovernmental Panel on Climate Change (IPCC) acknowledged that ISDS poses a huge obstacle to effective climate action. Many governments are waking up to this and are trying to extricate themselves from investment treaties. For example, the European Union is seeking to withdraw from the Energy Charter Treaty (ECT), the largest investment treaty in the world, because it "is not aligned with the Paris Agreement, the EU Climate Law or the objectives of the European Green Deal."

TC Energy v. the United States, Take Two

In 2017, shortly after assuming the U.S. presidency, Donald Trump invited TransCanada "to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline."[1] He did so on condition that the firm drop its $15-billion NAFTA

lawsuit related to the Obama administration's cancellation of the project, which TransCanada announced it had done in February 2017.[2]

A presidential permit for Keystone XL was issued two years later, on March 29, 2019. However, numerous court cases, powerful opposition from Indigenous groups and environmental activists, and other obstacles continued to delay construction. When Joe Biden was sworn in as U.S. president in January 2021, the Democratic administration swiftly rescinded TransCanada's (now TC Energy) permit once again. It was the final nail in the coffin for the project.

Although NAFTA was, by this point, also dead, and the replacement, CUSMA, eliminated recourse to ISDS for Canadian firms in the U.S. and vice versa, the new deal included a two-page annex in the investment chapter related to "legacy" investments. Annex 14-C of the CUSMA appeared to allow ISDS claims arising from alleged breaches of NAFTA's investment rules for three years after the older treaty expired in July 2020.

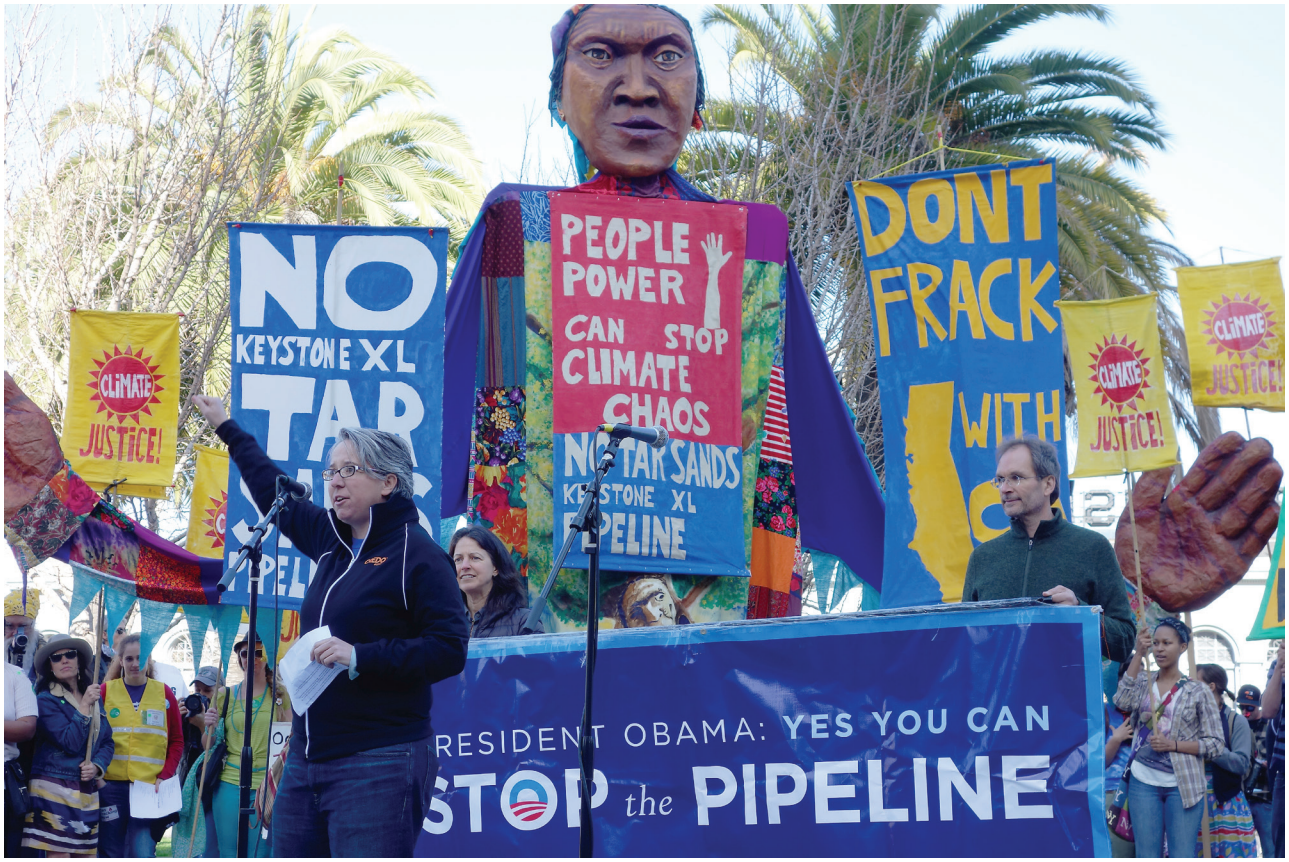
Most observers believed the legacy annex acted like the sunset clauses typically found in investment treaties. These clauses kick in when a treaty is terminated to extend investment protections, including recourse to ISDS, for a further 10 to 20 years for investments and investors established prior to termination. These clauses are hugely problematic and are complicating the EU's efforts to exit the ECT.

In comparison, the three-year "legacy period" in the CUSMA is relatively short and just came to an end. And yet, by our count (see table below), 15 investors took advantage of it to launch ISDS cases before the clock ran out on claims based on the NAFTA investment chapter rules.

While most of the legacy cases involve alleged government breaches of NAFTA's investment rules *prior* to July 2020, in at least five cases (shaded rows in the table) the investor alleges a *post-NAFTA* violation. TC Energy's re-launched ISDS case against the U.S. is one of them, as the Biden administration revoked the permit for the Keystone XL project in January 2021, six months after NAFTA ceased to exist.

Contested legacy: the surprising but plausible U.S. defence

It's possible we all got it wrong: TC Energy, Ruby River Capital, Access Business Group, and the dozens of law firms that, for the last three years, encouraged investors to get new ISDS lawsuits filed (mostly, it appears,



A 2013 protest against the Keystone XL pipeline in San Francisco, California
Steve Rhodes, Flickr Creative Commons

against Mexico) before the effective April 30, 2023 cutoff date.[3] It's possible the CUSMA legacy annex was not a three-year sunset clause after all, but an orderly way to resolve prior disputes, stemming from measures taken while NAFTA was still in effect, under NAFTA's old investment rules.

At least this is the crux of the U.S. defence against TC Energy's second ISDS case against the Keystone XL cancellation. Though the legal arguments behind this assertion are complex—and hotly contested by TC Energy's lawyers—they strike us as an elegant and plausible reading of Annex 14-C of the CUSMA investment chapter. Before breaking down those arguments, we should briefly explain how the TC Energy arbitral tribunal works.

On July 2, 2021, TC Energy sent notice to the U.S. government of its intent to launch a CUSMA legacy ISDS case related to the revocation of the permit to construct the Keystone XL pipeline extension. This triggered a consultation period that included meetings with the Biden administration in September and October of that year.

According to the firm, in its November 22, 2021 notice of arbitration, these discussions did not settle the dispute. The case was registered at the International Centre for Settlement of Investment Disputes (ICSID), the most popular venue for deciding ISDS claims, a month later. A tribunal was established to hear the case in September 2022 and held its first hearing in early December of that year, releasing a first procedural order outlining rules and a schedule of future deadlines 10 days later.

As is common in investor-state arbitration, the U.S. (the respondent) requested that the tribunal split the case (*bifurcation* in ISDS parlance) to consider the jurisdictional objections separately before dealing with the merits of TC Energy's claims. In a second procedural order released on April 13, the tribunal agreed to this approach, stating that the U.S. arguments were "*prima facie* serious" (not frivolous) and could be settled without delving too far into the merits of the case.

As the tribunal summarizes in its second procedural order, the U.S. jurisdictional objection to the TC Energy case is based on two "uncontroversial principles of customary international law" agreed on by both the claimant (TC Energy) and respondent in this case.

The first is that when a treaty is terminated for any reason, as NAFTA was in July 2020, it releases the parties from any obligations in the treaty. Any derogations from this rule must be clear from an "ordinary reading" of the treaty. The second principle is that an act of state cannot breach an international obligation unless the state is bound by that obligation when the act occurs.

The U.S. argues that, had the CUSMA parties wanted to simply extend NAFTA's investment rules and ISDS procedures for another three years, they would have done so through a boilerplate sunset clause, which is typical in Mexican, Canadian, and U.S. investment treaties. For example, the Canada–Tanzania Foreign Investment Protection Agreement states (Article 40.2):

> In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 40 inclusive, as well as paragraph 2 of this Article and Article 42 (Amendment of the Agreement), shall remain in force for a period of fifteen years.

It is clear from a plain language reading of this article that essentially all of the obligations in the investment treaty remain binding on Tanzania and Canada for 15 years in the event that either party terminates the agreement.

In contrast, the U.S. argues in its TC Energy defence that the three-year extension in Annex 14-C of the CUSMA merely ensures that ISDS cases

involving alleged infractions of NAFTA, *while it was binding on the North American parties*, could conclude following the termination of the treaty in July 2020. This, the U.S. adds, would be consistent with articles 1116 and 1117 of the NAFTA investment chapter, which state that an investor has a maximum of three years from the point it became aware of a potential NAFTA infraction to file a claim.

TC Energy vigorously opposes this reading of the CUSMA legacy annex. If it were true that NAFTA's investment protections and ISDS were only available to dispute government actions prior to July 2020, the company asks, why did no one mention this sooner? Where, they add, is the evidence that the negotiating parties agree with this U.S. interpretation?

As the tribunal recognized, this is a serious question from TC Energy in response to a serious challenge from the U.S. How the tribunal decides on jurisdiction in the Keystone XL case will have implications for several other CUSMA legacy cases involving claims for compensation exceeding $23 billion USD.

This is why Canada's next move, and that of Mexico, is so important.

Canada has a role to play in the TC Energy dispute

Though the TC Energy dispute pits a Canadian company against the U.S. state, it does not follow that it is in Canada's interest for TC Energy to prevail. Indeed, Canada has previously intervened in ISDS cases in support of foreign states defending themselves against harmful claims from Canadian firms (e.g., *Eco Oro v. Colombia*). Likewise, the U.S. and Mexico intervened in support of Canada in a U.S. investor's highly problematic NAFTA lawsuit against an environmental assessment of their rejected quarry in Nova Scotia (*Clayton/Bilcon v. Canada*).

There are options available to Canada to attempt to influence the tribunal one way or another in TC Energy's Keystone XL case. We think Canada should make use of those options to support the U.S. interpretation of the CUSMA "legacy" provisions. Doing so would show Canada's support for democratic decision-making and climate action in the face of oil industry bullying.

As we explain below, the most effective route, though it is not foolproof, may be to work with Mexico and the U.S. on an official interpretation of the Annex 14-C from the CUSMA Free Trade Commission. The benefit of this option is that a Free Trade Commission interpretation should be binding on the TC Energy tribunal and others hearing cases involving allegations

Emergency crews work to clean up a large spill of crude oil following the leak at the Keystone pipeline operated by TC Energy in rural Washington County, Kansas on December 9, 2022. REUTERS/Drone Base

of post-NAFTA infraction. Alternatively, or preferably as well, Canada could corroborate the U.S. defence in a non-party submission to the TC Energy tribunal due this September.

Option 1: Canada, Mexico, and the U.S. issue a CUSMA Free Trade Commission interpretation of the Chapter 14 "legacy" provisions that would be binding on the TC Energy tribunal

In July 2001, in response to a barrage of controversial ISDS cases involving environmental policies, the NAFTA Free Trade Commission released "notes of interpretation" of certain provisions of the treaty's investment chapter. In part, this tri-national effort attempted to clarify and limit the expansive meaning of "fair and equitable treatment" (FET) that tribunals were reading

into the treaty when assessing whether a government measure had violated an investor's minimum standard of treatment (NAFTA Article 1105).

While this interpretative guidance from the NAFTA Commission was meant to be binding on future tribunals (NAFTA Article 1131), some sidestepped it. For example, the tribunal in *Merrill & Ring vs. Canada* argued that the minimum standard of treatment has evolved to the point that "fair and equitable treatment has become a part of customary law." Therefore, the tribunal asserted, efforts to limit the treatment Article 1105 affords by expressly referencing customary international law are not meaningful, since the latter now "protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness."

Like NAFTA, Article 30.2.2(f) of the updated CUSMA says that Free Trade Commission interpretations are binding on ISDS tribunals. Though there is still a risk the TC Energy arbitrators could freelance their way out of a joint interpretive statement, this route is still attractive. As well as clarifying the proper interpretation of the treaty, a Free Trade Commission statement could neutralize problematic multi-billion-dollar "legacy" claims in all three countries, involving alleged NAFTA infractions that postdate the agreement (see Table).

Any of the three CUSMA parties could pursue this route by putting the Keystone XL NAFTA case on the agenda of the Free Trade Commission. It's possible they are already discussing it. While the commission will meet again in July, there are no limits on the number of times North American trade ministers can meet under the auspices of the commission. An interpretive declaration with respect to the proper reading of the legacy annex could be settled without too much debate, as long as the parties agree on the matter.

Option 2: Canada backs the U.S. position on jurisdiction in a submission to the TC Energy tribunal

Both the NAFTA and CUSMA investment chapters allow non-disputing parties to file submissions to ISDS tribunals, at the jurisdiction and the merits stage, regarding interpretation of the treaty (NAFTA Art. 1128; CUSMA Art. 14.D.7). Canada, the U.S., and Mexico regularly use this provision to express their shared understanding of how complicated and contested treaty provisions, such as NAFTA's minimum standard of treatment, should be read.

For example, both Mexico and the U.S. intervened in support of Canada in Lone Pine's failed NAFTA investment lawsuit against Quebec's moratorium on oil and gas developments in the St. Lawrence River. In non-party submissions,

they concurred with Canada with respect to the appropriate standards and tests the tribunal must apply to determine whether Lone Pine's fracking interests constituted an investment and, if so, whether the fracking moratorium amounted to a direct or indirect expropriation of that investment.

The tribunal hearing the TC Energy case is under no obligation to consider non-party submissions in making its decision on jurisdiction. But it seems that it would be difficult for arbitrators to ignore a statement from Canada, and perhaps also Mexico, agreeing with the U.S. view. In combination with a Free Trade Commission interpretive statement on the legacy annex, non-party submissions backing the U.S. position on jurisdiction could prove decisive.

There is an alternative scenario in which Canada intervenes in support of TC Energy's interpretation of the legacy annex, but this would simply annoy the Biden administration and is, therefore, highly unlikely. Canada might also choose to do nothing, but given its activism over NAFTA's lifespan on the interpretation of the treaty's investment chapter by ISDS tribunals, this is also unlikely. Abstaining on such an important legal question regarding the proper interpretation of the CUSMA would be a copout—one that directly helps TC Energy.

As mentioned above, Canada has interjected as a non-disputing party in a large share of cases against the U.S. and Mexico. Canada is very likely to interject later, at the merits stage, on the interpretation of Article 1105 (minimum standard of treatment), since TC Energy claims the cancellation of Keystone XL violated its right to fair and equitable treatment under the NAFTA standard.

The TC Energy case was the first, but it is not the only CUSMA legacy claim involving an alleged post-NAFTA infraction. Due to the novelty of the U.S. argument and its fundamental importance to the operation of the CUSMA, a no-show from Canada at this stage of the arbitration would signal to the tribunal that the U.S. position on the "legacy" provisions is not credible. It would also demonstrate that the government is more interested in bowing to the interests of the oil patch than in the correct interpretation of treaties.

Concluding remarks

The decision to remove ISDS from the Canada-U.S. trading relationship was a wise one. ISDS cases, and even threats by investors to launch them, pose a substantial obstacle to achieving public policy goals. We need swift and bold action to address the climate crisis and we cannot afford to have

governments wasting time and public funds fighting off disgruntled investors that are upset over potential lost profits.

The Keystone XL case is a clear example of a company wanting to be compensated for making a risky bet—that the Trump administration would stay in power long enough for the pipeline to be completed. This bet didn't play out. A win for TC Energy would send a devastating message to countries around the world, most of which cannot afford to finance the transition to clean energy while also paying off the fossil fuel industry.

If the ISDS tribunal agrees with the U.S. jurisdictional objection, based perhaps in part on non-party submissions from Canada and Mexico or on a binding interpretation from the Free Trade Commission, it won't be a panacea. Unfortunately, governments will still be bound by thousands of investment treaties with much stricter sunset clauses.

But throwing out TC Energy's case early, at the jurisdictional stage, would ensure that at least one, and possibly more, companies are not unjustly rewarded for challenging decisions taken in the public interest after NAFTA ceased to exist. Canada has an important role to play in this regard and we hope that, in this instance, the government will prioritize defending democracy and the planet over appeasing the oil and gas industry.

Further reading

Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets, by Kyla Tienhaara and Lorenzo Cotula, International Institute for Environment and Development, 2020.

The Rise and Demise of NAFTA Chapter 11, by Scott Sinclair, Canadian Centre for Policy Alternatives, April 2021.

Investor-State Disputes Threaten the Global Green Energy Transition, by Kyla Tienhaara, Rachel Thrasher, B. Alexander Simmons, and Kevin P. Gallagher, *Science*, May 2022, Vol 376, Issue 6594, pp. 701-703.

NAFTA's Shadow of Obstruction: Investor rights in the expired North American Free Trade Agreement continue to undermine democratic decision-making and climate policy in Mexico, Canada, and the United States, by Stuart Trew, Manuel Pérez-Rocha, and Karen Hansen-Kuhn, a joint publication of the Canadian Centre for Policy Alternatives, Institute for Policy Studies, Institute for Agriculture and Trade Policy, and Rosa Luxemburg Stiftung–New York, February 2023.

TABLE 1 CUSMA "legacy" claims against Canada, Mexico, and the U.S., July 2020-June 2023

Complainant	Respondent	Request for arbitration	Status	Compensation sought	Date of alleged NAFTA violation
Access Business Group	Mexico	Not known (registered by ICSID May 15, 2023)	Active	$3 billion USD	July 1, 2022
Sepadeve International	Mexico	Not known (registered by ICSID Mar. 10, 2023)	Active	Not known	Events post Dec. 2017
Ruby River Capital	Canada	Feb. 17, 2023	Active	$20 billion USD	July 21, 2021
Goldgroup Resources	Mexico	Feb. 13, 2023	Active	$100 million USD	Events leading up to Apr. 30, 2021
Westmoreland Coal Company	Canada	Oct. 11, 2022	Active	$470 million CAD	Nov. 24, 2016
Amerra Capital Mgmt LLC and others	Mexico	Aug. 3, 2022	Active	Not known	Events leading up to Apr.-May 2022
Doups Holdings LLC	Mexico	Not known (registered by ICSID Sept. 14, 2022)	Active	Not known	Events post June 12, 2019
TC Energy and TransCanada Pipelines Ltd.	United States	Nov. 22, 2021	Active	$15 billion	Jan. 25, 2021
Talos Energy Inc.	Mexico	NA (notice of intent Sept. 3, 2021)	Pending	Not known	Events leading up to July 2021
Margarita Jenkins, Maria Elodia Jenkins and Juan Carlos Jenkins	Mexico	NA (notice of intent July 19, 2021)	Pending	Not known	Events leading up to June 29, 2021
Windstream Energy LLC	Canada	Not known (first procedural order from UNCITRAL Dec. 21, 2021)	Active	$284.7–333 million CAD	Feb. 20, 2018
L1bre Holding LLC	Mexico	Not known (registered by ICSID Nov. 15, 2021)	Active	Not known	Not known
Finley Resources Inc., MWS Management Inc. & Prize Permanent Holdings LLC	Mexico	Mar. 25, 2021	Active	$100 million	Events post Oct. 4, 2018
First Majestic	Mexico	Mar. 2, 2021	Active	$500 million	Events leading up to and including Jan. 2020
Koch Industries Inc. and Koch Supply & Trading LP	Canada	Dec. 7, 2020	Active	$30 million	July 3, 2018

Notes For consistency, and to accurately capture "legacy" cases initiated after July 31, 2020, we have ordered the cases by date of request for arbitration. For pending cases, we have marked NA in this field (not applicable) and include the date for the notice of dispute where this is known. Cases involving alleged post-NAFTA (post-July 2020) infractions are shaded. Where a case alleges NAFTA violations for both pre- and post-NAFTA actions by government, regulators, or the courts (e.g., where a pattern of behaviour versus a single post-NAFTA incident is being disputed), we have not included the case in our list of expressly post-NAFTA cases that could be affected by the jurisdictional decision in TC Energy v. the United States.

Source World Bank ICSID database; Investment Arbitration Reporter; Italaw ISDS database; Government of Mexico; other news sources.

Annex

The CUSMA "legacy" provisions
of the investment chapter (Chapter 14)

ANNEX 14-C
LEGACY INVESTMENT CLAIMS AND PENDING CLAIMS

1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

(a) Section A of Chapter 11 (Investment) of NAFTA 1994;

(b) Article 1503(2) (State Enterprises) of NAFTA 1994; and

(c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.[4,5]

2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;

(b) Article II of the New York Convention for an "agreement in writing"; and

(c) Article I of the Inter-American Convention for an "agreement".

3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

5. For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.

6. For the purposes of this Annex:

(a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;

(b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and

(c) "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions).

Notes

1 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, January 24, 2017.

2 John T. Bennett, March 22, 2017, "Trump Boasts of Forcing Canadian Firm to Drop Keystone Lawsuit," Roll Call.

3 CUSMA Annex 14-C extends most of NAFTA's investment rules and recourse to ISDS for cases launched before June 30, 2023. However, a 90-day notification requirement in NAFTA Chapter 11 still holds, meaning that firms would have needed to send an official notice of intent to launch CUSMA/NAFTA arbitration to the respondent state by April 30, 2023.

4 For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.

5 Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
CENTRE CANADIEN
de POLITIQUES ALTERNATIVES