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A State's Right to Regulate versus Favouring Foreign Investment: Analyzing the Investor-State Dispute Settlement Mechanism in NAFTA

By

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Acknowledgments

Part of this thesis was written at thirty-five thousand feet.

I'd like to thank my mother, father, and two sisters for their support, I could not have done this without you. Thank you for believing in me.

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Abstract

<u>Context and Problem</u>: With the rise of a new wave of populism and anti-globalization sentiment, Investor-State Dispute Settlement (ISDS), including Chapter Eleven of the *North American Free Trade Agreement*, has become the subject of controversy, mainly on the basis that it creates a chilling effect for states, while jeopardizing their sovereignty and right to regulate in matters of public importance.

<u>Objectives</u>: This research aims to answer the following question: Is there reason to worry about whether the adherence to an ISDS mechanism jeopardizes state sovereignty by inhibiting local governments from regulating on their territory? The purpose of my research is to examine international arbitration clauses, a developing standard in international law, in the context of the North American Free Trade Agreement. The interests of this research lie primarily in the protections afforded to multinational firms – firms that enter a market through foreign direct investment. These firms are often bound by investment agreements and international laws and conventions, whereas local firms are bound by national laws. Therefore, there is a perceived discrimination between national firms and foreign firms. In other words, such arbitration clauses extend the possibility to foreign firms to work outside of a country's national legal system. The primary focus of this research is to identify whether there is a reason for Canada to be concerned with the skepticism presented in this document, in relation to its adherence to the North American Free Trade Agreement's investment protection mechanisms.

<u>Methodology</u>: Three arbitral rewards exclusively involving foreign investment in Canada, under the *North American Free Trade Agreement* will be analyzed. The three awards chosen will involve Canada as the defending party, in a situation where the Government was unable to successfully defend its claims. In order to analyze these documents, triangulation will be used to bolster credibility of results. The first methodology used, the Traditional Method in International Law will enable the analysis of international investment instruments in order to understand the activities are covered by each instrument. Second, these instruments will be assessed to

understand whether the criteria of legality of each normative instrument will be used is present, and to what extent the rules found within are present in the North American Free Trade Agreement, the focus of the research. A second methodology, the Critical Discourse Method will be used, in order to analyze the discourses of arbitrators, politicians and scholars in regard to the arbitral awards in question.

<u>Findings</u>: Despite the criticism, the damages and settlement amounts under the *North American Free Trade Agreement* are small given the benefits of the agreement as a whole. However, the cost of professional legal fees and arbitration remain high. Therefore, an argument can be made supporting the skepticism on the basis of the three cases analyzed, just as much as a counterargument can be made. The argument justifying the skepticism involves the idea that states have created non-discriminatory laws in areas of public policy, namely in environmental protection, but have nonetheless been found to be in breach of their obligations under the agreement. On the other hand, the three cases demonstrate that the Tribunal is aware of the need to legislate in certain areas, but that in any case, stable and predictable legislation is paramount in the protection international investment agreements. Finally, a state's right to legislate is not mutually incompatible with ISDS mechanisms, but resources are required in order to ensure compliance with any international agreement.

<u>Research Limitations</u>: The methodologies used are susceptible to bias. A bias may exist in the way the analysis is conducted since cultural and political bias are often present in qualitative research. Furthermore, the methodological framework selected for the purpose of this thesis is related to the researcher's previous background. Having completed two law degrees, and thus relying on a bi-jurisdictional training, with a focus on international law, as well as studies at the Masters' level in International Business Management, the study will evidently present the findings through a legal and international business-oriented perspective. A selection bias may equally exist in the selection of the cases used.

Keywords

Chapter Eleven, Disputes, Expropriation, International Arbitration, International Business, International Law, Investor-State Arbitration, Investor-State Dispute Settlement, ISDS, Minimum Standard of Treatment, Most-Favoured Nation, NAFTA, National Treatment, North American Free Trade Agreement

1. INTRODUCTION

As we move forward into an age where global trade and investment increase at an exponential level, an age characterized by rapid change, and the corresponding fear of change, anti-globalization sentiments persevere. With the rise of populism, attracting voters in nearly every corner of the western world, globalization is facing numerous challenges. With paradigm shifts, and a new skepticism of the new intertwined perspective of global trade and investment, turning points in democracy, including Brexit, Britain's Exit from the European Union, or the beginning of the Trump Era, the election of an anti-globalization, "America-first" president of the United States, the very fabric of international trade and its survival is being put to a perilous test.

One of the areas where anti-globalization pundits have been particularly vocal in their dissent has been Investor-State Dispute Settlement (ISDS). ISDS is a mechanism often found in Preferential Trade Agreements and International Investment Agreements that allows foreign firms to sue the state outside of the domestic legal system. Critics are concerned that ISDS gives foreign firms an unfair advantage over domestic firms and jeopardizes a government's sovereignty by limiting its ability to regulate its own country.

In this thesis, we conduct an in-depth analysis of ISDS and its ability to curtail a country's regulatory autonomy. In particular, we shed light on the importance of the investor-state dispute mechanisms, which take the form of arbitration, and their objective of creating a stable environment in which private firms, who are under no obligation to do so, invest, potentially benefitting a local economy, while interconnecting smaller economies to much larger global one.

1.1. Research Focus

There is a growing literature that points out that ISDS can be a useful way to reduce the risk for foreign firms. Authors including Andrew Newcombe and Lluís Paradell (2009) have explored this topic extensively[1]. First, ISDS creates a forum where foreign firms entering a market can submit disputes in the event where they believe government action discriminates against foreign companies, often in favour of their domestic counterparts. In other words, the mechanism attempts to create a balance of state rights and foreign investment rights, by placing foreign firms on a more equal footing to their domestic counterparts, that is, where foreign firms receive *national treatment*.

Critics are concerned, however, that foreign firms are able to abuse the ISDS system by forcing governments to weaken their health and environmental regulations. They have buttressed their arguments with a number of high-profile examples. In 2012, Australia introduced generic cigarette packaging. After moving their headquarters from Australia to Hong Kong, a state that currently has an investment agreement with Australia, Philip Morris, a large tobacco multinational, submitted a dispute involving the Australian government for enacting laws restricting marketing on cigarette packages, using the World Trade Organization (WTO) as their main forum. Although the Australian government was successful in their defense, this demonstrates how large multinationals like Philip Morris try to use arbitration as a way of manipulating governments and attempting to overturn national law, even in sensitive issues such as public health, adding validity to the current sentiments of skepticism[2] among scholars and the general public that the thesis based on this document intends to explore (Miles & Geller, 2017; Spooner & Leong, 2016).

These critics have not been confined to traditional globalization critics. On 25 October, 2017, 230 Law and Economics professors signed an open letter to United States President, Donald Trump, urging him to remove the ISDS provision from the North American Free Trade Agreement,

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[1] Namely in their 2009 work, *Law and Practice of Investment Treaties: Standards of Treatment.*

[2] The Merriam-Webster Dictionary defines Skepticism as "a sceptical attitude; doubt as to the truth of something". Attitude is defined as "a settled way of thinking or feeling about something". These definitions are important as they establish the notion that skepticism is in fact a subjective notion, and as such presents a limitation in the research.

and to ensure that any future Investment Agreement where the United States is a party be devoid of such a mechanism. The 230 scholars suggest that:

> [ISDS] grants foreign corporations and investors rights to skirt domestic courts and instead initiate proceedings against sovereign governments before tribunals [made up] of […] private-sector lawyers. […] Foreign investors can demand taxpayer compensation for laws, court rulings and other government actions that the investors claim violate loosely-defined rights provided in a trade agreement or investment treaty. The merits of those rulings are not subject to appeal, but are fully enforceable against […] government […] in [domestic] courts (Stiglitz, Sachs, & Reich, 2017).

This research document aims to answer the following question: Is there any evidence that ISDS mechanism jeopardizes state sovereignty by inhibiting local governments from regulating on their territory? The purpose of this document is to examine international arbitration clauses, a developing standard in international law, namely in bilateral and multilateral investment agreements (Franck, 2005). The interests of this research lie primarily in the protections afforded to multinational firms – firms that enter a market through foreign direct investment. These firms are often bound by investment agreements and international laws and conventions, whereas local firms are bound by national laws. In other words, such arbitration clauses extend the possibility to foreign firms to work outside of a country's national legal *system (*De Mestral et al., 2017; Franck, 2005). The primary focus of this research is to identify whether there is a reason for Canada to be concerned with this apparent discrimination, in relation to its adherence to the North American Free Trade Agreement's investment protection mechanisms.

This question is highly pertinent today as globalization continues to take its toll; this is characterized by the large increase in the number of investment agreements concluded between countries, and supranational organizations, such as the European Union (Van Duzer, 2016). Furthermore, the research topic is a relatively new one – presently, there is not an abundance of research surrounding this topic (Myers, 2013), presenting an opportunity for the researcher to contribute to the topic.

Moreover, recently, President Donald Trump vocalized his objection to the North American Free Trade Agreement, one of the largest investment and trade agreements ever concluded. One point of contention is the fact that corporations who submit disputes are not subject to U.S. law, and do not use U.S. courts as a means of resolution instead, independent international arbitrators are appointed. Prime Minister Justin Trudeau, alongside Chrystia Freeland, Minister of Foreign Affairs, contend that an independent arbitration panel assures fairness and stability in investment, whereas U.S. Courts are likely to veer towards favouring U.S. firms (since domestic laws can be drafted by Government, and are then in turn enforced by the courts). In order to avoid such events, International Investment Agreements (IIA) establish an international framework, in order to attempt to protect foreign firms. However, this creates a situation where foreign firms subtract themselves from national law when entering a market through FDI. As trade globalization occurs, the number of IIAs, as well as the criticisms associated with this phenomenon are continually expanding (Frisk, 2017; Parkin, 2017; Rabson, 2017; VanDuzer, 2016).

1.2. Thesis Objectives: Filling A Research Gap

The main gap in this research is the limited number of studies that have analyzed how the outcome of specific cases confirm or reject the criticism and perception of investment agreements. Scholars speak of the fact that the number of cases has gone up exponentially (Franck, 2005 ; Newcombe & Paradell, 2009), and that international arbitration is becoming of great importance (Gertz, 2017), but there has been little empirical work investigating if ISDS curtails a country's ability to implement regulatory changes.

Our analysis also contributes to a sparse but growing literature that analyzes the inequalities between national firms versus foreign firms in the framework of bilateral or multilateral investor agreements (Baldwin, 2016). The issue of discrimination, which is often discussed by the authors pertains only to the perceived discrimination of foreign firms (Franck, 2005). Conversely, most authors only briefly mention how foreign firms are in a position to abuse their power (e.g. Kurtz, 2009; Bronckers, 2015). No author mentions the effects of this abuse on smaller local competitors, instead, the authors focus on the *likelihood* of abuse and the incidence it *may* have on governments (A. Newcombe, 2017; A. P. Newcombe & Paradell, 2009).

To conclude, although the topic in itself, and the numerous criticisms have been discussed in the literature, few studies have focused on proving or ascertaining whether these criticisms are justified, and as such, a research gap exists that ought to be filled, enabling the researcher to uncover a new phenomenon and contribute to scholarly research in the field. (Garcia & Gluesing, 2013). Although many criticisms will be raised primarily through the literature review, this thesis will focus on the concerns of skeptics in regard to the effects of ISDS on government sovereignty and whether ISDS hinders a state's right to regulate within their territory.

1.3. Thesis Structure

This thesis focuses on whether the current critiques and skepticism surrounding ISDS are justified by focusing on the North-American context, and more specifically, the Canadian context (under the North American Free Trade Agreement) in order to answer this question.

A literature review will be conducted in order to identify the research question. The primary goal of the literature review is to provide a basis to answer the question, whilst ensuring that the previous research on the matter benefits the topic at hand.

Based on the analysis of this literature review, two research methodologies will be introduced. This methodology will be primarily focused on the analysis of legal texts and the analysis of discourses. This will enable the identification and analysis of substantive norms found in the law, as well as a more subjective analysis of the textualized discourses of international arbitrations and politicians amongst others.

An analysis of three cases focused on the *North American Free Trade Agreement,* where Canada has been unsuccessful in defending their claims, will be undertaken. After the analysis, conclusions will be drawn on the matter, and suggestions for further research will be presented.

The objectives will be divided into several sections. After this introductory section, the literature review will be presented in the second chapter. The third section will be dedicated to outlining the methodological framework, as well as the data collection process. Section four will present the analysis. Section five will discuss the results, the implications, limitations, future research, and the contribution that this thesis will set forth. Chapter six will conclude the thesis.

2. LITERATURE REVIEW

This literature review will be divided into several sub-sections. First, the search protocol will be presented, in order to assist future researchers in replicating and verifying the sources used. Second, the selection rationale will be presented. Third, a summary of the literature will be presented.

2.1. Search Protocol

I began my research by running a Google search on specific terms such as *Most Favoured Nation*, *Fair and Equitable Treatment*, N*ational Treatment*, and *Investor-State Dispute Settlement* in order to gain some knowledge on my main area of focus. As a second step, I used Google Scholar to focus my search on peer-reviewed scholarly articles. My Google Scholar search produced numerous results including many from legal databases such as HeinOnline and LexisNexis QuickLaw. International legal arbitration databases, such as ITALaw were identified in order to examine the arbitral awards in question. Numerous scholarly articles from International Business and Trade Journals as well as journals in International Law were also detected.

Several days after my initial search, I met with Jean-Michel Marcoux, a Post-Doctoral Researcher from McGill University who specializes in policy on international trade and in investment. Marcoux suggested research articles and other texts by Andrew Newcombe, an associate professor at the University of Victoria whose primary focus of research is focused on Investment Treaty Arbitration and International Investment Law. Newcombe co-authored a text, *Law and Practice of Investment Treaties: Standards of Treatment* which I have included in my literature review.

Furthermore, press releases and news articles sourced primarily from Canadian and American news agencies will be used in order to examine the criticisms of the public. Sources such as the Canadian Press, the Canadian Broadcasting Corporation, Cable News Network and the Microsoft News Broadcasting Company will be used.

Finally, government resources such as those compiled by Global Affairs Canada (the Government of Canada), the United States International Trade Administration, as well as parliamentary and congressional reports will be examined. These resources will be used in tandem with para-public government agency reports such as those by Export Development Canada, and public universities, as well as reports from private firms, including the Royal Bank of Canada.

2.2. Literature overview

The literature review will be divided into eight subsections; The first sub-section will focus on introducing the notion of international institutions and providing a definition of what constitutes such an institution. This section will equally focus on the World Trade Organization (WTO) and the growing need for a rules-based trading system. The second sub-section introduces the mechanism known as Investment-Dispute Settlement. The third sub-section will discuss the *North American Free Trade Agreement* (NAFTA), the investment treaty at the heart of this treaty, and Chapter Eleven, the ISDS mechanism found in NAFTA. The fourth subsection of this literature review will present the process of the obligations present in investment agreements that are enforced by the ISDS Mechanism. The fifth subsection will analyze the treatment standards in investor-state relations. The sixth subsection will discuss the ISDS process. The seventh subsection will discuss the criticisms of the process. The Final subsection will present the suggested reforms to the ISDS process.

2.2.1. Origins of International Dispute Settlement

The origins of International Dispute Settlement are rooted in international organizations, namely, the United Nations. The third paragraph of article two of the United Nations Charter states that:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

Under the *Manila Declaration on the Peaceful Settlement of Disputes (1982)*, the United Nations General Assembly placed an emphasis on the need for states to resolve disputes peacefully (Bilder, 1986). As Bilder (1986) suggests "[e]very discipline concerned with international relations […] necessarily has an important stake in the task of crafting practical and acceptable ways of more effectively dealing with international conflicts and disputes (p.1)." It is inevitable that disputes will arise in any society. As such, it is necessary to have a procedure in place to settle disagreements. The realms of international trade and investment are not sheltered from this issue, and as such, mechanisms for resolving disputes in a peaceful manner, adopted in the form of arbitration embedded in multilateral agreements or large supranational organizations, including the World Trade Organization (Mansfield & Reinhardt, 2008).

The global economy presents enormous opportunities for states and non-state actors, such as firms. By internationalizing, many firms gain profit potential, as well as resources in new markets. However, internationalization equally presents firms with certain risks, including discrimination and volatility in prices, in trade and in policy which in turn, can represent enormous risks for the firms implicated (Mansfield & Reinhardt, 2008). Globalization set forth a need for standards and institutions that would act as facilitators in maintaining stability in the global economy. These institutions, such as the multilateral World Trade Organization (WTO), and regional North American Free Trade Association (NAFTA) have attempted to create and maintain stability. As Goldstein, Rivers and Tomz (2007) suggest, the WTO "is one of the most cited examples of a successful international institution" (p.37). In order to better understand such instruments, it is first important to define the notion of international institutions as a whole.

Duffield (2007) defines institutions as "relatively stable sets of related constitutive, regulative and procedural norms and rules that pertain to the international system, the actors of the system, and their activities (p.2)". Institutions can be formal, or informal. Within this context, Duffield (2007) provides a definition of international institutions that is comprehensive and reflects the diverse nature of the international stage: International institutions are "shared beliefs about the way things should be, or how things should be done. [They are] norms [that] carry a sense of obligation […] a sense that they ought to be followed" (p.2). Over the last one hundred years, a large number of institutions in international trade have been constituted, including the World Trade Organization (WTO) and the United Nations Conference on Trade and Development (UNCTAD).

It is argued by Mansfield and Reinhardt (2008), that international institutions, whether multilateral or regional in nature, facilitate stability in international trade by "reducing volatility in trade policy and trade flows", thus insulating economies from sudden and unpredictable behavior. Research equally suggests that trade and investment agreements facilitate market access (Mansfield & Reinhardt, 2008).

One of the best established, and most well-known international institutions, the World Trade Organization, (and its predecessor, the General Agreement on Tariffs and Trade) establishes this level of stability through the introduction of a rules-based trading system, whereby the organization places constraints on the introduction of trade barriers by member states, while promoting transparency and establishing uniform standards ((Mansfield & Reinhardt, 2008). Since firms prefer this level of stability, states who participate in such institutions are likely to promote more international investment and trade. International institutions use three mechanisms in order to provide this sought-after level of predictability and safety: transparency, convergence and restructuring.

First, international institutions attempt to establish a level playing field for members. For example, the WTO's dispute settlement mechanism enables smaller states to bring disputes against larger, more economically powerful states, thus facilitating the resolution of disputes in a forum whose results are not primarily based on the resources of each party[3] (Bechtel & Sattler, 2015; Busch & Reinhardt, 2003).

Second, several institutions, including the World Trade Organization use deterrence; institutions will attempt to deter states from creating barriers to trade and investment. Second, these institutions will attempt to facilitate transparency and enable the convergence of policy. Third, these institutions embed themselves in markets through the restructuring of trade and investment policy, often requiring long-term commitments, reducing volatility (Mansfield & Reinhardt, 2008). Furthermore, several authors suggest that international institutions do, in fact, increase commerce, trade and investment. For example, commerce has increased by at least 33 percent for countries with standing at the WTO, up to 70 percent for developed states that are members of the WTO (Goldstein, Rivers, & Tomz, 2007).

In order to understand ISDS, it is imperative to discuss the evolution and workings of the World Trade Organization (WTO), a precursor to the ISDS mechanism. The World Trade Organization (WTO), and its predecessor, the General Agreement on Tariffs and Trade establishes (GATT) "a rules-based system for trade and […] facilitates mutually advantageous trade

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[3] It should however be noted that although the WTO has attempted to further equalize the discrepancies between both states, developing countries are still less likely to be successful in their filing of disputes; developing countries equally require more assistance. Furthermore, the WTO's standing is still primarily based on negotiation, despite the presence of tribunals in the event of further disagreement, creating further inequality (Bechtel & Sattler, 2015; Busch & Reinhardt, 2003).

liberalization" (Baldwin, 2016, p. 95), which all adhering countries must follow. Otherwise put, the WTO's objective is to "help trade flow smoothly, freely, fairly, and predictably" (Rose, 2004, p. 99). These rules are based on negotiated agreements. This system provides a stable, transparent and predictable means of conducting international trade, enabling access to global markets (Kanungo, 2012). WTO rules equally include a dispute settlement mechanism. The WTO has three primary functions. First, it is the forum of negotiation on trade matters; second, it oversees all existing agreements under the WTO, and third, it settles disputes and enforces the outcomes of such disputes (Davey, 2014)[4].

In order to understand the World Trade Organization, it is important to first shed light on the General Agreement on Tariffs and Trade, the precursor to the WTO. The GATT was established in 1947, but negotiations for an instrument that would help reduce tariffs began in the 1930s, when world leaders were promoting trade liberalization in a post First World War political climate, and in an era marked by the Cold War. Trade liberalization during the Cold War was thought to be a means of geopolitical advantage for western countries, as well as a means of reducing shortages in goods, favouring trade and generating profit. During the Second World War, the United States became a world leader, and during this period Congress was refusing to promote the establishment of an organization, instead favouring an agreement, general in nature, based on the principles of non-discrimination, transparency, reciprocity, flexibility, and consensus (Baldwin, 2016).

Shortly after the creation of GATT in 1947, trade liberalization continued in full force. In the 1960s, European nations began negotiations on regional free trade. The 1970s brought progress to European regional negotiations, as well as a round of talks for GATT members, known as the Tokyo round. Finally, the 1980s brought another round of talks, while the United States

[4] It should be noted that article III of the WTO agreement lists five functions, but in the literature, Davey (2014) condensed the functions into three, which for the purposes of this thesis, is more fitting.

and Canada began negotiations on a free-trade agreement, while the European Union continued to expand, and the European Single Market was introduced (Baldwin, 2016).

The last 115 years have demonstrated the emphasis that governments have placed on the importance of protecting investors, and the promotion of foreign direct investment, as shown by the number of trade and investment agreements signed by countries, and by the exponential increase of disputes under these agreements since 2003. In the last three decades especially, the global trade environment has seen exceptional growth in the negotiation of bilateral and regional free trade agreements (Baldwin, 2016; Davey, 2014; Roderick Abbott, Fredrik Erixon, & Martina Francesca Ferracane, 2014).

Some scholars believe that this the negotiation of multilateral and bilateral agreements has somewhat undermined the support for large multilateral organizations such as the WTO (Davey, 2014). As of 2014, approximately 2 800 Bilateral Investment Agreements exist (Abbott, Erixon, & Ferracane, 2014). Multilateral (or bilateral) investment agreements are seen as a more flexible and efficient means of obtaining favourable trade conditions, since there are fewer (sometimes as little as two) parties involved. It became necessary that such free trade agreements not only provide similar levels of stability, predictability and transparency, but equally, a means of settling and enforcing trade/treaty disputes. The need for a clearly defined set of rules and a means of enforcing them has created a situation where WTO principles were in a sense, transposed into the investment agreement sphere.

International trade organizations such as the World Trade Organization, and free trade agreements have attempted to harness trade through international legal principles of non-discrimination. Although the World Trade Organization, its structure, and dispute mechanisms have been the primary inspiration for similar mechanisms in International Investment Agreements, it should be noted that the WTO governs trade, and not foreign investment, which relies on multilateral agreements whose rules bind only the countries part of the agreement's negotiation process. The World Trade Organization has established several principles that have served as the basis for the ISDS settlement mechanism. This includes the Most-Favoured Nation Principle, the National Treatment Principle, and the dispute settlement mechanism.

First, The Most-Favoured Nation Principle (MFN)[5] entrenches the principle of non-discrimination within international trade. The MFN rule establishes a principle in which countries cannot discriminate between their trading partners. In other words, a country must treat all of its trading partners similarly and cannot grant exceptions (including lower tariffs on products or services) to specific nations, but instead must grant such "exceptions" to every member of the WTO[6] (World Trade Organization, 2018b). This principle applies to the trade in goods, services, and to all trade-related aspects of intellectual property rights, under the WTO.

Second, the National Treatment[7] Principle establishes the principle of non-discrimination. This principle restricts the discrimination between domestic and foreign imported goods and services. In other words, goods or services of foreign or domestic origin must be treated equally[8]. National Treatment provisions equally apply to trademarks, patents and copyrights of local and foreign origin (World Trade Organization, 2018).

The Most-Favoured Nation and National Treatment principles found in the World Trade Agreement's constitutive articles, act as a legitimation for the ISDS in International Investment Agreements. Since domestic courts do not guarantee the above principles in matters of International Investment, an alternative system is needed to compensate, to ensure stability, and to promote international trade.

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[5] *General Agreement on Tariffs and Trade*, Article 1 ; *General Agreement on Trade in Services*, Article 2 ; *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 4.

[6] However, exceptions to the MFN rule exist, specifically for developing countries, specific free trade agreements, or to prevent unfair trading practices.

[7] *General Agreement on Tariffs and Trade*, Article 3 ; *General Agreement on Trade in Services*, Article 17 ; *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 3.

[8] After their entry to the market. This means that states can still apply customs duties

In order to uphold such principles, the WTO provides for a forum to settle disputes. The Dispute Settlement Mechanism, known as Dispute Settlement Understanding (DSU)[9]. Members of the WTO renounce their right to take action unilaterally in the event of a dispute and do so through a multilateral method that produces judgments that are binding between parties. The process begins with a consultation and possibly, a mediation. In the event that no agreement is reached, a panel is constituted, and panelists are appointed. The panel then collects information from both parties, reports it back to those involved, and a report is drafted. The report, or judgment, is then adopted, and becomes binding if it is not appealed. It is important to note that the WTO's dispute settlement mechanism does provide for an appeal. The typical dispute lasts approximately one year if it is not appealed, and one year and three months if appealed (World Trade Organization, 2018). In the event that states do not respect a decision of a WTO panel, retaliatory methods can be used to place pressure on the state at fault. Retaliatory efforts are often in another sector of trade than that of the dispute.

2.2.2. Dispute settlement in PTAs

According to the World Trade Organization, Preferential Trade Agreements are "defined as reciprocal trade agreements between two or more partners. They include free trade agreements and customs unions (World Trade Organization, 2018)." Although the WTO is based on the principle of non-discrimination, such agreements constitute an exception to this doctrine. Effectively, the WTO allows reciprocal agreements against member states who offer preferential trade or investment arrangements.

Numerous trade agreements, including the North American Free Trade Agreement are comprehensive, and cover various aspects of trade, and go a step further, covering foreign-direct investment. For example, Chapter Eleven (also known as the Investment Chapter) of the North American Free Trade Agreement provides a structure in which rules-based investment

[9] Annex 2, *World Trade Organization* Agreement; *Uruguay Round Agreement;* For a chart of the DSU process, see exhibit 20.

framework is established, with a goal of creating a favourable investment climate. The notion of a rules-based system is influenced by the rules-based nature of the WTO, an exclusively trade-focused institution, in which member states cannot discriminate between domestic and foreign trade.

To conclude, investment protection in preferential trade agreements, are heavily rooted in the WTO's principles. It should however be noted that the dispute settlement mechanism, however, is vastly different. In terms of the WTO, only states can interject on behalf of themselves, or the firms conducting trade within their territories, under the Dispute Settlement Mechanism (DSU). In preferential trade agreements, however, investment disputes are often settled through alternative dispute settlement mechanisms, often in the form of arbitration panels, presided by multiple professionals in the field of international investment and international public law. Furthermore, firms are actively implicated in the arbitration process; multinational firms can bring actions directly against states in the event of a breach by a government, without the involvement of their home government, a significant dissimilarity between the two dispute mechanisms (A. P. Newcombe & Paradell, 2009; World Trade Organization, 2017).

2.2.3. Investment and Trade: A Distinction

The previous section discusses the World Trade Organization, and its role in the Public International Legal System through the promotion of international trade and ensuring non-discrimination between foreign and domestic goods and services. Although the WTO governs matters of international commerce in trade, it does not govern investment.

It is therefore important to distinguish between two concepts: international trade and international investment. Trade involves the exchange of goods, services and intellectual property. International investment is a term used to describe international portfolio investments including but not limited to, any assets (such as equity) or debts. More importantly, international investment is primarily concerned with foreign direct investment (FDI): “[a]n investment made to acquire lasting interest in enterprises operating outside of the economy of the investor (International Monetary Fund, 2013)[10]". Investment equally differs from trade in that it requires a presence in the host country, creating a risk for the firm. Such risks mainly include expropriation risks (International Monetary Fund, 2013). The former is within the World Trade Organization’s scope, as it provides a framework intended to facilitate the negotiation of trade, trade agreements, and it provides a forum in the event of a dispute. The latter, however, does not fall within the scope of the WTO, and as such is governed by negotiated agreements between states.

This distinction is equally important to understand since the World Trade Organization trade principles mentioned in the previous section have served as the inspiration for the ISDS mechanism found in many investment agreements, including the North American Free Trade Agreement.

2.2.4. Investor-State Dispute Settlement

Although globalization is not a new phenomenon, the process has been marked by astronomical growth since the 1990s. The levels of foreign direct investment inflows have increased from a mere 10 billion USD in 1970 to levels above 2.3 trillion USD in 2016[11]. The rapid growth in foreign direct investment and the desire for firms to continually reach new markets has led to a growing desire for investment protection.

In this ever-growing globalized economy, states have opted for private arbitration clauses in bilateral and multilateral trade and investment agreements in order to promote and protect foreign investment. As Kahale (2018) states “[t]he *raison d’être* of [ISDS] is to provide a speedy,

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[10] “[t]he foreign entity or group of associated entities that makes the investment is termed the "direct investor". The unincorporated or incorporated enterprise-a branch or subsidiary, respectively, in which direct investment is made-is referred to as a "direct investment enterprise (International Monetary Fund, 2013)”

[11] Exhibit 19.

cost-effective and neutral means of resolving commercial disputes. The idea is to settle and move on, not to uphold some grand principle of international law (Kahale, 2018, p. 7).

The following literature review will explore the ISDS mechanism in light of recent criticisms and protectionist sentiment. In order to do so, the concept of private arbitration in international law must first be explored.

Globalization has brought a need for a liberalization in trade and investment. The platform in which the internationalization of trade occurs is better governed by multilateral treaties in which several states agree on a set of standards; For example, through the World Trade Organization, an intergovernmental organization that establishes the rules of trade between member states (Chase, 2015; Kurtz, 2009; World Trade Organization, 2017). These multilateral treaties enable State governments to act on behalf of the firms who are involved in the trade of goods and services. In terms of foreign investment, however, a different set of rules must apply due to the vast differences between investment and trade.

Although the use of ISDS Clauses has gained significance, Alford (2003) discusses the origins of international arbitration: the first recorded use of this mechanism dates back to 1794, the date the *Jay Treaty* was signed between the United States of America and Great Britain, in order to provide an arbitral platform for claims between creditors and debitors of both countries (Alford, 2003).

The Jay Treaty[12] is perceived to be the defining moment, beginning the modern era of international arbitration. This treaty enabled access for merchants to areas of land across North America. The Jay Treaty included numerous treaty clauses that are used similarly today. For example, the treaty takes into account the fact that domestic courts are unequipped for international arbitration; the treaty equally required each party to appoint an arbitrator, and

[12] Treaty of Amity, Commerce and Navigation, between His Britannick Majesty; and the United States of America, by their President, with the Advice and Consent of their Senate (1794).

subsequently, those arbitrators would appoint a third arbitrator to chair the arbitration. The Jay Treaty equally stipulated that all awards are binding and final, and the treaty required that parties commit to honour any reward decided upon by the arbitrators in question. (Alford, 2003)) suggests that such clauses are still used today in modern bilateral and multilateral trade agreements.

Several authors suggest that private arbitration in international law was created with one primary goal in mind: to liberalize trade through the promotion of investment in turn, promoting a stable economic environment in which governments are subject to boundaries, and in which they are accountable for their actions in a similar way that multinational firms would be held accountable under domestic laws. As was stated in *R v Sussex Justices*[13], it is "of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" ((*R v Sussex Justices, Ex parte McCarthy*, n.d.).

2.2.5. Investor-State Dispute Settlement: Obligations

In 1990, the first investor-state arbitration conflict was settled, paving the way for an exponential growth in the number of international arbitration cases since. Investor-State Arbitration provisions in investment agreements are one of the most frequently use means of protecting foreign investment and fostering investment within states. Since the beginning of their use, and more so in the last ten years, this mechanism has provoked numerous negative reactions by governments, scholars, and the general public, namely in developed and democratic nations, in part, because of its unpredictability ("Mediation of investor-state conflicts," 2014).

Investor-State Arbitration was established as part of international trade or investment agreements to level the playing field between states and firms (Alford, 2003; De Mestral et al., 2017; Franck, 2005; Matveev, 2015; "Mediation of investor-state conflicts," 2014; A. Newcombe,

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[13] Ex parte McCarthy [1924] KB 256.

2017; Schwieder, 2006). Schwieder (2006) suggests that "'investor-state dispute settlement' broadly refers to the heterogeneous category of adjudication regimes that all share one basic feature: they empower private individuals and corporations wronged under an investment agreement to bring claims against foreign signatory states [and] allow investors to bypass domestic courts in favor of a 'neutral, international arbitration procedure' for resolving conflicts with host country governments (p. 184)". Franck (2005) mentions that an international arbitration forum of dispute expedites the process, since "[r]ather than having to resolve a dispute with a Sovereign through the cumbersome [International Court of Justice] process or the Sovereign's court, investors can proceed directly to arbitration" (p. 1540).

Furthermore, the Investor-State Arbitration (ISA) process was created with a goal of depoliticising disputes between state government and investors. The World Bank suggested that ISDS be used as a means of prevention of disputes that would require the use of diplomatic intervention between states (De Mestral et al., 2017).

A priori, governments have a right to regulate activities within their jurisdiction. This right is assumed in any international mechanism (Chase, 2015). Foreign investment is generally subject to all domestic rules and regulations in the state in which the firm is to invest. This includes business incorporation and activity regulation, labour, environment, banking, financial and property laws and regulation. Furthermore, all applicable sanctions including criminal sanctions apply. It is out of the necessity for stability, predictability, clear regulation and the facilitation of investment that bilateral and multilateral investment agreements are required (Chase, 2015).

There is a positive correlation with the conclusion of trade agreements by states and their level of economic development, which is amplified according to the level of comprehensiveness and the level of legal enforceability of the agreement (Kohl, Brakman, & Garretsen, 2016). ISDS is a means of enforcing and settling trade disputes in these agreements while creating a more predictable and transparent environment that fosters foreign investment, all while maintaining the efficiency of a trade agreement (Davey, 2014).

A recurring question in the literature examined pertains to whether ISDS process “strikes an appropriate balance between investor protection and state sovereignty (Matveev, 2015, p. 348)”. For example, the Comprehensive Economic Trade Agreement (CETA), a multilateral trade agreement between Canada and the United States is a prime example of anti-ISDS sentiment pertaining to this discussion of “balance”; Several weeks prior to the process in which the European Union and Canada would agree on the agreement in principle, the people of Wallonia, a region in Belgium, protested ferociously against the inclusion of an Arbitration provision in CETA, instead favouring a more stable and permanent tribunal. The arbitration mechanism was seen as many as a threat to democracy, and the authority of a government to regulate within the confines of its borders. These protests led to the last-minute inclusion of an investment tribunal, instead of ad hoc arbitration (De Mestral et al., 2017).

Similarly, in 2012, The Swedish energy company, Vattenfall brought an arbitration claim against the German Federation after it announced that it would be phasing out nuclear power in part, for public health and safety reasons. Vattenfall eventually won the dispute, creating a further level of skepticism within Europe (*Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6 (formerly Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. The Federal Republic of Germany)*, 2011) – the question being, how a firm could win its arbitration case against a country when the country drafted such legislation intended to protect the general public (Tino Andresen & Brian Parkin, 2016)?[14]

[14] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6 (formerly Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG* v. *The Federal Republic of Germany), https://www.italaw.com/cases/1148.*

This anti-ISDS sentiment has been felt on every continent; in 2011, the Federal government of Australia stated that it would no longer agree to Investor-State arbitration provisions in trade agreements (Trakman, 2014)[15].

The following section will attempt to define the notion of Investor-State Arbitration. According to De Mestral et al., (2017), Investor-state arbitration (ISA) is a treaty-based form of arbitration by which a state agrees, in advance, to be the object of a claim in arbitration by a private investor who claims to have suffered financial loss as a result of violation of one or more standards of treatment set out in the treaty (p. 10). The process was created originally so that foreign investors and governments could maintain a level of equality in the event of a dispute, in developed and emerging countries alike (De Mestral et al., 2017) Typically, International investment arbitration tribunals are granted extensive powers of revision, including the revision of government policy and legislative decisions. Arbitration tribunals are equally given the power to grant awards in the form of damages to foreign investors or states in the event of a violation of investment treaties (A. Newcombe, 2017).

ISDS is a mechanism used by governments to ensure that foreign investors are treated fairly with respect to their local counterparts. The ISDS mechanism is intended to provide a means in which foreign companies are treated on a level playing field. In investment treaties, governments agree not to discriminate against foreign investors and will treat them the same as local investors, notably in terms of domestic legislation[16] (Chase, 2015). Furthermore, some scholars suggest that domestic courts are unable to handle such cases, since they hold a national bias; in other words, domestic courts will refer frequently to national policy and regulation, even in cases of international law (Bronckers, 2015) This is intended to provide a stable investment climate by enabling foreign firms to bring any potential violation to arbitration (Franck, 2005).

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[15] Although, later recanting this decision.
[16] This is further discussed in the literature review in section V.

The past three decades have seen an exponential increase in the number of bilateral and multilateral trade agreements signed between states. Prior to the 1990s, only a small amount investor-state disputes were being pursued. By the end of 2015 just under 700 cases were pursued or being pursued under Investor-State Dispute Settlement clauses (UNCTAD, 2009, 2015; United Nations, 2010; VanDuzer, 2016).

Studies have shown a positive correlation between the use of bilateral and regional investment treaties and foreign direct investment. In other words, these agreements, which often use arbitration as a method to resolve disputes have been shown to promote foreign direct investment, by promoting and permitting a stable institutional and regulatory framework that guarantees the rights of investors, through the commitment towards a liberalization of trade and investment policy (Grosse & Trevino, 2005; Neumayer & Spess, 2005; Roderick Abbott et al., 2014; Salacuse & Sullivan, 2005; UNCTAD, 2009).

The ISA process has been favoured by both governments and investors alike. For governments, the ISA process is intended to create confidence and stability in that, like the Jay Treaty, provides a framework between states in which actors can reasonably predict what is to be expected in the event of a disagreement.

As Franck (2005) suggests "various countries turned to bilateral treaties to secure rights for international investors and encourage efforts to promote stable investment climates" (p. 1527). For foreign investors, ISA provides a neutral means of resolving disputes that is outside the realm of domestic courts and domestic law, and this provides a more equal footing (Franck, 2005; A. Newcombe, 2017). ISDS clauses give foreign investors legal standing to dispute state action in the event that the firm feels like the host state has violated its obligations (Matveev, 2015).

Furthermore, some countries' legal systems are unequipped and lack the resources to maintain efficient legal systems. In countries where corruption is frequent, and where domestic law is not well-understood or poses risks for foreign investors, ISDS provisions in trade agreements establish predictability in an otherwise unpredictable environment, fostering investment (Gertz, 2017; Kurtz, 2009; Trakman, 2014). Furthermore, the ISDS process, which is normally agreed upon by states during the negotiation of investment or trade treaties, provides a means in which firms and states can enforce the legal standards set out within the treaty. This provides a level of stability, that in turn stimulates investment, especially in countries with weak legal institutions, government corruption or interference, or unpredictability in the climate of investment; in short, ISA can provide a means of establishing legal impartiality and legal stability and predictability in states that lack judiciary independence (A. Newcombe, 2017).

Therefore, International Investment Agreements enable investors to have a direct cause of action against governments of states in which they invest, and such disputes are held in a setting that is neutral (Franck, 2005; A. Newcombe, 2017). These agreements equally contain obligations that bind both parties.

In terms of the criticism within the realm of international arbitration, skepticism towards arbitration clauses in trade agreements is not a new phenomenon. Such negative reactions were recorded as early as 1899, at the Hague Peace Conference, where Germany was against the establishment of an investment tribunal, since “arbitration through interested judges… [is] nothing but intervention”, noting that “courts of arbitration would result in bringing up the interests of different countries, forming groups for war, and taking advantage of the weaker group (Alford, 2003, p. 69).”

This criticism still persists today (De Mestral & Centre for International Governance Innovation, 2017; Franck, 2005). It was only sixty years later that ISDS appeared in a trade agreement: the Germany – Pakistan Bilateral Investment Treaty of 1959 (Daley, 2011). The anti-globalization sentiment is at present, stronger than it has ever been. For example, the

Transatlantic Trade and Investment Partnership[17], a multilateral trade agreement between the United States and the European Union has incited so much criticism that as Chase (2015) suggests "few in Europe want to hear about [ISDS] again if they can help it (Chase, 2015, p. 218)".

In fact, several criticisms of the ISDS mechanism exist. First, there is a perceived lack of impartiality in the appointment of arbitrators. Second, the lack of consistency in international law, and the absence of the rule of precedence (or *stare decisis*) is thought to create further inconsistencies in International Investment Law. Fourth, the mechanism is criticized for its lack of transparency, particularly the unavailability of arbitral decisions for public consultation. Fifth, the lack of an appeals mechanism is criticized. Sixth, there is a notion that Investor-State Disputes are being americanized, and as such are becoming costly mechanisms in which large firms with particularly strong legal arsenals become more powerful than governments. Seventh, the ISDS mechanism is often perceived as demonstrating favouritism for the firm, creating a bias. Eighth, it is feared that the mechanism allows forum shopping. In other words, firms can move their primary place of business to benefit from International Investment Agreements, skirting the domestic law they were previously bound by. Finally, it is suggested that ISDS poses a threat to sovereignty and public policy by hindering a government's right to regulate, through fears of billion-dollar lawsuits under the ISDS mechanism.

Despite the criticisms, scholars including Newcombe and Paradell (2009) suggest, international investment treaties impose several obligations, namely promotion, admission and establishment obligations. Investment treaties seek to protect and promote investors, investments, and states. Investment agreements equally attempt to create a framework in which firms can understand, evaluate the rules of entry and establishment (also known as pre-entry requirements; this includes business formalities and other regulations). As the authors suggest,

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[17] Other agreements inciting similar negative reactions include the Trans-Pacific Partnership, a partnership between Pacific Rim countries (presently excluding the United States) and the Comprehensive Economic and Trade Agreement, a trade agreement between the European Union and Canada, that is currently in force on a provisional basis (A. Newcombe, 2017).

it is important to understand that such agreements do not provide any preferential treatment in terms of admission or establishment but will only do so once foreign investors have been admitted as an investor, in accordance with domestic law and regulation. States are under no obligation to promote investment, to sign treaties, and if they choose to do so, can establish pre-entry and entry rules and regulation (A. P. Newcombe & Paradell, 2009). Chase (2015) states that it is important for all protections and agreements to be codified, as the codification of these rules allow accountability, and pave the way for predictability, an important element allowing investors to decide whether they are to invest.

Investor-State Dispute Provisions generally provide four types of guarantees. First, they provide a guarantee against discriminatory practices (this includes most favoured nation or national treatment stipulations). Second, they provide protection from expropriation without compensation. Third, they provide protection against “unfair and inequitable treatment”, and finally the ISDS provisions provide protection against capital flow restrictions (such as currency manipulation) by a government (O’Brien & Nandivada, 2014, p. 185; Schwieder, 2006).

Most international investment agreements do however contain the obligation to promote investment, and very often, contain a clause in which the states in question will “create favourable conditions” for investors (A. P. Newcombe & Paradell, 2009, p. 130).

The authors list seven different rights that are often provided to investors in International Investment Agreements. First, a guarantee of adequate compensation in the event of expropriation. Second, currency controls should not be used by governments Third, there shall be no discrimination by states on the foundation of nationality. Fourth, a government must treat all investments within their state in a fair and equitable manner. Fifth, a government must provide protection (and/or security) to foreign investments. Sixth, a government must provide a guarantee that foreign investments will not be disadvantaged or treated less favourably than domestic investments. Finally, government must honour any other commitment they have made in the agreement (A. P. Newcombe & Paradell, 2009, p. 1530–1532).

It is equally important to note that the literature points out that arbitration panels can only award monetary compensation for damages and cannot in any way compel a government to change discriminatory laws or regulations on which the financial compensation is based (Chase, 2015). However, investment treaties do bind governments to legislate in a non-discriminatory manner; in other words, regulations cannot discriminate based on nationality, and if panels conclude that such discrimination has occurred, governments are bound by the arbitration decision (Chase, 2015).

The North American Free Trade Agreement is an agreement that has revolutionized the international investment environment. In January 1994, the *North American Free Trade Agreement* (NAFTA), a treaty between Canada, the United States and Mexico took effect. NAFTA's primary goal was to attempt to remove tariffs and non-tariff barriers in trade and investment, with certain sector and industry exceptions (Floudas & Rojas, 2000). Since Canada and the United States had concluded a bilateral trade agreement, several years earlier, in 1988, Mc Bride & Aly Sergie (2017) suggest that "NAFTA's goal was the integration of Mexico with the highly developed economies of the United States and Canada." The gradual removal of tariffs and other barriers continued until January 2008, where the remaining agricultural, textile, and automobile barriers were removed (McBride & Aly Sergie, 2017).

This agreement created one of the largest free trade zones in the world and included several provisions regarding ISDS, namely in terms of arbitration. Chapter Eleven of NAFTA is possibly the most important element in terms of foreign investment protection within North America; it enables investors to bring disputes in an international arbitration forum, bypassing domestic courts (Dodge, 2000). This includes cases in which a state directly or indirectly attempts to expropriate an investment of a foreign firm or foreign national, 'including by law, regulation, procedure, requirement of practice (Matveev, 2015, p. 368)". As suggested by Dattu & Pavic (2017):

> *"The Chapter 11 investor-state arbitration mechanism allows investors of a NAFTA country to bring proceedings directly against the government of another NAFTA party for alleged breaches of its obligations under the treaty. The dispute settlement procedure is intended to provide investors with timely recourse to an impartial international tribunal. It replaces the need for governments to take on claims on behalf of their nationals in a government-to-government dispute resolution process that would result in proceedings before international tribunals, such as the International Court of Justice" (Dattu & Pavic, 2017).*

As per Article 1136, Chapter Eleven equally provides for the enforcement of all awards within the NAFTA territory (Dodge, 2000). Chapter Eleven has been the subject of numerous controversy in Canada, and Canada has seen the highest number of ISDS claims out of all three states party to NAFTA (Dattu & Pavic, 2017).

Chapter Eleven of NAFTA[18] provides investors with three main protections. First, Investors (and their investments of any country party to NAFTA, are accorded no less favourable treatment that both domestic investors[19], and investors of other countries[20], in any step of the investment process including the acquisition, management, or sale of the investment. Second, NAFTA states must provide a minimum standard of treatment[21] and protection for their investments. Finally, all three parties to NAFTA are restricted in the nationalization or expropriation of investments or taking any action that is comparable to nationalization or expropriation, with certain exceptions (Dattu & Pavic, 2017).

Canadian Foreign Affairs Minister, Chrystia Freeland stated, on August 14th, 2017, that the Liberal majority government would seek modifications to Chapter Eleven, namely in that it would allow the government to regulate for the public interest above all, creating an exception to

[18] The pertinent article used in this analysis can be found at Exhibit 1 in the annex.

[19] *National Treatment,* Article 1102 *of the North American Free Trade Agreement*.

[20] *Most-Favoured Nation Treatment,* Article 1103 *of the North American Free Trade Agreement.*

[21] *Fair and Equitable Treatment,* Article 1105, *North American Free Trade Agreement*.

NAFTA’s Chapter Eleven. The United States has equally suggested that it would seek a similar change to Chapter Eleven, adding that international forums should not be able to skirt American law, and that domestic courts are perhaps more suited to dealing with issues occurring within the United States (Dattu & Pavic, 2017; Office of the United States Trade Representative (Executive Office of the President), 2017).

2.2.6. Investor-State Dispute Settlement Treatment Standards

International Investment Agreements often provide for standards in order to level the playing field between parties and favour predictability of the investment environment. Although most International Investment Agreements[22] do not define the term treatment, most agreements include clauses that bind states providing foreign investments to treat foreign investments with the same or similar treatment as domestic firms. In the *Siemens*[23] case, the arbitrators define treatment as “behaviour in respect of an entity or a person” (Siemens A.G. v. Argentina, at para. 85; A. P. Newcombe & Paradell, 2009, pp. 202–203). The *Canfor*[24] case adds onto this definition by distinguishing between the terms ‘conduct’ and ‘treatment’: “conduct is what officials do and treatment is the manner in which the officials direct conduct to a specific investor or claimant (A. Newcombe, 2017, pp. 202–203)”. There are three major treatment standards found in International Investment Agreements the Fair and Preferential Treatment standard, the National Treatment Standard, and the Most Favoured Nation Treatment standard.

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[22] Including the *North American Free Trade Agreement*.

[23] *Siemens* A.G. v. *The Argentine Republic*, ICSID Case No. ARB/02/8

[24] Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America, UNCITRAL (formerly Canfor Corporation v. United States of America; Tembec et al. v. United States of America.

Fair and Equitable Treatment

The first standard, Fair and Equitable treatment can be defined as a standard that protects "legitimate expectations and the need for a basic level of stability, predictability, consistency, and transparency in government conduct (A. P. Newcombe & Paradell, 2009, p. 425)". This treatment standard has been critiqued since interpretations of Fair and Preferential Treatment clauses are seen to restrict regulatory powers of government, namely in environmental and public health realms, and this, in favour of promoting investment (A. P. Newcombe & Paradell, 2009, p. 425). This level of treatment establishes a minimum standard of treatment (Franck, 2005, pp. 1575–1576; Matveev, 2015, pp. 371–372). For example, the *North American Free Trade Agreement*[25], at its article 1105 provides for a Fair and Preferential standard of treatment:

> **1105.** Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment".

The Fair and Equitable Treatment Standard has been the subject of numerous debate and a slew of inconsistency in the jurisprudence. As Newcombe (2017) suggests "Concerns have been raised that "investor-friendly" interpretations of fair and equitable treatment unduly constrain government regulation, particularly when governments bring in new regulations to deal with environmental and health risks (A. Newcombe, 2017, p. 425)." The *S.D. Myers*[26] Case considered the question of what constitutes case law in terms of article 1105 of the *North American Free Trade Agreement* and suggests that a violation of this article and its related standard occurs when "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective" (Franck, 2005).

[25] See Exhibit 1 in the Annex for pertinent legislation.
[26] S.D. Myers, Inc. v. Government of Canada, UNCITRAL.

International Investment Agreements impose limits on origin or nationality-based discrimination through the use of two treatment standards, National Treatment and Most Favoured Nation Treatment (A. P. Newcombe & Paradell, 2009, p. 148)

National Treatment

The second standard, The National Treatment standard is, in essence, one of the most important elements of international trade and investment law. National Treatment assures non-discrimination between foreign and domestic markets, often focusing on the removal of protectionist measures[27] (A. P. Newcombe & Paradell, 2009). As Newcombe and Paradell (2009) suggest, "[t]he purpose of the national treatment obligation in [International Investment Agreements] is to prohibit nationality-based discrimination by the host state, between the host states' investors, and investments and those of another" (A. P. Newcombe & Paradell, 2009, pp. 149–150).

The National Treatment standard is relative, and contrary to the fair and equitable treatment standard, it does not provide for a minimum threshold; the standard depends on the comparison between the domestic and foreign element in question, and whether a difference exists between the two (A. P. Newcombe & Paradell, 2009; O'Brien & Nandivada, 2014). In other words, the required standard of treatment that applies is one where foreign entities, goods, investments or services receive treatment that is no less favourable than that of a domestic entity, good, investment or service. From an economic standpoint, this treatment standard seeks to ensure that all investments are treated equally in terms of competitive opportunity. One prominent example of the National Treatment standard is Chapter 11 of the North American Free

[27] According to Newcombe and Paradell (2009) OECD commentary suggests that four types of discrimination are possible. This includes "differentiation between the property of: (i) nationals of the same foreign state party; (ii) nationals of different foreign state parties; (iii) nationals of a foreign state party and a third state; (iv) nationals of a foreign state party and domestic nationals (A. P. Newcombe & Paradell, 2009, p. 155)." These apply to both National Treatment and Most-Favoured Nation Treatment.

Trade Agreement, which provides a level playing field in terms of competitive opportunity to all investors who are operating in similar circumstances. From a legal standpoint, a National Treatment clause establishes administrative equality and formal equality; in other words, all investors are equal before the law, government, and receive equal forms of legal protection (A. P. Newcombe & Paradell, 2009,)[28]. In other words, "the purpose of national treatment is to prohibit *de jure* and *de facto* nationality-based discrimination (A. P. Newcombe & Paradell, 2009, p. 151)", and is treated as a means of curbing forms of competitive disruption (Kurtz, 2009,)[29].

In applying the National Treatment standard, it is crucial to identify a standard of comparison (or comparator), that is a reference point in which one can measure whether a domestic firm is being granted more favorable treatment than a foreign one. The standard of comparison is necessarily between domestic and foreign firms and identifies whether the state administration created an environment where foreign investors are in a lesser favorable situation than their domestic counterparts (A. P. Newcombe & Paradell, 2009). International Investment Agreements treat National Treatment clauses differently. The North American Free Trade Agreement provides a three-step process in which arbitration tribunals first identify the subjects, and whether they are in similar circumstances. They then analyze whether the treatment received by one party was less favourable than the other. Finally, an analysis of whether the concerns are legitimate is conducted. During this analysis, the policies or regulations in place will be analyzed in order to determine whether they constitute protectionist measures (A. P. Newcombe & Paradell, 2009). In this light it is important that the tribunal remember the purpose

[28] As Newcombe and Paradell (2009) suggest, the 1976 Declaration on International Investment and Multinational Enterprises highlights four key elements of national treatment: "The first is that the prohibited discrimination is between foreigners and nationals […]. Second, the applicable subjects must be in like situations. Third, a foreign enterprise in a like situation to a domestic enterprise is to receive no less favourable treatment than the national enterprise. Finally, national treatment obligations are not absolute. Legitimate, non-protectionist rationales may justify differential treatment (A. P. Newcombe & Paradell, 2009, p. 155)".

[29] Examples of claims where National Treatment claims have arisen include judiciary conduct, tax rebate inequalities, fabrication requirements, export/import bans, unfavourable treatment by customs and border agents, postal service procurement, and public contract tenders (A. P. Newcombe & Paradell, 2009, p. 184)

of National Treatment, to protect foreign investors from a situation in which local firms are favored – and at times this will require that an analysis of one specific sector may not be sufficient, but the firms in question will have to be analyzed globally (A. Newcombe, 2017)[30].

Most-Favoured Nation Treatment

The thirds standard, Most-Favoured Nation treatment are "treaty provision[s] whereby a state undertakes an obligation towards another state to accord most-favoured-nation treatment in an agreed sphere of relations (Kurtz, 2009, p. 758)". Most-Favoured Nation treatment seeks to limit how states can discriminate based on origin or nationality of "similarly situated[31]" firms, investments, services or goods, to ensure equality of competition between investors (A. P. Newcombe & Paradell, 2009, p. 148; p.193). The International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco* mentions that the purpose of Most-Favoured National clauses is to "establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned (*Case Concerning Rights of Nationals of the United States of America in Morocco (France v. US) (1952) ICJ Rep 176 [Rights of US Nationals in Morocco*, n.d.)], par. 192; A. P. Newcombe & Paradell, 2009, p. 194)".

The Most-Favoured Nation principle is the corollary of one of the WTO's founding principles, the non-discrimination principle. This principle requires states to treat others the same way they treat most-favoured nations (Goldstein et al., 2007). Another prominent example of Most-Favoured Nation clauses is the *North American Free Trade Agreement's* article 1102(1):

> **1102(1).** Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like

[30] For example, in the *Occidental* case, the firms in question were analyzed not solely on the basis of their sector, but on the basis of all exporters under the agreement: *Occidental Exploration and Production Company* v. *Ecuador* (Final Award, 1 Jul. 2004).

[31] Newcombe & Paradell (2009) utilize this vocabulary.

> circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of Investments.

Most-Favoured Nation treatment contains three elements. First, there is a prohibition of discrimination by the state undertaking such obligations. This includes a restriction of discriminating between investments of other states. Second, this type of treatment is applicable where the standard of comparison (or comparator) are the same between the state undertaking the Most Favoured Nation treatment obligation, the beneficiary state and any third state involved. Finally, the investment from the beneficiary or third state cannot receive less than favourable treatment (A. P. Newcombe & Paradell, 2009).

Often, the Most-Favoured Nation standard of treatment is included within the same clause as the National Treatment standard. These clauses can vary, namely on their applicability. Some will apply to investors and investments, whereas others will apply on the former or latter only; some will only apply to specific activities or sectors; some will include a standard of comparison (A. P. Newcombe & Paradell, 2009).

2.2.7. Investor-State Disputes: A Brief Process View

International disputes often take the form of a process comprised of numerous steps. Investor-State disputes is no exception. The process by which a dispute is lodged under any bilateral or multilateral investment treaty is similar and follows a standard set of rules. First, the complainant submits a notice of the dispute to the foreign government in question. Second, the waiting period, if any, must be respected. Third, the location of the dispute must be chosen if it has not been set out in the agreement, and Fourth, the procedure must be chosen according to the rules set out in the agreement. Finally, the arbitrators and chief arbitrators are chosen; normally this includes the election of one arbitrator per party, and a third arbitration either being selected by the arbitrators chosen by the parties, or jointly by the parties themselves, often with the help of a third party, such as an international trade or investment organization (Franck, 2005)[32].

2.2.8. Investor-State Dispute Settlement: A Subject of Numerous Criticism

ISDS is seen by many pro-globalization scholars as a process with some distinct benefits. It fosters investment by creating a stable mechanism of recourse; this is of importance in developing and developed nations alike, but in countries with a weak rule of law, or rampant corruption, ISDS promotes investment by creating a stability outside the realm of such domestic issues, while limiting the inconsistencies or frequent delays of the domestic court system. Furthermore, ISDS enables the circumvention of rules of evidence and procedure, which are often onerous and complex in Common Law jurisdictions; the process equally enables firms to circumvent the inquisitorial system of obtaining evidence often found in Civil systems (Trakman, 2014).

However, with an exponential growth of claims (A. Newcombe, 2017), ISDS has recently become the subject of numerous criticism in the last decade by the general public and scholars alike. ISDS is seen as a system that gives greater advantage to foreign investors as opposed to their domestic counterparts (Schwieder, 2006). As a 2006 article in The Economist puts it, “If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law” (“The arbitration game,” 2014, para. 1).

[32] The process under the *North American Free Trade Agreement* equally takes this form, with certain exceptions.

This criticism has been discussed throughout the literature by numerous scholars, namely in three areas. First, the appointment of arbitrators and the temporality of arbitration forums is perceived by many as a means of skirting justice by not guaranteeing the same levels of judicial independence and security as traditional domestic courts. Second, scholars suggest that investment treaties create a situation that poses a threat to sovereignty by restraining government's regulatory power. Third, it is suggested the absence of the *stare decisis* rule creates a level of inconsistency in the decision-making process.

The Double Hat Dilemma: Appointing Arbitrations

First, the arbitral process and the appearance of justice within is perhaps one of the most important elements of the Investor-State Dispute process. The process has been subject to many criticisms including the fact that justice is seemingly not served, and that judicial independence is not guaranteed. Arbitral tribunals in the ISDS process are often ad hoc, and arbitrators do not benefit from employment security or tenure, a fundamental principle of most developed nations' judicial system, that ensures judicial independence. This lack of independence creates an issue in which a sentiment of bias grows in a process that should otherwise remain neutral. For example, it is suggested that lawyers who at one point represent corporations, could sit as arbitrators for cases involving these corporations in the future, creating a concern of bias (Matveev, 2015).

Furthermore, scholars have suggested that party-appointed arbitrators are in a position where they are likely to favour the party who appointed them, and that in the case of International Arbitration where investors are the ones who initiate the cases, arbitrators may be propelled to favour investments, as this creates further employment possibilities in the international arbitration field (VanDuzer, 2016).

Several scholars have suggested that these criticisms are inaccurate and are based on the scepticism currently making the rounds in the media, and a general presumption of bad faith for those involved in the process. Proponents of the process suggest that their Investor-State

Arbitration clauses do have processes that ensure a certain level of independence and impartiality, including the fact that each party chooses an arbitration, and can challenge the opposing party's choice.

Rules in customary international law, and several international conventions equally set forth several rules for the selection process; this includes the obligation that arbitrators be of "high moral character and recognized competence" in several fields including law[33]. There is a requirement of independence and impartiality of arbitrators, and the obligation to disclose any doubtful conduct or relations[34]. It should be noted that these obligations are not legally binding (Matveev, 2015, pp. 352–353). Furthermore, it is suggested that international arbitrators appointed to ISDS cases often have more experience in the matter than domestic court judges, who often lack experience in many of the cases they try (since they are experts of the law, but necessarily of the facts or situation in question (Trakman, 2014).

Regulatory Chill: A Threat to Sovereignty and Public Policy

Second and possibly one of Investor-State Arbitration's most important criticism is that it "unduly restrains domestic regulatory options and threatens environmental, labour and human rights standards: it leads to a 'regulatory chill' (De Mestral & Centre for International Governance Innovation, 2017, p. 23)". As Chriki (2018) suggests, "regulatory chill occurs when governments refrain from adopting certain measures out of fear that these would trigger costly arbitration disputes with affected foreign investors (p.1)." Authors such as De Mestral (2017), Schwieder (2006), Newcombe (2017), Matveev (2015) Franck (2005) and Trakman (2014) suggest that critics have argued that although Investor-State Dispute Settlement was created to level the playing

[33] According to The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,

[34] According to The Arbitration Rules of the United Nations Commission on International Trade Law.

field between corporations and governments, the mechanism stifles domestic courts and government's legislative regulatory and political functions, placing them in a situation where they are unable act in ways they deem necessary (Schwieder, 2006). For example, several critics suggest that governments forego regulating and legislating in areas of public interest, fearing that such legislation could trigger a dispute. The fear of such disputes is important due to the financial burden placed upon the state in defending themselves in an international investment arbitration dispute.

This burden is especially cumbersome for developing states, where disputes against large multinationals place the state in a vulnerable financial position, where they may be unable to inject more funds into a dispute simply to defend themselves (A. Newcombe, 2017)[35]. In the case of Canada, As De Mestral (2017) suggests, The *Ethyl Corporation* v. *The Government of Canada,* UNCITRAL (1998) case "[raised] the awareness of governments, civil society — and foreign investors — of the fact that Canada, despite being a developed democracy, can be sued for violation of NAFTA [… giving] birth to the idea that governments would be afraid to take legislative action in the general interest for fear of being sued (p. 94)".

This criticism has prompted several academics to sign a document entitled the *Public Statement on the International Investment Regime (2010)*, in which they stated in the preamble that they "have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially the way it hampers the ability of governments to act for their people in response to the concerns of human development and

[35] As Matveev (2015) suggests: "[t]he final concern about ISDS outlined in Chapter One is that of 'regulatory chill'. 'Regulatory chill' occurs if States take note of the size and frequency of ISDS awards as well as the costs of the ISDS process and are deterred from implementing public interest regulation. […] Large companies like Philip Morris may be tempted to threaten smaller countries with ISDS to pressure them into not putting in place regulations that would affect their business interests. However, if there is greater certainty as to the precise delimitation of permissible regulatory power under IIAs and if there are clear exceptions and regulatory carve-outs in place for public interest regulation, then States will be more confident enacting appropriate regulation without fear of losing ISDS arbitral cases (Matveev, 2015, p. 379)."

environmental sustainability (A. Newcombe, 2017, p. 428)". This, coupled with the fact that most Investor-State Arbitrations are ad hoc, and only bind the parties subject in the dispute, creates an enormous lack of confidence in the arbitration system . This criticism has been rebutted by several scholars, namely because newer investment agreements often include interpretation clauses that provide governments with flexibility in areas of public interest.

For example, U.S. and Canadian Investment Agreements often include exceptions for health and safety regulations or environmental regulations; furthermore, States are under no obligation to sign such investment agreements and governments do so on their own discretion (De Mestral & Centre for International Governance Innovation, 2017).

Although it has been argued that there is little to no empirical evidence confirming the existence of regulatory chill in ISDS (A. Newcombe, 2017), this criticism has nonetheless been taken seriously by several nations, developing and developed alike.

A prominent example is the case of Australia. According to the Gillard Government's policy in 2014, Australia opted to no longer include arbitration clauses in its investment agreements, as these are seen to "confer greater legal rights on foreign businesses than those available to domestic businesses (Trakman, 2014, p. 161)" and "constrain the ability of the Australian Government to make laws on social, environmental and economic matters in circumstances where those laws to not discriminate between domestic and foreign businesses (Trakman, 2014, pp. 161–162)". The government has chosen to opt, instead for the use of domestic courts. The Trump Administration has currently reopened negotiations with Canada and Mexico on NAFTA, and equally wishes to change the forum of disputes by giving U.S. domestic court's jurisdiction over certain matters, a point of contention for the Canadian government, who categorically refuse to accept such demands (Frisk, 2017; Gold, 2017; Parkin, 2017).

Inconsistency: An Absence of Stare Decisis

Third, Investor-State Dispute mechanisms often provide for an individualised decision-making process in which arbitrators are not bound by previous decisions under the same investment agreement despite whether the facts may be similar. As explained by Professor Thomas Franck, Professor of International Law at New York University suggests, "[a] rule is coherent when its application treats like cases alike when the rule relates in a principled fashion to other rules in the same system. Consistency requires that a rule, whatever its content, be applied uniformly in every similar or applicable instance (Franck, 2005, p. 1585)". The Anglo-Saxon legal tradition is deeply rooted by the principle of *stare decisis* or precedence. According to *Kimble v. Marvel Enterprises*, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process (*Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401*, n.d., p. 2409)[36]". Inconsistent decisions occur when different courts can come to different conclusions about the same rule or standard. For example, several cases under one trade agreement can be concluded differently, despite the fact that they treat similar questions of law and fact (Franck, 2005; Kahale, 2018).

As Matveev (2015) suggests, "it is important to remember that the credibility of the entire dispute resolution system depends on consistency, because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose […] This is a significant concern because it undermines States' ability to predict how [ISDS] provisions will be interpreted when they are going through the process of drafting and negotiating [International Investment Agreement] provisions (Matveev, 2015, p. 354)." In other words, the inconsistency that currently occurs in arbitration creates an environment in

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[36] *Kimble* v. *Marvel Entertainment, LLC,* 135 S. Ct. 2401.; As a general rule, the same principle applies in Canada, *Wolf* v. *The Queen* (1974), 47 D.L.R. (3d) 741 (S.C.C.).

which the unpredictable result of the process creates a lack of confidence amongst the general public.

Transparency: A Lack Thereof

Fourth, another procedural criticism of the Investor-State Arbitration process is the lack of transparency of arbitral procedures. Most ISDS agreements include strict non-disclosure agreements, restricting the discussing or publishing of arbitral grievances or awards (Schwieder, 2006).

This criticism suggests that the arbitration selection process, which is often done in private coupled with the finality of (private or confidential) decisions creates a further lack of appearance of justice (De Mestral & Centre for International Governance Innovation, 2017, p. 18). For example, many ISDS agreements include non-disclosure agreements. Authors suggest that this creates a situation where awards and other decisions are often not available to the public. This lack of transparency adds to the lack of confidence and skepticism in the ISDS process and creates a situation where the arguments and reasoning used by arbitrators cannot be analyzed by third parties, such as legal and international trade scholars (Schwieder, 2006).

Furthermore, critics of ISDS suggest that the process operates like a "Trojan horse" in that it allows multinational firms to challenge government regulation and legislation in key sectors such as environment, public health, and various other social protections, in a non-transparent way. Critics contend ISDS provides a means for multinational to contest legislation of social importance for the benefit of their profit margin. As an article published in the Economist suggests in 2014 puts it "ISDS "give[s] foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe (Schwieder, 2006, pp. 187–188; "The arbitration game," 2014)."

Scholars argue that transparency "has become an important factor in assessing the legitimacy of international organizations (De Mestral & Centre for International Governance Innovation, 2017, p. 188)." De Mestral (2017) argues that a monitoring system, clear procedural steps and compliance measures and the ability to provide information in order to increase the predictability of the arbitral process are key elements in instilling a higher level of confidence in the process (Schneider, 1999, p. 710). De Mestral (2017) equally suggests that in the event of an arbitration, particularly to which the government is a party, the *de facto* rules should not create an obligation of confidentiality that in essence, restricts the government from discussing the award or case in a public forum, as this essentially deprives the public of knowledge that they would otherwise be entitled to, and that constitutes public affairs.

No Appeals: The Finality of International Arbitration Decisions

Fifth, International arbitration dispute settlement often provides for a final solution, with no opportunity for appeals. Proponents of the no appeals rule contend that it provides for a low-cost and time efficient means of settlement. The critique against the no appeals rule asserts that without appeals, first-instance arbitrators are given extreme latitude and a power of decision without any effective means of checking or balancing the decision (Bouras, 2012).

Americanization of Investor-State Disputes: A Threat to Developing Nations

Sixth, several authors including Alford (2003) suggest that international arbitration is being Americanized; The author suggests that the concept of the American Law Firm is gaining fervour within the realm of international arbitration, and more generally, the global marketplace in general. Scholars describe the interaction between large corporate firms and international actors as the "soft-power" game. In other words, a more culturally and economically focused power, as opposed to one of brute force, such as military power.

Furthermore, Matveev (2015) and Alford (2003) suggest that the choice of law in many international arbitration agreements are greatly influenced by American Law. That is, the law is often drafted in the English tradition of the *Common Law,* and many American law firms are greatly involved in the drafting of contracts. Furthermore, New York law is becoming an international standard as the preferred choice of law for international contracts. Although the research presented in this document will have a primary focus around the *North American Free Trade Agreement*, it is important to note that the Americanization of law international law is highly criticized in that the use of large law firms, and the complexities of the *Common Law* versus the use of Civil Law as a legal standard often requires additional costs, an issue for many emerging nations who are limited by financial resources. This, in turn, can create a situation of inequality in which the multinational firm's financial resources surpass that of the country, further inhibiting countries to regulate for fear of reprisals by firms (Alford, 2003).

Investor-State Dispute Settlement: Favouritism for the Multinational

Seventh, an important criticism of the ISDS process is that it was designed to favour foreign firms over domestic ones by enabling such firms to avoid domestic regulation where domestic firms otherwise cannot (De Mestral & Centre for International Governance Innovation, 2017). In addition to this, many critics suggest that this creates a situation in which a country's most important legal principles as set out in its constitution do not apply to foreign firms subject to the agreement in question (De Mestral & Centre for International Governance Innovation, 2017), and as such the decisions lack accountability since they do not fall on these critical legal principles (A. Newcombe, 2017).

Forum Shopping: The case of Philip Morris Asia

The final criticism demonstrated in the literature is the issue of forum shopping. There is a fear that domestic firms will change their place of residence or incorporate themselves in nations that currently have a trade agreement with the country in question, in order to circumvent domestic courts for what is perceived as a favourable investor-state arbitration process. In 2012, Philip Morris Asia brought a grievance to international arbitration as part of the Australia-Hong Kong Bilateral Investment Treaty of 1993[37]. The grievance was brought in order to contest Australia's public health regulations that were recently enacted, and which would require plain cigarette packaging[38] (Daley, 2011; Spooner & Leong, 2016).

Although Philip Morris did not succeed in their claim, the case was brought into the eyes of the general public, adding to the anti-ISDS sentiment creeping up worldwide. To add to this, PhilipMorris was originally located in Australia, but shifted their place of residence to a state that had concluded a trade agreement with arbitration provisions in order to avoid using the domestic court system and opt for International Arbitration as per the stipulations in the Hong Kong – Australia agreement (Hong Kong-Australia BIT, 1993; Matveev, 2015; Spooner & Leong, 2016).

2.2.9 Investor-State Dispute Settlement: Suggested Reforms

The literature has set forth several suggested reforms of the Investor-State Arbitration process that is likely to respond to some the criticisms. Three suggested reforms to the Investor-State Arbitration process will be discussed. First, establishing a procedure for regular review will be discussed. Second, establishing a standing forum for arbitration, as opposed to ad hoc tribunals will be explored. Third, establishing the rule of *stare decisis,* or precedence will be considered.

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[37] *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments (1993)*; *Philip Morris Asia Limited* v. *The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

[38] The law was intended to "prevent tobacco advertising and/or promotion on tobacco product packaging" with the goal of "reducing the attractiveness and noticeability and effectiveness of mandated health warnings; and reducing the ability of tobacco product packaging to mislead consumers about the harms of smoking (Daley, 2011, p. 8; Spooner & Leong, 2016, pp. 8–10)".

Regular Review

The first suggested reform that will be discussed is the regular reviewing of ISDS mechanisms, and the requirement to update on a regular basis. For example, the China-Switzerland Free Trade Agreement, signed in 2013 includes a clause requiring the two parties to review the provisions of the agreement every two years. It is suggested by several authors that when negotiating, States should include a similar review clause, perhaps on a five-year basis. This would ensure that the agreement remains current and reflects the needs of a rapidly changing globalized economy (Matveev, 2015).

As an addition to this argument, Matveev (2015) suggests that developed states should assist developing nations in assessing the impact of International Investment Agreements on government policy and scope of obligations, in order to ensure that the agreements are reflective of the needs of the signing parties, but also to ensure that the obligations set forth are realistic. It should be noted that several counterarguments exist. Sunset clauses and review clauses create a climate of uncertainty as to the future of the investment agreement, and thus creates a climate of uncertainty which may worry investors and propel them from investment within the state in question (Alexander Panetta, 2017a, 2017b; Dani Rodrick, n.d.; Daniel Dale, 2017; Dave Lawder & Dave Graham, 2017; Eric Martin, Josh Wingrove, & Andrew Mayeda, 2017).

Establishing a Permanent Tribunal

A second suggested reform that has also recently become increasingly relevant is the establishment of a standing international investment court. The suggestion of a standing investment court would enable the appointment of a permanent set of judges, ensuring a higher level of judicial independence (through the security of a tenure position) (Matveev, 2015). It is argued that the inclusion of a permanent body that handles all decisions would further enable coherence in the arbitration process and would enable the collection of jurisprudence, similarly to those of Canadian or American courts (Matveev, 2015).

It should be noted that there are several counterarguments to the establishment of a more permanent forum for arbitration. The *ad hoc* nature of arbitration forums enables a flexibility that a permanent court would not allow. Furthermore, the limiting of this flexibility would equally limit the inclusion of technical experts, namely as arbitrators. This flexibility has been perceived by parties as a positive aspect, and one of the main elements in considering the arbitration process since it is often perceived as the most "fair" method of resolving disputes in the context of International Investment (Franck, 2005).

The *Comprehensive Economic Trade Agreement* (CETA), a free trade agreement signed between the European Union and Canada creates a more permanent forum for arbitration. The tribunal does not employ judges on a full-time basis, and does not have the same guarantees of independence as a domestic court, but as of 2017, it is said to be the "most substantial response to critics' concerns in any investment treaty to date (VanDuzer, 2016, pp. 1–3)." The tribunal present in the agreement does, however, require that the appoint tribunal members for a period of five years, with the opportunity for one renewal. Tribunal members have the competencies required to hear a case, independence of tribunal members from the parties of the tribunal.

Furthermore, members cannot take instructions from an "organization or government with regard to matters related to the dispute (Art. 8.30)". (VanDuzer, 2016, p. 9)". There are equally rotations for tribunal president between the members in order to ensure a "random and unpredictable" composition (VanDuzer, 2016, p. 10).

Tribunal members, once appointed, must abide by a restriction of outside work that would create a conflict of interest. In other words "Members must 'refrain from acting as counsel or as a party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law' (Art. 8.30(1)) (VanDuzer, 2016, p. 10)." All appointments to cases are random (VanDuzer, 2016). In terms of the critiques surrounding temporary nature of courts, VanDuzer (2016) suggests, CETA does respond to critics' concerns to a certain extent but does not address all the aforementioned criticisms.

Establishing an Investment Arbitration Liability Scheme

A third, and more recent suggested reform is that of establishing a liability insurance scheme. Chriki (2018) suggested that, in order to prevent regulatory chill, liability insurance for governments, specifically in the case of errors and omissions during the dispute process, would help mitigate the uncertainty of the international arbitration process and the interpretations by panelists. By establishing insurance schemes in ISDS, governments can effectively protect themselves, balancing their right to protect public policy, while still guaranteeing the same levels of protection for foreign direct investment. Chriki (2018) proposes an errors and omissions insurance in which governments hold policies that protect them against "any act of neglect or breach of duty (p.2)". Such an insurance would cover claims of actions taken by elected (or appointed) government officials[39]. Chriki equally suggests that this solution is partially flawed since insurance can create a situation in which insured parties act less carefully knowing that they can fall-back on the policy, creating a larger risk for insurance. Although insurance generally excludes intentional actions, it might be difficult for insurance companies to discern whether an act was intentional or not, given the complexity of government action and regulation. Furthermore, for this insurance to benefit both the insured and the insurer, multiple state governments would have to pool their interests and subscribe, keeping in line with the general notion of insurance, which is not effective unless perceived larger risks are mitigated by anticipated smaller risks (Chriki, 2018 ; Lluelles, 2017).

[39] Chriki (2018) provides examples such as a change in zoning issues.

Establishing the Binding Principle *(Stare Decisis)*

A fourth suggested reform of the Investor-State Arbitration Process is the establishment of the rule of legal precedence, or *Stare Decisis*. The rule takes its origins from the Anglo-Saxon *Common Law* tradition. In essence, the principle of *Stare Decisis* binds courts to follow cases that have already been decided on similar questions of law and fact, in turn creating coherence within the legal system. International Investment Arbitration tribunals do not abide by the *Stare Decisis* principle (Kurtz, 2009; A. P. Newcombe & Paradell, 2009). As Kurtz (2009) puts it "the contradictory jurisprudence driving these changes is now attracting the attention of legal scholars (p. 750)."

Despite the fact that the doctrine of Stare Decisis does not exist in international investment law, tribunals do refer to previous awards and decisions as a means of direction (A. P. Newcombe & Paradell, 2009). However, there have been cases where tribunals reviewed previous decisions and not only disagreed with the reasoning but contradicted and challenged the reasoning. For example, in *Société Générale de Surveillance* v. *Philippines*[40], the arbitration tribunal in question disagreed with a similar case[41] and with the interpretation of a clause that was the subject of debate in both cases (A. P. Newcombe & Paradell, 2009).

This literature review demonstrates that the ISDS mechanism has been subject to numerous criticism, but that much of this negative criticism lacks robust foundational evidence to confirm much of the claims made, whereas the positive critical elements of the investment agreements, in general, have been confirmed by quantitative studies. For example, bilateral, regional and multilateral investment agreements have been shown to foster foreign investment. The skepticism surrounding ISDS has been exacerbated by populist governments, and the advent

[40] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6.

[41] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13.

of major political events such as the Trump era, and Brexit. It is important to note that the criticisms in the literature, as set forth in this literature review are real, and recurring not only in academia but in political discourse. As more of the world shifts towards democracy, and as trade barriers continue to fall, this skepticism is likely to rise.

Furthermore, cases such as *Philip Morris*[42] demonstrate how ISDS could potentially lead to nefarious effects, that hamper governments' power within the confines of their borders, and thus it is important to find a balance between the promotion of foreign direct investment and the protection of sovereignty, and justice (Daley, 2011; *Philip Morris Asia Limited v. The Commonwealth of Australia* ; Spooner & Leong, 2016). As Lord Hewart famously stated in the landmark 1924 British decision *R* v. *Sussex Justices*[43] "it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done (*R v Sussex Justices, Ex parte McCarthy*, n.d.)"; International Law, namely in the context ISDS is not exempt, especially during a time where human connectedness, social-networking, and information exchange is at an all-time high.

This literature review has attempted to define and explain the ISDS mechanism and process, as well as present the numerous critiques alternatives found in scholarly literature. Through the use of several international arbitral cases under the *North American Free Trade Agreement,* necessarily involving Canada, the analysis of this paper will attempt to understand whether the critiques of this process are in fact, justified.

A primary focus will be placed on the critique of regulatory chill and the notion that ISDS is thought to diminish a state's right to regulate on its territory. Scholars including Franck (2005), and Newcombe and Paradell (2009) have discussed this topic at length, and numerous criticisms

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[42] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12

[43] [1924] 1 KB 256, [1923] All ER Rep 233.

of several NAFTA cases exist, including those by Hogdes (2002), Gantz (2003) and Legros (2015). The concept of regulatory chill is still prevalent and the justification to analyze this critique over the other ones presented in this literature review are based on the contemporaneity of the issue, since scholars continue to explore the issue, and how to overcome it (e.g. Chriki, 2018, and Kahale, 2018), and since the concept has caused a stir amongst numerous legal and economic scholars, leading them to sign an open letter directed at current American President, Donald Trump advocating for the removal of ISDS in all current and future investment treaties (Stiglitz et al., 2017).

The primary focus of this research is to identify whether there is a reason for Canada to be concerned or not with the ISDS mechanism currently present in NAFTA. The concerns in question are focused primarily with the fact that ISDS settlement clauses allow foreign firms to sue governments, thus creating a situation where many critics suggest that states lose their sovereignty in a quest to promote foreign investment. The analysis set forth in this paper will focus on Canadian International Arbitral Awards under the North American Free-Trade Agreement and will attempt to identify whether these cases are or were considered discriminatory in that they precluded the Canadian government from enacting its sovereignty, hampering the government's right to regulate.

First, an examination of the *North American Free Trade Agreement's (NAFTA)* provisions will be undertaken. A primary focus on the responsibilities of states of foreign investors, namely in terms of Most-Favored Nation clauses, Investor-State Arbitration, and investor protection clauses will be undertaken.

Second, after identifying the areas in question, a number of decisions and reports, involving claimants under NAFTA will be examined and will be assessed in terms of their relation the provisions set forth in NAFTA. Since there is no concept of stare decisis, or precedent in international trade law, similar cases with various outcomes will be selected and analyzed.

Arbitration decisions will primarily be sourced from databases such as ITAlaw, NAFTAclaims and the NAFTA secretariat.

Finally, an examination of whether arbitration decisions reached under NAFTA justify the current anti investor-state arbitration sentiment that is currently being portrayed by critics and the media alike.

3. DATA AND METHODS

The methodology of a research study is a crucial element that requires enough detail, enabling the replication, verification, and incorporation of the new elements the study establishes (Bui, 2009). This thesis is based on the analysis of legal texts and discourses and will be based primarily on two methodologies that will be discussed in this section. This section will be divided into three parts, the first part will discuss this research gap as per the literature review, in order to provide a basis for the research. Second, the first methodological framework, the Traditional Method in International Law, will be discussed. Third, the second methodological framework, the Critical Discourse Analysis will be presented. Finally, the limitations and biases of these methodologies will be discussed.

3.1. Investor-State Dispute Resolution and Research: Identifying a Gap

The main gap in this research is that there isn't much available in terms of "track records" (or, an analysis of how the outcome cases influence specific investment agreements) in international arbitration. Scholars discuss the fact that the number of cases has gone up exponentially, and that international arbitration is becoming of great importance, and is subject to numerous criticisms in today's globalized world. One example of this gap is how there is little to no information on how small and medium enterprises are able to operate within these frameworks versus large multinational firms. For example, how in-country SMEs, who are subject to national law at a more stringent level, compete with large multinationals who enter the market via foreign-direct investment, and are thus subject to international law through treaties and agreements (De Mestral & Centre for International Governance Innovation, 2017; Franck, 2005; A. Newcombe, 2017, 2017).

Another topic of interest that has only been discussed by the authors in a very sparse manner are the inequalities of national firms versus international firms in the framework of bilateral or multilateral investor agreements. The issue of discrimination, which is often discussed by the authors pertains only to the perceived discrimination of international firms (Franck, 2005). Conversely, most authors only briefly mention how international firms are in a position to abuse their power. No author mentions the effects of this abuse on smaller local competitors, instead, the authors focus on the *likelihood* of abuse and the incidence it *may* have on governments (De Mestral & Centre for International Governance Innovation, 2017; A. Newcombe, 2017; A. P. Newcombe & Paradell, 2009).

To conclude, although the topic in itself, and the numerous criticisms have been discussed in the literature abundantly, the literature has not focused on proving or ascertaining whether these criticisms are justified, and as such, a research gap exists that ought to be filled, enabling the researcher to uncover a new phenomenon (Garcia & Gluesing, 2013).

The primary focus of this research is to identify whether there is a reason for Canada to be concerned with the skepticism presented in this document, in relation to its adherence to the *North American Free Trade Agreement*'s investment protection mechanisms. The concerns in question are focused primarily with the fact that ISDS clauses allow foreign firms to sue governments, thus creating a situation where many critics suggest creates a loss of sovereignty for states, in a push to promote foreign investment.

There is a growing literature that points out that Investor-State Dispute Settlement (ISDS) can be a useful way to reduce the risk for foreign firms. However, criticism geared towards ISDS are becoming prolific, and the main concern is that sovereignty is being taken away from countries in order to promote foreign investment. Critics believe that this hinders a state's capacity to legislate in areas such as public health and the environment. On the other hand, many critics in favor of ISDS clauses suggest that states give away their sovereignty based on certain principles, - for the greater good – to guarantee foreign firms that they will not be discriminated against when investing.

This research paper will attempt to discuss and analyze the critiques on both sides through an analysis of international legal trade jurisprudence (cases, also known as arbitral awards); In order to limit the scope of this very large area of research, a specific focus will be placed on arbitral awards under the *North American Free Trade Agreement (NAFTA),* necessarily involving an unsuccessful attempt by Canada to defend itself.

3.2. Methodology

Tuoko Piiparinen, author of *Normative Pluralism and International Law: Exploring Global Governance* states the following: "it is necessary to go beyond the descriptive level of global complexity and explore those normative orders that underlie that seemingly anarchical and complex world, because only then is it possible to understand the real dynamics and mechanisms of globalization" (Piiparinen, 2013, p. 42)". The research in question is of an interdisciplinary nature, since it involves the use of business-oriented research, coupled with legal research tools. Two different methods will be used.

First, after a thorough review of the literature, and in order to answer the research question, *three* arbitral rewards exclusively involving foreign investment in Canada, under the *North American Free Trade Agreement* will be analyzed. In order to analyze these documents, triangulation will be used to bolster the credibility of results (Lincoln & Guba, 1985). Triangulation is used in order to minimize the limitations presented by this topic of research: the fairly recent nature of the topic, the large gap in the research, as well as the generally subjective nature of skepticism (Lincoln & Guba, 1985).

The arbitral awards were chosen by filtering cases in which Canada was the responding party, and where Canada was unsuccessful in defending its claim. Two of the three cases were equally chosen because of their frequency in the literature. *Pope & Talbot* v. *The Government of Canada* and *S.D. Myers* v. *The Government of Canada* have been discussed and critiqued at length by numerous authors (e.g. Newcombe & Paradell, 2009 ; Brower, 2004 ; Hodges, 2002 ; Ripinsky & Williams, 2008 ; Dodge, 2000 ; Gantz, 2003). The third case was chosen due to its more recent nature. Despite this case being fairly recent, *Clayton/ Bilcon of Delaware* v. *Government of Canada* has been equally subject to numerous criticism by scholars (e.g. Carfagnini, 2016 ; Legros, 2015) and by news outlets (e.g. McCarthy, 2015 ; Bursa, 2018 ; Wilt, 2018 ; Renders, 2018).

Although the three cases were not specifically selected based on their subject (environmental protection), all three cases share the same topic area: environmental protection. The cases equally share the same narrative: the Canadian government defending its claim on the basis of its right to legislate in matters of public policy. The cases were equally selected on the basis of what was discovered during the literature review. Therefore, there may be a selection bias present in the process selection since the cases were not selected blindly or randomly, and the author was made aware of numerous negative criticisms, which also served as a basis justifying the author's choice (Panucci & Wilkins, 2010).

The methodology in this research paper will focus on documentary analysis and an analytical framework that will be primarily focused on international relations and the principles of international law. Much of the methodology in this section can be attributed to the methodological framework presented by Jean-Michel Marcoux in his doctoral dissertation entitled *International Investment Law and the Evolving Codification of Foreign Investors' Responsibilities by Intergovernmental Organizations*. As Marcoux (2006) suggests, the specific nature of the research creates the need for an interdisciplinary methodology. The methodologies presented, and that will be used as a basis of analysis for this research are exclusively qualitative. Two methodologies will be used in tandem, the first, the *Traditional Method in International Law*, is a methodology rooted in the legal discipline; the second methodology, the *Critical Discourse Analysis* is a multidisciplinary methodological framework enabling the critical analysis of a discourse, whether it be political or otherwise.

A combination of both methods will ensure that the arbitral awards analyzed in this thesis will be analyzed both substantively, through the analysis of legal instruments including treaties and relevant international legal frameworks, and analytically through the critical analyses of discourses found within the arbitral awards, as well as those publicly expressed by government and the involved firms.

The use of two methodologies enables a more rigorous examination of the situation at hand. The Traditional Method in International Law equally enables a thorough examination of normative and legal standards in international investment arbitration, and how, if the case may be, such norms and the actions of firms using these norms can produce negative effects, leading to the skepticism that will be highlighted throughout this paper. Conversely, the Critical Discourse Analysis will facilitate the analysis of the degree of integration of such legal standards and norms in international investment law, as well as the point of view of the various actors involved in the process including those in the political sphere.

Finally, it is important to remain vigilant about the nature of the methodological framework presented, and the limits of each methodology, as well as the biases, involved when conducting qualitative studies.

This section will be divided into three parts followed by a conclusion. The first part of this section will focus on the use of Traditional Method in International Law; The second section will focus on the use of the Critical Discourse Analysis. The final section will present the limitations of this methodology, as well as the biases entailed.

3.2.1. The Traditional Method in International Law: A Legal-Based Analytical Framework

The first methodological framework used, the *Traditional Method in International Law* is axed on the "examination of the context of various international materials, […including] international agreements, decisions from international adjudication forums, resolutions and reports" from a legal perspective, that is, an analysis based on the rule of law, and an analysis using the comparison of legal texts in similar spheres; in this case, the specific sphere in question is that of International Law (Marcoux, Newcombe, University of Victoria (B.C.). Faculty of Law, & University of Victoria (B.C.), 2016; Piiparinen, 2013, p. 94)).

First, an analysis of international investment instruments and other connecting instruments will be conducted in order to understand the activities are covered by each of these mechanisms. The examinations of the provisions within treaties and other documents will be analyzed in a way that will enable the researcher to identify various normative orders that are at the heart of the investment activities in question. This analysis will focus on how such activities can impact society and the physical, political and economic environments (Marcoux et al., 2016).

Second, these instruments will be assessed to understand whether the criteria of the legality of each normative instrument will be used is present, and to what extent the rules found within are present in the North American Free Trade Agreement, the focus of the research. Finally, the method will enable the researcher to discern whether NAFTA tribunals refer to any negative impacts of international investment agreements in the cases that are presented within their jurisdiction. Briefly put, this methodology examines the context of international legal texts, including but not limited to agreements, decisions from tribunals and other similar forums, resolutions and other international reports, from a legal perspective (Marcoux et al., 2016).

As Marcoux et al., (2006) suggests, "the traditional method in international law allows tracing the emergence of international norms (p.102)", something at the very heart of this study

(Marcoux et al., 2016). Once the responsibilities of states and of foreign firms (or investors) is pinpointed, an analysis of the treaties and other pertinent documents will be analyzed using this method in order to determine the extent in which International Investment Agreement provisions in question are related to the criticisms uncovered in the literature review, and whether the criticisms presented are justifiable. Furthermore, this method will enable the evaluation of the extent to which Investor-State Dispute Tribunals discuss negative impacts of IIAs during the decision-making process (Marcoux et al., 2016).

The analysis will use this method to focus on the shared understandings in International Investment Law, that is, the rules of intergovernmental organizations are decided, such as the World Trade Organization, and how they have come to shape the responsibilities of investors in the *North American Free Trade Agreement* and the decisions settled in arbitration under this treaty (Marcoux et al., 2016).

In order to take into account, the relations between states and firms, as well as the power struggle inherent to the ISDS mechanism, a primary source of the criticism, it is important to not only use this method as a means of analysis, but to use a second method, namely the Critical Discourse Method to compliment the Traditional Method in International Law (Marcoux et al., 2016).

3.2.2. The Critical Discourse Analysis: A Text-Based Analytical Framework

The second methodology used, the Critical Discourse Analysis will be used in order to "question the presence of shared understandings, criteria of legality and a practice of legality that are necessary conditions for international instruments codifying foreign investors' responsibilities to be considered as legal norms" (Marcoux, 2016, p.93). The Critical Discourse Analysis method is considered to be a qualitative method since it focuses on describing written documents and spoken word through linguistic means (Banakar & Travers, 2005; Bryman & Bell, 2016; Klotz, Prakash, & SpringerLink (Online service), 2008).

As Marcoux (2016) suggests, the traditional legal method must necessarily be supplemented by another methodology in order to "shed light on the various actors' positions […] one must turn to a method that allows accounting for power relations that are inherent to the international lawmaker process occurring in intergovernmental organizations." (p.97). The critical discourse analysis is an interdisciplinary methodology often used in social sciences (including the legal field) and humanities. It is focused primarily with language as a means of social practice and is used to analyze and interpret discourse or text. This equally includes the analysis of political speeches, transcribed interviews, and other documents published by public bodies, such as governments and intergovernmental institutions (Foucault, 1969; Foucault, Burchell, Gordon, & Miller, 1991; Weiss & Wodak, 2003).

This type of analysis will be used to manipulate the impression of written speech (found in the international arbitral cases that will be analyzed), and the impression of the language used on its readers. Briefly put, an analysis of written language texts will be undertaken (Fairclough 1995; 2011) in order to "[study] the processes related to the establishment of societal constructs, for example, policies, norms, and normative concepts (Marcoux et al., 2016 p.97)". As Finnemore (1996) states in her text, *National Interests in International Society, "*norms may be articulated in *discourse…* because they are intersubjective and collectively held, norms are often the subject of discussion among actors (Finnemore, 1996 p.23-24).

The literature review allowed us to provide an overview of the critical discourse and skepticism presented in the literature and was used as a basis of the conceptual framework – a framework axed heavily on the different sources of criticism. Therefore, the connection between the conceptual framework and methodology will not only attempt to address the research question but will do so through a solid and comprehensive review of the literature (Creswell, 2014).

As several scholars suggest, using the Critical Discourse Analytical Framework takes into account the notion that such discourses help shape policy, and other facets of reality, and as such the analysis of such discourses will aid in understanding power relations. As Wodak & Meyer suggest:

> [T]he defining features of [the critical discourse methodology] are its concern with power as a central condition in social life, and its effort to develop a theory of language that incorporates this as a major premise. Closely attended to are not only the notion of struggles for power and control, but also the intertextuality and recontextualization of competing discourses in various public spaces and genres... Power does not necessarily derive from language, but language can be used to challenge power, to subvert it, to alter distributions of power in the short and the long term. Language provides a finely articulated vehicle for differences in power in hierarchical social structures (p.10; Marcoux et al., 2016, p. 99).

Furthermore, it should be noted that (despite the fact that most arbitral cases that are decided are not binding on future similar cases), discourses do become a source of power, and a breeding ground for criticism, and as such, analyzing them are critical in understanding whether skepticism behind it is justified (Carroll, 2004; Cooper, 2012; Lapan, Quartaroli, & Riemer, 2012; Marcoux et al., 2016; Milliken, 1999; Schiffrin, Tannen, Hamilton, & Ebooks Corporation, 2001; Weiss & Wodak, 2003; Willis, 2007).

3.3. A Two-Pronged Approach

It should be noted that the research question in this thesis requires a methodological approach that is different to those typically used in International Business Studies but is more familiar to researchers in the realm of legal studies and other social sciences. This varied approach will provide a unique insight into international business studies through the use of well-respected multidisciplinary methodologies.

As such, the Traditional Method in International Law is appropriate for this analysis, as it will enable a thorough analysis from a legal standpoint (Marcoux et al., 2016). This methodology is often used in the realm of legal studies in order examine legal norms including articles of law, and case law, and will equally help identify the areas of International Investment Law that are most vulnerable to the skepticism revealed in the literature review. Furthermore, the goal of this method is to analyze the content of these norms, how they came to be, in order to gain insight on the effectiveness of the institutions and how they may be improved – a key element of this thesis (Abbott, 1999). As Slaughter and Tulumello (1998) suggest, this method enables researchers to "to diagnose substantive problems and frame better legal solutions; to explain the structure or function of particular international legal rules or institutions; reconceptualize or reframe particular institutions or international law generally (p.369)".

Furthermore, a two-pronged approach enables a more comprehensive level of research, and the critical discourse method enables the coupling of legal instruments with the discourses surrounding such legal instruments amongst the countries involved. The critical discourse method is an appropriate methodology as it enables the researcher to "shed light on relations of power characterizing the elaboration and implementation of specific instruments by intergovernmental organizations" and state governments (Marcoux et al., 2016 p. 105). Furthermore, as Marcoux et al. (2016) suggests, "[t]he language found in statements, press releases, reports and summaries of negotiation processes produced by intergovernmental organizations can thus be analyzed with a view to identifying the extent to which these discourses reflect relations of power that underlie the international lawmaking process" (p.106). This method equally enables the analysis of the influence of the discourses and how such *discourses shape practice of legality* (Marcoux, 2016).

3.4. Limitations and Biases

First, although triangulation was used in order to enhance credibility (Lincoln & Guba, 1985), the Critical Discourse Analysis methodology, and the Traditional Method in International Law both present certain limitations. As text-based analyses, the perspective of the researcher can cloud the analytical process (Lockyer, 2008). As mentioned by Chouliaraki and Fairclough, “[c]ritical social research should be reflexive, so part of the analysis should be a reflection on the position from which it is carried out (Chouliaraki & Fairclough, 2010, pp. 352–353; Lange, 2005)”.

The methodological framework presented is based on the reflection of the researcher of various legal frameworks in tandem with legal, political and economic discourse surrounding the outcome of several decisions, and as such the researcher must raise awareness that this research and any future research of its kind will always present a bias based on the researcher’s perspective. As Marcoux (2016) suggests “the individual conducting the examination inevitably carries professional presuppositions, cultural biases and personal experience (p.110), and that “[t]he critical stance adopted by a researcher who follows this method is also likely to influence the collection and the analysis of data” (p.100). It is imperative that the researcher and any future researcher understand the scope of these limitations, since the understanding of limitations not only raises awareness of how far the research can be pushed but equally enables researchers from different disciplines and of various perspectives to improve and build to provide better research in the future (Wodak & Meyer, 2009).

A bias may exist in the way the international legal arbitral awards will be analyzed through the methodologies[44] since cultural and political bias is often present in qualitative research (Patton, 2002). Furthermore, the methodological framework selected for the purpose of this thesis are related to the researcher’s previous background. Having completed two law degrees, and thus relying on a bi-jurisdictional training, with a focus on international law, as well as studies at the Masters’ level in International Business Management, the study will evidently present the findings through a legal and international business-oriented perspective.

This unique combination creates several limitations, namely in that a bias, namely in terms of the presuppositions of the researcher from past studies, as well as his personal experience will create a bias that cannot be ignored[45]. The chosen method, in this case, the

[44] The Critical Discourse Method and the Traditional Method in International Law.
[45] Similarly, Marcoux (2016), in his doctoral thesis, mentions this bias at p.110-111.

Critical Discourse Method, will impact how data is collected and analyzed (Marcoux et al., 2016; Weninger, 2006). It must equally be noted that the researcher's choice of the discourses included in their study, and the conclusions that will be drawn cannot be separated; in other words, the texts are chosen strategically, in order to demonstrate what the researcher intends to prove or disprove (Lockyer, 2008; Marcoux et al., 2016).

Finally, it should be noted that any researcher will likely formulate personal opinions prior to, during and after conducting research, and as such, it is important to raise awareness of such a bias. The researcher is pro-globalization and is in favor of International Arbitration as a means of ISDS, heavily relying on the lessons learned throughout his studies of Québec and Ontario law, where arbitration or mediation has become the first step in resolving civil disputes, and this before the traditional court system is used. The researcher will attempt to remain as objective as possible, but as Marcoux (2016) suggests, as with most qualitative research, a researcher cannot ignore the fact that her/his research will remain totally objective.

In other words, the interest of the researcher to attempt to fill the gaps currently present in this field of research, his interest in the topic, and the use of a Critical methodological framework requiring reflection through analysis can and will present a bias (Marcoux et al., 2016).

3.5. Data Collection

Since the focus of this research is to examine international arbitral awards, data will be collected through the use of international arbitral award databases. All international arbitral awards under the *North American Free Trade Agreement* are published and made available online in several major databases: NAFTAclaims.com, a database focusing solely on cases involving the North American Free Trade Agreement, ITAlaw.com, NAFTAclaims.com and the NAFTA Secretariat databases of international investment cases, awards, decisions and materials, and the Ministry of Global Affairs, Canada at international.gc.ca[46]. The research will be exclusively focused on cases under the *North American Free Trade Agreement* in which Canada is a party and has been unsuccessful in defending its claims. The Investor-State Law Guide database will be used in order to search for arbitration decisions that will be at the heart of this study.

Several other resources will be used, including government press releases, and other sources from news outlets such as the Canadian Broadcasting Corporation (CBC). News articles are necessarily related to the three cases and will be gathered through news databases such as Google News. Government press releases will be accessed through official government websites for the three parties of NAFTA, Canada, the United States, and Mexico.

[46] More specifically: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng

4. ANALYSIS

In the following section, an analysis of three cases brought under the auspices of the *North American Free Trade Agreement's Chapter Eleven*, filed against the Canadian Government, will be presented. First, a presentation of the dispute in question will be exposed. Second, an analysis of the primary issues of each respective case will be discussed. Third, the impacts of the case on the ISDS mechanism of NAFTA will be discussed[47].

In the following section, conclusions will be drawn on whether the three cases are representative of the current criticisms of Investor-State Arbitration, as well as the connecting skepticism, and anti-globalization sentiment currently changing the political and investment environment in the Western World. Finally, the implications of such conclusions will be discussed.

4.1. The North American Free Trade Agreement: An Overview

The *North American Free Trade Agreement* (NAFTA), which formally entered into force on January 1, 1994, is a multilateral free trade agreement between three North American States, the United States, Canada, and Mexico. The agreement builds on existing unilateral trade liberalization of Mexico, and the several agreements already signed between Canada and the United States, including the U.S.-Canada Free Trade Agreement of 1989[48] and the Canada–United States Automotive Products Agreement of 1965 (Jackson, 2016; Villareal & Fergusson, 2017). NAFTA was the first ever free trade agreement involving two developed countries, and one developing one (Hufbauer & Schott, 2005; Villareal & Fergusson, 2017, p. 10).

[47] A brief breakdown of every NAFTA case can be found at Exhibit 18.

[48] This agreement was incremental in eliminating the majority of tariffs between Canada and the United States, in liberalizing the financial sector, and expanded the size of government procurement markets available for the opposing country, amongst other things.

One of the treaty's main objectives is to "help promote a common trade agenda with shared values and generate economic growth (Villareal & Fergusson, 2017, p. 1)". NAFTA's article 102(1) outlines the objectives of the agreement; the treaty's main objectives are to:

> *(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;*
> *(b) promote conditions of fair competition in the free trade area;*
> *(c) increase substantially investment opportunities in the territories of the Parties;*
> *(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;*
> *(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and*
> *(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement*[49]*.*

As such, paragraph 2 of the article stipulates that all provisions in the agreement must be interpreted in light of these objectives[50].

This agreement was preceded by the Canada-United States Free Trade Agreement (CUSFTA), an agreement that came into force in 1989. It should be noted that the data presented below on Canada/United States trade began under the CUSFTA, and continued throughout NAFTA – however, no significant change in growth patterns occurred between the United States and Canada once NAFTA came into force (Hufbauer, 2000)[51]. However, U.S. trade as a whole between all three members of NAFTA has tripled since the agreement came into force (Villareal & Fergusson, 2017).

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[49] Article 102(1) of the *North American Free Trade Agreement, (Exhibit 1).*

[50] Article 102(2) of the *North American Free Trade Agreement, (Exhibit 1).*

[51] As Villareal & Fergusson (2017) states "U.S. trade with Canada more than doubled in the first decade of the FTA/NAFTA (1989-1999) from $166.5 billion to $362.2 billion. U.S. exports to Canada increased from $100.2 billion in 1993 to $312.1 billion in 2014, and then decreased to $266.8 billion in 2016. U.S. imports from Canada increased from $110.9 billion in 1993 to $349.3 billion in 2014 (p.14)".

However, the economic impact of the agreement is difficult to measure, since the NAFTA environment also fluctuates according to economic factors, such as growth, currency fluctuations, inflation (Villareal & Fergusson, 2017).

NAFTA has facilitated the removal of trade barriers, including all tariffs and the majority of non-tariff barriers. This occurred over ten years, with some sensitive sectors given an additional five-year grace period. Prior to NAFTA, Mexican tariffs remained high between Mexico and other NAFTA countries. These tariffs were significantly reduced, with a large portion of tariffs completely removed. Furthermore, the agreement paved the way for the liberalization of the trade in services. Services providers in all three countries were granted rights of non-discrimination and were able to enter and invest other member state economies[52] (Villareal & Fergusson, 2017).

NAFTA facilitated the protection of intellectual property rights namely in the protection of copyrights, patents, trademarks, and trade secrets. Finally, the agreement removed barriers pertaining to foreign investors, providing basic protections for investors and provided for investment dispute settlement procedures, including those in Chapter Eleven (Villareal & Fergusson, 2017).

The United States is Canada's largest trading partner (Export Development Canada, 2017; Pettigrew, 2003). For Canada, exports to the United States grew at 4.6% per year between 1993 and 2015, over 78% of Canada's merchandise exports are intended and destined for NAFTA, and more than 15% of American goods are purchased by Canadians, while trade between Canada and the United States has doubled. Canada exported over 278 billion USD in goods to the United States, and the U.S. has imported 267 billion USD during the same timeframe (Laliberté & Sinclair,

[52] With certain exceptions including those in certain aspects of the telecommunications industry in all three countries, maritime shipping (USA), film and publishing services (Canada) and the oil and gas industry (Mexico).

2017)[53]. The trade for goods and service between Canada and the United states was nearly 881 billion CAD in 2015, and Canada remains the largest foreign supplier of energy for the United States. Furthermore, forty American states have Canada as their current largest market, and over 85% of Canadian merchandise exports go to the United States (Pettigrew, 2003)[54].

Mexico is Canada's third largest trading partner with an average of 10% in annual growth of exports going from Canada to Mexico since 1993. Since the inception of NAFTA, trade has increased by over 700% Merchandise trade between Mexico and Canada reached nearly 37.8 billion CAD in 2015, growing on average by 10.1 % yearly (Export Development Canada, 2017; Global Affairs Canada, 2017).

Trilateral merchandise trade within NAFTA is measured at over 1.0 trillion USD, an increase of over 300% since 1993, the year prior to NAFTA's coming into force. NAFTA currently represents over 28% of the world's gross domestic product, despite only covering below 10% of the world's population.

Canada is the United States' largest trading partner when services and merchandise are taken into account (Export Development Canada, 2017).

Furthermore, in terms of economic integration, the U.S. and Canada benefit from a high level of economic integration, so much that 17.5% of Canadian exports to the U.S. feature American content. Furthermore, 64% of all products and services produced and sold in Canada and the United States contain materials or services sourced from either country (Export Development Canada, 2017).

In terms of investment, as Posen (2004) suggests "Canada, Mexico, and the United States – enjoy a large joint market and common supply chain. Consumers in all three countries have

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[53] For a trade surplus of 11 billion USD in Canada's favour (2016).
[54] See exhibits 11, 12, 13, 14 and 15.

gained (p.4). American investment into Canada has reached 392.1 billion CAD (or 47.5%), while Canada has invested 463.3 billion CAD across NAFTA. The value of cross-border investment by Canadian companies in the U.S. is 474.4 billion CAD. Bilateral investment between Canada and the United States in 2015 was evaluated at nearly 836.2 billion CAD (Global Affairs Canada, 2017). The United States is the largest investor in Canada with its foreign domestic investment stocks at 352.9 billion USD in 2015, in comparison to 69.9 billion in 1993[55]. Mexican foreign direct investment amounts for 1.7 billion CAD, and the value of cross-border investment by Canadian firms in Mexico is 16.8 billion CAD (Export Development Canada, 2017; Posen, 2014).

These statistics are important as they demonstrate the interconnectedness of the three economies in terms of participation. Furthermore, the above data suggest that the countries have benefitted quite handsomely from the agreement.

4.2. ***Firms* v. *The Government of Canada*: An Introduction**

As the literature explains, Chapter Eleven of the *North American Free Trade Agreement* grants investors extraordinary rights to sue governments in the event that they have not been treated similarly to their domestic counterparts, or if they aren't provided with a minimum standard of treatment. The criticisms of the ISDS mechanism in NAFTA are similar to that of any similar mechanism in any similar bilateral or multilateral investment agreement: such mechanisms cost states dearly in terms of monetary and social costs. First, governments assume the financial burden of defending themselves, the potential cost of damages in the event that they are unsuccessful in defending their claims, or settlement costs. Second, governments assume the social costs of these disputes: the fact that they pose a risk to the very fabric of democracy, and the heart of state sovereignty – that is, the right of a state to legislate, specifically in areas of importance such as healthcare and the environment. As of 2018, Canada has been sued under Chapter Eleven a total of forty-one times, and Canada is presently the country that

[55] Exhibit 16.

has been sued most frequently under NAFTA (The Canadian Press, 2016)[56]. To date, Canada has been unsuccessful in defending itself in eight cases and has won nine[57].

4.3. Investor-State Dispute Settlement: An Obstacle to Sovereignty and State Regulation?

The purpose of this section is to discuss the policy considerations of the ISDS mechanism in NAFTA. One of the largest criticisms of NAFTA is the loss of sovereignty in legislating, namely in the sphere of public interest in fields such as environmental protection, the administration of justice, the management of resources, healthcare, agriculture and financial regulation[58]. According to Sinclair (2018), The ISDS system under NAFTA has been used on numerous occasions to attack regulations in all NAFTA countries, specifically more so in Canada and Mexico.

For example, in *Ethyl Corporation* v. *The Government of Canada,* a chemical company based in the U.S. used NAFTA's ISDS mechanism to contest an import and interprovincial trade ban on MMT[59], an additive in gasoline that is suspected to be hazardous to the nervous system, and which interferes with certain automotive parts. Ethyl was successful in their claim and was awarded 19.5 million CAD in damages.

In the *Abitibi Bowater* v. *The Government of Canada* case, an investor ceased operations in Canada due to bankruptcy, and failed to pay remaining bills, wages and pension contributions, while also failing to clean up toxic materials. Although the province had expropriation legislation that provided compensation, Abitibi Bowater decided to bring an action under Chapter 11 of NAFTA. The Canadian government settled, paying 130 million USD to the firm, the largest settlement under NAFTA to date. This case had an impact of Canadian policy and legislation in

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[56] Exhibits 5, 6, 7, 8.

[57] It should be noted that the United States has been implicated in 11 cases and has not lost a single case under NAFTA. See Exhibits 4,7,8 and 9.

[58] See Exhibit 9 and 10 for statistics.

[59] Methylcyclopentadienyl manganese tricarbonyl.

that the Federal government stated that any future damages or settlement payouts under the ISDS mechanism of NAFTA involving provincial regulation will be handed to the provinces, setting new precedent, and creating a situation where, although only the Federal government, in theory, defends Canada's during the arbitration process, it would nonetheless hold the provincial level of government responsible for the payout.

The *Saint Mary's VCNA, LLC* v. *Government of Canada* case involves freshwater zoning laws, by the Ontario government. The restrictions essentially precluded the firm from turning an agricultural water source into an extraction source for the purposes of industrial use, a policy put in place to preserve and manage the water supply and protect the environment. Although the case was withdrawn (in exchange for 15 million USD in government support), this case demonstrates one of the major critiques of the ISDS system: the fact that investors use the mechanism when governments refuse to approve controversial projects, namely in regard to the environment or healthcare (Sinclair, 2018).

In *Mobil Investments/Murphy Oil* v. *The Government of Canada*, Canada was ordered to pay damages to Mobil in the amount of 13.9 million CAD plus interest and 3.4 million CAD[60] plus interest to Murphy Oil Corporation in damages, due to a Canadian law that obliges firms wishing to carry out oil and gas projects in Atlantic Canada to make investments in R&D. This legislation was put into place in order to ensure that natural resource projects would benefit the region since various similar projects in the past did not benefit the regional economy. The law was found to be in breach of the National Treatment clause, and damages were assessed. Furthermore, Canada may be liable for more damages, as the firms have applied for further damages, for the actions of the government occurring after 2012 (Sinclair, 2018).

The above cases demonstrate the effect that international arbitral awards can have on a government regulation. The above cases, *a priori* demonstrate how the criticisms revealed

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[60] These damages were awarded for the actions that occurred between 2004 and 2012.

throughout the literature might have an effect on a government's right to regulate in matters of public policy. However, in order to provide an answer to the text's main research question, and accept or refute the above argument, three cases will be analyzed in order to build on the above analyses and understand whether the criticism against the ISDS mechanism is justified.

The following section will analyze three cases under the North American Free Trade Agreement, in which Canada was the defending party. First, an introduction to each case will be presented. Second, the arguments of the case and pertinent legislation will be presented. Third, the conclusion of the case, by the Tribunal in question will be exposed.

The cases selected are of significance since they represent cases in which the government of Canada was unable to successfully defend their claims. Furthermore, the cases involve questions of environmental legislation and Canada's right to regulate in environmental matters for the protection of the ecosystem, and of the public. Finally, the cases have been discussed by numerous scholars in which such individuals suggest that the cases pose a risk to Canada's right to regulate in public policy matters. The cases themselves have been presented as confirming the criticism that ISDS inhibits and hampers a government's right to regulate within their territory[61].

4.3.1. *Pope & Talbot Inc.* v. *Government of Canada*

The *Pope & Talbot Case*[62] involves a large pulp mill multinational firm, based in Portland, Oregon, incorporated in Delaware, and the Government of Canada. Although a U.S. firm, Pope & Talbot operated in Canada via a Canadian subsidiary, incorporated in British Columbia. The subsidiary operated three mills in British Columbia, Canada, exporting most of its product, softwood lumber, to the United States. On May 29, 1996, the Canadian government

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[61] A summary of the key findings for the three cases in question can be found in the annex, at Exhibit 21.

[62] A timeline of this case can be found in the annex, at Exhibit 1.

implemented the Softwood Lumber Agreement, an agreement that was to last 5 years, between Canada and the United States.

One major element of the agreement, the Export Control Regime (ECR)[63], became the subject of criticism. The ECR's main purpose was to limit free exportation of softwood lumber from four of Canada's provinces, Québec, Ontario, Alberta and British Columbia towards the United States (Dervaird, Greenberg, & Belman, 2000).

This was achieved through the collection of intermediary fees[64] established on a sliding scale, for any lumber over the quota amount. The current year's scale would vary by firm and was based on the previous year's export levels for each firm[65] The fees would apply for any amount of wood imported above 14.7 billion board feet, anything below that would remain free of charge. Any amount of wood between 14.7 billion board feet and 15.35 billion board feet was subject to a fee of 50 USD per thousand board feet[66]. This fee was known as the Lower Fee Base. Any import above 15.35 billion board feet would be subject to a higher rate of 100 USD per thousand board feet, known as the Upper Fee Base. Furthermore, an administrative fee was assessed on all exporters when issuing the required export permits. Although introduced in 1997, the Softwood Lumber Agreement (SLA) applied retroactively to 1996. In order to control this system, the Canadian government would require that any firm wishing to export towards the United States be granted a permit under the ECR. Such permits were granted based on recent export numbers. This system, known as the Export Control Regime, was contested by the plaintiffs as Canada's legal obligations under NAFTA, specifically under the Investment chapter [67]of the treaty (Dervaird et al., 2000).

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[63] Article 2.1, *Softwood Lumber Agreement*.
[64] Article 2.2, *Softwood Lumber Agreement*.
[65] Article 2.4, *Softwood Lumber Agreement.*
[66] Article 2.4, *Softwood Lumber Agreement.*
[67] Chapter Eleven.

The plaintiffs filed a complaint under NAFTA claiming that Canada breached its obligations under Chapter Eleven through the use of the Export Control Regime under the Softwood Lumber Agreement. The plaintiffs contended that Canada breached the National Treatment Rule[68], the Minimum Standard of Treatment Rule[69] (art. 1105), the Performance Requirements Rule[70] and the Expropriation Rule (Art. 1110)[71]. As such, Pope & Talbot claimed 508 million USD in compensation.

4.3.1.1. <u>The Performance Requirements Provision</u>

Pope & Talbot contend that the Export Control Regime breaches the Performance Requirements rule in NAFTA, since it restricts the volume of sales of the firm and requires that a firm export a certain amount of product, or by not doing so, the firm will effectively restrict the amount they can export the following year, fee free (Dervaird et al., 2000, Interim Award, par.45). Pope & Talbot contend that "Canada has regulated the Investor's activity in a manner that violates NAFTA Article 1106(1)(a) because the Export Control Regime requires the Investment to export a given level of goods that is lower than that which the Investment would export if it were not forced to pay export fees on exports above its fee-free allocation", and that it creates a regime that penalizes producers if they do not use their full fee-free export quota in that year (Dervaird et al., 2000, Interim Award, par.47).

The Government of Canada responded to Pope & Talbot, mentioning that the Export Control Regime does not force firms to export a certain amount, and as such, is not in breach of the Performance Requirement Provision[72]. Furthermore, the government contends that the

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[68] Article 1102, *North American Free Trade Agreement* (Exhibit 1).
[69] Article 1105, *North American Free Trade Agreement* (Exhibit 1).
[70] Article 1106, *North American Free Trade Agreement* (Exhibit 1).
[71] Article 1110, *North American Free Trade Agreement* (Exhibit 1).
[72] Article 1106 (1)a), *North American Free Trade Agreement.*

Export Control Regime does not fall within the provisions of this article since it does not accord a preference to goods in its territory[73], nor does it restrict the sale of such goods[74].

On this question, the Tribunal concluded that, through the interpretation of NAFTA in a way that conforms with International Law, under the *Vienna Convention on the Law of Treaties*, it is important to analyse the Performance Requirements with regards to the treaty. As such, the Tribunal concludes that the Investor's claim is without merit since the Export Control Regime does not "impose or enforce […] requirements", but instead restrains free import of goods after a certain threshold and regulates the export through a permit system. Although it does deter exports over the threshold, it does not restrict the activity per se (Dervaird et al., 2000, Interim Award, par.26).

4.3.1.2. <u>The National Treatment Rule</u>

In terms of the National Treatment Rule[75], the panel applies a specific rule; the Tribunal suggests that "once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they *in like circumstances (Dervaird et al., 2000, Awards on the Merit Phase 2, par.73; Gantz, 2003, p. 942)*?" This is a two-part test since a difference in treatment between local and foreign firms must first be concluded, and these firms must be in like circumstances (Dervaird et al., 2000, Awards on the Merit Phase 2, par.79). In this case, the tribunal did not find that the use of the Softwood Lumber Act constituted a violation of national treatment, but instead was "reasonably related to the rational policy of removing the threat of countervailing duty actions (Gantz, 2003, p. 942)."

The Tribunal begins their arguments by attempting to define National Treatment as per the written legislative text. The tribunal concluded that "there is no dispute that the

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[73] Article 1106 (1)e), *North American Free Trade Agreement.*
[74] Article 1106 (3)d), *North American Free Trade Agreement.*
[75] Article 1102, *North American Free Trade Agreement*.

implementation of the SLA does relate at least to the "expansion, management, conduct [and] operation of the investment", a key component of the article (Dervaird et al., 2000, Award on The Merits of Phase 2, par.31). Second, the Tribunal clarifies the article and states that the very nature of National Treatment is "simply to make clear that the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords any investment of its country, not just the best treatment it accords to investments of *its* investors (Dervaird et al., 2000, Award on The Merits of Phase 2, par. 41)".

Furthermore, according to NAFTA, if a Government creates unfavourable conditions for a firm in a discriminatory fashion, it is in violation of the National Treatment clause. If the conditions are neutral, it is the Tribunal's responsibility to conclude whether the condition although neutral, disadvantages the foreign investment (Dervaird et al., 2000, Award on The Merits Phase 2, par. 56). As is suggested in *S.D. Myers* v. *The Government of Canada*, in order to assess whether the National Treatment clause has been breached, there is a requirement to determine "whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals (Hunter, Schwartz, & Chiasson, 2000, par. 252)." Furthermore, these differences are permissible in certain situations where they "have a reasonable nexus to rational government policies that (1) do not distinguish […] between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA (Dervaird et al., 2000, Award on The Merits, Phase 2, par.78).

In this case, the Tribunal comes to the conclusion that the Export Control Regime is not discriminatory because it limits Canadian firms similarly to foreign firms (Dervaird et al., 2000, Award on The Merits Phase 2, par. 74). One argument Pope & Talbot attempts to make was that since the Regime only applied in certain provinces, those exploiting the softwood lumber industry in provinces not covered under the Regime were afforded more favourable treatment (Dervaird et al., 2000, Award on The Merits, Phase 2, par. 85). The tribunal found that a regime covering only several provinces was "reasonably related to [… government] policy", and that the producers in other provinces could equally not be considered *in like* circumstances since the economics of the industry in the other provinces varied greatly to those covered under the ECR (Dervaird et al., 2000, Award on the Merits, Phase 2, par.88).

Finally, the courts addressed a subsidiary issue of an additional fee, known as the Super Fee, introduced for Softwood Lumber producers in British Columbia, as Pope & Talbot contended that this fee was discriminatory and thus breached National Treatment. Although this fee targeted producers in only one province, it did not distinguish between local and foreign firms, and as such, was found not to breach National Treatment (Dervaird et al., 2000, Award on The Merits, Phase 2).

4.3.1.3. <u>The Expropriation Argument</u>

Pope & Talbot claim that the Export Control Regime was tantamount to expropriation[76] since it "deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market". The firm contends that every time their quota was reduced based on the previous year's results, that this constituted expropriation, and was in violation of NAFTA[77] (Dervaird et al., 2000, par.81). The firm suggests that the Expropriation provision in NAFTA "provides the broadest protection for the investments of foreign investors who may suffer harm by being deprived of their fundamental investment rights" and that furthermore, the Canadian government is expropriating the investment through "creeping" expropriation, a type of expropriation that is conducted through various stages (Dervaird et al., 2000, par. 83.)

In response, the Canadian government argues that expropriation has not occurred since, what is being expropriated in this case is the firm's "the ability to alienate its product to market", which is not a property right in itself. Furthermore, Canada contends that Pope & Talbot has exported its product to the United States since the controls were put into place and continued to do so even during the case before the Tribunal (Dervaird et al., 2000, par. 87). Furthermore,

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[76] Article 1110, *North American Free Trade Agreement.*
[77] Article 1110, *North American Free Trade Agreement*.

the Government suggests that although no clear definition of the term *expropriation* exists, according to international legal standards, proof of an interference in the fundamental rights of a firm's ownership. In other words, "mere interference is not expropriation: rather, a significant degree of deprivation of fundamental rights of ownership is required (Dervaird et al., 2000, par. 88). Canada suggests that the Export Control Regime does not deprive the firm of any of its rights as it does not, for example, expropriate any facilities, stock or control of operations (Dervaird et al., 2000, par.90-92.)

As a reply, Pope & Talbot contend that limiting access to the U.S. market is indeed expropriation, as it is the primary means in which the firm generates a profit, and that comprises its value.

The Tribunal agreed with Pope & Talbot in that limiting an investment's access to a market does fall under the scope of expropriation. Furthermore, the Tribunal suggests that regulations can be tantamount to expropriation, even when they are applied in a "creeping" fashion. However, according to the Tribunal, the Export Control Regime does not interfere with business activities in a way that is *tantamount*[78] to expropriation. The Tribunal concludes that there has been no nationalization of the firm, nor was any part of the firm confiscated. The firms retained the control of its subsidiary including daily operations and management. Although the Tribunal concluded that the Regime did interfere with the investment, it did not do so at a degree that would constitute expropriation, and as such rejected Pope & Talbot's claim on the basis of expropriation.

[78] The Tribunal concludes that the term "tantamount" is interpreted in the same manner at the term "equivalent" and as such, must be used in that sense. An action that is tantamount to expropriation is by definition, equivalent or the same, as expropriation. This restrictive definition was mentioned in Pope & Talbot's Interim Award at par. 104.

4.3.1.4. <u>The Minimum Standard of Treatment Rule</u>

In terms of the Minimum Standard of Treatment[79] rule, Pope & Talbot suggest that Canada failed in its obligations to provide a "fair and equitable treatment and full protection of security (Dervaird et al., 2000, Award on the Merits, Phase 2, par.109)." the plaintiffs contended that Canada violated its obligation seven times (two of which will be discussed in detail)[80], the court disagreed, and established that Canada violated this standard once, when the Softwood Lumber Division of Global Affairs Canada, an arm of the Canadian Government used threats, and denied requests by the investors deemed reasonable by the panel of judges, in turn forcing the Pope & Talbot to incur excess legal costs and causing damage to their reputation (Ripinsky & Williams, 2008).

Pope & Talbot contend that Canada breached the Minimum Standard of Treatment standard in its communications with the firm, as the Government failed in their obligations to assure administrative fairness, by not providing an appeal mechanism on Softwood Lumber Board Disputes. The Tribunal found that in all decisions concerning Pope & Talbot, detailed letters were drafted and sent, special telephone numbers and other ways to reach pertinent departments were contained in this letter, and Ministerial intervention was provided despite any political beliefs. In this respect, Canada was found not to have breached this standard.

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[79] Art. 1105(1) *North American Free Trade Agreement.*

[80] The plaintiffs suggest that the Government of Canada breached their obligation to provide a Minimum Standard of Treatment in seven cases: (1) Versus new entrants of the industry, where the plaintiffs suggests the standards were preferential to new entrants ; (2) during the transitional adjustment quota for the first year (the retroactive year) of quotas under the Softwood Lumber Agreement; (3) with Wholesalers, whom did not originally have quotas directly assigned to them; (4) the Special Reallocation Adjustment for 13 B.C. Companies, which was intended to offset errors, unfavourable affecting the plaintiffs; (5) the additional stumping fee (known as the Super Fee) which was readjusted on the agreement of Canada and the United States in 1999, creating added costs for the plaintiff and other firms exploiting resources in British Columbia; (6) the event known as the Verification Review Episode, which will be discussed in detail above and (7) the issue of administrative fairness, which will equally be discussed above.

However, in one case, Canada was accused of lacking administrative fairness in the verification review process. After filing a notice of a claim under NAFTA, the Softwood Lumber Division reviewed Pope & Talbot's quota allocation and concluded that it did not receive the proper quota allocation, and that in fact, the firm sold more wood than it had produced prior, creating a discrepancy. After numerous communication, over several years, the Softwood Lumber Division rejected every element of Pope & Talbot's proposals concerning the discrepancy. The Softwood Lumber Division demanded a review of a copious amount (truckloads) of documents.

The firm invited the Government of Canada and Softwood Lumber Division to Portland Oregon to verify all the documents since the shipment of these documents would be excessively laborious and unjustified. Canada disagreed without any justification, nor provide any means to enable inspection and verification in a way that would diminish the burden on the firm. The Tribunal suggests that Canada acted in a way that bred an environment of "combat: instead of one of "cooperative regulations", wholly attributing the blame on the Softwood Lumber Division, since it was shown that they subjected Pope & Talbot "to threats, denied […] reasonable requests for pertinent information, required [them] to incur unnecessary expense and disruption in meeting […] requests for information, forced to expand legal fees and probably suffer a loss of reputation in government circles (Dervaird et al., 2000, Award on the Merits, Phase 2, par. 181)," thus breaching their obligation of administrative fairness.

4.3.1.5. <u>The Critiques</u>

This case has been criticized by numerous scholars, and the media alike (e.g. De Mestral et al., 2017). The *Pope & Talbot* case was considered to prove the notion that De Mestral (2017) sets forth in his work *Second thoughts: Investor-State Arbitration Between Developed Democracies:* that ISDS leaves arbitrators with extensive powers of interpretation, that in turn, can lead to abusive interpretations of the provisions in question, all while "unduly [restraining] domestic regulatory options and [threatening] environmental […] standards", leading to a regulatory chill (De Mestral et al., 2017, p.25).

4.3.1.6. <u>The Assessment of Damages</u>

As such, the damages awarded were exclusively based on the above incident. The Tribunal awarded the plaintiffs costs for expenses, namely professional fees and fees incurred through the lobbying process, as well as hearing fees, totalling 407 000 USD. The tribunal equally awarded interest at 5% per year, bringing the total amount of damages to 461 600 USD (Dervaird et al., 2000, Award on Costs, Award on the Merits, Phase 2; Dodge, 2000; Ripinsky & Williams, 2008).

After numerous years of deliberations, and a substantial reduction in the amount sought (from 508 million USD to 2.2 million USD), the court presented its conclusions. The Tribunal dismissed all but one claim. The panel did not find any breach in the National Treatment standard, nor expropriation. As such, the Tribunal did not find any legitimate basis for the PCB export ban

It should be noted that, although damages remained fairly low, the parties spent over 7.6 million USD. This includes 1.64 million USD in arbitration fees, and 6.19 million USD in professional legal fees (Gantz, 2003).

4.3.1.7. <u>The Impact</u>

It is important to note that the *Pope & Talbot* case is a result of the (still ongoing) Softwood Lumber dispute between Canada and the United States. Prior to Pope & Talbot bringing the action, Canada was pressured by the United States to restrict its exports. Pope & Talbot, a U.S. based firm, brought an action to challenge the legislation that its government pressured Canada's government in implementing.

Pope & Talbot was successful in its claim in regard to Canada' breach of the Minimum Standard of Treatment rule. The rule was largely interpreted by the arbitration panel and ignored the representations made by the U.S., Canadian, and Mexican governments suggesting that the minimum standard of treatment rule ought to be interpreted narrowly, in order to encompass only the most "egregious" conduct. The case remains controversial to date, since the Tribunal ignored the calls of all three member states of NAFTA, demonstrating what Sinclair (2018) suggests "underscores the lack of accountability inherent in the ISDS procedure" (p.6). This is of great importance since all three state governments understood the necessity of the export quotas, and the quotas were a product of pressure from a foreign government. Ultimately, Canada was ordered to pay damages, and more importantly spent a significant amount on legal representation, despite consensus by all three states.

Furthermore, the Tribunal concluded that the government of Canada failed to provide the firm with the required minimum standard of treatment, suggesting that even a minimal number of collaboration from the government would have alleviated them of this breach. Upon the examination of the facts presented and the case at hand, it doesn't seem shocking that the tribunal found in favour of the firm, since Canada's actions were considered combative, uncooperative, unreasonable mostly because of the governments collaborate.

One of the main purposes of ISDS provisions such as Chapter Eleven of NAFTA is to create a level playing field and to prevent the government from abusing their position of power, with the means to justify such an abuse. In this case, the tribunal used their powers to denounce what it considered abuse, that left now defunct Pope & Talbot with a compromised reputation, as well as a large amount of legal fees that could have been kept to a minimum had the Government cooperated with the firm, even at a minimal level, assuring that they provided a certain level of administrative fairness consistent with international law. Furthermore, in this case, three governments disagreed with Pope & Talbot's arguments, and the tribunal ultimately concluded that Pope & Talbot's arguments had merit, demonstrating how International Arbitration attempts to provide a level of equal footing intended to promote investment.

4.3.2. S.D. Myers Inc. v Government of Canada

S.D. Myers is a firm that specializes in (amongst other lines of work) the treatment of environmentally dangerous, toxic materials, PCB[81]. The firm created a Canadian subsidiary in order to acquire Canadian PCB, for transport and treatment in the United States. Originally, the United States banned the practice in 1980, but fifteen years later, in 1995, granted special permission to the firm to import the materials from Canada. That same year, Canada began prohibiting the export of PCB waste into the United States, and this restriction lasted approximately sixteen months. In February 1997, Canada ended the ban, and five months later, a US ban on imports was invoked by U.S. domestic courts. This prevents S.D. Myers Canadian subsidiary from carrying out its work. As such, the firm brought a claim under Chapter Eleven of NAFTA, claiming damages for the government's actions. S.D. In 1998[82], Myers claimed damages for loss of profits, opportunity, as well as the recuperation of expenses, and goodwill, which the firm estimated at between 70 – 80 million USD (Ripinsky & Williams, 2008).

4.3.2.1. <u>The Performance Requirements Provision</u>

S.D. Myers contends that the Government of Canada lacked in their Performance Requirements[83] , since by banning the export of PCBs, they effectively required that PCBs be treated in Canada, effectively forcing the firm to conduct its operations differently. S.D. Myers contends that this was arbitrary and unjustified, and that the Interim Order constitutes a restriction on international investment (Hunter et al., 2000, Partial Award, par. 138-141).

[81] Polychlorinated biphenyl.
[82] A timeline of the dispute can be found in the annex, Exhibit 2.
[83] Article 1106, *North American Free Trade Agreement*.

The Government of Canada disagrees and contends that there was no enforcement of a performance requirement since the Interim Order did not force S.D. Myers to purchase Canadian goods, nor did it establish a quota of Canadian origin content.

4.3.2.2. The National Treatment Rule

In terms of National Treatment[84] S.D. Myers contends that they were not "given the best in jurisdiction treatment with respect to the establishment, acquisition, expansion, conduct, operation, and sale or other disposition of investments in like circumstances to the investments of Canadian investors. (Hunter et al., 2000, Partial Award, par. 130)." The firm contends that, through the Interim Order that the Government of Canada passed forbidding the export of PCBs to the United States, the Government limited the firm's ability to conduct its operations in an arbitrary manner. Furthermore, the firm alleges that the Government of Canada knew that banning the export of PCBs would directly affect the firm's operations.

Canada argued that the order against the export of PCBs was drafted in order to protect the environment, citing concerns. The Tribunal, however, upon examining evidence, concluded that the Canadian ban on PCB was enacted to protect the Canadian market from foreign competition, thus favouring the Canadian economy over that of the United States, as such precluding S.D. Myers from benefitting from their Canadian investment (Ripinsky & Williams, 2008).

The Tribunal concluded that Canada breached its obligation to provide National Treatment to S.D. Myers. First, the tribunal concluded that S.D. Myers was in "like circumstances" with Canadian firms in the same field, a prerequisite to proving a breach in the National Treatment rule. The Tribunal compared S.D. Myers to two Canadian PCB remediation firms, Chem-Security and Cintec, and added that S.D. Myers had superior technology, and their services

[84] Art. 1102, *North American Free Trade Agreement.*

were more favourably priced, and as such was a competitor that "was in a position to take business away from its Canadian competitors", the same competitors that lobbied the government to ban the re-exportation of PCBs once the U.S. government reopened the border (Hunter et al., 2000, Partial Award, par. 251).

The Tribunal decided that by banning the exports of PCBs, Canada was trying to ensure that the "economic strength of the Canadian industry […] because it wanted to maintain the ability to process PCBs within Canada in the future (Hunter et al., 2000, Partial Award, par. 255)". The court deemed this as legitimate, and consistent with Government policy, but concluded that the means by which the government tried to do this breached its commitments under NAFTA (Hunter et al., 2000).

4.3.2.3. <u>The Expropriation Argument</u>

In terms of expropriation[85], S.D. Myers suggests that the Government of Canada created a measure *tantamount* to expropriation, since the measure in question, the Interim Order, denied a benefit that the firm previously had, that is, the export of PCBs to the United States. As such, the firm contends that it ought to be compensated for Canada's "interference with their property rights (Hunter et al., 2000, Partial Award, par. 142-143)". S.D. Myers contends that it lost sales, profits as well as the loss of the investments in its subsidiaries all while having to assume the cost of reducing their Canadian operations, as well as the professional fees and tax consequences incurred (Hunter et al., 2000, Partial Award, par. 144).

The Government of Canada disagrees, since S.D. Myers continued their operations even after the release of the Interim Order, nor was there a loss sustained by the firm (Hunter et al., 2000, Interim Award, par. 156).

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[85] Art. 1110, *North American Free Trade Agreement*.

The Tribunal, based on the arguments presented in the Pope & Talbot case, concluded that there was no expropriation in the case at hand, since the Interim and Final Orders banning PCB export could not be "tantamount" to expropriation. The Tribunal uses a literal interpretation, stating that the term "tantamount" is synonymous with "equal", and interprets expropriation in terms of state practice in international law. In international law, expropriation necessarily requires that a government body or similar type "take property" by means of transfer of ownership one to another, most often from the private sector into the government's possession. Therefore, the regulations put into place by the Government of Canada cannot constitute expropriation, since they do not fall into the above category.

The court distinguishes between the "deprivation of ownership rights" and "regulation", suggesting that although both constitute an interference, the latter constitutes a much lower level of interference. The Tribunal thought important to make this distinction, adding that "the distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs (Hunter et al., 2000, Interim Award, par. 280-282)".

4.3.2.4. <u>The Minimum Standard of Treatment Rule</u>

The Minimum Standard of Treatment creates a "floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner (Hunter et al., 2000, Interim Award, par. 259)," by obliging member states of NAFTA to treat investments in good faith, equally and fairly. S.D Meyers suggests that the ban on the export of PCBs discriminated against the firm, and the actions of the government in regard to this ban were in bad faith.

In terms of the minimum standard of treatment[86], Canada's treatment of S.D. Myers amounted to a breach in which "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective (Hunter, Schwartz, & Chiasson, 2000, par. 263; Ripinsky & Williams, 2008)". The tribunal concluded that the breach was unjust and arbitrary and fell below the threshold of what was acceptable.

The Tribunal did state in their arguments that a great level of deference is to be accorded to states in order to protect domestic regulation and legislation, but nonetheless concluded, on similar arguments to that of the National Treatment argument, that the Government of Canada contravened the Minimum Standard of Treatment.

4.3.2.5. <u>The Right of a Government to Regulate</u>

The Government of Canada contends that the interim order banning the export of PCBs was enacted in order to protect the Canadian environment. The tribunal, however, concluded that this was not the case, instead, the evidence suggests that "the policy was shaped to a very great extent by the desire and intent to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that there were owned by Canadian nationals (Hunter et al., 2000, Partial Award, par.162.).

The Tribunal came to this conclusion in part, by suggesting that when the border between the United States and Canada was reopened to PCB transportation by the U.S. government, the Canadian government should have welcomed this change, since it would have allowed for a swifter treatment and destruction of hazardous material, bettering the environment (Hunter et al., 2000).

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[86] Art. 1105, *North American Free Trade Agreement.*

4.3.2.6. **The Critiques**

Similarly to the *Pope & Talbot* case, the *S.D. Myers* case was criticized as an example of abusive interpretations by the arbitral tribunal on matters of public policy, creating a situation where governments fear regulating public policy, in order to avoid the extremely high costs associated in the event of an international investment dispute (De Mestral et al., 2017) Scholars suggest that the National Treatment Norm, the Most Favoured Nation Norm, and the Fair and Equitable Treatment[87] norms have been interpreted too broadly, creating a "catch-all" norm that favours investment while imperiling government regulation in important areas of policy (Hodges, 2002). Furthermore, Hodges (2002) suggests that the *S.D.* Myers case equally imperils domestic environmental norms as well as internationally recognized environmental norms and internationally accepted environmental *norms, since the case:*

> *[h]as led to a crisis in public international law where international environmental conventions and customs have little effect in the face of private interests. The scope of private international law must be constrained to purely private matters, not issues of international public concern* (Hodges, 2002, p.367.*)*

The author equally contends that this complete disregard for both the domestic and international law is done in name of favouring investment and suggests that this is becoming a standard practice under NAFTA, where over 25% of cases under Chapter Eleven have involved environmental protection norms or legislation (Sinclair, 2018)[88].

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[87] Although the criticism covers all three norms, the Minimum Standard of Treatment Norm is most criticized (Carfagnini, 2016 ; Kurtz 2009 ; Legros, 2015, Neumayer & Spess, 2005).

[88] Exhibit 9.

4.3.2.7. The Assessment of Damages

In order to quantify damages, the court establishes that such damages cannot be speculative or remote. In the case at hand, the tribunal focuses on S.D. Myers lost and delayed income. The Tribunal awarded S.D. Myers 6 050 000 USD in lost profits and denied damages on the basis of expenses, goodwill or loss of opportunity, interest at Canada's prime rate + 1%, compounded daily, totalling approximately 900 000 USD, and 500 000 CAD in legal expenses. (Hunter et al., 2000, Second Partial Award and Final Award).

4.3.2.8. The Impact

The S.D. Myers case is equally of importance since it is concerned with the regulation of the exportation of toxic waste. The legislation banning PCBs was applied impartially, to all firms dealing with PCBs. Regardless of the fact that the regulation in question remained impartial, the tribunal concluded that the ban was discriminatory, and in violation of the minimum standard of treatment rule. To add insult to injury, the tribunal rejected Canada's claim that the *Basel Convention*[89], a treaty that Canada signed prior to NAFTA, with a main focus on the regulation of the export, import, and disposal of toxic waste, did not oblige Canada to dispose of the hazardous waste within its borders, despite the fact that the U.S. domestic courts on numerous occasions, as well as the Environmental Protection Agency, a U.S. agency tasked with the protection of the environment, closed the border to PCB imports on numerous occasions, and despite the fact that the Basel Convention's main purpose is to limit the movement of hazardous waste, emphasizing that such hazardous waste should "be disposed of in the state where they were generated"[90].

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[89] *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Exhibit 17.*

[90] *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Preamble, Exhibit 17.*

This case was the subject of enormous criticism on the basis that it provided an example of how a non-discriminatory regulation could fall within the grasp of a Chapter Eleven violation. In terms of National Treatment, critics have suggested that the S.D. Myers Case poses a risk to environmental regulation. The statistics show that a large majority of the arbitration cases under NAFTA's Chapter Eleven are concerned with environmental regulation[91].

However, these arguments can equally be refuted. One of the primary goals of the *Basel Convention* is to facilitate the removal and proper disposal of toxic materials in the most environmentally responsible way. As the tribunal suggests, S.D. Myers was in a position to remediate the waste at a lesser cost, using better technology, and as such, it should have been in Canada's interests to facilitate this. The Tribunal argues that Canada was simply trying to protect its own industry and that there was no rational explanation (including one of environmental sensitivity) in doing so. Thus, although the protection of the environment was considered paramount by the Canadian Government, in justifying their claims, it was suggested by the Tribunal that the export of these hazardous materials could have in fact benefitted Canada's environment. Hence, it would be unfair to look at this decision one that is irreconcilable with the protection of the environment (and the government's right to regulate the matter) and the promotion and protection of international trade and investment, a distinction the Tribunal attempted to make in their arguments and conclusion.

Furthermore, in terms of the breach of the minimum standard of treatment, the tribunal attributes great deference to the right of states to regulate, namely in sensitive areas such as the protection of the environment, but provides an individualised response to the case, since according to the tribunal, the way in which the Government decided to regulate was not in the interests of the environment *per se*, but a means of controlling which firms could and could not conduct business[92]. Briefly put, the tribunal does provide a justification as to why they ruled against the supposed environmental legislation – for the sake of stability and the promotion of

[91] Exhibits 9 and 10.
[92] In this case, favouring Canadian PCB removal firms over foreign ones.

international investment while recognizing the importance of government sovereignty in the regulation of public policy, all while providing a warning to veiled regulation intended to specifically target firms.

4.3.3. Clayton/Bilcon of Delaware Inc. v. Government of Canada

The Claytons and Bilcon of Delaware Inc. (Bilcon)[93] are investors in mines and quarries. Bilcon presented a proposal for a quarry project in Nova Scotia, known as the Whites Point Project, through a partnership between their Canadian subsidiary and Nova Stone Exporters. In 2004, Bilcon acquired the entire subsidiary. The project was subject to rigorous environmental assessments. The project was subsequently rejected, and the Minister responsible for the refusal refused to meet with representatives of Bilcon, nor did they provide any reasons in writing, an obligation the Minister has towards all firms whose projects are refused under a Joint Review Panel.

In 2008, the plaintiffs submitted a claim for arbitration based on the 2003 – 2007 Environmental Assessment process conducted jointly by the Federal Government (Canada) and Nova Scotia’s provincial government. Although the plaintiffs understand that Environmental Assessments are necessary, the claim was based on the fact that the plaintiffs suggest that the assessment was arbitrary and discriminatory. Upon assessment, the governments concluded that the project would, in fact, affect the environment negatively, to the point where “significant and adverse environmental effect on the ‘community core values’” would ensue (Government of Canada, 2018). The Government’s contends that their conclusions were based on the *Canadian Environmental Assessment Act*[94], and the fact that this project would have been likely to cause deleterious environmental effects (Simma, McRae, & Schwartz, 2015). The plaintiffs contend that they were discriminated against by the Government of Canada, thereby breaching their National

[93] A Timeline of this case can be found at Exhibit 3.
[94] *S.C. 2012, c.19, s.52.*

Treatment[95] obligations, their Most-Favoured Nations obligations[96], and the Minimum Standard of Treatment[97] rule. The damages claimed by the firm were 101 000 000 USD.

Bilcon suggests that Canada's environment minister wanted the "process dragged out as long as possible[98] (Simma et al., 2015, par. 15)." Furthermore, the firm suggests that the Joint Review Panel, a process undertaken by firms willing to conduct operations in Canada with enormous environmental impact should not have been used in the case of the Whites Point Project, since generally, they are only used for projects that bear a larger risk. Furthermore, when Bilcon was submitted to the process, they "exercised every reasonable effort to address the issues identified by […] environmental assessment laws and that were specifically mentioned in the Terms of Reference for the" Joint Review Process (Simma et al., 2015, par. 18).

During the Joint Review Panel, the panel rejected the project on the basis that "community core values were the overriding consideration in assessing the project" and that there was an "exceptionally strong and well-defined vision of its future that precluded the development" of the project (Simma et al., 2015, par. 20). One of Bilcon's argument's in front of the Tribunal was that "community core values" was not a lawful environmental impact under Federal or Provincial law, and as such, the panel should have only concluded through the use of a "rational and evidence passed process" (Simma et al., 2015, par. 20-24).

The Government of Canada contends that the Whites Point area was an "ecologically sensitive area", and as such, a Joint Review Panel is a "reasonable and appropriate measure" within their rights under NAFTA on any matter in which environmental sensibility is concerned, including the case at hand (Simma et al., 2015, par. 28-29).

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[95] Article 1102, *North American Free Trade Agreement*.

[96] Article 1103, *North American Free Trade Agreement*.

[97] Article 1105, *North American Free Trade Agreement*.

[98] As per a memo by Bruce Hood, a Federal Official working for the Minister of the Environment.

In response to Bilcon's "community core values" argument, the Government of Canada contends that it notified Bilcon of the guidelines ahead of time and provided sufficient time for Bilcon to familiarize themselves with such criteria. Furthermore, the "community core values" approach is consistent with Canada's right to enact policy concerning the environment (Simma et al., 2015, par. 35.)

4.3.3.1. The National Treatment Rule

In terms of the supposed breach in National Treatment[99] and Most-Favoured Nation treatment[100], Canada contends that the cases invoked by the plaintiffs during the arbitration process were not found to be "in like circumstances" (Simma et al., 2015, par. 37).

Bilcon contends the opposite, suggesting that the Whites Point project is in like circumstances, citing several other projects including the Voisey's Bay Project[101], and the Sable Gas Project[102], further suggesting that the Joint Review Panel used conditions and definitions that "failed to recognize the absence of full-scientific certainty (Simma et al., 2015, par 617)." Furthermore, the firm asserts that they were subject to "unreasonable, arbitrary and highly burdensome information requests" concerning the numerous requests for information, during the approval process (Simma et al., 2015, par. 620), and that the Whites Point project was the only project of its kind (out of thirty-three other projects) to be subject to a Joint Review Panel process, a very restrictive process reserved for projects that are considered to pose a high environmental risk (Simma et al., 2015, par. 629), and that contrary to other similar projects, it

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[99] Article 1102, *North American Free Trade Agreement.*

[100] Article 1103, *North American Free Trade Agreement.*

[101] The Environmental Assessment Panel Report of the Voisey's Bay Project, published by the Canadian Environmental Assessment Agency can be found at https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=0A571A1A-1&xml=0A571A1A-84CD-496B-969E-7CF9CBEA16AE&offset=2&toc=show, accessed 22 March 2018.

[102] The Joint Review Panel Report of the Sable Gas Project, published by the Canadian Environmental Assessment Agency can be found at http://publications.gc.ca/collections/Collection/NE23-91-1997E.pdf, accessed 22 March 2018.

was subject to a more rigorous and lengthy Environmental Assessment process (Simma et al., 2015. par. 630).

The Tribunal found that Canada breached its obligation of National Treatment since it failed to provide a foreign investor under *the North American Free Trade Agreement* treatment that is no less favourable than what would be provided to a domestic firm.

The Tribunal found that Canada breached its National Treatment obligations[103], since the Environmental Assessment conducted by the Joint Review Board was shown to apply standards in this case, that was not applied in alike cases with Canadian firms, nor could a non-discriminatory reason for the differences be deduced (Government of Canada, 2018; Simma et al., 2015).

4.3.3.2. The Most Favoured Nation Rule

Similarly, to the breach in National Treatment[104], Canada contends that the Most-Favoured Nation rule[105] was not breached since, the cases that BIlcon asserts are similar, presented during arbitration, are not "in like circumstances" to the Whites Point project (Simma et al., 2015, par. 37).

Bilcon contends that six projects received more favourable treatment, pertaining to the recommendation to be submitted to a joint review panel, and the duration of the process. This includes the Diavik Diamond Mine Project[106] , a project that, despite public opposition and

[103] Article 1103, *North American Free Trade Agreement.*
[104] Article 1102, *North American Free Trade Agreement.*
[105] Article 1103, *North American Free Trade Agreement.*
[106] The Comprehensive Study of the Diavik Diamond Mine Project, published by the Canadian Environmental Assessment Agency can be found at http://acee.gc.ca/A4FE86CA-docs/diavik_csr_e.pdf, accessed 22 March 2018.

pressure to submit the project to a Joint Review Panel, it was only assessed via a study. (Simma et al., 2015, par. 638).

The Government of Canada denied any discrimination, stating that a breach of both the Most Favoured Nation rule and the National Treatment rule necessarily requires that a discrimination based on nationality. Furthermore, Canada asserts that Bilcon does not satisfy the "in like circumstances" criteria with the projects it suggests are similar (Simma et al., 2015 par. 650-655).

The Tribunal did not pronounce itself on the question as to whether "Canada provided less favourable treatment concerning the mode of review [Joint Review Panel] and the evaluative standard", since Bilcon brought an action after the limitation period, as such the case was prescribed (Simma et al., 2015, par. 205). However, in *obiter*, the Tribunal mentions that the fact that the Whites Point Project was subject to a joint review panel was "unusual" since only 0.3% of projects under the Canadian Environmental Assessment Act[107] are subject to a review panel, 98.8% are subject to screenings, and 0.9% to comprehensive studies. Furthermore, other than the White Point Project, no other quarry project subject to the Act was subject to a Joint Review Panel (Simma et al., 2015, par. 687-689).

However, the Tribunal did conclude that there was a breach in Most Favoured Nation and National Treatment under NAFTA in respect to the application of the "likely significant adverse effects after mitigation", since Canada did not provide any means of mitigating the effects that the project would have on the environment, nor adequate reasoning as to why despite any mitigation, the project still was too great of a risk. (Simma et al., 2015, par 689 and 731).

[107] *S.C. 2012, c.19, s.52.*

4.3.3.3. The Minimum Standard of Treatment Rule

Bilcon contends that the Government of Canada breached its obligation to provide a minimum standard of treatment[108], as it did not treat the investment fairly, reasonably, with due process, and classified the government's actions as arbitrary and discriminatory, lacking openness and transparency. In order to support this claim, Bilcon sets forth several arguments on the basis that the Joint Review Panel in question overstepped their boundaries and based their conclusion to refuse the project on a biased and flawed legal approach and did not give the firm the ability to refute such claims (Simma et al., 2015, par. 361).

Furthermore, Bilcon contends that the Joint Review Panel "ignored relevant facts and relied upon arbitrary, biased, capricious and irrelevant considerations (Simma et al., 2015, par. 362)." The firm suggests that the entire refusal process was fueled by political motivations that "[perverted] the environmental assessment process", by basing decisions on inappropriate guidelines, by "not informing the Investors of regulatory decisions that had been made, and misrepresenting to the Investors that it possessed legal authority that it did not have (Simma et al., 2015, 363)". According to Bilcon, the Joint Review Panel abused of its discretion by changing the guidelines used, and by imposing requirements on Bilcon that the firm contends, were impossible to adhere to (Simma et al., 2015, par. 373). In this regard, Bilcon suggests that instead of adhering to regular legal standards, the Government of Canada "demanded 'perfect certainty'" from the firm (Simma et al., 2015, par. 373).

Furthermore, Bilcon suggests that the Government of Canada breached their obligation by "depriving them of an ability to seek necessary information (Simma et al., 2015, par. 365 et 366)". Finally, Bilcon contends that the Government "deliberately chose panel members who were manifestly biased (Simma et al., 2015, par. 370)" and that the agencies involved in the decision-making process, imposed requirements and discussed concerns that were

[108] Article 1105, *North American Free Trade Agreement*.

unfounded[109]. This includes the Government of Canada's arguments on the basis of "aboriginal traditional knowledge" and "community core values (Simma et al., 2015, par. 373)", the latter being a condition that Bilcon suggests was "artificially concocted (Simma et al., 2015, par. 377)". In this respect, the firm suggests that the Joint Review Panel acted out of their scope, by attempting to regulate, despite the fact that Government regulators including Natural Resources Canada commended the firm for its thorough approach and detailed project reports (Simma et al., 2015, par. 383).

Bilcon also submitted that the Ministers involved[110] did not provide an independent report, as they should have under Canadian law, and instead, agreed with the Joint Review Panel, unequivocally. Bilcon equally asserts that one Minister in particular in a public discourse, made statements that "inflamed the situation and polarized public opinion", and one government official equally stated that the Whites Point Project was "extremely important to the minister" and was a "politically hot file", and as such wanted the "process [to be] dragged out as long as possible (Simma et al., 2015, par. 388)." On the bases of the aforementioned facts, Bilcon asserted that the Canadian Environmental Agency lacked transparency in this case due to the high level of political interference, and the inability of the Agency to disconnect itself from political clout, in order to provide an independent opinion (Simma et al., 2015, par. 393).

The Government of Canada contends that in order for a Government to breach the Minimum Standard of Treatment Rule under international legal standards, a state's conduct must be "egregious" and as such the threshold is significantly high in that the misconduct of a state must reach "a level that implicates international responsibility on the basis that it breaches the minimum international standard of fair and equitable treatment (Simma et al., 2015, par. 36)," something Canada denies.

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[109] For example, concerns on the salmon and whale population near the Whites Point Project were discussed, despite the fact that Whales are known not to be present anywhere near the project, and that the project was likely not to cause any harm to the salmon population.

[110] s. 37(1)(b), *Canadian Environmental Assessment Act (S.C. 2012, c.19, s.52)*.

Bilcon relies on three arguments in the *Mobil Investments/Murphy Oil v. the Government of Canada* decision, an ongoing arbitration case, to base their claims. First, Bilcon asserts that a "permit is a clear and explicit representation to induce investment" and as such, when Canada granted the permit, it should have done so in good faith, with the intention of eventually approving the project, since a permit implies political support. Second, any Investor should be able to rely on a permit as a first sign of approve, and third, when the Provincial and Federal Governments made it difficult for Bilcon to adhere to the conditions set forth by the various levels of government, it implicitly rescinded the permit in an unjust manner (Simma et al., 2015, par. 395-397).

In response to Bilcon's claims, the Government of Canada, basing themselves on several NAFTA decisions[111], asserts that the Threshold for a breach of the Minimum Standard of Treatment rule is high, and as such, the conduct must be egregious, discriminatory, arbitrary and grossly unfair. Canada contends that Bilcon failed to establish any breach of the Minimum Standard of Treatment, including any behaviour deemed "egregious".

First, Canada contends that it respected both Provincial and Federal Law when conducting the environmental assessment. Second, Canada suggests that the Minimum Standard of Treatment rule does not provide for an obligation of transparency and that any firm wishing to conduct business in Canada on an issue of environmental sensibility should anticipate that their project be subject to a Joint Review Panel. Third, Canada maintains that Bilcon was given an unbiased, impartial and "reasonable opportunity to be heard". Fourth, Canada suggests that Bilcon provided inefficient and incomplete information. Finally, Canada suggests that in order to comply with Federal and Provincial law, it chose the regulatory framework with a higher

[111] *Cargill* v. *United Mexican States* ; *Glamis* v. *The United States of America* as well as several other International Legal Arbitrations including *CMS Gas Transmission Company* v. *The Republic of Argentina* ; *Rumeli Telekom A.S.* and *Telsim Mobil Telekomunikasyon Hizmetleri* A.S. v. *Republic of Kazakhstan*; Azurix Corp. v. The Argentine Republic.

threshold on environmental regulation (Simma et al., 2015, par. 413-420). In this case, Nova Scotia's Environmental Assessment Regulations required that any project that is susceptible to having a significant impact on the environment be subject to a Joint Review Panel (instead of a criterion requiring a higher level akin to a "major or catastrophic" impact (Simma et al., 2015, par. 418).

In terms of Government intervention, Canada contends that there is no obligation in Canada's domestic legislation obliging ministers to hear comments or views from anyone involved in the Joint Review Panel.

Finally, Canada interprets the Minimum Standard of Treatment regulation as one that only "guarantees the physical security of investors and their investment" and asserts that this "does not extend to 'regulatory security' and certainly not to the type of 'protection' the claimants seek (Simma et al., 2015, par. 422)". Canada equally categorically refuses the idea that Bilcon was subject to an environment plagued with political interference (Simma et al., 2015, par. 423).

On 17 March 2015, the Tribunal concluded that the Canadian Government breached its obligation to provide a minimum standard of treatment[112], which requires that all parties of the treaty be treated fairly, equitably and be given a level of protection and/or security consistent with international law – in other words, the foreign investment was not provided with a minimum standard of treatment that would have otherwise applied to a Canadian Investment. The Tribunal based itself on the principles of the *Waste Management* v. *United Mexican States* NAFTA decision.

First, The Tribunal found that "Bilcon was denied a fair opportunity to know the case it had to meet. It had no reason to expect, under the law or any notice provided by the [Joint Review

[112] Art. 1105, specifically at (1), *North American Free Trade Agreement*

Panel] that "community core values would be an overriding factor." Furthermore, the Tribunal found that Bilcon was not only cooperative but thorough in the filing of its documents, including expert evidence on environmental and social effects (Simma et al., 2015, par. 590).

Second, the tribunal addressed the concept of arbitrariness, set out in the *Waste Management* case. The Tribunal concluded that the Joint Review Panel acted in an arbitrary fashion, basing their decision on elements other than a competent legal authority, and did not provide adequate notice to the firm. The panel failed to carry out their mandate, set out in the *Canadian Environmental Assessment Act* (2012)[113], specifically by failing to provide mitigation tactics in the Whites Point Project (Simma et al., 2015, par. 591).

Third, the Tribunal found it unjust that, as a general rule, Canada encourages mining projects, and to specifically promote the Whites Point project, and retract their approval after Bilcon made a large investment and put major efforts in attempting to have the project approved (Simma et al., 2015, par. 591-592). Furthermore, the tribunal found it relevant to mention that "[t]he Nova Scotia Premier himself […] personally told the Claytons [of Bilcon] that the Province was 'open for business' (Simma et al., 2015, par. 469)."

Fourth, the Tribunal agrees with Canada in that a breach of the Minimum Standard of Treatment rule necessarily requires that the plaintiff can prove the breach at a very high threshold. In the case at hand, the tribunal is satisfied that the threshold has been reached in light of:

> *[T]he Investors' reasonable expectations and major consequent investment of resources and reputation in a process that is the most rigorous, public and extensive kind […] ; the fact that the [Joint Review Process's] distinctive approach in adopted the concept of community core values was not proceeded by reasonable notice; and the fact that the approach of the JRP departed in fundamental ways from the standard of evaluation required by the laws of Canada rather than merely being controversial in matters of detailed application (Simma et al., 2015, par. 594).*

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[113] *S.C. 2012, c.19, s.52.*

These arguments were primarily based on the fact that the criteria used by in the Environmental Assessment in question were the disruption to "core community values", a term not found in any Canadian legislation, and as such was deemed arbitrary, discriminatory and unfounded.

In light of these facts, the Tribunal thought necessary to clarify that the case at hand is based on environmental regulation, and that such regulation is a concern (as well as a priority) for many governments. The Tribunal makes a point to not that NAFTA is not intended to be an obstacle to the protection of the environment, nor the creation or enactment of high standards, but that states under the treaty must "ensure a predictable commercial framework for business planning and investment (Simma et al., 2015, par. 596)" and that the preamble of NAFTA[114] equally ensures the upholding of environmental law, without providing any limits on how governments legislate in this regard. That being said, governments have the obligation under the treaty to provide for legislation that enables a certain level of reliance and predictability, which Canada omitted to provide. The Tribunal states that the issue at hand was not preoccupations of the government in the matter of environmental protection, but the means by which they attempted to bar the Whites Point Project, through an arbitrary means which Bilcon could not have predicted (Simma et al., 2015, par. 595 - 601).

The Tribunal concludes that cases of a breach in treatment must individualised, as the Tribunal's decision must be based on the facts and context at hand. As the Tribunal mentions, the case at hand involves "whether an investor was treated less favorably for the purpose of an environmental assessment (Simma et al., 2015, par. 694)". The Tribunal compared the Whites Point Project to three other cases, the Belleoram Marine Terminal Project[115], the Aguathuna

[114] Article 102, Exhibit 1.

[115] The Comprehensive Study of the Belleoram Marine Terminal Project, published by the Canadian Environmental Assessment Agency can be found at http://www.ceaa.gc.ca/050/documents_staticpost/pdfs/23263E.pdf, accessed 16 March 2018.

Quarry and Marine Terminal Project[116] and the Tiverton Harbour Project[117], three projects the court deemed similar, and which were not subject to the Joint Review Process. As such, the tribunal concluded that the Whites Point Project did satisfy the "in like circumstances" criteria or the National Treatment (and Most Favoured Nation) clause. Furthermore, the Tribunal notes that unlike these three cases, the Whites Point Project did not garner opposition by the community, instead, there was a relatively high level of public support for the project.

Furthermore, the Tribunal noted that the "emphasis on 'community core values'" by the Joint Review Panel puts into question whether, had a Canadian firm been the one heading the Whites Point Project, the "community core values" criteria would have been applied (Simma et al., 2015, par. 715).

Furthermore, the tribunal cites the *Pope & Talbot* case, in order to examine one exception to the National Treatment (or Most Favoured Nation Treatment) rule:

> Differences in treatment will presumptively violate Article 1102(2), unless they have a <u>reasonable nexus to rational government policies</u> that (1) <u>do not distinguish</u> on their face or *de facto*, <u>between foreign-owned and domestic companies</u>, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

(Dervaird et al., 2000, Award on the Merits, Phase 2, par. 78)

As the Tribunal suggests, the *Pope & Talbot* approach enables governments to take action in policy decisions, while still providing for the respect of ensuring predictability and economic cooperation within NAFTA. However, the Tribunal concludes that the "community core values" concept cannot be considered "rational government policy", since it contradicted the very core

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[116] The Comprehensive Study of the Aguathuna Quarry and Marine Terminal Project, published by the Canadian Environmental Assessment Agency can be found at https://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=4F5DF2F1-0C41-413D-B1AE-F50656AD960C, accessed 16 March 2018.

[117] The Screening of the Tiverton Harbour Project, published by the Canadian Environmental Assessment Agency http://www.acee-ceaa.gc.ca/052/details-eng.cfm?pid=2018, accessed 16 march 2018.

of the *Canadian Environmental Assessment Act*[118], while creating an unexpected obstacle in having the project approved after the firm was nearly assured that the project would be approved. As such Canada breached its obligation to provide National Treatment to Bilcon (Simma et al., 2015, par. 724). The Tribunal did not deem it necessary to pronounce itself on whether Canada breached the Most Favoured Nation clause of NAFTA, suggesting it was neither "necessary [nor] prudent" to do so (Simma et al., 2015, par. 730).

4.3.3.4. The Critiques

The *Clayton/Bilcon* case, which still has not completely concluded[119], has not only been criticized by scholars for creating too low of a threshold for the Minimum Standard of Treatment norm (Carfagnini, 2016), but has made numerous headlines in Canada, and internationally (e.g. McCarthy, 2015; Bursa, 2018; Wilt, 2018; Renders, 2018). Interestingly enough, the outcome of the case was even criticized by one of the three arbitrators tasked with deciding the outcome of the case. Professor Donald McRae in his dissent argues that the majority's decision is a "remarkable step backwards in environmental protection and would impose a chill on environmental review panels (LeGros, 2015, p. 343)", since it jeopardizes environmental protection in Canada, by forcing the government to continually review environmental norms in a way that McRae deems costly, lengthy and hazardous to the very notion that policy should remain somewhat flexible to enable government to act for the benefit of its citizens (Simma et al., 2015).

4.3.3.5. The Assessment of Damages

At the time of writing this text, the Tribunal has yet to quantify any damages and release them to the public.

[118] *S.C. 2012, c.19, s.52.*
[119] The damages have not yet been completely awarded.

4.3.3.6. **The Impact**

The *Bilcon* case is highly controversial, as it involves the protection of an environmentally sensitive area. Despite this, the Tribunal found that the investor was discriminated against, and was treated arbitrarily. According to Sinclair (2009), although the facts of this case demonstrate the highly arbitrary nature of the review process, the case equally unearths the overuse and abuse of the Minimum Standard of Treatment clause. The clause provides a large level of discretion to arbitrators in the decision of what is and what isn't an arbitrary action, potentially putting at risk, a government's right to regulate.

Furthermore, it may be reasonable to think that governments treat investors in different situations differently. For example, an investor wishing to exploit land in an environmentally sensitive area is likely not to be treated the same as an investor wishing to exploit land or resources in a non-sensitive (or less sensitive) area. However, the *Bilcon* decision goes against this notion instead equating "different, allegedly less favourable treatment with nationality-based discrimination […] holding governments to unattainable and undesirable standards of consistency" (Sinclair, 2018).

As mentioned previously Professor McRae, the dissenting arbitrator in the Bilcon case fears that this case will, in fact, lead to a regulatory chill. McRae equally argues that, although the term "community core values" as a term is new, the concept has always existed. For McRae, it was part of the Joint Review Panel's mandate to equally consider the "human environment", something they neglected to do (LeGros, 2015, p.343; Simma et al., 2015, , par.357). The *Bilcon* decision demonstrates the notion that NAFTA decisions are likely to cause a chilling effect, since it may hinder governments to attempt to regulate in a similar matter, such as taking into account the "human environment", in the future, for fear of reprisals, costly professional (and arbitration) fees, and enormous damages under Chapter Eleven (Carfagnini, 2016; LeGros, 2015; Sinclair, 2018).

However, the Tribunal went to great lengths to explain why it ruled against the environmental legislation, and in favour of the firm. First, upon the analysis of similar projects in Canada, it was found that the Whites Point Project was the only one to be submitted to a Joint Review Panel, and on the basis of a criterion that had never been used before. One of NAFTA's key objectives is the promotion of fair competition[120] as well as the upholding of environmental law. In this case, Canada breached several obligations by not providing a predictable environment. Free trade agreements, as well as other multilateral trade or investment agreements, are generally tasked with creating a framework of predictability, in order to establish a structure for cooperation[121]. In fact, this is equally one of the main objectives of NAFTA[122]. The *Bilcon* case does underline the fact that this need for predictability was breached on numerous occasions, and that once again, an underlying interest, one other than environmental protection was unearthed by the tribunal, which then used the evidence in order to rule against the Canadian Government.

4.4. Firms v. The Government of Canada: An Analysis

A recent case, *Windstream Energy LLC* v. *Government of Canada*, involves Windstream, a wind power projects firm, and the Government of Ontario. The Provincial Government of Ontario restricted the installation of offshore wind turbines on Lake Ontario through a moratorium. Windstream filed their ISDS claim under NAFTA. The Tribunal concluded that the Province violated the minimum standard of treatment[123], since it was slow in providing Windstream with the scientific research that would back up its claim of the moratorium. However, as Sinclair (2018) suggests, this case is troubling since there was an existing controversy surrounding offshore windfarms present prior to, and as such, any wind power projects firm should have reasonably

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[120] Article 102(b), *North American Free Trade Agreement* (Exhibit 1).
[121] Article 102(f), *North American Free Trade Agreement* (Exhibit 1).
[122] According to Article 102, *North American Free Trade Agreement* (Exhibit 1).
[123] Article 1105, *North American Free Trade Agreement* (Exhibit 1).

foreseen government action in preventing such projects as a possible recourse and should have adjusted their risk tolerance accordingly (Sinclair, 2018).

First, when Chapter 11 of NAFTA was brought into force, scholars and politicians alike could not have fathomed that such a mechanism would be used to contest government regulation in key public policy sectors such as the environment, let alone concerning the regulation of toxic materials as was the case in *S.D. Myers*, that such a mechanism could be used to contest environmentally sensitive projects in the event that governments refused to permit them, as was the case in *Bilcon*, or that such a mechanism could be used to contest a norm that all state actors are in agreement with, as was the case in *Pope & Talbot*. As Hufbauer & Schott (2005) suggest, the minimum standard of treatment clause has "fostered a broader range of litigation" than anyone could have ever possibly imagined.

Second, States are placed in a situation where they must expend enormous amounts of funds on direct and indirect legal costs, which are unrecoverable, and represent a large portion of the costs associated with NAFTA ISDS claims. In terms of direct costs, Canada has paid out 219 million CAD to investors and has expended 95 million CAD in legal costs. As Sinclair (2018) mentions, this amount of public money could be put to better use. In fact, that amount of money could provide wastewater treatment on every First Nation community across Canada.

In terms of indirect costs, the Federal and Provincial governments must expend indirect legal and compliance fees, not included in the above amount. This includes the changes required in the decision-making process to account for concerns related to ISDS, in obtaining legal advice in assessing potential risks, the cost of governmental regulatory examination and ensuring compliance with NAFTA (Van Harten & Scott, 2016). Such indirect costs are not included in the above amount. Furthermore, any domestic legal proceedings, such as any review of the award amounts are not included in the above number (Barlow, 2018; Healing, 2018; "How to Improve NAFTA," 2017; Sinclair, 2018). To conclude, legal costs represent a considerable amount of funds for any government, and the current state of the North American Free Trade Agreement's

Chapter Eleven has surely opened Canada up to expending extraordinary amounts of financial resources in this regard.

Third, as was discussed in the literature review, one major skepticism of ISDS is the chilling effect, the idea that governments will fear regulating for further fear of fines, damages, and other reprisals. As the data provided by Sinclair (2018) demonstrates, a disproportionate amount of NAFTA claims has challenged a state's right to enact regulation pertaining to environmental protection[124]. For Canada, this is specifically important, since Canada is the most frequently sued state under NAFTA, and the sixth most sued in the world, according to the United Nations Conference on Trade and Development, and the second most sued developed country, after Spain (UNCTAD, 2017). All but one of these cases[125], was in regard to NAFTA's Chapter Eleven (Sinclair, 2018).

Therefore, the fear of a chilling effect is well and alive, specifically for Canada. Examples include the *Ethyl* case, the *S.D. Myers* case, the *Windstream* case, the *Mobil/Murphy's* case and the *Saint Mary's* case (Sinclair, 2018).

The *Bilcon* case is perhaps the best illustration. The Tribunal concluded that "community core values" (a component of the "human environment" as suggested by the dissent) as a criterion for the rejection of a project was outside of the Joint Review Panel's mandate. Furthermore, the Tribunal expressed disapproval at the fact that the panel did not suggest changes that could've made the project feasible, through the mitigation of negative effects. This demonstrates the idea that the NAFTA Tribunals have on occasion second-guessed the decisions of governments, creating a situation that is likely to limit how the government regulates environmental protection in the future. According to Sinclair (2018), "trade concerns including

[124] Exhibit 9 ; In Canada a disproportionate number of claims revolve around resource management and environmental protection, see: Exhibit 10.

[125] The only case in which Canada has not been sued under NAFTA was the Wind Mobile/Orascom claim against Canada, a case made on the basis of the Canada-Egypt Foreign Investment Protection Agreement.

ISDS had led to changes in the decision-making process, including a significant increase in the internal vetting by trade lawyers for potential trade treaty risks (p.9)." Briefly put, Sinclair (2018), concludes that "the ubiquitous threat of investor-state challenge under NAFTA has warped the relationship between multinational corporations and democratically elected governments to the detriment of other social groups and the broader public interest (p.10)[126]."

It should, however, be noted that, as discussed in the literature review, the principle of *stare decisis*, or, legal precedence does not exist in International Law, and as such, the cases discussed in this document were decided based solely on the facts of each individual case[127]. As such, the cases above do not necessarily establish a precedent that must be followed and that will necessarily hinder governments from regulating in matters. Governments must, however, respond to cases such as *Bilcon, S.D. Myers and Pope & Talbot*, by understanding the consequences, and dedicating the proper governmental resources required to establish a non-discriminatory, constant and conforming set of legislation in the interest of not only protecting the environment, but in the interest of stability, and the promotion of investment and public policy, two realms that are not mutually incompatible.

It is equally important to understand that although the above argument that such decisions from ISDS Tribunals can cause a chilling effect, conclusions for an opposing argument can equally be drawn. The facts of the *Bilcon* case are particular in that the "community core values" criterion was introduced quite late in the process, after numerous meetings with officials and assurances by various levels of government on the validity of the project. It would be unfair

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[126] Quebec's recent moratorium on shale gas exploration has equally fallen into the grip of the Investor-State Dispute Settlement mechanism. Calgary-based, but U.S. registered Lone Pine Resources is currently suing the Government of Canada over Quebec's moratorium set out in an *Bill 18, An Act to Limit Oil and Gas Activities*. The firm has argued that it was not compensated for its investment. Although ongoing, this is yet another recent example of how the Investor-State Dispute Settlement in NAFTA is susceptible to compromising public policy decisions by government (Davis, 2017; Politico, 2018).

[127] Although the Tribunals do at times refer to previous cases, they are not obliged to, and therefore, can rule against previous cases, despite similar facts.

to view the *Bilcon* case as one-sided, since one mandate of the North American Free Trade Agreement is to create this stable environment, and the case at hand demonstrates a government attempting to jeopardize this stability by including a criterion late on in the process as if it were a sudden and unprecedented change in policy. This can be evidenced by the discourses of the various government officials as mentioned in the above text.

5. CONCLUDING COMMENTS

The ISDS mechanism of NAFTA presents numerous challenges for Canada. First, Canada is disproportionately the one being sued, with more than twice as many active claims against the Canadian government than against Mexico and the United States combined.

Although Canada has won more cases than it has lost, it is important to note that Canada has lost several cases in which it implemented non-discriminatory policies which were still deemed to be in breach of their obligations under NAFTA, and as Sinclair (2018) suggests, this empowers firms to attack Canadian governmental policy, and regulation, with a general understanding that they have very little to lose (Sinclair, Trew, & Mertins-Kirkwood, 2017)". Although Canada contends that the protections afforded by NAFTA do not encroach on their sovereignty, scholars suggest that this creates a situation in which Chapter Eleven is being used to overturn the democracy and sovereignty of the country, in favour of international trade, and profit-making.

However, as John Ibbitson suggests "free trade helped Canada to grow up, to turn its face out to the world, to embrace its future as a trading nation, [and] to get over its chronic sense of inferiority (Ibbitson, 2012; Villareal & Fergusson, 2017, p. 22)".

The ISDS mechanism is heavily supported by the private sector because it enables a level of protection that would otherwise be unheard of and allows such firms to take larger risks in their investments, while benefitting from a framework of stability. It is true that governments are currently in the hot seat to uphold environmental standards and other areas of public policy. However, the North American Free Trade Agreement has created an era of intense investment and interconnectedness, and Chapter Eleven has been seen as a backbone to this investment, and a beacon of stability.

However, Canada has paid over 219 million CAD (not including the recently lost *Bilcon* case) in damages and settlements and has expended over 95 million CAD in legal fees, defending itself against ISDS claims under NAFTA[128]. Furthermore, since NAFTA's coming into force in 1994, the number of ISDS claims under NAFTA has risen steadily. For Mexico and the United States, the rise is somewhat similar, and both countries have been party to about half as much as Canada. For Canada, the number of ISDS cases under NAFTA has increased exponentially. In 1998, a mere five cases involved Canada in comparison to over forty today [129]. Over 90% of these cases invoke article 1105 of NAFTA, where Firms assert that they were not provided with the minimum standard of treatment as per international law. Furthermore, 48% of all claims made under NAFTA's history involve firms bringing an action against Canada under Chapter 11 (Freeman, 2015; Sinclair, 2018).

For Sinclair (2018), there is sufficient evidence that the ISDS mechanism in NAFTA negatively impacts Canada, disproportionately. For Sinclair (2009), the ISDS mechanism in NAFTA puts Canadian taxpayers in an awkward situation, since, in many cases, even when the Canadian government is successful in defending their claim, the amount of money expended on legal costs, and the particularities of many businesses in Canada constitute higher costs than the amount originally in question. For example, the *OmniTRAX*[130] case, demonstrates Sinclair's point. OmniTRAX is responsible for running a rail line to the Hudson's Bar in Northern Canada. It receives government subsidies for the maintenance of the rail line. After the firm refused to repair the rail line following flooding, the Government if Canada cut subsidies to the rail operator. Shortly after, in November 2017, the rail operator submitted a notice of intent to arbitrate under NAFTA, claiming that the reorganization of some government organizations and several provincial government decisions impeded on their right to conduct business profitably. Sinclair (2018)

[128] Mexico however, has incurred the highest costs in Damages, at more than 205 million USD (268.5 million CAD), and is currently facing three claims valued at over 300 million USD (394 million CAD). There are currently no active cases against the United States.

[129] Exhibit 6.

[130] *OmniTRAX Enterprises Inc.* and *Others* v. *Canada.*

suggests that in cases similar to this one "NAFTA provides no recourse whatsoever for the Federal government of Canadian Public to oblige [firms like] OmniTRAX to fulfillits legal commitments [… and] [e]ven worse, Canadian taxpayers are put in the absurd situation where if the federal government were to win in court, and oblige OmniTRAX to repair the rail line or forfeit subsidies, the company could be able to recover the costs of complying with the court's decision through its NAFTA arbitration (Sinclair, 2018, p.2)". The case is still pending.

Briefly put, Sinclair (2009) suggests that "ISDS potentially indemnifies foreign investors from facing the domestic legal consequences of their own misconduct (Sinclair, 2018, p.2). Furthermore, it should be noted that governments too can bring cases to arbitration in various forums but even if this is the case in theory, diplomacy often precludes governments from doing so in practice, since the state in question risks reprisals from the firm's country of origin.

Although ISDS claims have represented significant costs for Canada under NAFTA, a thorough analysis of these costs in light of the benefits conferred by the agreement in general demonstrate that although the disagreements under Chapter Eleven have cost the Canadian government dearly, the benefits in trade, and the stability which Chapter Eleven provides to foreign firms wishing to invest in Canada do outweigh such costs; the amount of trade generated under the agreement far outweighs the amount expended in damages, settlements and legal fees under chapter eleven.

Although there are calls to renegotiate Chapter Eleven by numerous scholars and politicians on every side of the current NAFTA negotiations, it is important to understand the push and pull between governments and the private sector and the imbalance in power between these two groups. ISDS was created with this notion in mind, in order to provide an independent forum for foreign investors and governments to settle disputes. Bilateral and multilateral investment treaties are positively correlated with an increased investment, and it would be difficult to envision such agreements without an impartial means of settling disputes, specifically for the firms who use the agreements as a basis to invest abroad.

Any mechanism, including ISDS is subject to abuse, but despite the added costs of this mechanisms, it is always important to view such disadvantages in comparison to the advantages that the North American Free Trade Agreement has brought upon the economies of Mexico, the United States, and Canada. As Robert Lighthizer, the United States Trade Representative stated "I'm always troubled by the fact that nonelected non-Americans can make the final decision that the United States law is invalid. This is a matter of principle I find… offensive (Davis, 2017)." For Canada, as the Royal Bank of Canada suggests in a recent report, the ISDS mechanism creates stability and allows a forum for investors to dispute government action. The loss of such a mechanism would make Canada more vulnerable to non-tariff barriers that may be placed in response to certain government actions. The ISDS mechanism helps prevent this, albeit at a high cost. Furthermore, without the NAFTA mechanism, the WTO could be used to address certain trade disputes, but this necessarily requires state intervention, and the process itself is lengthier and far more inefficient (RBC Economics Research, 2017). As such, the ISDS mechanism in NAFTA provides somewhat of a middle ground.

At the time of writing this thesis, negotiations for a new North American Free Trade Agreement are currently underway. One of the main points of contention for the United States Government is Chapter Eleven. The Trump Administration currently opposes the ISDS mechanism in its current state and is advocating for the removal of the process. Canada's current position is to reject any modification of the sort to Chapter Eleven.

The above analysis demonstrates that governments have, in fact, been unsuccessful in defending claims which they content were in the interest of regulating for the public benefit, and thus within their rights as sovereign nations. Although the scholarly literature of the above three cases does demonstrate a worry that the way in which the cases were decided does, in fact, imperil a government's right in favour of a firm's right to generate profit. The analysis conducted in this thesis, however, does not conclude that the fact that the Canadian government was unsuccessful in defending their claims necessarily demonstrates an unfair advantage of multinational firms, or a bias towards them. The above cases were selected on the basis that the literature suggested such an unfair advantage. It is however important to analyze the arguments of panel members in their conclusions, as the basis for determining whether such a bias exists. The answer to this question is inconclusive, since, although the government has failed to successfully defend themselves, they were in fact in breach of numerous standards, and could have reacted differently in order to protect the interests of Canadians as well as the norms required by their governing International Investment Treaty. Furthermore, the absence of the binding principle, or *stare decisis,* in International Public Law creates a situation where these three cases, although decided, do not bind arbitrators in future cases, and thus do not set standards that must be followed. Whether there is a reason to worry about whether the adherence to ISDS mechanisms jeopardize state sovereignty and inhibit government regulation on their territory is difficult to conclude given the above analysis. However, this is of significance, since the majority of the literature discussed throughout this paper point necessarily to a positive answer, and as such, the research presented throughout this document refutes this position, by presenting a more measured, and tempered response.

5.1. What's Next? The Implications

On September 21, 2017, the Canada-European Union (EU) Comprehensive Economic and Trade Agreement entered into force, preventing enormous opportunity for investment in both regions. On 8 March, 2018, the eleven members of the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership was signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru and Singapore. As Freeman (2015) suggests, "Canada is embarking on a new generation of multinational treaties such as the European Union free trade deal and the Trans-Pacific Partnership, both of which contain ISDS systems. While governments can be sued under ISDS, there is no similar recourse for states to hold foreign investors, often wealthy corporations, accountable for their actions".

The skepticism towards ISDS continues to persist. As we have seen with the protests in the Belgian region of Wallonia, it is important to reflect on what was presented in this text as a basis to whether this skepticism is justified. Has environmental legislation for example been jeopardized in favour of international trade? Although some would argue that the cases discussed in this thesis point to an affirmative answer, the opposite can easily be concluded as well.

Furthermore, with the absence of *stare decisis*, or legal precedent, such cases, although can be consulted by members of a Tribunal in a subsequent case, do not become law, as is the case in many *Common Law* countries. One must wonder whether what is decided in one case will actually jeopardize future regulation.

One thing that is important to note is that ISDS seems to be the new normal, and provides the stability that firms seek in mitigating their risk when investing abroad, providing enormous incentives to such firms in investing in countries that conclude agreements

As this text suggests, the principles of international law still remain relatively vague compared to their domestic counterparts, and although extraordinary progress has been made, plenty more is necessary. Although the ISDS mechanism in NAFTA is far from perfect, with the minimum standard of treatment at article 1105 being a primary example, since this article has been used so largely, and against the wishes of all three NAFTA member states, it seems as though the skepticism, although not completely justified, is creating a push for better instruments.

The protests in Wallonia were not in vain. The Comprehensive Economic Trade Agreement's ISDS mechanism was changed in order to create a permanent forum for arbitration. Although the judges are not employed on a full-time basis, a certain level of independence of judges is established, and judges are appointed jointly by the European Union and Canada and must abide by a code of ethics. Furthermore, the hearings will be opened to the public.

Furthermore, the mechanism clearly defines expropriation and introduces specific and precise standards of treatment (European Commission, 2016).

During negotiations, the Comprehensive Economic and Trade Agreement for example, was met with extreme dissent by Belgians in the region of Wallonia, on the basis that the proposed ISDS mechanism in the agreement was not transparent enough, and that potential conflicts of interests with arbitrators appointed would arise (The Canadian Press, 2016). Although the research in this paper shows, on the basis of the North American Free Trade Agreement, that arguments can be made in favour or against the justification of the skepticism towards ISDS mechanisms in investment agreements, the presence of this skepticism has opened discussions, and created opinions in an ever developing rise of populism and anti-globalization sentiment in which, a small region of 3.5 million people in a country of nearly 12 million, in a political and economic union of over 511 million, were able to have their voices heard, and were prominent in shaping a newer, potentially more improved ISDS mechanism, that responds to the many criticisms unveiled in this text.

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Annex

Exhibit 1: The North American Free Trade Agreement (1994), Treaty, Pertinent Legislation

Chapter One: Objectives

Article 101: Establishment of the Free Trade Area

The Parties to this Agreement, consistent with Article XXIV of the *General Agreement on Tariffs and Trade*, hereby establish a free trade area.

Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
(b) promote conditions of fair competition in the free trade area;
(c) increase substantially investment opportunities in the territories of the Parties;
(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.
2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Chapter Eleven: Investment
Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
   (a) investors of another Party;
   (b) investments of investors of another Party in the territory of the Party; and
   (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.
2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or

insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:
   (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
   (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1104: Standard of Treatment

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
(d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
(b) necessary to protect human, animal or plant life or health; or
(c) necessary for the conservation of living or non-living exhaustible natural resources.

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
   (a) for a public purpose;
   (b) on a non-discriminatory basis;
   (c) in accordance with due process of law and Article 1105(1); and
   (d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

Source: Simma et al., 2015

Exhibit 2: *Pope & Talbot* v *Canada*, reproduction of information prepared by Rapinsky & Williams (2000) for a course at the British Instituted of International and Comparative Law

Pope & Talbot Inc. v Canada

Year of the award: 2000-2002
Forum: *Ad hoc* tribunal (UNCITRAL arbitration rules)
Applicable investment treaty: NAFTA

Arbitrators	**Timeline of the dispute**
The Hon. Lord Dervaird – President The Hon. Benjamin J. Greenberg Mr. Murray J. Belman	24 December 1998 – Notice of Arbitration 19 August 1999 – Arbitral Tribunal constituted 26 June 2000 – Interim Award (on Merits) 10 April 2001 – Award on Merits Phase 2 31 May 2002 – Award on Damages 26 November 2002 – Award on Costs

Source: Sergey Ripinsky & Kevin Williams, 2008, p.1.

Exhibit 3: *S.D. Myers* v *Canada*, reproduction of information prepared by Rapinsky & Williams (2008) for a course at the British Instituted of International and Comparative Law

S.D. Myers, Inc. v Canada

Years of the awards: 2000-2002
Forum: *Ad Hoc* Tribunal (UNCITRAL arbitration rules)
Applicable investment treaty: NAFTA

Arbitrators	**Timeline of the dispute**
Mr. J. Martin Hunter – President Mr. Bryan P. Schwartz Mr. Edward C. Chiasson	30 October 1998 – notice of arbitration 4 March 1999 – arbitral tribunal constituted 13 November 2000 – First Partial Award ("Merits Award") 21 October 2002 – Second Partial Award ("Damages Award") 30 December 2002 – Final Award ("Award on Costs") 13 January 2004 – domestic judicial review (not relevant for damages)

Source: Sergey Ripinsky & Kevin Williams, 2008, p.1.

Exhibit 3: *Clayton/Bilcon of Delaware, Inc* v *Canada*

Clayton/Bilcon of Delaware v. Canada

Year of the award: 2015-2018
Forum: *Ad hoc* tribunal (UNCITRAL arbitration rules)
Applicable investment treaty: NAFTA

Arbitrators	**Timeline of the dispute**
Judge Bruno Simma– President Donald McRae Bryan Schwartz	26 May 2008 – Notice of Arbitration 17 March 2015 – Award on Jurisdiction \ Liability 6 February 2018 – Press Release re Public Hearing on Damages

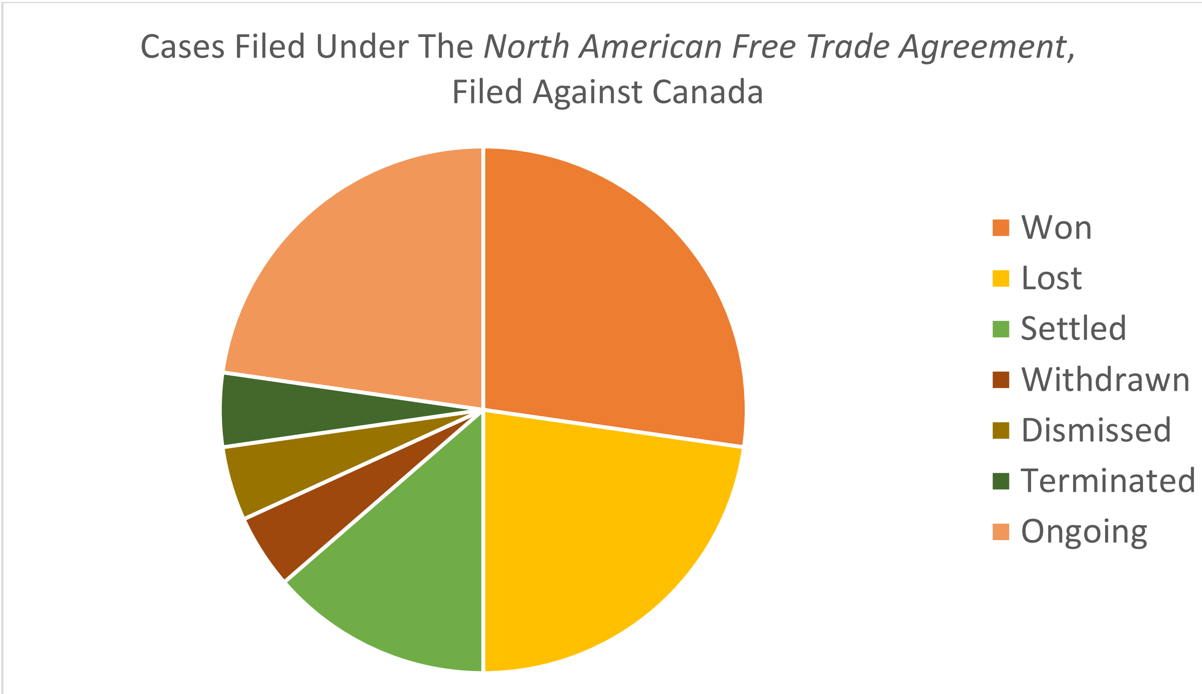
Source: Own elaboration based on Sergey Ripinsky & Kevin Williams, 2008, p.1.

Exhibit 4: Cases Filed Under the *North American Free Trade Agreement*, Filed Against Canada

Ongoing Arbitrations to Which Canada is a Party				
Actors	Won	Lost	Ongoing	Other
Clayton/Bilcon v. *The Government of Canada*		X		
Lone Pine Resources Inc. v. *The Government of Canada*			X	
Mercer International Inc. v. *The Government of Canada*			X	
Mobil Investments Canada Inc. v. *The Government of Canada*			X	
Resolute Forest Products Inc. v. *The Government of Canada*			X	
Tennant Energy, LLC. v. *The Government of Canada*			X	
Concluded Arbitrations to Which Canada was a Party				
AbitibiBowater Inc. v. *The Government of Canada*				X
Centurion Health Corporation v. *The Government of Canada*				X
Chemtura Corp. v. *The Government of Canada*	X			
Detroit International Bridge Company v. *The Government of Canada*	X			
Dow AgroSciences LLC v. *The Government of Canada*				X
Eli Lilly and Company v. *The Government of Canada*	X			
Ethyl Corporation v. *The Government of Canada*				X
Merrill & Ring Forestry L.P. v. *The Government of Canada*				X
Mesa Power Group LLC v. *The Government of Canada*	X			
Mobil Investments Inc. and Murphy Oil Corporation v. *The Government of Canada*		X		
Pope & Talbot Inc. v. *The Government of Canada*		X		
S.D. Myers Inc. v. *The Government of Canada*		X		
St. Marys VCNA, LLC v. *The Government of Canada*				X
United Parcel Service of America, Inc. (UPS) v. *The Government of Canada*	X			
V. G. Gallo v. *The Government of Canada*	X			
Windstream Energy LLC v. *Government of Canada*		X		
Withdrawn or Inactive Claims				
Contractual Obligation Productions, LLC, Charles Robert Underwood and Carl Paolino v. *The Government of Canada*				
GL Farms LLC and Carl Adams v. *The Government of Canada*				
J.M. Longyear v. *The Government of Canada*				
William Jay Greiner and Malbaie River Outfitters Inc. v. *The Government of Canada*				

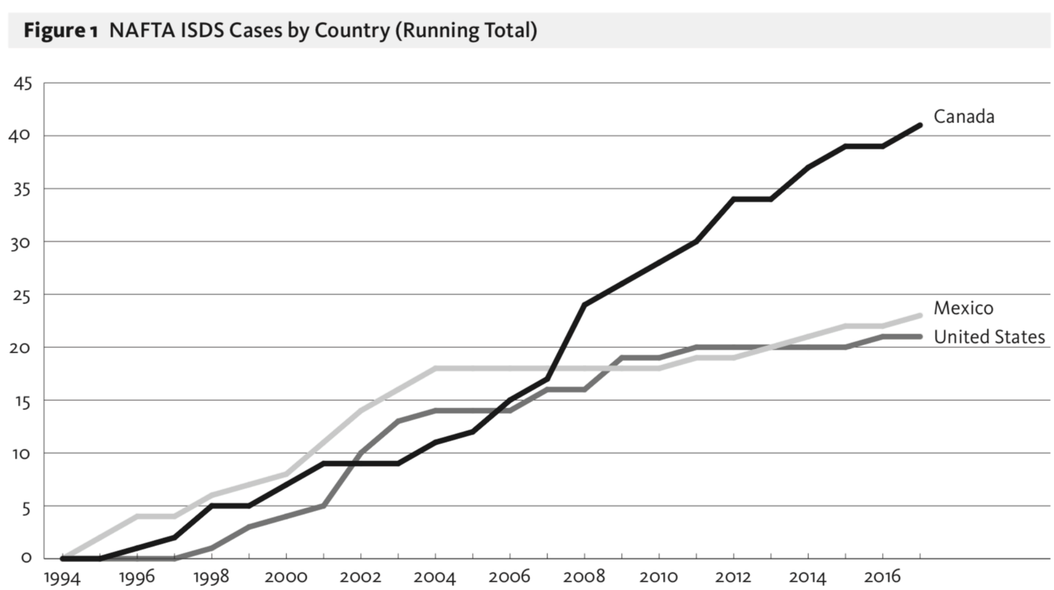
Source: Own elaboration with data provided by Global Affairs Canada (http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng, accessed 16 March 2018)

Exhibit 5: Pie-Graph Demonstrating the Cases Filed Under The *North American Free Trade Agreement*, Filed Against Canada.



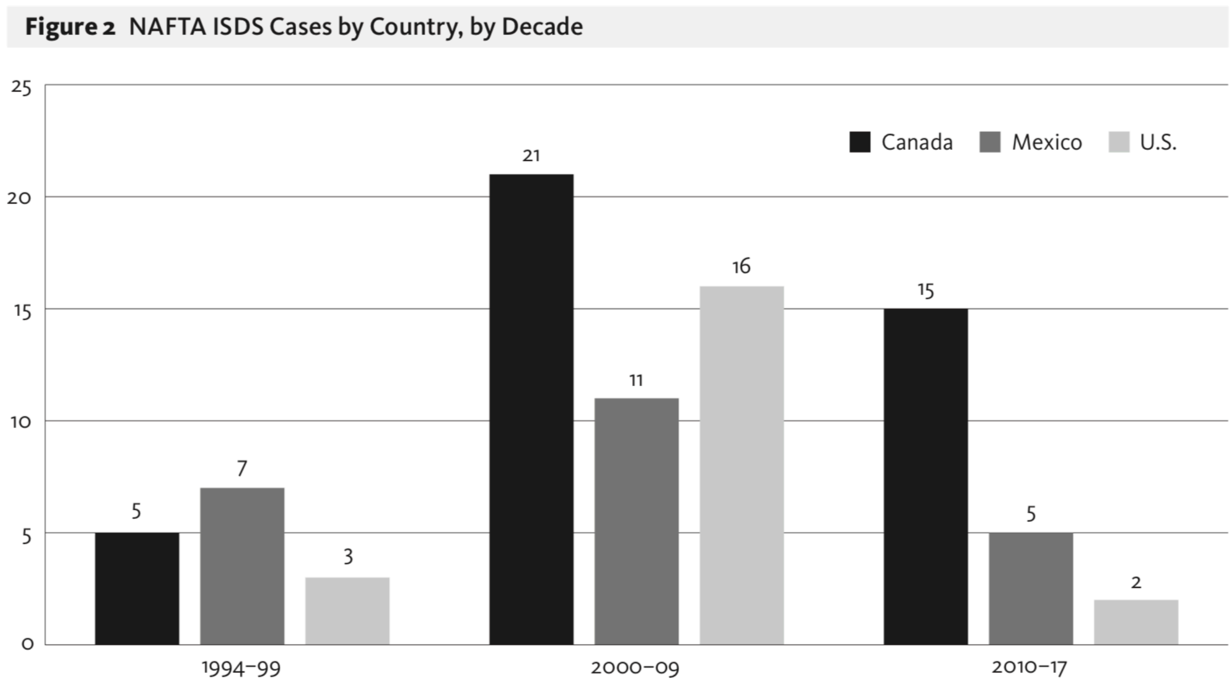
Source: Own elaboration based on data provided by Global Affairs Canada http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng, accessed 16 March 2018).

Exhibit 6: NAFTA ISDS Cases by Country (Running Total)



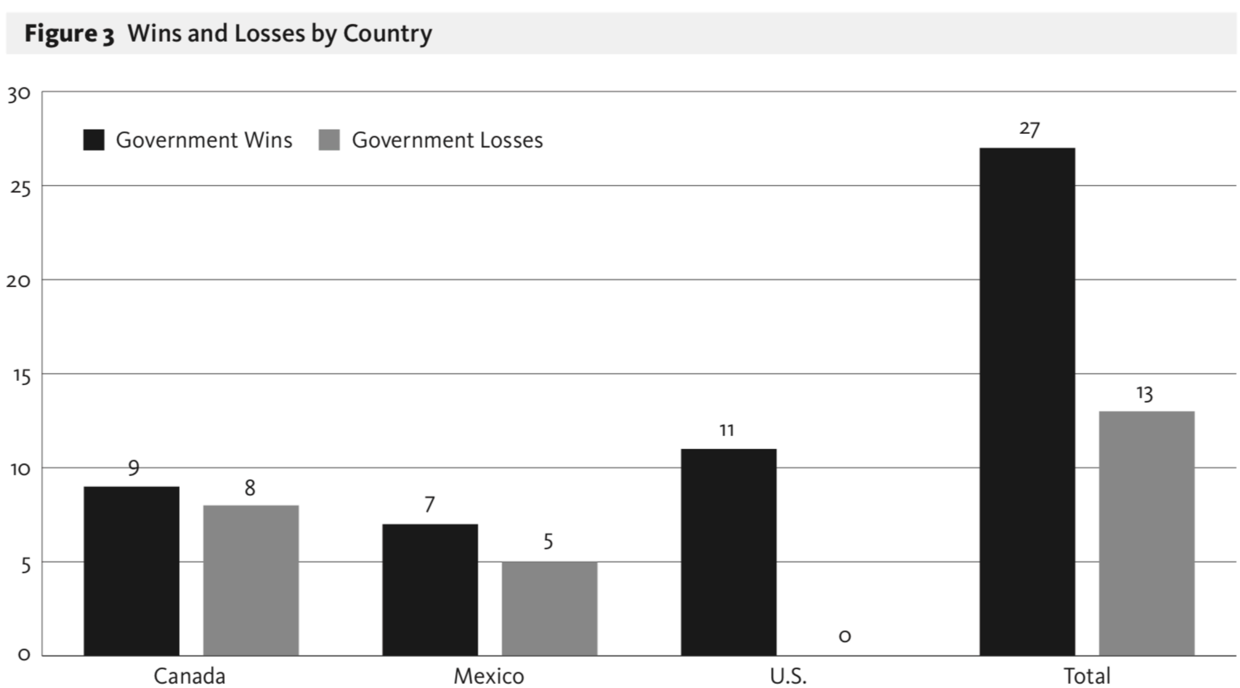
Source: Sinclair, 2018

Exhibit 7: NAFTA ISDS Cases by Country, by Decade



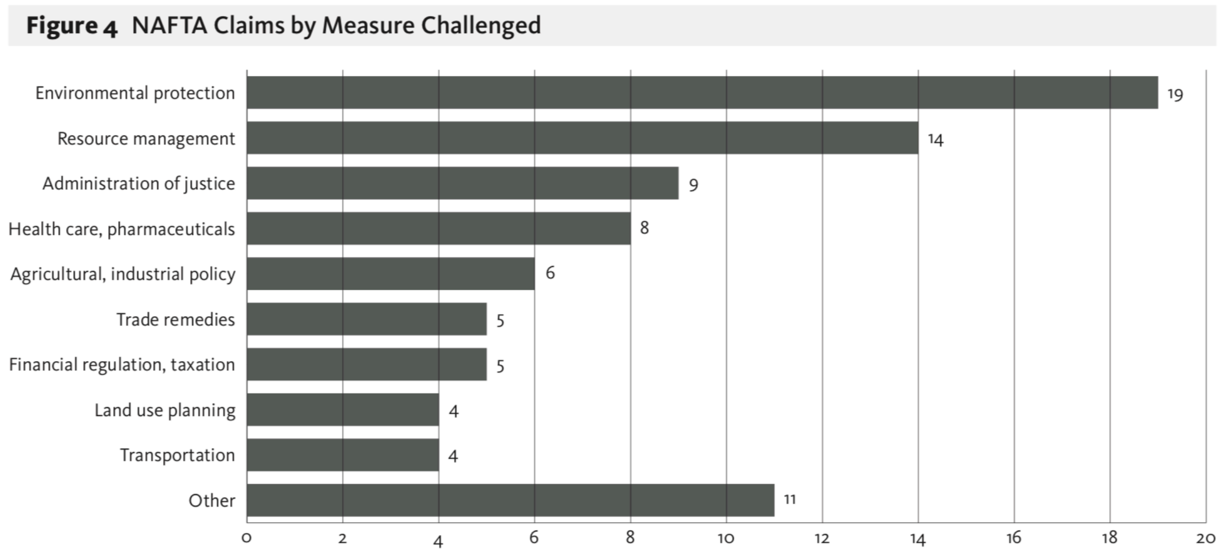
Source: Sinclair, 2018

Exhibit 8: Wins and Losses by Country



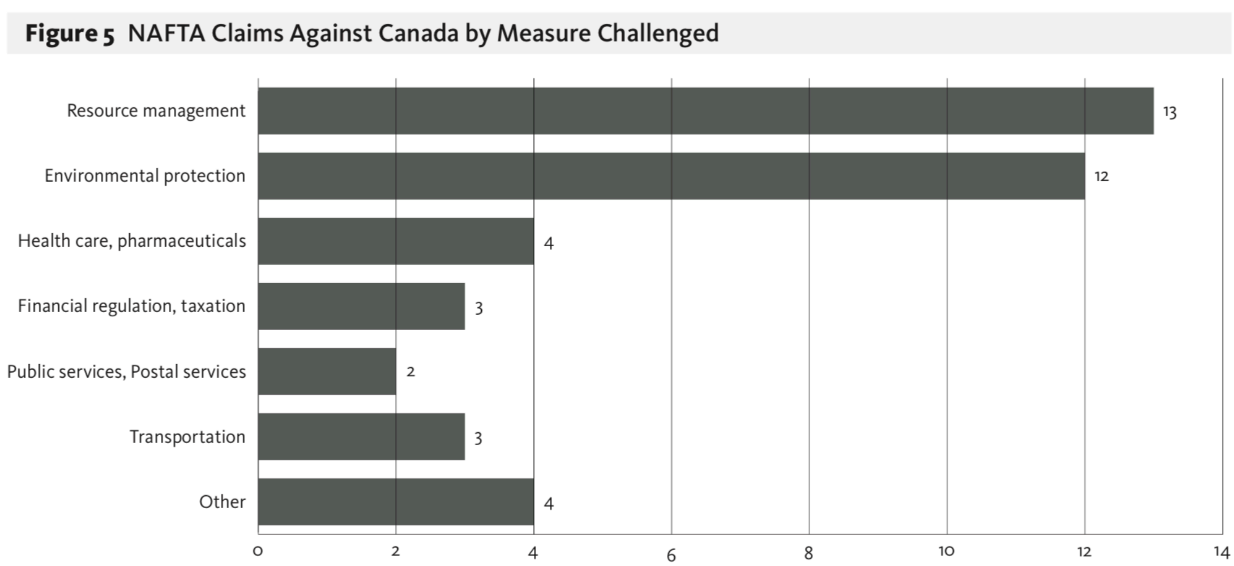
Source: Sinclair, 2018

Exhibit 9: NAFTA Claims by Measure Challenged



Source: Sinclair, 2018

Exhibit 10: NAFTA Claims Against Canada by Measure Challenged



Source: Sinclair, 2018

Exhibit 11: U.S. Merchandise Trade with NAFTA Partners (1993-2016)

Figure 2. U.S. Merchandise Trade with NAFTA Partners: 1993-2016

(billions of nominal dollars)

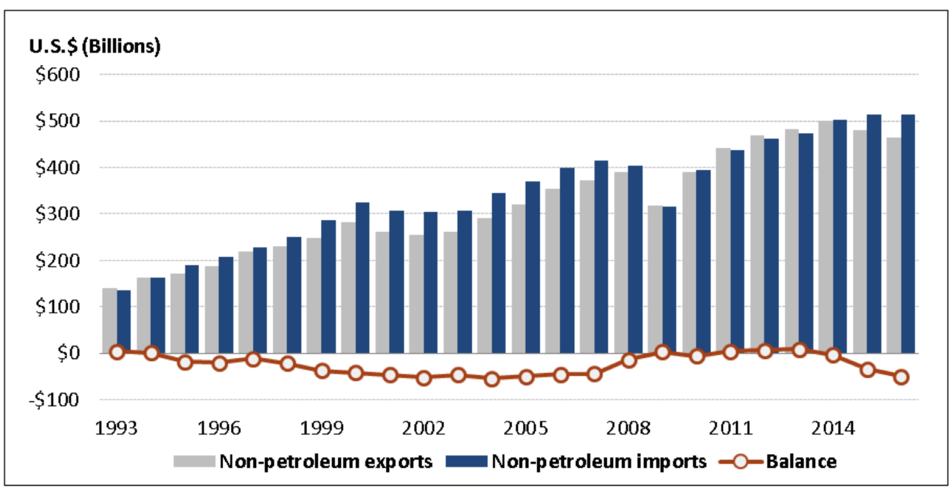
Source: Compiled by CRS using trade data from the U.S. International Trade Commission's Interactive Tariff and Trade Data Web, at http://dataweb.usitc.gov.

Source: Villareal & Fergusson, 2017

Exhibit 12: Trade with NAFTA Partners Excluding Petroleum Oil and oil Products (1993-2016)

Figure 3. Trade with NAFTA Partners Excluding Petroleum Oil and Oil Products: 1993-2016

(billions of nominal dollars)



Source: Compiled by CRS using trade data from the U.S. International Trade Commission's (USITC's) Interactive Tariff and Trade Data Web, at http://dataweb.usitc.gov.

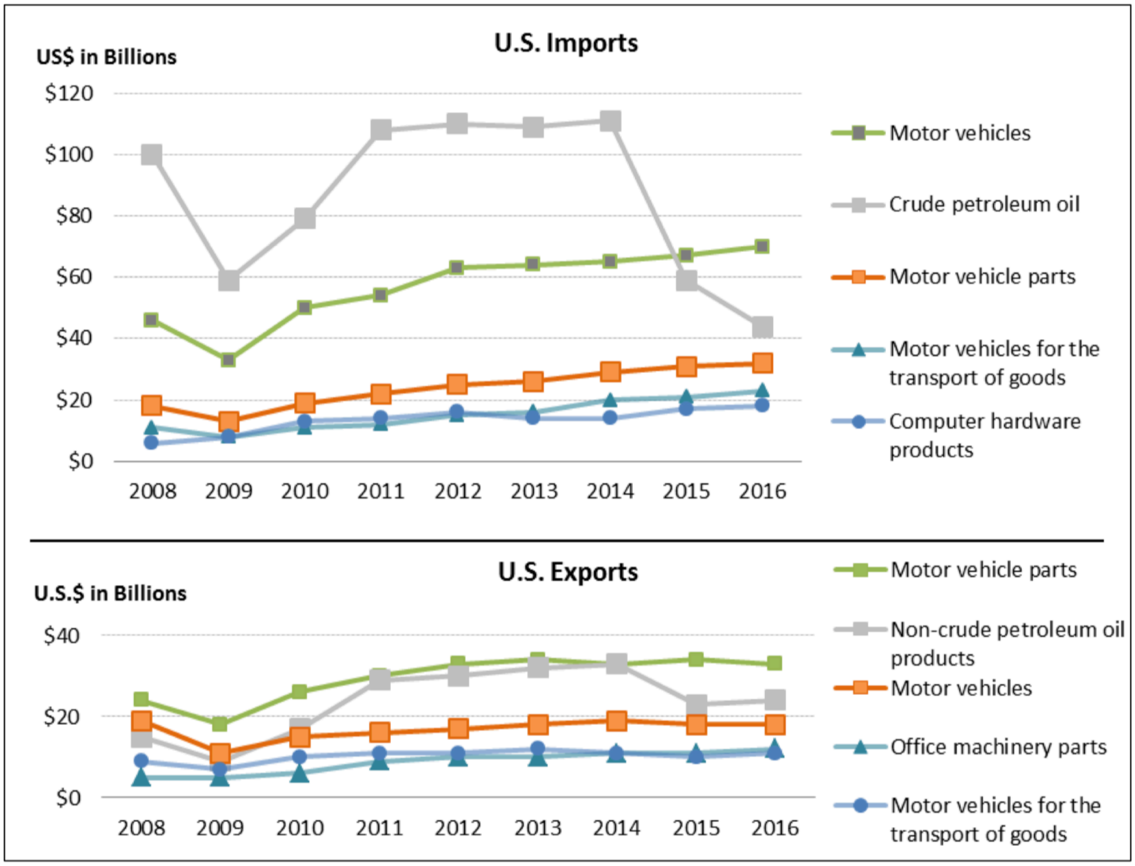
Notes: The United States uses different classifications of trade for trade statistics. Trade data in this chart excludes energy trade in three categories: Harmonized Tariff Schedule (HTS) code 2709, petroleum oils and oils from bituminous minerals, crude; HTS code 2710, petroleum oils and oils from bituminous minerals (other than crude) and products therefrom, NESOI, containing 70% (by weight) or more of these oils; and HTS code 2711, petroleum gases and other gaseous hydrocarbons. See http://dataweb.usitc.gov.

Source: Villareal & Fergusson, 2017

Exhibit 13: Top Five U.S. Import and Export Items to and from NAFTA Partners

Figure 4. Top Five U.S. Import and Export Items to and from NAFTA Partners

(billions of nominal dollars)



Source: Compiled by CRS using trade data from the USITC at http://dataweb.usitc.gov.

Notes: This figure does not include low-value export shipments. Statistics are derived from the harmonized Tariff Schedule (HTS) of the United States at the 4-digit level. The HTS comprises a hierarchical structure for describing all goods in trade for duty, quota, and statistical purposes. This structure is based on the international Harmonized Commodity Description and Coding System (HS), administered by the World Customs Organization in Brussels.

Source: Villareal & Fergusson, 2017

Exhibit 14: U.S. Trade in Motor Vehicles and Parts: 1993 and 2016

Table 1. U.S. Trade in Motor Vehicles and Parts: 1993 and 2016

(billions of dollars)

	1993			2016			% Change 1993-2016	
	Exports	**Imports**	**Total**	**Exports**	**Imports**	**Total**	**Exports**	**Imports**
Mexico								
Vehicles	0.2	3.7	3.9	4.6	49.7	54.3	2222%	1242%
Parts	7.3	7.4	14.7	22.5	46.3	68.9	209%	526%
Total	7.5	11.1	18.6	27.2	96.0	123.2	262%	765%
Canada								
Vehicles	8.2	26.7	34.9	26.1	46.7	72.7	218%	75%
Parts	18.2	10.3	28.5	26.4	14.0	40.5	45%	36%
Total	26.4	37.0	63.4	52.5	60.7	113.2	99%	64%
World								
Vehicles	18.9	63.0	81.9	68.4	199.5	267.9	262%	217%
Parts	33.4	38.3	71.7	64.08	115.4	179.5	92%	201%
Total	52.3	101.3	153.6	132.5	314.9	447.4	153%	211%

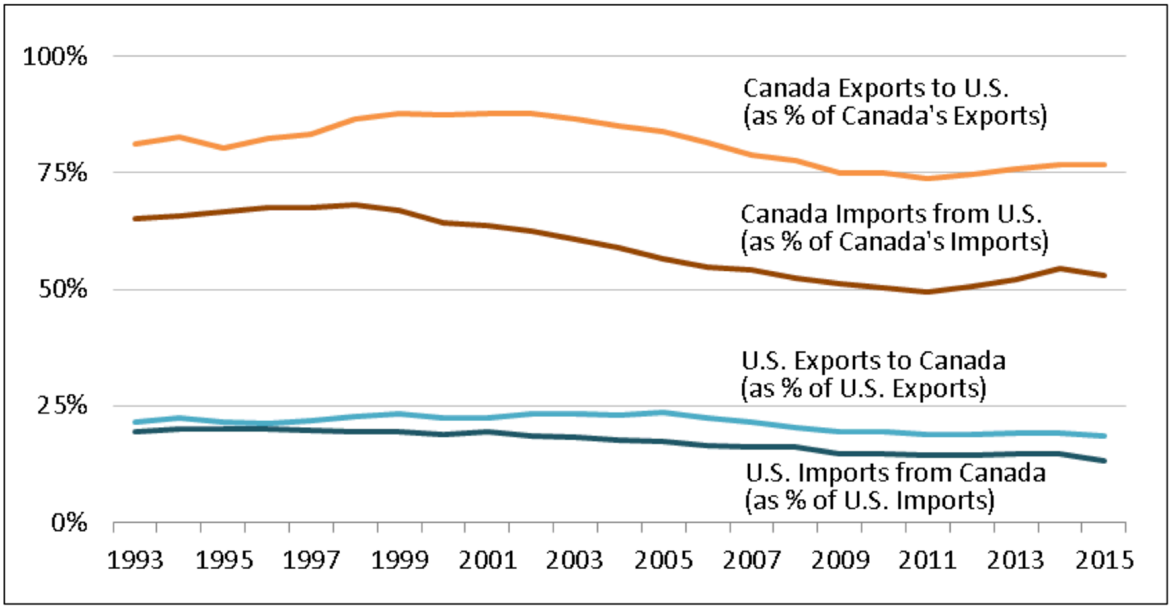
Source: Compiled by CRS using trade data from the USITC at http://dataweb.usitc.gov. For 2016, "vehicles" consists of items under the North American Industrial Classification System (NAICS) number 3361 and "parts" consists of items under NAIC number 3363. The NAICS is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

Source: Villareal & Fergusson, 2017

Exhibit 15: Market Share as Percentage of Total Trade: Canada and the United States (1993-2015)

Figure 6. Market Share as Percentage of Total Trade: Canada and the United States

(1993-2015)



Source: Economic Intelligence Unit, from IMF International Financial Statistics.

Note: Represents exports to and imports from other country as percentage of country's total trade.

Source: Villareal & Fergusson, 2017

Exhibit 16: U.S. Foreign Direct Investment Positions with Canada and Mexico

Table A-4. U.S. Foreign Direct Investment Positions with Canada and Mexico

(1993-2015 historical cost basis [millions of dollars])

Year	Canadian FDI in the U.S.	U.S. FDI in Canada	Mexican FDI in the U.S.	U.S. FDI in Mexico
1993	40,373	69,922	1,244	15,221
1994	41,219	74,221	2,069	16,968
1995	45,618	83,498	1,850	16,873
1996	54,836	89,592	1,641	19,351
1997	65,175	96,626	3,100	24,050
1998	72,696	98,200	2,055	26,657
1999	90,559	119,590	1,999	37,151
2000	114,309	132,472	7,462	39,352
2001	92,420	152,601	6,645	52,544
2002	92,529	166,473	7,829	56,303
2003	95,707	187,953	9,022	56,851
2004	125,276	214,931	7,592	63,384
2005	165,667	231,836	3,595	73,687
2006	165,281	205,134	5,310	82,965
2007	201,924	250,642	8,478	91,046
2008	168,746	246,483	8,420	87,443
2009	188,943	274,807	11,111	84,047
2010	192,463	295,206	10,970	85,751
2011	205,225	330,041	12,500	85,599
2012	214,314	366,709	12,751	104,388
2013	222,989	370,259	15,869	86,433
2014	257,142	358,452	16,567	89,650
2015	268,972	352,928	16,597	92,812

Source: Compiled by CRS using most recent data from the Bureau of Economic Analysis online database at http://www.bea.gov.

Source: Villareal & Fergusson, 2017

Exhibit 17: *Basel convention on the control of transboundary movements of hazardous wastes and their disposal – Protocol on liability and compensation – For damage resulting from transboundary movements of hazardous wastes and their disposal, Preamble*

The Parties to this Convention,

Aware of the risk of damage to human health and the environment caused by hazardous wastes and other wastes and the transboundary movement thereof,

Mindful of the growing threat to human health and the environment posed by the increased generation and complexity, and transboundary movement of hazardous wastes and other wastes,

Mindful also that the most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum in terms of quantity and/or hazard potential,

Convinced that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal,

Noting that States should ensure that the generator should carry out duties with regard to the transport and disposal of hazardous wastes and other wastes in a manner that is consistent with the protection of the environment, whatever the place of disposal,

Fully recognizing that any State has the sovereign right to ban the entry or disposal of foreign hazardous wastes and other wastes in its territory,

Recognizing also the increasing desire for the prohibition of transboundary movements of hazardous wastes and their disposal in other States, especially developing countries,

Convinced that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated,

Aware also that transboundary movements of such wastes from the State of their generation to any other State should be permitted only when conducted under conditions which do not endanger human health and the environment, and under conditions in conformity with the provisions of this Convention,

Considering that enhanced control of transboundary movement of hazardous wastes and other wastes will act as an incentive for their environmentally sound management and for the reduction of the volume of such transboundary movement,
Convinced that States should take measures for the proper exchange of information on and control of the transboundary movement of hazardous wastes and other wastes from and to those States,

Noting that a number of international and regional agreements have addressed the issue of protection and preservation of the environment with regard to the transit of dangerous goods, Taking into account the Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972), the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes adopted by the Governing Council of the United Nations Environment Programme (UNEP) by decision 14/30 of 17 June 1987, the Recommendations of the United Nations Committee of Experts on the Transport of Dangerous Goods (formulated in 1957 and updated biennially), relevant recommendations, declarations, instruments and regulations adopted within the United Nations system and the work and studies done within other international and regional organizations,

Mindful of the spirit, principles, aims and functions of the World Charter for Nature adopted by the General Assembly of the United Nations at its thirty-seventh session (1982) as the rule of ethics in respect of the protection of the human environment and the conservation of natural resources,

Affirming that States are responsible for the fulfilment of their international obligations concerning the protection of human health and protection and preservation of the environment, and are liable in accordance with international law,

Recognizing that in the case of a material breach of the provisions of this Convention or any protocol thereto the relevant international law of treaties shall apply,

Aware of the need to continue the development and implementation of environmentally sound low-waste technologies, recycling options, good house-keeping and management systems with a view to reducing to a minimum the generation of hazardous wastes and other wastes,
Aware also of the growing international concern about the need for stringent control of transboundary movement of hazardous wastes and other wastes, and of the need as far as possible to reduce such movement to a minimum,

Concerned about the problem of illegal transboundary tra c in hazardous wastes and other wastes,

Taking into account also the limited capabilities of the developing countries to manage hazardous wastes and other wastes,
Recognizing the need to promote the transfer of technology for the sound management of hazardous wastes and other wastes produced locally, particularly to the developing countries in accordance with the spirit of the Cairo Guidelines and decision 14/16 of the Governing Council of UNEP on Promotion of the transfer of environmental protection technology,

Recognizing also that hazardous wastes and other wastes should be transported in accordance with relevant international conventions and recommendations,

HAVE AGREED AS FOLLOWS:

Exhibit 18: Claims Against Canada, 26 pages

Source: Sinclair, 2018

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

Source: Sinclair, 2018

CLAIMS AGAINST CANADA					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**[2]	**Status**
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. 1105 (minimum standard of treatment) Art. 1502 (monopolies and state enterprises) Art. 1503 (state enterprises)	$160 million	Notice of arbitration submitted on January 5, 2009. 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. The claimant was ordered to pay Canada's share of arbitration costs.
August 25, 2008	**Dow AgroSciences LLC**	Dow AgroSciences LLC is a wholly owned subsidiary of the U.S.-based multinational corporation, Dow Chemical Company. Dow AgroSciences manufactures 2,4-D, an active ingredient in many commercial herbicides. In 2006 Quebec banned the use of certain chemical pesticides, including 2,4-D, on lawns within the province. Several other provincial and municipal governments are considering or have already enacted similar bans on the use of pesticides for cosmetic lawn care purposes. The constitutional validity of such pesticide bans has been upheld by the Supreme Court of Canada. Dow AgroSciences alleges that the ban is without scientific basis and was imposed without providing a meaningful opportunity for the company to demonstrate that its product is safe. Dow further alleges that the ban is "tantamount to expropriation."	Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation)	$2 million +	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.
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 licences and to restrict access to certain salmon fishing areas were tantamount to expropriation, discriminated against the investor in favour of Canadian-owned fishing lodges, and violated minimum standards of treatment.	Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation)	$7.5 million	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.

Source: Sinclair, 2018

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

Source: Sinclair, 2018

CLAIMS AGAINST CANADA

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
April 23, 2009	**AbitibiBowater 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	Statement of claim submitted February 25, 2010. In August 2010 the Canadian federal government announced that it had agreed to pay AbitibiBowater C$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 stated it would not seek to recover the costs of the settlement from the Newfoundland government in this instance, it said it intended to hold provincial and territorial governments liable for any future NAFTA-related damages paid by the federal government in respect of provincial measures.
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 arbitration submitted April 28, 2011. Amended notice of arbitration submitted in January 2013. On April 2, 2015 the tribunal, with one arbitrator dissenting, dismissed the claim on jurisdictional grounds. NAFTA Article 1121 requires a disputing investor to waive their right to litigation in the domestic courts of any NAFTA party with respect to the same measure(s) being challenged under NAFTA. The tribunal ruled that the claimant, who continued to pursue a lawsuit against Canada in the U.S. federal courts on the same matter, had failed to meet this waiver requirement. The claimant was ordered to pay a portion of Canada's costs, amounting to C$1,977,000.

Source: Sinclair, 2018

CLAIMS AGAINST CANADA					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**[2]	**Status**
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. 1110 (expropriation and compensation)	$4 million +	Claim is inactive.
May 13, 2011	**St. Marys VCNA, LLC**	St. Marys VCNA is a U.S.-based cement corporation, which is a subsidiary of the Brazilian-owned Votorantim Group. St. Marys VCNA alleges that its Canadian subsidiary, St. Marys Cement Inc., was the victim of political interference in its attempt to open a quarry at a site near Hamilton, Ontario. St. Marys Inc. took over the site in 2006 from Lowndes Holdings Corp., which since 2004 had been seeking approval for a quarry on land that was zoned agricultural. However, as early as 2005 local residents began campaigning against the quarry on environmental and social grounds. Due to concerns related to groundwater, and in response to public pressure, the Ontario Ministry for Municipal Affairs and Housing issued a zoning order that prevented the site from being converted from agricultural to extractive industrial use. St. Marys 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 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. Marys VCNA was a Brazilian-owned company without substantial U.S. business activities and therefore did not qualify as a U.S. investor. St. Marys challenged this move in an Ontario court, but abandoned the case before the court could rule. The parties reached a settlement on February 28, 2013, which saw St. Marys withdraw the claim in exchange for C$15 million in compensation from the Ontario government.

Source: Sinclair, 2018

CLAIMS AGAINST CANADA					
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 favouring other local and international investors, including Korea's Samsung C&T, which secured a PPA. According to the investor, these "sudden and discriminatory" changes cost them access to a number of lucrative contracts. Mesa also alleges that "local content" requirements related to the FIT program are NAFTA-inconsistent performance requirements.	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 (state enterprises)	CAD $775 million	Notice of arbitration submitted October 4, 2011. On March 31, 2016 the tribunal, with one arbitrator dissenting, ruled that the FIT program constituted government procurement, which (by reason of NAFTA article 1108(8)) was excluded from challenge under NAFTA articles 1102, 1103 and 1004. Furthermore, the tribunal majority rejected Mesa's complaints that various Ontario government administrative measures breached NAFTA's minimum standard of treatment obligation. The claimant was ordered to pay 30 per cent of Canada's legal costs, amounting to C$2,948,701.
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 cogeneration 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 B.C. Utilities Commission and BC Hydro are responsible for this unfavourable treatment. Mercer also claims that it has been denied "direct subsidies, low-interest loans or other financial incentives" available to its competitors.	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)	C$232 million	Notice of arbitration submitted April 30, 2012. The tribunal process continues.

Source: Sinclair, 2018

CLAIMS AGAINST CANADA					
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 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)	C$475 million	Notice of arbitration submitted January 28, 2013. On Sept. 16, 2017 the tribunal dismissed the investor's claims related to national treatment, most-favoured-nation treatment and expropriation. But it ruled that certain Ontario government actions had breached NAFTA's minimum standard of treatment provision. In particular, the tribunal ruled that the Ontario government had not undertaken sufficient scientific studies to resolve the uncertainly around the environmental safety of offshore wind power. Those studies that were conducted did not lead to any regulatory changes either allowing offshore wind projects to proceed or to a permanent ban. The claimant was thus left, according to the tribunal, in a state of "regulatory limbo." Canada was ordered to pay the investor C$25,182,900 in damages and C$2,912,432 in legal costs. The Ontario government paid the award, plus interest, in March 2017.

Source: Sinclair, 2018

CLAIMS AGAINST CANADA					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**[2]	**Status**
November 7, 2012	**Eli Lilly and Company**	Eli Lilly is a U.S.-based multinational pharmaceutical company that 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)	C$500 million	First notice of intent subsequently withdrawn. Second notice of intent submitted June 13, 2013. Notice of arbitration submitted September 12, 2013. In its March 17, 2017 final award the tribunal dismissed Eli Lilly's claims. The tribunal unanimously dismissed the investor's claims on minimum standards of treatment and expropriation. The tribunal agreed with Canada that judicial decisions should be accorded a high degree of deference. But its reasoning left the door partly open to future NAFTA arbitral review of court decisions, even those that do not violate a gross denial of justice standard. The tribunal ordered the claimant to pay 75 per cent of Canada's legal costs and Canada's share of the arbitration costs, totalling approximately C$4,800,000.
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, after extensive public and legislative debate, the Government of Quebec passed Bill 18, an Act to Limit Oil and Gas Activities. The legislation revoked all permits for oil and gas development under the St. Lawrence River and prohibited further exploration by resource companies. 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)	$119 million	Notice of arbitration submitted September 6, 2013. The tribunal hearing on the merits was held in Toronto in October 2017. The tribunal process continues.

Source: Sinclair, 2018

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

Source: Sinclair, 2018

CLAIMS AGAINST CANADA

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

Source: Sinclair, 2018

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

Source: Sinclair, 2018

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CLAIMS AGAINST THE UNITED STATES					
Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
February 29, 2000	**ADF Group Inc.**	Canadian steel contractor challenges U.S. "Buy America" preferences requiring that U.S. steel be used in federally funded state highway projects.	Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment) Art. 1106 (performance requirements)	$90 million	In January 2003 the tribunal dismissed the investor's claim. The tribunal concluded that the measures in question were procurement measures exempted under NAFTA Article 1108.
November 5, 2001	**Canfor Corp.**	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and antidumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers.	Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation)	$250 million	Notice of arbitration submitted on July 9, 2002. On September 7, 2005, at the request of the U.S. government, the Canfor, Terminal and 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.

Source: Sinclair, 2018

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

Source: Sinclair, 2018

CLAIMS AGAINST THE UNITED STATES					
Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
September 9, 2002	**Paget et al. & 800438 Ontario Limited**	An Ontario numbered company operated three subsidiaries in Florida that sold or leased bingo halls. Between 1994 and 1995 the state of Florida accused it of violating the Racketeer Influenced and Corrupt Organizations Act and subjected it to a tax audit. As a result, the State of Florida seized the company's property. Ontario Ltd. claims that the state improperly refused to return its property and destroyed its financial records.	Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation)	$38 million	Claim is inactive.
June 12, 2003	**Terminal Forest Products Ltd.**	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and antidumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers.	Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation)	$90 million	Notice of arbitration submitted on March 31, 2004. At the request of the U.S. government, the Canfor, Terminal and 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. On June 8, 2009 the tribunal issued its award, dismissing Glamis's claims. The tribunal found that the economic impact of the environmental regulations on the company's investment was not substantial enough to be deemed an expropriation. It also rejected the investor's claim that a range of state and federal government measures related to the mining project violated minimum standards of treatment. The tribunal ordered the company to pay two-thirds of the costs of the proceeding.

Source: Sinclair, 2018

CLAIMS AGAINST THE UNITED STATES

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

Source: Sinclair, 2018

CLAIMS AGAINST THE UNITED STATES					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**	**Status**
September 21, 2007	**Apotex Inc. (I)**	Apotex Inc. is a Canadian pharmaceutical company that develops and manufactures generic drugs. In 2003 Apotex sought U.S. Food and Drug Administration approval to develop a generic version (sertraline) of Pfizer Inc.'s anti-depressant medication Zoloft once Pfizer's patent expired in 2006. 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 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 the legal costs of the U.S. government ($526,000) and the 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. Claim is inactive.

Source: Sinclair, 2018

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CLAIMS AGAINST THE UNITED STATES					
Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)	Status
June 4, 2009	**Apotex Inc. (II)**	Apotex Inc. is a Canadian pharmaceutical company that 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 the legal costs of the U.S. government ($526,000) and the costs of the proceedings.
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 protect itself against potential losses in the Texan courts.	Not available	Not available	Notice of intent reportedly submitted in September 2009. Claim is inactive.

Source: Sinclair, 2018

CLAIMS AGAINST THE UNITED STATES					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	**NAFTA Articles Cited**	**Amount Claimed ($US)**	**Status**
November 23, 2011	**Apotex Holdings Inc. and Apotex Inc.**	Apotex Holdings Inc. is a Canadian investor that owns and controls Apotex Inc., a Canadian pharmaceutical company specializing in generic drugs, and Apotex Corp., which distributes these drugs in the U.S. 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. 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.
January 6, 2016	**TransCanada Corp. & TransCanada Pipelines Ltd.**	Canadian energy company alleges that the delay and eventual rejection by the Obama administration of the Keystone XL pipeline discriminated against the company, denied it fair and equitable treatment and expropriated its investment. The Keystone XL pipeline is a planned 1,900-km pipeline to carry bitumen from the Alberta tar sands to refineries in the southern U.S. After the Trump administration approved the controversial project the investor and the U.S. government agreed to discontinue the NAFTA claim.	Art. 1102 (national treatment) Art. 1103 (most-favoured-nation treatment) Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation)	$15 billion	Notice of arbitration submitted June 24, 2016. On March 24, 2017, at the request of the parties, the ICSID secretary-general formally discontinued the arbitral proceeding.

Source: Sinclair, 2018

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

Source: Sinclair, 2018

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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.
February 20, 1998	**USA Waste Management Inc.**	U.S. waste management company challenges state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco.	Art. 1105 (minimum standard of treatment) Art. 1110 (expropriation and compensation)	$60 million	In June 2000 the tribunal ruled that it lacked jurisdiction because Waste Management Inc. had not properly waived domestic legal claims as required by NAFTA. The investor then resubmitted its notice of intent. The tribunal subsequently confirmed its jurisdiction. In April 2004 the tribunal dismissed the investor's claims on their merits. The tribunal observed that a breach of contract did not rise to a breach of NAFTA's investment protections, especially since the claimant had judicial remedies available.

Source: Sinclair, 2018

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

Source: Sinclair, 2018

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

Source: Sinclair, 2018

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

Source: Sinclair, 2018

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

Source: Sinclair, 2018

CLAIMS AGAINST MEXICO					
Date Complaint Filed[1]	**Complaining Investor**	**Issue**	NAFTA **Articles Cited**	**Amount Claimed ($US)**	**Status**
September 15, 2017	**Vento Motorcycles, Inc.**	Vento was founded in Mexico but now assembles motorcycles in the U.S. for export to Mexico. Mexican trade authorities ruled that Vento's motorcycles are assembled with mostly foreign components and do not have sufficient North American content to qualify for preferential tariff treatment under NAFTA. Accordingly, Vento's vehicles are now subject to a 30% import duty. The company asserts its Mexican-owned competitors, whose assembly practices are allegedly similar, do not pay such a duty, resulting in discrimination against Vento.	Art. 1102 (national treatment) Art. 1105 (minimum standard of treatment)	Not available	Claim is ongoing.

Source: Sinclair, 2018

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

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

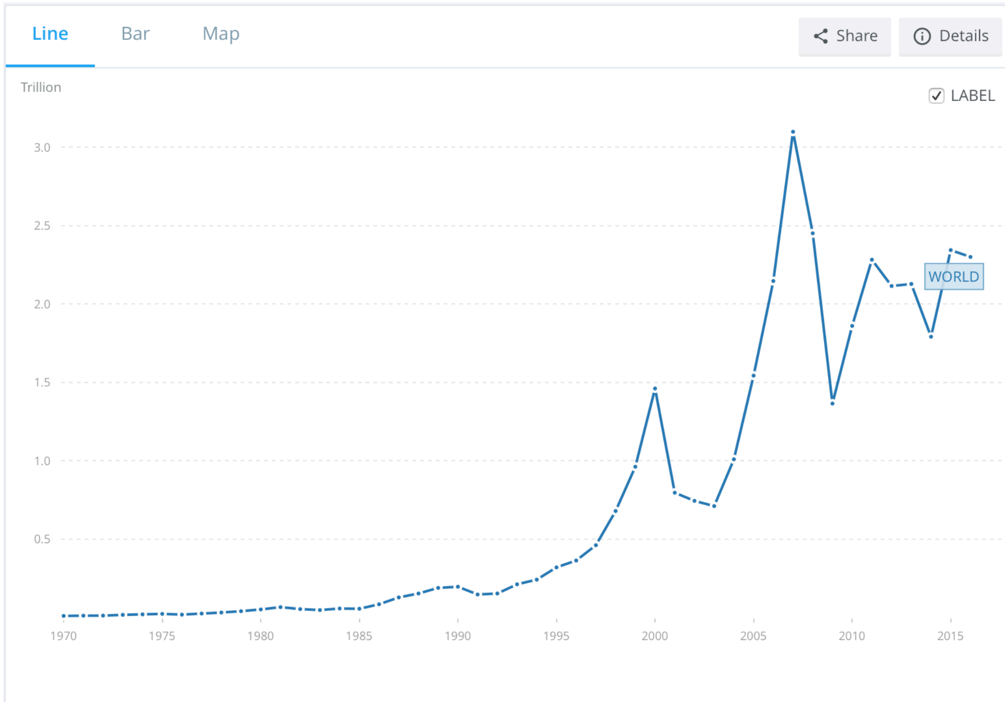
SOURCES Global Affairs Canada (http://www.international.gc.ca), U.S. Department of State (www.state.gov), Mexico's Secretaria de Economia (www.economia-snci.gob.mx), NAFTA Claims (www.naftaclaims.com), Investment Treaty News (www.iisd.org/investment/itn), Investment Arbitration Reporter (www.iareporter.com),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

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

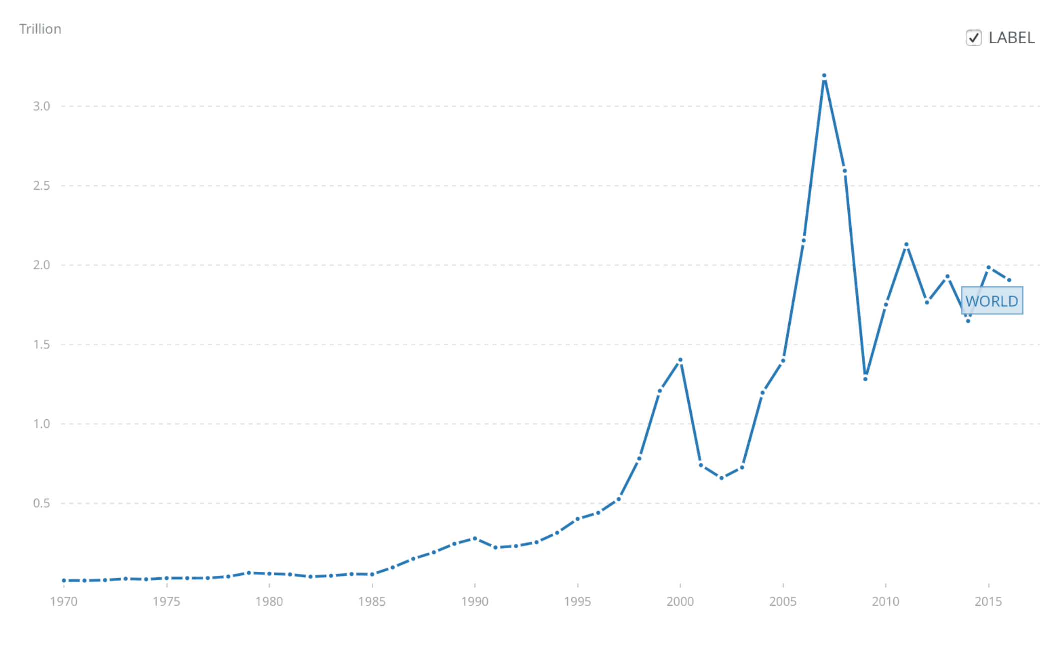
Source: Sinclair, 2018

Exhibit 19: Foreign Direct Investment (Net Inflows and Outflows)

Foreign Direct Investment, Net Inflows (BoP, US Dollars)

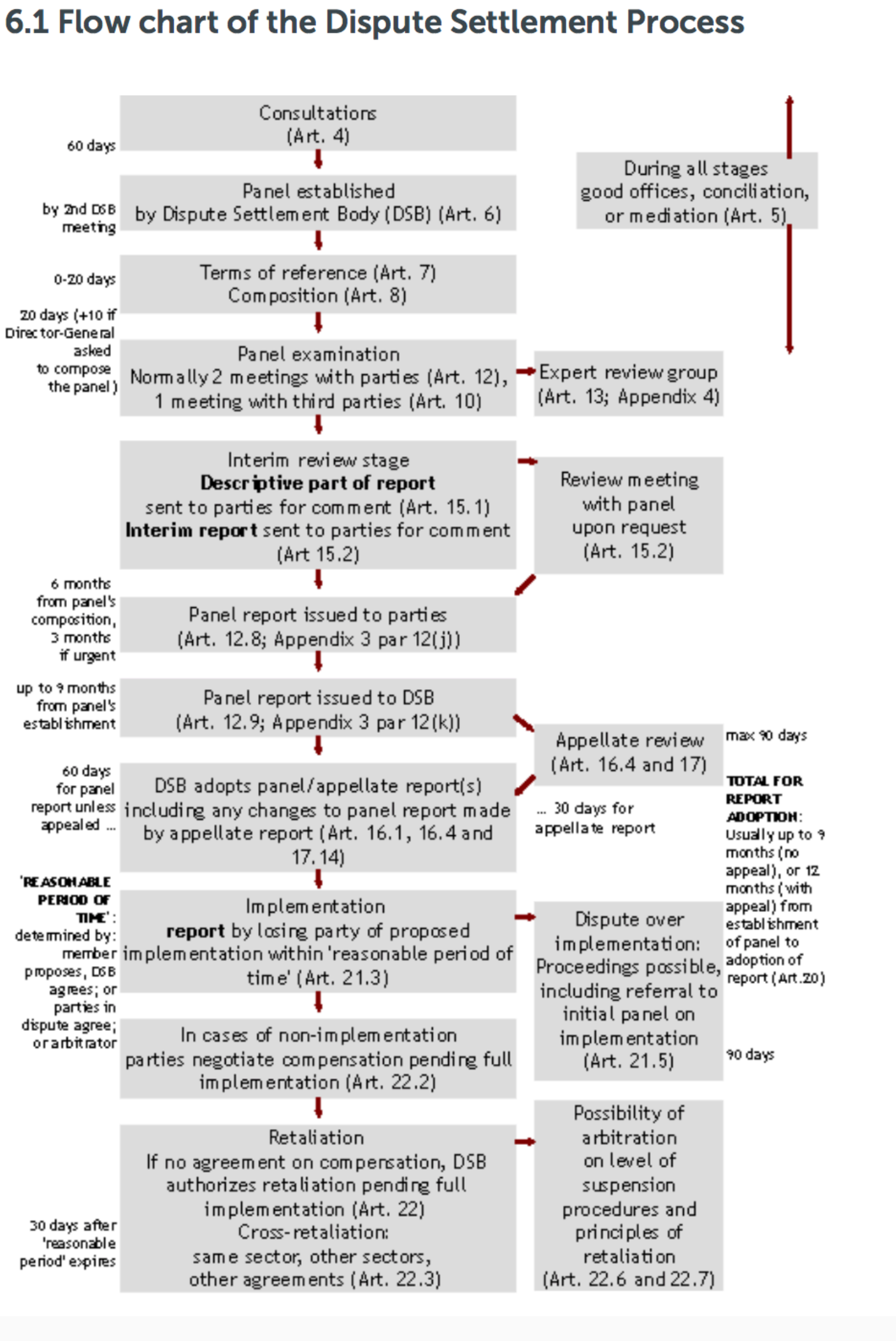


Foreign Direct Investment, Net Outflows (BoP, US Dollars)



Source: World Bank, 2018

Exhibit 20: Flow Chart of the World Trade Organization Dispute Settlement Process



Source: World Trade Organization (2018)

Exhibit 21: Analysis Case Summary

Parties	*Key Points*
Pope & Talbot Inc.	**National Treatment**: The Tribunal concluded that Canada respected its National Treatment obligations since the legislation in question was "reasonably related to the rational policy of removing the threat of countervailing duty actions (Gantz, 2003, p. 942)."
	Expropriation: The tribunal establishes that limiting an investment's access to a market does fall under the scope of expropriation. Regulations can be tantamount to expropriation, even when they are applied in a "creeping" fashion. The Tribunal concluded that the regulations did interfere with the investment, it did not do so at a degree that would constitute expropriation (e.g. nationalisation or loss of control of a subsidiary).
	Minimum Standard of Treatment Standard: Canada breached its Minimum Standard of Treatment obligations since, the government denied reasonable requests, bred a climate of hostility and contributed to a loss of reputation of the firm.
	Conclusion: The Minimum Standard of Treatment interpretation by the Tribunal ignored the representations made by governments of the three NAFTA member states. The rule was interpreted broadly, despite calls for a narrow interpretation. A minimal cooperation by Canada would have avoided the combative and predatory nature, thus alleviating the consequences. A primary purpose of ISDS provisions is to level playing field and to prevent the government from abusing their position of power, with the means to justify such an abuse. The Tribunal was within its powers to denounce what they perceived as abuse by a government on a foreign firm. The tribunal equally demonstrates deference towards governments in regard to regulation of public policy and provides a warning for veiled regulation intended to target firms.
S.D. Myers Inc.	**National Treatment:** Canada breached its obligation since the ban in question equated to ensuring that the "economic strength of the Canadian industry […] because it wanted to maintain the ability to process PCBs within Canada in the future (Hunter et al., 2000, Partial Award, par. 255)".
	Expropriation: No breach.
	Minimum Standard of Treatment Standard: The Minimum Standard of Treatment creates a "floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner (Hunter et al., 2000, Interim Award, par. 259)," Although the tribunal suggests that a great level of deference is to be accorded to states in order to protect domestic regulation, Canada was found to have been in breach of this standard since it treated the investor in an unjust and arbitrary manner.
	Conclusion: The case involves a regulation/ban that remained impartial for all firms in the industry; despite this fact, the regulation was found to be discriminatory. Furthermore, the ban was based on an international environmental treaty. The decision was criticized for the risk it poses on environmental regulation. However, as a counterargument, the ban in question did create a situation where the removal of hazardous materials from the environment came at a higher cost, and it should have been in the government's interests to facilitate such a removal, at a lesser cost, using better technology. It is unfair to look at this decision one that is irreconcilable with the protection of the environment (and the government's right to regulate the matter) and the promotion and protection of international trade and investment.
Clayton/Bilcon of Delaware inc.	**National Treatment**: Canada breached its obligation since the Environmental standards applied in the case were not applied to similar Canadian firms and their projects.
	Most Favoured Nation Standard: No breach.
	Minimum Standard of Treatment Standard: The tribunal concluded that discrimination did occur due to the highly arbitrary nature of the review process in question. The tribunal contended that the firm had reasonable expectations and invested heavily in the process only to be refused on the basis of an arbitrary concept. This case demonstrates the overuse and abuse of the Minimum Standard of Treatment clause of NAFTA (Sinclair, 2009).
	Conclusion: The tribunal bases its arguments on the highly arbitrary nature of the Government's actions, and state that Canada filed to provide a predictable environment for FDI, going against one of NAFTA's main objectives. However, a counterargument to this is that governments do in fact treat investors in different situations according to differing standards (e.g. environmentally sensitive versus non-sensitive projects), and as suggested by the dissent, it should be within the government's scope to reject a project on criteria that it deems important (such as the criteria in question, of *community core values)*.

Source: Own Elaboration