THE INVESTMENT TREATY ARBITRATION REVIEW

FOURTH EDITION

Editor
Barton Legum

THE LAWREVIEWS

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PREFACE

The past year has again confirmed *The Investment Treaty Arbitration Review*'s contribution to its field. The biggest challenge for practitioners and clients over the past year has been to keep up with the flow of new developments and jurisprudence in the field. There was a significant increase in the number of investment treaty arbitrations registered in the first years of this decade. These cases have come or are now coming to their conclusions. The result today is more and more awards and decisions being published, making it hard for practitioners to keep up.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment, therefore, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This fourth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Dentons
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April 2019

Chapter 31

NAFTA IN TRANSITION: THE CURRENT STATE OF PLAY AND WHAT COMES NEXT

Lisa M Richman[1]

I THE 'NEW NAFTA' – INTRODUCTION TO NAFTA AND USMCA

After multiple rounds of negotiation, and years of speculation and discussion about the fate of the North American Free Trade Agreement (NAFTA), a revised North American trade pact, known in the United States as the United States–Mexico–Canada Agreement (USMCA) was signed by US President Donald Trump, then Mexican President Enrique Peña Nieto and Canadian Prime Minister Justin Trudeau on 30 November 2018 to replace NAFTA, originally executed in 1994.

The (maybe) soon-to-be-abandoned NAFTA, born with popularity as well as controversy, was initially negotiated by the governments of the United States, Canada and Mexico in an effort to liberalise trade by eliminating tariffs on products traded between and among these three countries. NAFTA also offered other innovations, including cross-border intellectual property protection and a dispute resolution mechanism under which private investors from one of the Member States were permitted to bring claims directly against one of the other Member States. The idea was to create greater trade opportunities, broader protection for investors and innovative mechanisms to create the world's largest international free trade zone. In fact, NAFTA helped contribute to a tremendous increase in trade among the United States, Canada and Mexico, and substantially reshaped North American economic relations. Apart from its economic contributions to both regional and world economy, NAFTA also plays a significant role in foreign relations and in promoting political stability within the region.

However, NAFTA has been a perennial target for President Trump, who describes it as 'the worst trade deal ever'.[2] Soon after his election, he proposed the renegotiation of NAFTA to Congress as part of his plan to reduce the trade deficit. After more than a year of negotiation, a new agreement, USMCA, was signed. It addressed some of the major concerns of certain constituents arising from NAFTA.

Although USMCA and NAFTA contain many similarities, there also are important changes. For example, USMCA expands intellectual property protection and adjusts treatments on important industries, such as automobile and agriculture. Perhaps the most significant change relates to the investment dispute resolution mechanism available under USMCA. Although the substantive protections for foreign investments in USMCA Chapter 14 largely mirror those contained in NAFTA Chapter 11, the scope of investor–state

1 Lisa M Richman is a partner in the Washington, DC office of McDermott Will & Emery LLP. She represents both investors and states in investment disputes. The author wishes to thank Xingyu Wan, LLM candidate at the Georgetown University Law Center, for her invaluable assistance with this chapter.

2 See e.g., Maggie Severns, 'Trump Pins NAFTA "worst trade deal ever", on Clinton', available https://www.politico.com/story/2016/09/trump-clinton-come-out-swinging-over-nafta-228712.

dispute settlement (ISDS) is reduced considerably. Additionally, in a significant departure from NAFTA, Canada has not agreed to the investment arbitration mechanism. This means that neither US nor Mexican investors will be able to bring claims against Canada under USMCA, nor will Canadian investors be entitled to bring such claims against Mexico or the United States. Other important changes to the substance of investment protections contained in USMCA as compared with NAFTA will be discussed in more detail in Section IV.

To date, USMCA has not yet gone through domestic procedures for finalisation and implementation in any of the three Member States. Although it is unclear whether USMCA will be ratified, investors should be prepared for the potential transition from NAFTA to USMCA, and be aware of the significant changes USMCA introduces.

II HOW AND WHEN COULD USMCA BE RATIFIED?

i The process in the United States

In the United States, the future of USMCA now largely depends on Congress. Although the President has the authority to negotiate trade agreements without interference, members of Congress have the power to vote on trade promotion agreements without amendment.

Under normal 'fast-track' procedures for trade agreements, a simple majority vote is needed in the House of Representatives (within 60 session days) followed by a simple majority vote in the Senate within 30 session days thereafter to approve or refuse a trade agreement. Before the final text of the agreement is introduced to Congress, a report describing the required changes to US law drafted by the US Trade Representative (USTR) and a study on the agreement's economic impact drafted by the International Trade Commission (ITC) also are to be provided to Congress. The USTR report was submitted by Representative Lighthizer in early February. The ITC's impact study was issued on 18 April 2019, delayed because of the 35-day government shutdown in early 2019. Because trade agreements are typically subject to an up or down vote with no amendments within the quick deadlines identified above, things could move swiftly. The Trump administration could also wait to send the agreement to Congress for a vote until concerns have been addressed through either a side agreement or changes to US laws, as necessary. Historically, prior administrations have pulled free trade agreements where they detected they would not pass in Congress.

However, there also is the question of what the Trump administration might do to force Congress's hand. On 1 December 2018, the day after USMCA was signed, President Trump gave Congress formal notice that he would terminate NAFTA in the 'near future'.[3] Article 2205 of NAFTA provides that a Member State wishing to withdraw must provide written notice, and then six months later withdrawal becomes effective for that Member State (but not the others) unless the Member State takes back the withdrawal.

Assuming President Trump follows through on his announcement and does not delay a vote to address concerns (as prior administrations have done where congressional concerns regarding a free trade agreement remained to be addressed), it could leave Congress with limited options: accept the new agreement, risk having no deal at all or try to enact legislation that mandates that the President must seek congressional approval before withdrawing from NAFTA.

3 See, e.g., Roberta Rampton, Reuters, 'Trump to Notify Congress in "near future" he will eliminate NAFTA' (December 1, 2018), available at https://www.reuters.com/article/us-usa-trump-nafta/trump-to-notify-congress-in-near-future-he-will-terminate-nafta-idUSKCN1O103K.

If Congress formally approves USMCA, it will take the place of NAFTA and become the new law governing the commercial relationships between the United States, Mexico and Canada. There is also the possibility of Congress striking down the whole deal completely. In that case, NAFTA might remain since the President's power to withdraw from an international treaty without congressional approval is currently in dispute.

Even if President Trump attempts to withdraw from NAFTA, the NAFTA Implementation Act, which ensures the domestic implementation of NAFTA, would basically stay intact. This means that, absent congressional action, the effect of withdrawal will not mean that all parts of NAFTA end, although the reciprocal tariff concessions could expire[4] or be modified by the President.[5] Unless the President issues an immediate tariff proclamation, tariff concessions will not revert to their prior most favoured nation (MFN) level for one year after the termination of a free trade agreement.[6] And, as noted above, Congress could also enact legislation calling on President Trump to obtain congressional assent.

It is hard to predict whether USMCA will stall for some period (and for what length of time), whether and when it could be approved, or whether the United States will withdraw from NAFTA as President Trump could be blocked by the newly Democrat-controlled Congress.

ii The process in Canada

In Canada, the decision of whether USMCA will be ratified domestically lies in the hands of Parliament. Since the Prime Minister of Canada already approved the deal and the Liberals have a majority in Parliament at present, the implementation of USMCA would likely go through in Canada without difficulty.

The ratification process in Canada contemplates that, after signature, the new agreement, along with an explanatory memorandum, is tabled in the House of Commons for debate. If there is sufficient support in the House of Commons, it proposes a motion to recommend action within 21 sitting days, including ratification of the agreement. A vote is not required. The cabinet would exercise full control over the ratification process. It would authorise the Minister of Foreign Affairs to sign an Instrument of Ratification. Then, an implementing bill, which contains the changes required to Canadian law at the national level, would be tabled and debated in the House of Commons and Senate respectively. Members of Parliament may suggest changes to the implementing laws and ask questions of the government, but they cannot change the substance of the new agreement.

iii The process in Mexico

The ratification process in Mexico is simpler than that of the United States and Canada, which means USMCA likely would be approved quickly and without trouble.

The ratification process in Mexico contemplates that, after signature, the new agreement is sent to the Senate for a vote. If a simple majority votes for USMCA, it would then be published and entered into force. Although there is no mandatory time limit for the whole process, it took Mexico fewer than seven weeks to ratify the Comprehensive and Progress Agreement for Trans-Pacific Partnership (CPTPP).

4 H.R. 3450, North American Free Trade Agreement Implementation Act, Section 109.

5 H.R. 3450, North American Free Trade Agreement Implementation Act, Section 201.

6 Trade Act of 1974, Section 125.

iv Concluding thoughts regarding ratification

Even though the ratification procedures in Canada and Mexico appear easier than that of the United States, neither Canada nor Mexico has ratified or implemented USMCA to date. Commentators have speculated that Canada and Mexico are worried about the fate of USMCA in the United States. If US Congress strikes down the deal, it is pointless to go through the process only to find that a key partner in the agreement is not going forward with it. Perhaps more importantly, and as described in more detail below, Canada and Mexico appear to be awaiting the resolution of the related issue of national security tariffs under Section 232 of the 1962 Trade Expansion Act. Until this issue is resolved, it is unlikely that any of the USMCA parties will take any meaningful action towards ratification of the deal as a whole.

Investors will want to continue to watch closely for developments in Congress. Until USMCA has been ratified, NAFTA will remain in place and offer broader protection for investors. But even after USMCA enters into force, investors with 'legacy investments'[7] will still have a three-year period to bring a dispute under NAFTA,[8] even though NAFTA will terminate upon entry into force of USMCA, three months after the Member States have all ratified it.[9] Investors with potential claims concerning legacy investments will want to take all necessary preliminary steps and submit a formal notice of arbitration no later than three years after USMCA enters into force to avoid risks and uncertainties caused by the transition. Investors who establish investments after the entering into force of USMCA will not be able to bring claims under NAFTA.

III MOST SIGNIFICANT DIFFERENCES BETWEEN USMCA AND NAFTA

i Dispute resolution mechanism[10]

Compared with NAFTA, some of the biggest changes in USMCA are set forth in its Chapter 14. Perhaps the biggest change is that Canada has not signed on to Annex 14-D (US–Mexican investment disputes) or Annex 14-E (covered government contracts). As a result, other than for legacy investments and pending claims under Annex 14-C, neither US nor Mexican investors can bring arbitration claims against Canada under USMCA, nor can Canadian investors bring such claims against the United States or Mexico. Canadian investors in Mexico and Mexican investors in Canada, however, have access to investment arbitration under the CPTPP, which entered into force in December 2018. However, the application of ISDS in CPTPP Chapter 9 is not as broad as in NAFTA. For example, Mexico has carved out its consent to investment arbitration under the CPTPP with respect to government contracts-related infrastructure projects.[11]

USMCA also contains numerous changes to the availability and terms of ISDS for claims against Mexico (by US investors) or the United States (by Mexican investors). The

7 USMCA, Annex 14-C, Article 6 (a) (‘“legacy investment” means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement’).

8 USMCA, Annex 14-C, Articles 1 and 3.

9 Protocol Replacing the North American Free Trade Agreement, Paragraphs 1 and 2; USMCA, Chapter 34, Article 5.

10 USMCA, Annex 14-D.

11 Meriam Al-Rashid, Bernardo Cortés, Rachel A. Howie, Catharine Luo & Chloe A. Snider, *Future Of Investor-State Dispute Settlement Mechanisms Under The United States – Mexico – Canada Agreement*

four most significant changes relate to the restriction of covered claims under Article 14.6, the requirement to exhaust local remedies under Article 5 of Annex 14-D, the definition of 'investment' under Article 14.1 and the definition of 'claimant' under Article 1 of Annex 14-D.

First, USMCA limits the types of claims that can be brought in arbitration as compared with NAFTA. Two of the most common claims under NAFTA, for indirect expropriation or for a breach of the minimum standard of treatment, are no longer covered under the new agreement. Nonetheless, investors who enter into government contracts related to oil and natural gas, power generation, telecommunications, transportation services, or ownership or management of infrastructure, are exempted from those changes (in part) and offered a broader set of ISDS protections. Additionally, USMCA limits the scope of 'fair and equitable treatment' and 'full protection and security' by giving these terms specific definitions under minimum standard of treatment.[12] Moreover, Annexes 14-D and 14-E provide that the MFN clause (Article 14.5) cannot be used to import substantive or arbitration provisions from other treaties.[13] This change is unprecedented – no other investment treaty explicitly restricts an MFN clause in this way.[14]

Second, the new procedural requirements in USMCA create additional burdens for investors. They must pursue national court proceedings to completion or for at least 30 months before submitting claims to arbitration under USMCA, unless they can demonstrate that this would be 'futile' or 'manifestly ineffective'.[15] Meanwhile, the four-year overall time limit for bringing claims from the date on which the investor first acquired, or should have acquired, knowledge of the alleged breach includes the 30 months that must be spent before the domestic courts. This means that, in practice, investors who plan to bring claims under USMCA will need to watch the calendar very carefully and consider preparing a notice of claim even before or while national proceedings are pending. In what has been described as an 'asymmetrical fork-in-the-road provision',[16] a US investor may not bring to arbitration a claim for a breach of USMCA, as distinguished from a breach of other obligations under Mexican law, that the investor previously has submitted to national court proceedings or an administrative tribunal of Mexico.[17] Although this provision has not been tested in practice, this seems to suggest that US investors who intend to bring claims for violation of USMCA need not exhaust domestic remedies and, in fact, would waive their right to arbitrate in doing so.[18] The procedural requirement of going to national courts or

(December 5, 2018), available at http://www.mondaq.com/unitedstates/x/761334/Arbitration+Dispute+Resolution/Future+Of+InvestorState+Dispute+Settlement+Mechanisms+Under+The+United+States+Mexico+Canada+Agreement.

12 USMCA, Chapter 14, Article 6.

13 USMCA, Annex 14-D, fn 22. Chapter 17 also contains similar limitations as it relates to investment arbitrations relating to the financial services sector. Chapter 17 contains a slightly different set of procedures.

14 USMCA, Annex 14-D, fn 22 and Annex 14-E, fn 29. See Alexander Bedrosyan, Hughes Hubbard & Reed LLP, 'The Asymmetrical Fork-in-the-Road Clause in the USMCA: Helpful and Unique' (October 29, 2018), http://arbitrationblog.kluwerarbitration.com/2018/10/29/usmca/ for a discussion of this change.

15 USMCA, Chapter 14, Article 5 and Annex 14-D, fn 24.

16 See, e.g., Alexander Bedrosyan, Hughes Hubbard & Reed LLP, The Asymmetrical Fork-in-the-Road Clause in the USMCA: Helpful and Unique (October 29, 2018), available at http://arbitrationblog.kluwerarbitration.com/2018/10/29/usmca/.

17 USMCA, Annex 14-D, Appendix 3.

18 There are no such restrictions for Mexican investors; presumably, because unlike Mexico, where the international treaties automatically become domestic law, meaning it is possible for US investors to directly

administrative tribunals before arbitration also does not apply to an investor who is a party to certain government contracts, as mentioned above. And, the overall time limit of claims involving such government contracts is three years instead of four.[19]

Finally, certain clarifications were made in USMCA to the definition of 'investment', and 'claimant' was added as a new term (which modifies the definition of 'investor').

Under Article 1139 of NAFTA, investment is defined by a finite list of 10 examples, which include 'an enterprise', 'credit security' and 'debt security' in an enterprise, a 'loan . . . [or] interest in an enterprise', 'real estate or other property, tangible or intangible', and 'claims to money'. In contrast, Article 14.1 of USMCA defines investment more broadly and like many other investment treaties (including more modern US free trade agreements), as 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.[20] This general definition is followed by an open list of examples, which includes an express exclusion only for 'an order or judgment entered in a judicial or administrative action' or 'claims to money that arise solely from commercial contracts for the sale of goods or services', and related extensions of credit. It is unclear whether this change to the definition of investment will be interpreted in a different and more expansive way than investments under Article 1139 of NAFTA.

Under Article 1 of Annex 14-D of USMCA, claimant is defined as 'an investor of an Annex Party [i.e., the United States or Mexico], excluding an investor that is owned or controlled by a person of a non-Annex Party that the other Annex Party considers to be a non-market economy, that is a party to a qualifying investment dispute'. This restriction is new. Though both NAFTA (in Article 1113) and USMCA (in Article 14.14) already contain denial of benefits clauses, those clauses only allow a respondent state to deny the benefits of the investment chapter, including access to ISDS, to an enterprise of another party that is owned or controlled by third-state nationals and that has no substantial business activities in the territory of the party in which it is incorporated. The new exclusion of US or Mexican claimants owned or controlled by a national or enterprise of a non-market economy is broader because it excludes a potential claimant from arbitration even if the US or Mexican company engages in substantial business activities in its state of incorporation.

When NAFTA was initiated, private investors' wide range of rights were strongly supported by the United States and Canada to obtain the maximum protection against what was perceived to be 'Mexican nationalism'.[21] It seems the tides have turned and that there is a greater emphasis in USMCA on the Member States' sovereign right to regulate public policy, especially with respect to environmental regulation.

bring USMCA claims in Mexico national courts, the United States does not have such a mechanism for Mexican investors to directly bring USMCA claims in US courts.

19 USMCA, Annex 14-E.

20 USMCA, Chapter 14, Article 1.

21 See, e.g., Gordon E Kaiser, Chapter 20, NAFTA: Past, Present and Future, *The Investment Treaty Arbitration Review* (second edition, May 2017).

ii Arbitral proceedings

In addition to the changes described above, USMCA contains additional changes that appear to be focused on streamlining arbitral proceedings and making them more transparent. Whether the changes will lead to a more effective, efficient and fair dispute settlement system remains to be seen.

USMCA includes new provisions intended to increase the transparency of arbitral proceedings by explicitly providing that the public have access to relevant arbitration documents and the hearings,[22] whereas NAFTA contained provisions relating to publication of the award, and of the notice and request for arbitration.[23] In practice, many of the written submissions, awards and other documents relating to NAFTA cases have been made publicly available (at least in redacted form) already such that this provision may have little practical effect.

USMCA contains new requirements to prevent 'double-hatting'. Annex 14-D provides that arbitrators must comply with the IBA Guidelines on Conflicts of Interest and are prohibited from 'acting as counsel or as party-appointed expert or witness in any pending arbitration under the annexes to this Chapter for the duration of the proceedings'.[24] Given the already relatively small pool of arbitrators with investment arbitration experience, this change will further limit the available pool of arbitrators, but also may help to avoid a perception that arbitrators could be involved as counsel in a dispute with related issues and therefore have an underlying if indirect conflict of interest.

In contrast with the NAFTA requirement that the arbitration be seated in a NAFTA state, USMCA allows the tribunal to choose the place of arbitration in any state that is a party to the New York Convention.[25] As the seat of arbitration can influence the proceedings in many ways, from the commencement of arbitration to the annulment of a final award, more choice over the seat of arbitration could introduce more flexibility, but will also require the parties to be on guard and ensure they provide input to ensure selection of a seat strategically best suited to the dispute at issue.

Another new feature of USMCA is that the disputing parties are given the right to review and comment on the tribunal's award on liability prior to its issuance.[26] Again, it remains to be seen how this innovation will play out in practice and whether it will simply lead to a never-ending circle of post-hearing and pre-final award briefings.

USMCA also provides an expedited hearing procedure for certain objections; for example, jurisdictional objections and objections that a claim is manifestly without legal merit.[27] Again, whether these changes will lead to more efficient or just more expensive and drawn-out proceedings remains to be seen; much will depend on arbitrators' willingness to kick out claims at the jurisdictional stage.

iii Investment fields

Apart from the dispute resolution mechanism, changes were also made in several investment fields.

22 USMCA, Annex 14-D, Article 8.

23 NAFTA, Chapter 11, Section C, Articles 1126 and 1137.4.

24 USMCA, Annex 14-D, Article 6.5.

25 ibid., Article 7.1.

26 ibid., Article 7.12.

27 ibid., Articles 7.4 and 7.5.

Auto industry

Significant changes were made to provisions relating to rules of origin and minimum wages. While NAFTA requires only 62.5 per cent of cars produced in the trade zone to be made in North America, the new agreement increases the percentage to 75 per cent.[28] A new requirement on minimum wages was added in USMCA, which provides that at least 40 per cent of automobile parts have to be made by workers who earn at least US$16 an hour by 2023.[29] The change was intended to encourage the signing countries to enhance their labour protections, particularly in Mexico.

Agriculture

USMCA creates new market access opportunities for US exports to Canada of dairy, poultry, and eggs. In return, the United States will provide new access to Canada for dairy, peanuts, processed peanut products, and a limited amount of sugar and sugar-containing products. The most significant change was made relating to the dairy industry, where the Unites States will be able to export to Canada the equivalent of 3.6 per cent of Canada's dairy market, up from the existing level of about 1 per cent.[30] Additionally, USMCA changes market access, sale and distribution regulations, relating to wine and other alcoholic beverages in a significant win for US wine and other alcohol exporters.

Intellectual property rights

Generally, as compared with NAFTA, USMCA offers broader protection in respect of intellectual property rights. Although NAFTA offers statutory protection for intellectual property rights, USMCA contains clarified definitions and stronger language. These changes appear to offer a wider range of protection in respect of addressing digital trade,[31] expanding the scope of intellectual property rights and enhancing the remedies for infringement.

Procurement

Although the public procurement provisions between the United States and Mexico essentially stay the same, Canada is excluded from the procurement chapter[32] in USMCA. Instead, Canada's relationship with the United States regarding procurement would be governed by the World Trade Organization Agreement on Government Procurement (GPA). And procurement as it relates to Canada and Mexico would be governed by the CPTPP.

The exclusion of Canada from the procurement chapter of USMCA is not expected to have a significant impact as between the United States and Mexico, or Mexico and Canada. But it may slightly reduce US companies' access to procurement in Canada as the procurement thresholds for goods and services in Canada under NAFTA will no longer apply.[33] Also, while under NAFTA, all services except for those Canada lists as excluded in NAFTA are available

28 USMCA, Chapter 4.

29 ibid.

30 Bob Bryan, 'The US, Canada, and Mexico's newly signed trade pact looks a lot like NAFTA. Here are the key differences between them', Business Insider (November 30, 2018), available at https://www.businessinsider.com/us-canada-mexico-trade-deal-usmca-nafta-details-dairy-auto-dispute-resolution-2018-10.

31 USMCA, Chapter 19.

32 ibid., Chapter 13, Article 2.

33 ibid., Annex 13-A, Section A; NAFTA, Chapter 10, Article 1001.

for procurement;[34] GPA provides a narrower list of services.[35] This difference in the scope of applicable services may reduce US companies' access to procurement opportunities in Canada as well.

US national security tariffs

During negotiation, Mexico and Canada asked the United States to lift its national security tariffs on steel and aluminium under Section 232 of the 1962 Trade Expansion Act. But USMCA does not mention this protection. Instead, the Unites States reached two separate side agreements with Mexico and Canada respectively to reduce national security tariffs on automobiles and automobile parts.[36] Under these agreements, 2.6 million passenger vehicles and US$32.4 billion in auto parts from Canada will be exempt from duties. For Mexico, 2.6 million passenger vehicles will also be exempt, as well as US$108 billion in auto parts.[37] As noted above, until this issue is resolved, there likely will be little movement relating to USMCA ratification.

Sunset clause

Unlike NAFTA, a sunset clause was included in Chapter 34 of USMCA. The Member States settled on a 16-year expiration term. Every six years, the United States, Mexico and Canada will conduct a joint review and decide whether to extend the term of the agreement for another 16-year period.[38]

IV STATUS OF CURRENT CLAIMS UNDER NAFTA CHAPTER 11

Although various US constituents have expressed significant concerns about and opposition to the NAFTA dispute resolution mechanism, it is notable that the United States has not lost in a single investor–state case as a respondent. However, US (and other) investors have benefited from NAFTA protections.

Approximately 94 known disputes have been filed under Chapter 11 of NAFTA. While about half of the claims were brought against Canada, only 21 claims have been brought against the United States and approximately 30 claims have been brought against Mexico. Among the cases that went through to a final award on the merits, Canada and Mexico lost six and five cases, respectively, while the United States lost none. Eleven of the 21 claims filed against the United States were dismissed by the arbitrators, and the remainder were either settled without damages (one case), withdrawn (two cases) or are inactive (seven cases).[39]

34 NAFTA, Chapter 10, Annex 1001.1b-2.

35 WTO GPA, Canada Annex 5: Services.

36 USMCA, MX-US Side Letter on 232; USMCA, Side Letter Text on 232 CA-US Response.

37 id.

38 USMCA, Chapter 34, Article 7.

39 Sources for information concerning claims filed and the status and information regarding those claims are drawn from the following sources: US.Department of State (www.state.gov), Global Affairs Canada (www.international.gc.ca), Mexico's Secretaría de Economía (www.economia-snci.gob.mx), International Centre for Settlement of Investment Disputes (https://icsid.worldbank.org), Investment Arbitration Reporter (www.iareporter.com) and Scott Sinclair, Canada Centre for Policy Alternatives, *Trade and Investment Research Project* (January 2018) (www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf).

Although USMCA contains several substantial changes to NAFTA, there are approximately 14 claims pending under NAFTA that should not be affected by the coming into force of USMCA.[40] Information about available details and status of each of these claims is set forth in the table in the Appendix to this chapter.

Of these claims, one prominent NAFTA claim is notable in light of recent US court litigation that may cause the NAFTA arbitration to be activated. In 2016, a Canadian company, TransCanada PipeLines Ltd, brought claims for US$15 billion against the United States.[41] TransCanada alleged 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 under NAFTA Chapter 11. After the Trump administration approved the project, the investor and the US government agreed to discontinue the NAFTA claims. In March 2017, the ICSID Secretary-General formally discontinued the arbitral proceedings. On 8 November 2018, in response to a lawsuit brought by environmental and Native American groups against the US Department of State and TransCanada, a federal court in Montana ordered a pause in the construction of the Keystone XL pipeline. Presently, it is unclear whether TransCanada will seek to revive its NAFTA claims in light of this latest setback to the project.

V RECOMMENDATIONS FOR INVESTORS

The ISDS arbitration provisions in USMCA represent a significant departure from those in NAFTA. US and Mexican investors in Canada will be unable to bring claims against Canada under USMCA, and Canadian investors also will be prevented from bringing such claims against the United States or Mexico. US and Mexican claimants also will have fewer potential grounds for claims, except where they are relying on a government contract in a covered sector, and will be required to comply with domestic litigation requirements (under certain circumstances) before commencing arbitration.

The full impact of the changes in USMCA remains to be seen. Though investors may not need to rethink their investment plans, there are some issues investors should consider while the fate of USMCA remains unclear.

For those who have NAFTA claims pending, the possible transition from NAFTA to USMCA will likely not have an impact on the ongoing procedure. The NAFTA dispute resolution mechanism will still be in place until the end of the dispute. This would likely not be the case, however, if a case relating to a legacy investment is annulled and later resubmitted if the resubmission occurs more than three years after NAFTA is terminated.

Investors with legacy investments who have potential claims and want to take advantage of the NAFTA dispute settlement mechanism, will want to submit a formal notice of arbitration no later than two years and nine months after the entry into force of USMCA. That is because legacy investment claims must be brought within three years after NAFTA is terminated; NAFTA contains a (minimum) 90-day notice provision, so investors will want to closely watch the clock and submit their claims in good time.

For investors who intend to establish or acquire investments after the entry into force of USMCA, special consideration should be given to address how to avoid or resolve potential

40 This excludes approximately 23 claims that have been inactive for an extended period.

41 *TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America*, ICSID Case No. ARB/16/21.

conflicts when drafting agreements with government entities. NAFTA remedies would no longer be available and USMCA does not provide investors the same broad rights to initiate arbitration directly against the Member States. As a result, investors will want to include in such agreements clear and unambiguous language concerning their dispute resolution rights, including, if applicable, the right to resort to arbitration.

In spite of the fact that USMCA has narrowed the scope of available procedure and remedies in the dispute resolution context, the progress made in other areas could provide certain benefits. For instance, the inclusion of broader intellectual property protections and new market access may prove more favourable.

Although President Trump has described USMCA as 'the largest, most significant, modern and balanced trade agreement in history',[42] the real impact of USMCA (if ratified) remains to be seen. Investors awaiting the ultimate fate of NAFTA and USMCA will want to carefully consider their current and future investments. Given USMCA's limitations, beyond considering whether they should bring claims now rather than waiting until USMCA is ratified, investors should evaluate other potential means of protecting their investments in the Member States beyond those contained explicitly in USMCA. In any event, investors will want to be prepared to move swiftly to protect their current and future rights if USMCA is ratified.

42 The White House official website, 'Remarks by President Trump, Prime Minister Trudeau of Canada, and President Peña Nieto of Mexico at Signing Ceremony for the United States–Canada–Mexico Agreement' (November 30, 2018), available at https://whitehouse.gov/briefings-statements/remarks-president-trump-prime-minister-trudeau-canada-president-pena-nieto-mexico-signing-ceremony-united-states-mexico-canada-agreement/.

APPENDIX: NAFTA CHAPTER 11 CLAIMS

The table below is drawn in part from Scott Sinclair, Trade and Investment Research Project, Canada Center for Policy Alternatives.[43]

Case and date	Issue	Status	Arbitration information
Amtrade International v. Mexico Notice of Intent submitted on 21 April 1995	Claim of discrimination in violation of prior settlement agreement. Damages sought: US$20 million.	Arbitration never commenced.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Halchette Corp. v. Mexico Notice of Intent submitted in August 1995	Dispute over airport concession. Damages sought: unavailable.	Notice of intent is not public. Arbitration never commenced.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Signa SA v. Canada Notice of Intent submitted on 4 March 1996	The investor alleged Canada expropriated its investment and violated the minimum standard of treatment. Damages sought: C$50 million.	Notice of intent was withdrawn by investor. Arbitration never commenced.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Ethyl Corporation v. Canada, *ad hoc (UNCITRAL)* Notice of Intent submitted on 10 September 1996	Challenge to ban on import and interprovincial trade of gasoline additive MMT. Damages sought: US$201 million.	After preliminary tribunal judgments against Canada, Canadian government repealed the MMT ban, issued an apology to the company and settled out-of-court with Ethyl for US$13 million.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Karl-Heinz Böckstiegel (President), Charles N Brower (appointed by claimant), Marc Lalonde (appointed by respondent)
Sun Belt Water, Inc v. Canada Notice of Intent submitted on 27 November 1998	Challenge to water protection legislation and moratorium on exports of bulk water. Damages sought: US$10.5 billion.	Arbitration never commenced.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Metalclad Corp v. Mexico, ICSID Case No. ARB(AF)/97/1 Notice of Intent submitted on 2 October 1996	US waste management company challenged decisions by a Mexican local government to refuse it a permit to operate a hazardous waste treatment facility and landfill site. Damages sought: US$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 was 'tantamount to expropriation' without compensation and breached the 'minimum standard of treatment' in NAFTA 1105. Mexico was ordered to pay US$16.7 million (of the US$90 million requested) in compensation. Mexico applied for statutory review of the tribunal award before the BC Supreme Court on the ground that the tribunal had exceeded its jurisdiction. The court set aside part of the award dealing with minimum standards of treatment, but it allowed US$15.6 million of the tribunal's original award of damages to stand.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Elihu Lauterpacht (President), Benjamin R Civiletti (appointed by claimant), José Luis Siqueros (appointed by respondent)

43 Scott Sinclair, Canada Center for Policy Alternatives, Trade and Investment Research Project (January 2018), available at https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf. Copied under licence from Access Copyright. Further reproduction, distribution or transmission is prohibited except as otherwise permitted by law.

Case and date	Issue	Status	Arbitration information
Robert Azinian v. Mexico, *ICSID Case No. ARB(AF)/97/2* Notice of Intent submitted on 24 November 1996	US waste management company challenged Mexican court ruling revoking its contract for non-performance of waste disposal and management in Naucalpan de Juarez. Damages sought: more than US$17 million.	On 1 November 1999, the tribunal dismissed the investor's claims. It held that the annulment of the concession contract was not an act of expropriation and based on the circumstances of this case, if there was no violation of Article 1110, there was none of Article 1105 either.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Jan Paulsson (President), Benjamin R Civiletti (appointed by claimant), Claus Von Wobeser (appointed by respondent)
Marvin Roy Feldman Karpa v. Mexico, *ICSID Case No. ARB(AF)/99/1* Notice of Intent submitted on 20 February 1998	US cigarette exporter challenged Mexican government decision not to rebate taxes on its cigarette exports. Damages sought: US$50 million.	On 16 December 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 US$0.9 million plus US$1 million in interest. Mexico appealed the award in the Ontario Superior Court of Justice. In December 2003, the court dismissed Mexico's application. Mexico's appeal of this decision was rejected by the Ontario Court of Appeal on 11 January 2005.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Konstantinos D Kerameus (President), Jorge Covarrubias Bravo (appointed by claimant), David A Gantz (appointed by respondent)
Waste Management, Inc v. Mexico, *ICSID Case No. ARB(AF)/98/2* Notice of Intent submitted on 20 February 1998	US waste management company challenged state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco. Damages sought: US$60 million.	Case registered at ICSID on 18 November 1998; tribunal was constituted on 3 June 1999. In its award rendered on 2 June 2000, the tribunal held it lacked jurisdiction because Waste Management had not properly waived domestic legal remedies as required by NAFTA. One of the arbitrators, Mr Keith Highet, issued a dissenting opinion.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Bernardo M Cremades (President), Keith Highet (appointed by claimant), Eduardo Siqueiros T (appointed by respondent), Julio C Treviño (appointed by respondent) (replaced)
SD Meyers, Inc v. Canada, *ad hoc (UNCITRAL)* Notice of Intent submitted on 21 July 1998	Waste disposal firm challenged temporary ban on export of toxic PCB waste. Damages sought: US$20 million.	Tribunal held that Canada violated NAFTA Articles 1102 and 1105. It awarded the investors around C$2 million in compensation (including C$850,000 in interest), plus C$500,000 in costs. Canada applied to the federal court to set aside the tribunal's award. On 13 January 2004, the court dismissed Canada's application.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: J Martin Hunter (President), Bryan P Schwartz (appointed by claimant), Edward C Chiasson (appointed by respondent), Bob Rae (appointed by respondent) (replaced)
The Loewen Group Inc and Raymond Loewen v. US, *ICSID Case No. ARB(AF)/98/3* Notice of Intent submitted on 29 July 1998	Loewen, a Canadian funeral home operator, challenged a jury verdict in a Mississippi state court that awarded US$500 million in compensation against it. Loewen also alleged that bond requirements for leave to appeal were excessive. Damages sought: US$725 million.	In June 2003, the tribunal determined that it 'lacked jurisdiction' to determine the investor's claims and dismissed them. The Loewen Group went bankrupt and assigned its NAFTA claims to a newly created Canadian corporation owned and controlled by the US corporation. The panel ruled that this entity was not a genuine foreign investor capable of pursuing the NAFTA claim. On 31 October 2005, a US court denied Raymond Loewen's petition to vacate the tribunal's award.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Anthony Mason (President), Abner J Mikva (appointed by claimant), Michael Mustill (appointed by respondent), L Yves Fortier (appointed by claimant) (replaced)

Case and date	Issue	Status	Arbitration information
Pope & Talbot Inc v. Canada, ad hoc (UNCITRAL) Notice of Intent submitted on 24 December 1998	Challenge to lumber export quota system implementing Canada–US softwood lumber agreement. Damages sought: US$500 million.	Tribunal ruled that Canada violated NAFTA Article 1105. Canada ordered to pay US$460,000 in compensation (plus interest) and part of the investor's legal costs, for a total of nearly US$600,000.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Lord Dervaird (President), Benjamin J Greenberg, Murray J Belman (arbitrators)
Mondev International Ltd v. US, ICSID Case No. ARB(AF)/99/2 Notice of Intent submitted on 6 May 1999	The investor alleged that a Massachusetts law immunising local governments from tort liability violates minimum standards of treatment under NAFTA. Damages sought: US$50 million.	In October 2002, the tribunal dismissed the investor's claims. It ruled that Mondev's claims were time-barred because the underlying dispute pre-dated NAFTA.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Ninian Stephen (President), James R Crawford (appointed by claimant), Stephen M Schwebel (appointed by respondent)
Methanex Corp v. US, ad hoc (UNCITRAL) Notice of Intent submitted on 2 July 1999	Challenge to California's phase-out of MTBE, a gasoline additive that contaminated ground and surface water throughout California. Damages sought: US$970 million.	On 9 August 2005, the tribunal dismissed the investor's claims. It ordered Methanex to pay the US government legal costs of US$3 million and the full cost of the arbitration.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: V V Veeder (President), J William F Rowley (appointed by claimant), W Michael Reisman (appointed by respondent)
Fireman's Fund Insurance Co v. Mexico, ICSID Case No. ARB(AF)/02/1 Notice of Intent submitted on 15 November 1999	US insurance company alleged that the Mexican government discriminated against it by facilitating the sale by Mexican financial institutions of peso-denominated debentures, but not the sale of US dollar-denominated debentures by Fireman's Fund. Damages sought: US$50 million.	On 17 July 2006, tribunal dismissed the investor's claim. It 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. It ruled that Mexico's treatment of the investor did not rise to the level of expropriation.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Albert Jan Van Den Berg (President), Andreas F Lowenfeld (appointed by claimant), Alberto Guillermo Saavedra Olavarrieta (appointed by respondent), Francisco Carrillo Gamboa (appointed by respondent) (replaced)
United Parcel Service of America Inc v. Canada, ICSID Case No. UNCT/02/1 Notice of Intent submitted on 19 January 2000	Multinational US courier company alleged that Canada Post's limited monopoly over letter mail and its postal service infrastructure enable it to compete unfairly in express delivery. UPS also alleged that Canada Post enjoyed other advantages denied to the investor (e.g., favourable customs treatment). Damages sought: US$160 million.	Notice of Arbitration filed on 19 April 2000. On 24 May 2007, the tribunal dismissed the investor's claims. It determined that key NAFTA rules concerning competition policy could not be invoked by an investor under Chapter 11, and that certain activities of Canada Post were essentially at arm's length from the Canadian government and therefore not subject to challenge by the investor. (Such activities could be scrutinised in a government-to-government dispute.) It also rejected claims that Canada Post unduly benefited from more favourable treatment.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Kenneth Keith (President), Ronald A Cass, L Yves Fortier (arbitrators)

Case and date	Issue	Status	Arbitration information
ADF Group Inc v. US, ICSID Case No. ARB(AF)/00/1 Notice of Intent submitted on 1 March 2000	Challenge to US 'Buy America' preferences requiring that US steel be used in federally funded state highway projects. Damages sought: US$90 million.	In January 2003, the tribunal dismissed the investor's claim. It concluded that the measures in question were procurement measures exempted under Article 1108.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Florentino P Feliciano (Presidnet), Armand De Mestral (appointed by claimant), Carolyn B Lamm (appointed by respondent)
Waste Management Inc v. Mexico, ICSID Case No. ARB(AF)/00/3 Notice of Arbitration submitted on 19 June 2000	US waste management company challenged state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco. Damages sought: US$60 million.	The investor resubmitted its Notice of Arbitration in this case to address the deficiencies in its waiver of domestic remedies (see above). The tribunal subsequently confirmed its jurisdiction. On 30 April 2004, it dismissed the investor's claims on the ground that there was nothing that could be properly described as an expropriation by Mexico and the conduct of Mexico did not otherwise violate NAFTA.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: James R Crawford (President), Benjamin R Civiletti (appointed by claimant), Eduardo Magallón Gómez (appointed by respondent), Guillermo Aguilar-Álvarez (appointed by respondent) (replaced)
Ketcham Investments, Inc & Tysa Investments, Inc v. Canada Notice of Intent submitted on 22 December 2000	Challenge to lumber export quota system put in place to implement Canada–US softwood lumber agreement. Damages sought: C$30 million.	Claim was withdrawn by investors in May 2001.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Trammel Crow Co v. Canada Notice of Intent submitted on 7 September 2001	US property management company alleged that Canada Post treated it unfairly in the outsourcing of certain real estate services. Damages sought: US$32 million.	Claims were withdrawn by investor in April 2002 after it reached an undisclosed settlement with Canada Post.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Billy Joe Adams et al v. Mexico Notice of Intent submitted on 10 November 2000	A group of US property investors disputed a Mexican court decision regarding title to real estate and related claims. Damages sought: US$75 million.	Notice of Arbitration was submitted on 16 February 2001. Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Lomas de Santa Fe v. Mexico Notice of Intent submitted on 28 August 2001	US investor alleged that it was treated unfairly and inadequately compensated in a dispute over the expropriation of land by Mexican authorities. Investor sought US$210 million in damages.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Canfor Corporation v. US Notice of Intent submitted on 5 November 2001	Canadian lumber company challenged US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. Damages sought: US$250 million.	Notice of Arbitration submitted on 9 July 2002. On 7 September 2005, at the request of the US government, the Canfor, Terminal and Tembec claims were consolidated into a single arbitration. On 6 June 2006, the tribunal determined that it had no jurisdiction over claims relating to US dumping and countervailing duty law, but that it did have jurisdiction to decide claims regarding the Byrd Amendment. Canfor withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the US and Canadian governments.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal (before consolidation): Emmanuel Gaillard (President), Joseph Weiler, Conrad Harper (arbitrators) Arbitral tribunal (after consolidation): Albert Jan Van Den Berg (President), Armand LC de Mestral, Davis R Robinson (both appointed by the Secretary-General of ICSID)

Case and date	Issue	Status	Arbitration information
Gami Investments Inc v. Mexico, ad hoc (UNCITRAL) Notice of Intent submitted on 1 October 2001.	US shareholders in a Mexican sugar company claimed that their interests were harmed by Mexican government regulatory measures related to processing and export of raw and refined sugar, as well as the nationalisation of failing sugar refineries. Damages sought: US$55 million.	On 15 November 2004, the tribunal ruled that it had no jurisdiction and dismissed the investor's claim.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Jan Paulsson (President), W Michael Reisman (appointed by claimant), Julio Lacarte Muró (appointed by respondent)
Chemtura Corp v. Canada, PCA Case No. 2008-01 (UNCITRAL) Notice of Intent submitted on 6 November 2001.	Challenge to the Canadian government's ban on the sale and use of lindane, an agricultural pesticide. Damages sought: US$100 million.	On 2 August 2010, the tribunal dismissed the investor's claims. It ordered the investor to pay the costs of the arbitration (US$688,000) and to pay 50 per cent of the government of Canada's costs in defending the claim (C$5.778 million).	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Gabrielle Kaufmann-Kohler (President), James R Crawford, Charles N Brower (arbitrators)
Francis Kenneth Haas v. Mexico Notice of Intent submitted on December 12, 2001	US investor in manufacturing company in Mexico alleged unfair treatment by Mexican courts and authorities in the investor's dispute with local partners in the company. Damages sought: approximately US$35 million.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Calmark Commercial Development Inc v. Mexico Notice of Intent submitted on 11 January 2002	US property development company challenged decision of Mexican courts in a property dispute. Damages sought: US$400,000.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Kenex Ltd. v. US Notice of Intent submitted on January 14, 2002	Canadian manufacturer of industrial hemp products objected to seizure of products under US Drug Enforcement Agency rules. Damages sought: US$20 million.	Notice of Arbitration was submitted on 2 August 2002. In February 2004, a US court granted Kenex's petition to prohibit enforcement of DEA rules barring certain hemp products. Claim is inactive.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Not constituted
Robert J Frank v. Mexico Notice of Intent submitted on 12 February 2002	US investor sought compensation from Mexico in dispute over development of beachfront property in Baja, California. Damages sought: US$1.5 million.	Notice of Arbitration was submitted on 31 July 2002. Claim is inactive.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Not constituted
James Russell Baird v. US Notice of Intent submitted on 15 March 2002	Canadian investor challenged US regulation banning disposal of radioactive waste at sea or below sea level. Damages claimed: US$13.58 billion.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
International Thunderbird Gaming Corp v. Mexico, Ad hoc (UNCITRAL) Notice of Intent submitted on 22 March 2002	Canadian gambling company challenged the regulation and closure of its gambling facilities by the Mexican government. Damages sought: US$100 million.	On 26 January 2005 the tribunal dismissed the investor's claim. Thunderbird Gaming was ordered to pay Mexico's legal costs of approximately US$1.2 million and three-quarters of the cost of the arbitration. On 14 February 2007, a US court rejected Thunderbird Gaming's petition to vacate the NAFTA tribunal's ruling.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Albert Jan Van Den Berg (President), Thomas W Wälde (appointed by claimant), Agustín Portal Ariosa (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Doman Inc v. US Notice of Intent submitted on 1 May 2002	Challenge to US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. Damages claimed: US$513 million.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Tembec Inc et al v. US Notice of Intent submitted on 3 May 2002	Challenge to US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. Damages claimed: US$200 million.	Notice of Arbitration and Statement of Claim submitted on 3 December 2004. On 7 September 2005, the Canfor, Terminal and Tembec claims were consolidated into a single arbitration. In December 2005, Tembec withdrew its claim. It then unsuccessfully challenged the consolidation order in US courts. In July 2007, the tribunal ordered Tembec to pay part of the arbitration costs as well as part of the legal costs of the US.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Albert Jan Van Den Berg (President), Armand LC de Mestral, Davis R Robinson (both appointed by the Secretary-General of ICSID)
Paget et al & 800438 Ontario Limited v. US Notice of Intent submitted on 9 September 2002	Property of three Florida subsidiaries of an Ontario company was seized following allegations of racketeering, corrupt practices and tax violations. Ontario Ltd claimed that the US improperly refused to return its property and destroyed its financial records. Damages claimed: US$38 million.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Corn Products International v. Mexico, ICSID Case No. ARB(AF)/04/1 Notice of Intent was submitted on 28 January 2003	Challenge to 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 HFCS. Mexico argued that it applied the 20 per cent tax to protect its sugar cane industry, which is losing domestic market share to imported HFCS, while facing barriers in selling sugar in US. Damages sought: US$325 million.	Mexico sought to consolidate the claims with those of Archer Daniels. A consolidation tribunal denied the request. In January 2008, the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. It dismissed the investor's claims that the tax was a prohibited performance requirement and tantamount to expropriation. After a July 2008 hearing on quantum, in August 2009, Mexico was ordered to pay the investor US$58.4 million. On 1 October 2009, the claimant filed a request for correction and interpretation of the award. On 23 March 2010, the tribunal issued a decision denying the claimants' request for correction and interpretation.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Christopher Greenwood (President), Andreas F Lowenfeld (appointed by claimant), Jesus Serrano De La Vega (appointed by respondent), Manuel E Tron (appointed by respondent) (replaced)
Terminal Forest Products Ltd v. US Notice of Intent submitted on 12 June 2003	Challenge to US anti-dumping regulation and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. Damages claimed: US$90 million.	Notice of Arbitration submitted on 31 March 2004. On 7 September 2005, the Canfor, Terminal and Tembec claims were consolidated into a single arbitration. On 6 June 2006, the tribunal determined that it had no jurisdiction over claims relating to US dumping and countervailing duty law, but that it did have jurisdiction to decide claims regarding the Byrd Amendment. Terminal withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the US and Canadian governments.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal (after consolidation): Albert Jan Van Den Berg (President), Armand LC de Mestral, Davis R Robinson (both appointed by the Secretary-General of ICSID)

Case and date	Issue	Status	Arbitration information
Glamis Gold Ltd v. US Notice of Intent submitted on 21 July 2003	Allegations that regulations intended to limit environmental impact of open-pit mining and to protect indigenous peoples' religious sites made proposed gold mine in California unprofitable, thereby expropriating investment and denying fair and equitable treatment. Damages claimed: over US$50 million.	Notice of Arbitration submitted on 9 December 2003. On 8 June 2009, the tribunal dismissed the investor's claims, finding that the environmental regulations were not sufficiently severe to constitute an expropriation or minimum standards or treatment. It ordered the company to pay two-thirds of the costs of the proceeding.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Michael K Young (President), Kenneth D Hubbard (appointed by claimant), Donald L Morgan (appointed by claimant) (resigned), David Caron (appointed by respondent)
Grand River Enterprises Six Nations Ltd et al v. US, *ad hoc (UNCITRAL)* Notice of Intent was submitted on 15 September 2003	Allegations that business was harmed by the treatment of 'non-participating manufacturers' under the terms of a settlement agreement between 46 US states and the major tobacco companies to recoup public monies spent to treat smoking-related illnesses. Damages sought: more than US$340 million.	In January 2011, after protracted proceedings, the tribunal dismissed the manufacturer's claim on jurisdictional grounds and dismissed the wholesaler's claim on its merits. It ruled that the costs of arbitration be split equally between the parties.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Fali S Nariman (President), James Anaya (appointed by claimant), John R Crook (appointed by respondent)
Archer Daniels Midland v. Mexico, *ICSID Case No. ARB(AF)/04/5* Notice of Intent was submitted on 14 October 2003	Challenge to a range of Mexican government measures that allegedly discouraged the import, production and sale of HFCS, including a tax on soft drinks sweetened with HFCS. Damages sought: US$100 million.	In November 2007, the tribunal ruled that Mexico had violated NAFTA's national treatment obligation, and that the tax on HFCS constituted a prohibited performance requirement. Mexico was ordered to pay the investors US$33.5 million.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Bernardo M Cremades (President), Arthur W Rovine, Eduardo Siqueiros (arbitrators)
Albert J Connolly (Brownfields Holding, Inc) v. Canada Notice of Intent submitted on 19 February 2004	US investor claimed actions of Ontario mining agency resulted in forfeiture of investor's interest in a quarry site. Amount in dispute not available.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Contractual Obligation Productions LLC et al v. Canada Notice of Intent submitted on 15 June 2004	US animation production company challenged decision that it was ineligible for Canadian federal tax credits, and challenged Canadian immigration and work restrictions. Damages claimed: US$20 million.	Statement of Claim submitted on 31 January 2005; amended Statement of Claim submitted on 16 June 2005. Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Canadian Cattlemen for Fair Trade v. US Notice of Intent submitted on 12 August 2004	Over 100 Canadian cattle farmers challenged US ban on imports of Canadian live cattle following discovery in 2003 of a cow infected with bovine spongiform encephalopathy from a herd in Alberta. Damages claimed: over US$235 million.	The first Notices of Arbitration were submitted on 16 March 2005; with subsequent Notices of Arbitration by each of the claimants submitted between 16 March 2005 and 2 June 2005. Over 100 claims were consolidated into a single arbitration. In January 2008, the tribunal dismissed the claims on jurisdictional grounds because they determined the claimants did not make or have an investment in the US, but only in Canada.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Karl-Heinz Böckstiegel (President), James Bacchus (appointed by claimant), Lucinda Low (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Bayview Irrigation District et al v. Mexico, ICSID Case No. ARB(AF)/05/1 Notice of Intent was submitted on 27 August 2004	Seventeen Texas irrigation districts claimed that the diversion of water from Mexican tributaries of the Rio Grande watershed discriminated against downstream US water users, breached Mexico's commitments under bilateral water-sharing treaties and expropriated water 'owned' by US interests. Damages sought: US$554 million.	On 21 June 2007, the tribunal dismissed the claims and ruled that the claimants, who were US nationals whose investments were located within the territory of the US, did not qualify as foreign investors entitled to protection under NAFTA.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal:Vaughan Lowe (President), Edwin Meese III (appointed by claimant), Ignacio Gómez Palacio (appointed by respondent)
Cargill Inc v. Mexico, ICSID Case No. ARB(AF)/05/2 Notice of Intent submitted on 30 September 2004	A large US agri-business challenged a range of Mexican government measures that allegedly discouraged the import, production and sale of HFCS, including a tax on soft drinks sweetened with HFCS. Damages sought: more than US$100 million.	The tribunal found against Mexico in an award rendered on 18 September 2009. The award has not yet been publicly released. Mexico was ordered to pay the investor US$77.3 million plus US$13.4 million in interest for a total award of US$90.7 million. The decision was upheld by the Supreme Court of Canada.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Michael C Pryles (President), David D Caron (appointed by claimant), Donald M McRae (appointed by respondent)
Peter Pesic v. Canada Notice of Intent submitted on 26 July 2005	US investor claimed that Canadian government decision not to extend his temporary work visa impaired his investments in Canada.	Notice of intent to submit claim to arbitration was withdrawn by the investor.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
GL Farms LLC and Carl Adams v. Canada Notice of Intent submitted on 28 February 2006	US agribusiness challenged Canadian provincial and federal government restrictions on the import of milk and requirements on quotas for milk products in Ontario. Damages claimed: US$78 million.	Notice of Arbitration received on 5 June 2006. Inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Merrill & Ring Forestry LP v. Canada, ICSID Case No. UNCT/07/1 Notice of Intent submitted on 25 September 2006	US forestry company alleged that Canadian federal and provincial regulations and policies restricting export of forestry products represent discriminatory treatment, expropriation and violate minimum standards of treatment. Damages claimed: US$25 million.	Award on 31 March 2010. Tribunal dismissed the investor's claims and ordered the costs of the proceedings be split between the two parties. It determined the investor had not demonstrated that minimum standards of treatment had been violated.	Arbitration rules: ICSID Administering institution: ICSID Arbitral tribunal: Franciso Orrego Vicuña (President, appointed by Secretary-General), Kenneth Dam (appointed by claimant), J William Rowley (appointed by respondent)
Vito G Gallo v. Canada Notice of Intent submitted on 12 October 2006	Claim filed following transfer of control of a project asserting legislation was 'tantamount to expropriation' and depriving the minimum standard of treatment. Damages sought: C$105 million.	Statement of Claim submitted on 23 June 2008. Jurisdictional hearing in February 2011. Award issued on 15 September 2011 dismissing the claims on jurisdictional grounds. The tribunal concluded that Mr Gallo could not prove that he acquired ownership and control prior to enactment of the legislation. He was ordered to pay Canada US$450,000 towards its legal costs.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Juan Fernández-Armesto (President), Jean-Gabriel Castel (appointed by claimant), Laurent Lévy (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Domtar Inc v. US Notice of Intent submitted on 16 April 2007	Domtar filed claims regarding US anti-dumping regulations and countervailing duties imposed on Canadian softwood lumber exports as well as relating to the Byrd Amendment. It also challenged aspects of the 2006 Softwood Lumber Agreement between the US and Canada, claiming these measures discriminated against it, denied it minimum standards of treatment under international law and prevented timely transfer of profits from its US operations. Damages claimed: over US$200 million.	Notice of Arbitration and Statement of Claim submitted on 16 April 2007. Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Mobil Investments Canada Inc & Murphy Oil Corporation v. Canada, I*CSID Case No. ARB(AF)/07/4* Notice of Intent for Mobil Investments submitted on 2 August 2007; Notice of Intent for Murphy Oil submitted on 3 August 2007	The investors alleged that Canadian guidelines stipulating that energy companies active in the offshore invest in research and development within Newfoundland and Labrador were NAFTA-inconsistent performance requirements. The claimants previously challenged these guidelines in the Canadian courts and lost. Damages sought: C$60 million.	On 22 May 2012, the tribunal ruled that the local R&D requirements constituted a 'prohibited performance requirement' under Article 1106. It rejected Canada's arguments that the guidelines fell within the scope of the Canadian reservation with respect to Article 1106. It also dismissed the investors' claim that the R&D guidelines breached Article 1105. The tribunal majority found Canada has been violating NAFTA Article 1106 since 2004, meaning that as long as the R&D guidelines remain in effect, damages will accrue. The award was issued in February 2015. Damages were set at US$132 million. A set-aside application by Canada in the Federal Court was dismissed.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Hans Van Houtte (President), Merit Janow (appointed by claimant), Philippe Sands (appointed by respondent)
Apotex Inc v. US (I), ICSID Case No. UNCT/10/2 Notice of Intent submitted on 21 September 2007	In 2003, Apotex sought US Food and Drug Administration (FDA) approval to develop a generic version of Pfizer's anti-depressant medication, Zoloft (sertraline hydrochloride once Pfizer's patent expired in 2006). Apotex later went to court to dispel uncertainty regarding the status of the Pfizer patents. US courts dismissed Apotex's suit for a declaratory judgment clarifying the patent situation. Apotex alleged that the US court judgments discriminated against it, denied it minimum standard of treatment and expropriated its investment in sertraline. Damages sought: US$8 million.	On 14 June 2013, the tribunal dismissed the claim on jurisdictional grounds, ruling that Apotex did not have investments in the US that qualified for protection under NAFTA Chapter 11. Apotex was ordered to pay all costs of the proceedings.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Toby Landau (President), Clifford M Davidson (appointed by claimant), Fern M Smith (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Apotex Inc v. US (II), ICSID Case No. UNCT/10/2 Notice of Intent submitted on 2 March 2009	Apotex sought FDA approval to develop a generic version of heart medication pravastatin sodium tablets marketed by Bristol Myers Squibb (BSM) (under the brand name Pravachol once BSM's patent expired in 2006). Apotex alleged that certain US court judgments and FDA decisions discriminated against it, denied it minimum standard of treatment and expropriated its investment in pravastatin. Damages sought: US$8 million.	By agreement of the parties, the jurisdiction phase in this arbitration (the pravastatin claim) and the above arbitration (the sertraline claim) were held concurrently, even though they were not consolidated. Determinations on preliminary issues in both arbitrations were set out in a single award. Both claims were dismissed on jurisdictional grounds. The tribunal held that Apotex did not have investments in the US that qualified for protection under NAFTA Chapter 11. Apotex was ordered to pay all costs of the proceedings.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Toby Landau (President), Clifford M Davidson (appointed by claimant), Fern M Smith (appointed by respondent)
Gottlieb Investors Group v. Canada Notice of Intent submitted on 22 April 2008	US-based private investor group alleged that changes in tax treatment of energy income tax trusts discriminated against US entities and were equivalent to expropriation, and violated minimum standards of treatment. Damages sought: US$6.5 million.	The investor was barred from bringing the expropriation claim. It could have proceeded on its other claims (Articles 1102, 1103 and 1105) but no Notice of Arbitration has been submitted to date. The claim has been inactive since the determination made by US and Canadian tax authorities.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Clayton/Bilcon Inc v. Canada, PCA Case No. 2009-04 (UNCITRAL) Notice of Intent submitted on 5 February 2008	The investor alleged that the administration of an environmental assessment review, along with various provincial and federal government measures, were discriminatory or violated minimum standards of treatment, or both. Damages sought: US$101 million.	The tribunal found in favour of Bilcon, noting that the regulatory process was unfair in that it introduced new concepts and principles without notice. Canada attempted to have the award set aside by the Federal Court in an application filed on 16 June 2015, but it was dismissed by the Court on 2 May 2018. A hearing on damages was held between 19–27 February 2018. Bilcon claimed over US$440 million. On 10 January 2019, the tribunal issued an award granting claimants only US$7 million, a bit more than their sunk costs. The tribunal appears to have reached this conclusion because it was not convinced that the quarry project would have been approved absent Canada's NAFTA breaches.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Bruno Simma (President), Bryan Schwartz (appointed by claimant), Donald M McRae (appointed by respondent)
Georgia Basin Holdings LP v. Canada Notice of Intent submitted on 5 February 2008	Allegations that Canadian federal and provincial regulations and policies restricting export of forestry products represent discriminatory treatment, expropriation and violate minimum standards of treatment. Damages sought: US$5 million.	This claim is inactive. In late 2007, counsel for Merrill & Ring requested Georgia Basin Holdings be added as a party to the Merrill & Ring arbitration. On 31 January 2008, the tribunal decided not to allow Georgia Basin to participate in the arbitration. Claimant has not brought separate claims against Canada to date.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Francisco Orrego Vicuña (President), Kenneth W Dam (appointed by claimant), J William Rowley (appointed by respondent)
Melvin J Howard, Centurion Health Corporation v. Canada, PCA No. 2009-21 Notice of Intent submitted on 11 July 2008	US investor alleged plans for private, fee-for-service health clinics in British Columbia and Alberta were frustrated by local, provincial and federal regulatory measures. Damages sought: US$160 million.	Notice of Arbitration submitted on 5 January 2009. Revised Statement of Claim submitted on 2 February 2009. In August 2010, the tribunal terminated the claim because the investor failed to make the required deposits to continue the claim. The claimant was ordered to pay Canada's share of the arbitration costs.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Peter Tomka (President), Marjorie Florestall (appointed by claimant), Henri C Álvarez (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Dow Agro Sciences LLC v. Canada Notice of Intent submitted on 25 August 2008	Dow Agro Sciences manufactures 2,4-D, an active ingredient in many commercial herbicides. In 2006, the Province of Quebec banned the use of these pesticides. Dow Agro Sciences alleged 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 alleged that the ban is 'tantamount to expropriation'. Damages sought: more than US$12 million.	On 25 May 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.	Arbitration rules: UNCITRAL Administering institution: Data not available Arbitral tribunal: Not constituted
William Jay Greiner and Malbaie River Outfitters Inc v. Canada Notice of Intent submitted 10 September 2008	Allegations that conservation measures taken by Quebec provincial government to reduce the number of salmon fishing licenses and efforts to restrict access to certain salmon fishing areas, amounted to expropriation and discriminated against investor in favour of Canadian-owned fishing lodges in violation of minimum standards of treatment. Damages sought: US$7.5 million.	Notice of Arbitration was submitted on 2 November 2010. Amended Notice of Arbitration was submitted on 2 December 2010. Claim was withdrawn by investor on 10 June 2011.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Shiell Family v. Canada Notice of Intent submitted on 14 October 2008	US family group of investors alleged Canadian courts and government agencies treated them unfairly during bankruptcy proceedings. Damages sought: US$21.3 million.	Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
David Bishop v. Canada Notice of Intent submitted on 8 October 2008	Allegations that conservation measures taken by Quebec provincial government to reduce the number of salmon fishing licenses and efforts to restrict access to certain salmon fishing areas, amounted to expropriation and discriminated against investor in favour of Canadian-owned fishing lodges in violation of minimum standards of treatment. Damages sought: US$1 million.	No Notice of Arbitration has been filed to date. Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Christopher and Nancy Lacich v. Canada Notice of Intent submitted on 2 April 2009	US investors alleged changes in tax treatment of energy income tax trusts were discriminatory, equivalent to expropriation of their investment and violated minimum standards of treatment. Damages sought: approximately US$1.2 million.	Notice of Intent was quickly withdrawn by investor.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
AbitibiBowater Inc v. Canada, ICSID Case No. UNCT/10/1 Notice of Intent submitted on 23 April 2009	In December 2008, the provincial government enacted legislation to return AbitibiBowater's water use and timber rights to the Crown and to expropriate certain AbitibiBowater lands and assets associated with the water and hydroelectricity rights. Damages sought: C$467.5 million.	In August 2010, the Canadian federal government announced that it had agreed to pay AbitibiBowater C$130 million to settle the claim.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Andreas Bucher (President), Doak Bishop (appointed by claimant), Gavan Griffith (appointed by respondent)

Case and date	Issue	Status	Arbitration information
CANACAR v. US Notice of Arbitration submitted on 2 April 2009	Truckers asserted that the US failed to permit Mexican truckers into the US to provide cross-border trucking services, barred them from investing in US companies providing cross-border trucking services and violated minimum standards of treatment by refusing to comply with a NAFTA government-to-government panel ruling. Damages sought: approximately US$2 billion a year.	Notice of Arbitration filed on 2 April 2009. In 2011, US and Mexico agreed to a three-year memorandum that allowed Mexican trucks to enter the US under certain conditions. In exchange, Mexico eliminated US$2.3 billion tariffs on US goods. There is no information that this case was withdrawn or otherwise terminated, although there has been no activity for many years.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Thomas Heather Rodríguez (appointed by claimant)
Cemex v. US Notice of Intent reportedly submitted in September 2009	Cemex 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 Texan courts.	Unavailable.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Detroit International Bridge Company v. Canada, PCA Case No. 2012-25 (UNCITRAL) Notice of Intent was submitted on 25 January 2010	Detroit International Bridge Company (DIBC) objected to Canadian government plans to build a second bridge across the Detroit River. Canada contended that the arbitration should be 'time-barred' because the investor filed the claim more than three years after learning about the alleged breaches. Damages sought: US$3.5 billion.	DIBC alleged that Canada had reneged on a commitment to build a direct connection between the Ontario 401 highway to the Ambassador bridge owned by DIBC and instead connected to the new proposed Gordie Howe bridge. On 2 April 2015, the NAFTA tribunal issued its award on jurisdiction dismissing the DIBC claim against Canada. The majority determined that the ongoing lawsuits by DIBC against Canada in the US District Court for the District of Columbia with respect to the same measures as those alleged in NAFTA meant that DIBC had failed to comply with the waiver requirements in Article 1121, which deprived the tribunal of jurisdiction of the entire dispute. The tribunal ordered DIBC to pay Canada C$2 million in costs.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Yves Derains (President), Michael Chertoff, Vaughan Lowe (arbitrators)
John R Andre v. Canada Notice of Intent submitted on 19 March 2010	Allegations that conservation measures taken to decrease the number of caribou that can be hunted expropriated investment. Damages sought: over US$4 million.	No Notice of Arbitration has been submitted to date. Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
International Vision (INVISA) et al v. Mexico Notice of Intent submitted on 15 February 2011	A group of US investors alleged a decision not to renew a 10-year agreement regarding billboards on Mexican land near the US–Mexico border crossing constituted expropriation and violation of minimum standards of treatment. Damages sought: US$7.5 million.	No Notice of Arbitration has been submitted to date. Arbitration never commenced.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted

Case and date	Issue	Status	Arbitration information
St Marys VCNA LLC v. Canada, PCA Case No. 2012-19 (UNCITRAL) Notice of Intent was submitted on 13 May 2011	St Mary's VCNA, alleged that its Canadian subsidiary, St Mary's Cement Inc, was the victim of political interference in its attempt to open a quarry. The Ontario Ministry for Municipal Affairs and Housing issued a zoning order that prevented the site from being converted from agricultural to extractive industrial use. St Mary's claimed the 2010 zoning order was unfair, arbitrary, discriminatory and expropriatory. Damages sought: US$275 million.	Canada attempted to have the claim dismissed pursuant to NAFTA Article 1113 on the grounds that St Mary's VCNA was a Brazilian-owned company without substantial US business activities and therefore did not qualify as a US investor. The parties reached a settlement on 28 February 2013, which saw St Mary's withdraw the claim in exchange for US$15 million in compensation from the Ontario government.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Michael C Pryles (President), Richard Stewart (appointed by claimant), Brigitte Stern (appointed by respondent)
Mesa Power Group LLC v. Canada, PCA Case No. 2012-17 (UNCITRAL) Notice of Intent submitted on 6 July 2011	The Ontario feed-in tariff (FIT) programme provides incentives for renewable energy producers. Under this programme, projects are ranked to determine priority for government power purchase agreements and access to the transmission grid. The claimant alleged that 2011 changes to the FIT programme discriminated against Mesa by favouring other local and international investors. Damages sought: C$775 million.	In May 2016, the tribunal, with one dissent, dismissed all of Mesa's complaints and awarded Canada 30 per cent of its legal costs of C$3 million. Mesa appealed this decision to the District Court in Washington, DC. The court denied Mesa's petition to vacate and granted Canada's counter-petition to enforce the award issued on 15 June 2017. The case is concluded.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Gabrielle Kaufmann-Kohler (President), Charles N Brower (appointed by claimant), Toby Landau (appointed by respondent)
Apotex Holdings Inc and Apotex Inc v. US, ICSID Case No. ARB(AF)/12/1 Notice of Intent submitted on 23 November 2011	Following an inspection of Apotex in 2009, Canadian manufacturing facilities and the FDA discovered deficiencies and issued an import alert on drugs produced in Apotex's facilities. Apotex claimed that the import alert resulted in substantial lost sales and claimed that similar measures were not taken by the FDA against Apotex's competitors. Therefore, the measures were discriminatory and violated minimum standards of treatment. Damages sought: US$520 million (reported).	On 25 August 2014, the tribunal dismissed all claims. By a 2:1 majority, the tribunal ruled that it lacked jurisdiction over certain claims that the tribunal found to be *res judicata*. The tribunal concluded that the import alert was a 'lawful and appropriate' exercise of the FDA's regulatory authority. The tribunal ordered Apotex to pay the US government's legal costs and three-quarters of the costs of the arbitration.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: V V Veeder (President), J William Rowley (appointed by claimant), John R Crook (appointed by respondent)
Mercer International, Inc. v. Canada, ICSID Case No. ARB(AF)/12/3 Notice of Intent submitted on 26 January 2012	Allegations that US investor was disadvantaged regarding other mills in the province with self-generating capabilities because of subsidies, preferential treatment and other measures by the provincial government towards its competitors. Damages sought: C$232 million.	Notice of Arbitration submitted on 30 April 2012. Registered at ICSID on 16 May 2012. Tribunal was constituted on 9 October 2012. It rendered an award on 6 March 2018, dismissing the claimant's claims and ordering it to pay C$9 million toward Canada's legal costs. The parties were ordered to split the arbitration costs. Claimant registered a request for a supplementary decision on 20 April 2018. The tribunal issued a decision on that request on 10 December 2018.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: V V Veeder (President), Franciso Orrego Vicuña (appointed by claimant), Zachary Douglas (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Windstream Energy LLC v. Canada, PCA Case No. 2013-22 (UNCITRAL) Notice of Intent submitted on 17 October 2012	In 2009, Windstream signed a 20-year FIT contract with the Ontario Power Authority for the purchase of renewable energy. 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 claimed that the moratorium is discriminatory and tantamount to expropriation. Damages sought: C$475 million.	In December 2016, the tribunal ruled that it would dismiss the Windstream indirect expropriation claim but grant the claim that the offshore moratorium was unfair and inequitable, awarding Windstream damages of C$25 million and C$3 million in legal costs.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: Veijo Heiskanen (President), R Doak Bishop (appointed by claimant), Bernardo Cremades (appointed by respondent)
Eli Lilly and Company v. Canada, *ICSID Case No. UNCT/14/2* Notice of Intent submitted on 7 November 2012	Zyprexa was first patented in Canada in 1980. Eli Lilly received a patent extension in 1991 on the ground that it had found new uses for the drug. In 2009, the Canadian Federal Court invalidated the patent extension based on a finding that the drug allegedly had not delivered the promised utility. Eli Lilly contested the invalidation of its patents in the Canadian courts. When it lost there, Eli Lilly filed under NAFTA claiming the new test was discriminatory. Damages sought: C$500 million.	On 17 March 2017, the tribunal dismissed Eli Lilly's claims and concluded that Canada was in full compliance with its NAFTA obligations. The tribunal ordered Eli Lilly to bear 75 per cent of Canada's legal costs, in addition to Canada's arbitration costs. Those costs were approximately C$5.2 million.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Albert Jan Van Den Berg (President), Daniel Bethlehem (appointed by claimant), Gary B Born (appointed by respondent)
Lone Pine Resources Inc v. Canada, *ICSID Case No. UNCT/15/2* Notice of Intent submitted on 8 November 2012	US oil and gas exploration company challenged the government of Canada's revocation of exploration licenses located in the St Lawrence River, claiming that it was not meaningfully consulted or compensated for the revoked permit and loss of potential revenue. Damages sought: US$119 million.	This case is pending. Notice of Arbitration was submitted on 6 September 2013. Response to the Notice of Arbitration was submitted on 27 February 2015. A hearing on the merits was held in Toronto in October 2017.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: V V Veeder (President), David R Haigh (appointed by claimant), Brigitte Stern (appointed by respondent)
Kellogg, Brown and Root (KBR) v. Mexico, ICSID Case. No. UNCT/14/1 Notice of Intent submitted on 19 February 2013	A US energy services company sought damages against the government of Mexico related to a 2011 decision by the Mexican courts to annul a US$320 million arbitration award issued by the International Chamber of Commerce in December 2009. The original arbitration related to a contract dispute between Pemex, the Mexican state energy company, and COMMISSA, a KBR subsidiary. Damages sought: more than US$400 million.	On 30 April 2015, in an unpublished award the arbitrators dismissed the claim. KBR was using the NAFTA claim to collect a large commercial arbitration award KBR had obtained against the Mexican state oil company. That award was set aside by the Mexican court and was subject to enforcement proceedings in the US and Luxembourg. The dispute between Pemex and COMMISSA was settled.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Andrés Rigo Sureda (President), Gabrielle Kaufmann-Kohler (appointed by claimant), Gerardo Lozano Alarcón (appointed by respondent)
JM Longyear, LLC v. Canada Notice of Intent submitted on 14 February 2014	Assertion that companies were improperly denied tax incentives for sustainable forestry management. Damages sought: C$12 million.	Notice of Arbitration was submitted on 20 May 2014. Investor formally withdrew the claim on 26 June 2015.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Not constituted

Case and date	Issue	Status	Arbitration information
B-Mex, et al v. Mexico, *ICSID Case No. ARB(AF)/16/3* Notice of Intent submitted on 23 May 2014	US gaming investors allege that after parting ways with their Mexican business partner, their five Mexican casinos were targeted and harassed by Mexican authorities. Damages sought: US$100 million.	Notice of Arbitration submitted on 15 June 2016. Respondent's memorial on jurisdictional objections submitted on 30 May 2017. A hearing on jurisdiction was held from 21–25 May 2018. In August 2018, both claimants and respondent submitted post-hearing submissions. The US and Canada both filed a written submission as non-disputing state parties on 28 February and 17 August 2018. On 23 November 2018, the tribunal invited the parties and non-disputing state parties to submit additional written submissions on a jurisdictional issue by 7 December 2018. On 21 December 2018, both parties provided written submissions in response to the tribunal's procedural order. On that same date, the US also filed an additional written submission as a non-disputing state party. The case has not yet proceeded to the merits phase as an award on jurisdiction is still pending.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Gaëtan Verhoosel (President), Gary B Born (appointed by claimant), Raúl E Vinuesa (appointed by respondent)
Mobil Investments Canada, Inc v. Canada (II), ICSID Case No. ARB/15/6 Notice of Intent submitted on 16 October 2014	In 2012, a NAFTA tribunal (see above) ruled that Canadian guidelines stipulating that energy companies active offshore invest a certain percentage of their revenue in R&D 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. Damages sought: C$20 million.	This case is pending. Notice of Arbitration was submitted on 16 January 2015. Counter-memorial was submitted on 30 June 2016. A hearing on jurisdiction, merits and quantum was held from 24–28 July 2017. On 13 July 2018, tribunal issued a decision on jurisdiction and admissibility, holding that the tribunal has jurisdiction and the claims are admissible. A decision on scope of damages phase was issued on 11 December 2018.	Arbitration rules: ICSID Convention Arbitration Rules Administering institution: ICSID Arbitral tribunal: Christopher Greenwood (President), J William Rowley (appointed by claimant), Gavan Griffith (appointed by respondent)
Murphy Oil Corporation v. Canada (II) Notice of Intent submitted on 16 October 2014	In 2012, a NAFTA tribunal ruled that Canadian guidelines stipulating that energy companies active 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, Murphy is seeking ongoing damages for the period 2012 to 2014. Damages sought: C$5 million.	This case is pending. Notice of Arbitration was submitted on 16 January 2015.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted

Case and date	Issue	Status	Arbitration information
Lion Mexico Consolidated (LMC) v. Mexico, *ICSID Case No. ARB(AF)/15/2* Notice of Intent submitted on 6 August 2015	Canadian real estate investment firm disputes the cancellation by Mexican courts of mortgages on three properties that 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. Damages sought: US$200 million.	This case is pending. Notice of Arbitration submitted on 11 December 2015. On 24 August 2016, Mexico filed a preliminary objection on jurisdiction. It was dismissed on 12 December 2016. A hearing on jurisdiction was held from 22–23 March 2018. A decision on jurisdiction was issued on 30 July 2018. The respondent filed a counter-memorial on the merits on 26 October 2018 and the tribunal issued a procedural order concerning production of documents on 3 January 2019.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal:Juan Fernández-Armesto (President), David J A Cairns (appointed by claimant), Laurence Boisson De Chazournes (appointed by respondent), Ricardo Ramírez Hernández (appointed by respondent) (replaced)
CEN Biotech Inc v. Canada Notice of Intent submitted on 1 September 2015	Allegations that Canada breached NAFTA's non-discrimination and minimum standard of treatment provisions when Health Canada denied CEN Biotech Inc a license. The company has been the object of numerous allegations of public misrepresentation and insider trading. Damages sought: US$4.5 billion.	This case is pending, but the Notice of Arbitration has not yet been submitted.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Resolute Forest Products Inc v. Canada, PCA Case No. 2016-13 (UNCITRAL) Notice of Intent submitted on 30 September 2015	The US supercalendered paper producer alleged that provincial government financial assistance to a competing mill in Nova Scotia discriminated against Resolute, resulted in unfair competition and provoked US trade remedy action, which ultimately led to the closure of one of Resolute's Quebec mills. Damages sought: US$70 million.	Notice of Arbitration submitted on 30 December 2015. Statement of Defence submitted on 1 September 2016. The tribunal held jurisdictional hearings in August 2017. A decision on jurisdiction and admissibility was made on 30 January 2018, holding that the tribunal has jurisdiction and claims are admissible, although certain claims dating prior to September 2012 were dismissed by the tribunal. Damages claimed are between US$163–201 million. Claimants submitted a memorial on 28 December 2018. A revised procedural timetable was adopted on 19 February 2019 and an oral hearing is expected in May 2020. This case is pending. Canada filed related proceedings at the WTO to contest trade measures brought by the US. The US alleged the bailout of the mill breached international trade law. The WTO found in favour of Canada, which the US appealed.	Arbitration rules: UNCITRAL Administering institution: PCA Arbitral tribunal: James R Crawford (President), Ronald A Cass (appointed by claimant), Céline Lévesque (appointed by respondent)
TransCanada Corp & TransCanada Pipelines Ltd v. US, ICSID Case No. ARB/16/21 Notice of Intent submitted on 6 January 2016	Canadian energy company alleged 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. After the Trump administration approved the controversial project, the investor and the US government agreed to discontinue the NAFTA claim. Damages sought: US$15 billion.	This case is discontinued by request of the parties. Notice of Arbitration submitted on 24 June 2016. On 24 March 2017, at the request of the parties, the ICSID Secretary-General formally discontinued the arbitral proceeding. On 8 November 2018, in response to a lawsuit brought by environmental and Native American groups against the US Department of State and TransCanada, a federal court in Montana ordered a pause in the construction of the Keystone XL pipeline.	Arbitration rules: ICSID Convention Arbitration Rules Administering institution: ICSID Arbitral tribunal: David R Haigh (appointed by claimant), Sean D Murphy (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Mr Joshua Dean Nelson and Mr Jorge Blanco v. Mexico, *ICSID Case No. UNCT/17/1* Notice of Intent submitted on 21 April 2016	Allegations that Mexican Federal Institute of Telecommunications' acts of failing to enforce Resolution 381, issuing subsequent Decree 77 and Resolution 127, which illegally reversed Resolution 381, irreparably harmed the investors' interests in Mexico and violated Mexico's obligation under NAFTA Articles 1110 1105 and 1102. Damages sought: approximately US$500 million.	Notice of Arbitration submitted on 26 September 2016. The tribunal was constituted on 1 May 2017. Claimants filed a Statement of Claim on 7 November 2017. Respondent submitted a Statement of Defence on 13 March 2018, Claimants submitted a reply on the merits on 5 June 2018 and respondent submitted a rejoinder on merits issues on 10 September 2018. The tribunal issued Procedural Order No. 11 on procedural matters on 22 October 2018. This case is pending.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Eduardo Zuleta (President), V V Veeder (appointed by claimant), Mariano Gomezperalta (appointed by respondent)
Primero Mining Corp v. Mexico Notice of Intent submitted on 2 June 2016	The investor alleged that actions taken by Mexican tax authority, which were intended to revoke investor's previously granted legal rights, were unfair, inequitable and discriminatory, and therefore violated Mexico's NAFTA obligations. The amount of damages in dispute has not been quantified.	Notice of Arbitration has not been submitted to date. Claim is inactive.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Vento Motorcycles, Inc v. Mexico, *ICSID Case No. ARB(AF)/17/3* Notice of Intent submitted on 20 February 2017	Vento assembles motorcycles in the US for export to Mexico. Its vehicles are now subject to a 30 per cent import duty. The company asserted its Mexican-owned competitors, whose assembly practices are allegedly similar, do not pay such a duty, resulting in discrimination against Vento. The amount of damages claimed by the investor is unavailable.	This case is pending. Notice of Arbitration submitted on 7 August 2017 (partially published). The respondent filed a counter-memorial on the merits and a memorial on jurisdiction on 12 November 2018. The tribunal issued a procedural order on document production issues on 25 January 2019.	Arbitration rules: ICSID Additional Facility Rules Administering institution: ICSID Arbitral tribunal: Andrés Rigo Sureda (President), David A Gantz (appointed by claimant), Hugo Perezcano Diaz (appointed by respondent)
Tennant Energy, LLC v. Canada Notice of Intent submitted on 2 March 2017	US-owned energy company alleged that it was treated unfairly by Ontario authorities administering the province's FIT programme. Damages sought: C$116 million.	The case is pending. Notice of Arbitration was submitted on 1 June 2017. No statement of Defence on the merits has been submitted to date.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Not constituted
Omnitrax Enterprises Inc v. Canada Notice of Intent submitted on 14 November 2017	Allegations 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. Damages sought: C$150 million.	This case is pending. But the Notice of Arbitration has not yet been submitted.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Alicia Grace and others v. Mexico, *ICSID Case No. UNCT/18/4* Registered at ICSID on 19 June 2018	Twenty-seven US investors in a petroleum services venture brought claims relating to oil exploration and production equipment against Mexico.	Tribunal was constituted on 25 January 2019. Request for Arbitration submitted on 19 June 2018. This case is pending.	Arbitration rules: UNCITRAL Administering institution: ICSID Arbitral tribunal: Diego P Fernández Arroyo (President), Andrés Jana Linetzky (appointed by claimant), Gabriel Bottini (appointed by respondent)

Case and date	Issue	Status	Arbitration information
Westmoreland Coal Company v. Canada Notice of Intent submitted on 20 August 2018	A US entity purchased mine-mouth coal operations adjacent to a coal-fired power station. In 2015, Canada changed its regulations, deciding to phase out coal-fired power by 2030. The investor alleged that Canadian companies were compensated for this change in an amount of over US$1.4 billion, but Westmoreland was excluded from the compensation, which it claims is tantamount to expropriation and violation of the minimum standard of treatment. Damages sought: US$470 million.	Notice of Arbitration and statement of claim were submitted on 19 November 2018. This case is pending.	Arbitration rules: UNCITRAL Administering institution: N/A Arbitral tribunal: Not constituted
Legacy Vulcan, LLC v. Mexico, *ICSID Case No. ARB/19/1* Notice of Intent submitted on 3 September 2018	US investor brought claims against Mexico relating to limestone extraction and exportation.	This claim was registered in ICSID on 3 January 2019. This case is pending.	Arbitration rules: ICSID Convention Arbitration Rules Administering institution: ICSID Arbitral tribunal: Not constituted
Odyssey Marine Exploration v. Mexico Notice of Intent submitted on 4 January 2019	US marine and development company alleged Mexico breached its NAFTA obligations and minimum standard of treatment, and national treatment by refusing to grant environmental permits for the exploration of large phosphate deposit located off the coast of Baja, California. Damages sought: more than US$3.5 billion.	This case is pending.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Renaud Jacquet et al v. Mexico Notice of Intent submitted on 17 January 2019	Investors from France, Canada and Portugal filed claims regarding several beachfront parcels in Tulum, Mexico on which they have hotels. Claimants allege, among other things, expropriation and breach of fair and equitable treatment standards under NAFTA, the France–Mexico BIT and the Mexico–Portugal BIT. Damages sought: US$70 million.	This case is pending.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted
Jonathan Levy v. Canada Notice of Intent submitted on 16 February 2019	US investor claimed that the Alberta Securities Commission ignored his rights as a cross-border legal service provider and treated him as a layperson to allegedly circumvent the attorney–client privilege. He also alleged discriminatory treatment. Damages sought: at least US$2 million in alleged lost investments and billings.	This case is pending.	Arbitration rules: N/A Administering institution: N/A Arbitral tribunal: Not constituted

Appendix 1

ABOUT THE AUTHORS

LISA M RICHMAN

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Lisa M Richman is a litigation partner at McDermott Will & Emery. For over 15 years, Lisa has focused her career on international dispute resolution, with a particular emphasis on international commercial arbitration and public international law. She has handled disputes in a wide variety of industries, including disputes relating to energy, oil and gas, intellectual property, pharmaceuticals, infrastructure, licensing, securities, telecommunications, transportation, joint ventures and construction.

Lisa's clients have included investors, governments, corporations, corporate officers and directors, and individuals in disputes seated in common law and civil law jurisdictions worldwide. Her work has included disputes conducted under ICC, ICSID, ICSID AF, AAA/ICDR, SIAC, HKIAC, JAMS, DIS, LCIA, CPR, Swiss Rules and UNCITRAL Rules as well as pure *ad hoc* arbitrations.

Lisa also has represented clients in international and domestic arbitrations, litigation, and mediations in the United States and around the world. Complementing her dispute resolution expertise, Lisa has managed internal investigations and has helped a variety of companies to resolve government investigations, including World Bank Sanctions proceedings.

Lisa has been recognised by clients, peers and others in the industry as one of the 'most highly regarded' international arbitration specialists in the United States. Lisa is a native German speaker, and also speaks Spanish and French.

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