

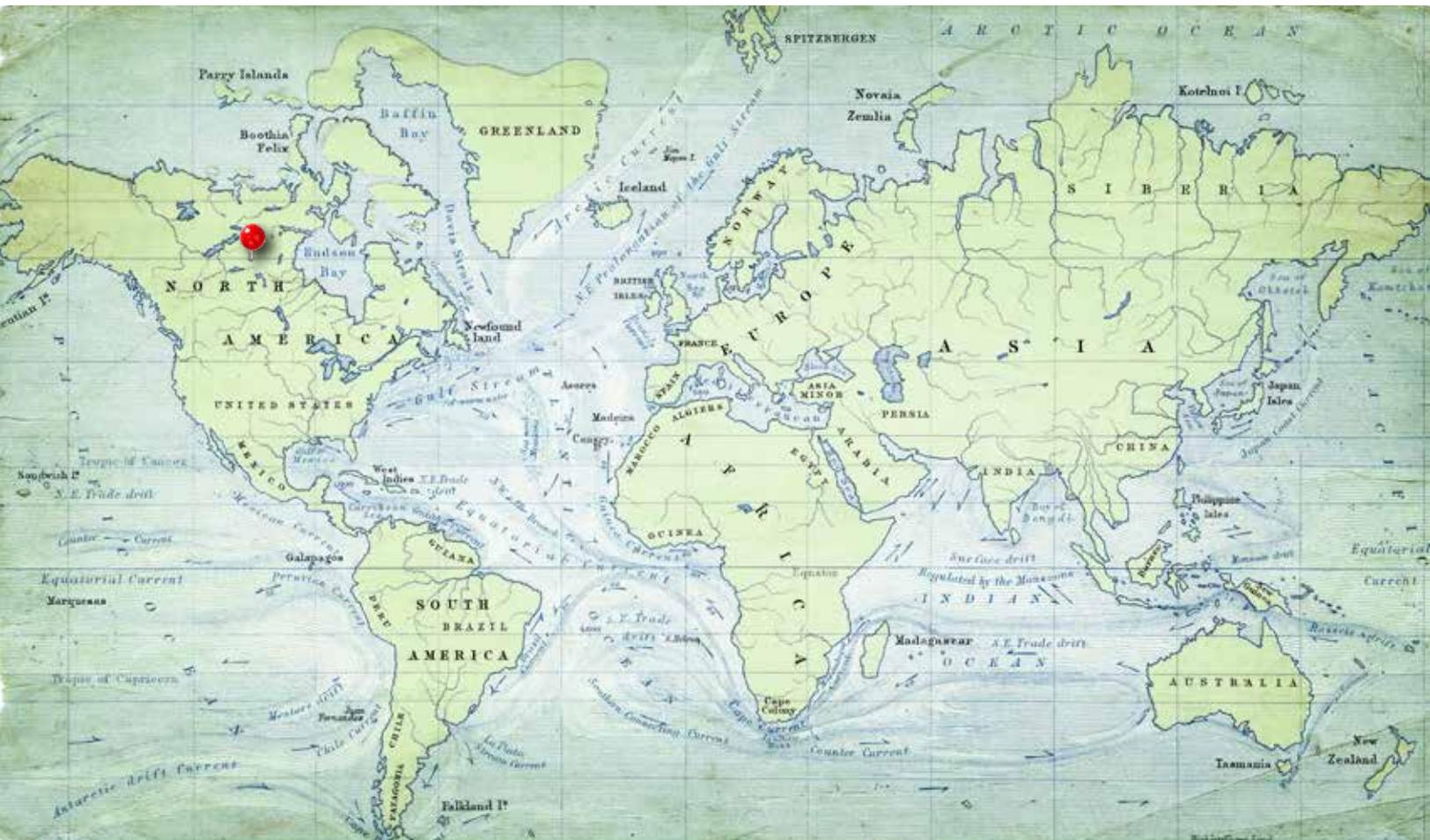


## INVESTOR-STATE ARBITRATION SERIES

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# DOES CANADIAN LAW PROVIDE REMEDIES EQUIVALENT TO NAFTA CHAPTER 11 ARBITRATION?

ARMAND DE MESTRAL AND ROBIN MORGAN





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**Armand de Mestral and Robin Morgan**



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## ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

## ABOUT THE AUTHORS



CIGI Senior Fellow Armand de Mestral leads the Investor-State Arbitration project. An expert in international economic law, Armand is professor emeritus and Jean Monnet Chair in the Law of International Economic Integration at McGill University. He has taught constitutional law, law of the sea, public international law, international trade law, international arbitration, European Union law and public international air law.

Armand's current research interest is the law of international economic integration. He has prepared books, articles and studies in English and French on international trade law and on Canadian and comparative constitutional and international law. He has served on World Trade Organization and North American Free Trade Agreement dispute settlement tribunals, as well as public and private arbitration tribunals. He was made a Member of the Order of Canada in December 2007.



Robin Morgan is a 2016 graduate of the McGill Faculty of Law. Prior to studying law at McGill, he studied pure and applied sciences at Marianopolis College, where he received distinction in law and social justice, and completed the honours science program. During his studies at McGill, Robin was awarded the Maurice Weinberg Scholarship for Academic Excellence and Innovation, and was the recipient of the J. W. McConnell entrance scholarship. His fields of interest include business, investment, tax and constitutional law. He will be pursuing an LL.M. at Harvard University, where he will focus on taxation and constitutional law.

## ACRONYMS AND ABBREVIATIONS

BIT	bilateral investment treaty
CPC	Code de procédure civile (Québec)
FIT	Feed-in Tariff
ICSID	International Centre for Settlement of Investment Disputes
ISA	investor-state arbitration
MFAA	Manganese-based Fuel Additives Act
MFN	most-favoured nation
MMT	methylcyclopentadienyl manganese tricarbonyl
NAFTA	North American Free Trade Agreement
PCBs	polychlorinated biphenyls
RFP	request for proposal
SDMI	S.D. Myers, Inc.
SMC	St. Marys Cement
SMVNCA	St. Marys Votorantim Cimentos
TCC	Trammel Crow Company
UNCITRAL	United Nations Commission on International Trade Law
UPS	United Parcel Service
WTO	World Trade Organization



## EXECUTIVE SUMMARY

It is often alleged that the provisions for investor-state arbitration (ISA) are not needed in international trade agreements to protect the interests of foreign investors in developed democracies because these countries possess well-established judicial systems where justice is given on an impartial basis by impartial judges. It is alleged that if foreign investors were to go to domestic courts, they would find all the remedies they require. To test this hypothesis, this paper looks at the situation in Canada. All 35 North American Free Trade Agreement (NAFTA) claims against Canada are considered with a view to determining whether Canadian courts would be empowered to award the same damages that might be awarded by an ad hoc arbitral tribunal, were the claimant to be successful. Somewhat surprisingly, damages fully equivalent to those that might be awarded by a NAFTA tribunal would be available in only four cases. In many other cases, only administrative law remedies and no damages would be available. In some cases, no remedy would be available at all. This is due, in part, to the absence of property and contract guarantees in the Constitution of Canada. The result might well be different in other developed democracies.

## INTRODUCTION

This paper seeks to address the argument made by critics of NAFTA Chapter 11 (Investment) that claims submitted to NAFTA arbitration could have been adequately resolved by Canadian courts. The goal is to translate NAFTA disputes into domestic claims to determine whether sufficient domestic remedies actually exist. The first section of this paper briefly explores the general background and current state of the law surrounding international investment agreements in Canada, including constitutional authority and the court system. Thereafter, the second section and primary focus of this paper will be to examine whether Canadian courts could adequately resolve Chapter 11 disputes that involve a claim in damages according to Canadian law. The first step of the analysis will be to determine the procedure an investor would use to bring such a claim, by determining before which court the action should be brought. Thereafter, a case-by-case analysis of Chapter 11 claims will be done by translating the arguments made by investors in the disputes into equivalent Canadian causes of action and evaluating potential remedies, if any exist.

The focus of this paper is on the relatively narrow issue of whether a remedy similar to that of Chapter 11 exists under Canadian law. Broader questions relating to the capacity of a treaty to affect Canadian law and whether such remedies should exist in Canadian law, are alluded to but not exhaustively covered. This paper does not comment on the availability of relief under NAFTA for claims brought against Canada, and does not limit itself to analyzing successful Chapter 11 claims. Instead, the focus rests on whether disputes submitted by foreign investors against Canada under Chapter 11 could have been brought under Canadian law. In particular, the analysis will assess whether a claim for damages exists, although all potential remedies are discussed.

A few words are in order about methodology, since this paper aims to produce several broad, quantifiable conclusions following the overview of all NAFTA claims brought against Canada to date. The first stage of the analysis involves outlining the facts and current status of each NAFTA claim brought against Canada. It is very important to note that the analysis is premised on not making any comment as to whether such claims are valid under Chapter 11 — thus no comment is made as to their likelihood of success. The second stage of the analysis involves determining whether a domestic claim might be brought in a Canadian court based on the alleged acts that formed the basis for the claim made by the investor against Canada under Chapter 11. The third stage of the analysis comments on whether the domestic remedy, if one exists, is equivalent to damages sought under Chapter 11.

As shall be seen, in a majority of cases, no arguable domestic claim equivalent to the one brought under NAFTA exists under Canadian law.

## BACKGROUND ISSUES: FEDERALISM, TREATY LAW AND ISA IN CANADA

### Canada, a Federal State

Briefly stated, the important conclusions as to federalism are that the separation of powers in Canada is jealously guarded by the judiciary, and that implementation of investment protection treaties is shared, if necessary, between the federal and provincial authorities according to the normal division of powers. Thus, implementation must be done by provinces wherever the subject matter of the treaty falls within provincial jurisdiction. The four heads of power under which the federal Parliament could potentially implement investor treaties are obsolete (the treaty power), largely inapplicable (“peace, order and good government,” or general trade), or too uncertain (international trade, and banking and currency) to guarantee the success of a claim for exclusive federal jurisdiction.

Most matters covered by investment protection treaties, however, especially the right of entry into Canada, are covered by federal heads of power. The commitment to arbitrate under a bilateral investment treaty (BIT) or a trade treaty commits the federal government alone. Only where an investment protection agreement requires a province to apply a specific standard of treatment that would not otherwise be required by federal law, might specific provincial legislative or administrative action be required. While the current state of the law may change over time, the conclusion (at the time of writing) is that implementation of investment treaties, including ISA, must be done by both the provincial legislatures and the federal Parliament if matters under their respective exclusive powers are involved. This can be problematic, since the federal government can still enter binding treaty obligations for which it can be found monetarily liable, even for provincial action or inaction. Nonetheless, there is considerable space under current law, in particular, the federal power over international trade and commerce, through which Parliament may implement investor treaties.

The standards of treatment required by Chapter 11 of NAFTA or various bilateral investment agreements have not been implemented by special legislation. Where necessary, provision has been made under trade legislation such as the NAFTA Implementation Act or relevant regulations at the federal level.<sup>1</sup> Very little provincial legislation has been deemed necessary, since nonconforming provincial laws were grandfathered under NAFTA or major provincial spheres of jurisdiction such as services and procurement were not covered.

## ARBITRATION AND JURISDICTIONAL ISSUES: INVESTMENT PROTECTION TREATY ENFORCEMENT MECHANISMS AND CANADIAN FEDERALISM

This section focuses broadly on the “jurisdiction” over the dispute resolution process for investment treaties in Canada. The current status of international arbitration in Canada is explored in order to determine, based on the separation of powers, which level of government has the potential to implement international arbitration treaties such as the International Centre for Settlement of Investment Disputes (ICSID) Convention.

In Canada, implementation of international arbitration conventions raises the same legal issues as implementation of substantive rights included under investment treaties. In general, the implementation of arbitration conventions has been accepted as falling under the provincial heading of “the administration of justice in the province” outlined in section 92(14) of the Constitution Act.<sup>2</sup> Again, while it would be conceivable for the federal government to assert a right to exclusively use one of the powers outlined above to implement international arbitration treaties, the current state of the law does not readily support such contentions — a fact that recent federal governments seem to have accepted.<sup>3</sup> Thus, international arbitration treaties must be signed and largely ratified federally, but implemented by both levels of government according to the normal division of powers.

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1 *NAFTA Implementation Act*, SC 1993, c 44.

2 *Constitution Act, 1982*, ss 91–92, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 Federal implementation of the *ICSID Convention* (*Settlement of International Investment Disputes Act*, SC 2008 c 8) occurred only after all provinces (except Quebec) had implemented the *ICSID Convention*.

Two examples are worth noting. The first is implementation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration and the New York Convention;<sup>4</sup> the latter has been adopted by all levels of government for almost 30 years. At the federal level and in Canada's common law provinces, this was done by statute, such as Ontario's International Commercial Arbitration Act,<sup>5</sup> while in Canada's civil law province of Quebec this was done by incorporating the substance of the laws into the province's Code civil<sup>6</sup> and Code de procédure civile (CPC).<sup>7</sup> While the existing edition of the CPC only mentions that the code is to be interpreted in accordance with the New York Convention, the "new" CPC, which entered into force in fall 2015, explicitly states that the rules concerning arbitration are to be interpreted as conforming to both the Model Law and the New York Convention.<sup>8</sup>

The second example is Canadian ratification and implementation of the ICSID Convention. Unlike the Model Law, the ICSID Convention shields arbitration awards under ICSID from judicial review by domestic courts.<sup>9</sup> Canada ratified the convention in late 2013 and adopted the Settlement of International Investment Disputes Act, which implements the ICSID Convention at the federal level.<sup>10</sup> The only province that has not adopted specific implementing legislation for the ICSID Convention is Quebec. It may be argued that implementation in Quebec is covered by the CPC, whose chapters on international arbitration incorporate the Model Law and the New York Convention. Under article 653, entitled "Powers of the court," judicial capacity exists to review an arbitral decision according to the six conditions set by article V of the New York Convention for arbitrations not covered by the exclusion of judicial review by the ICSID Convention.

Under current Canadian law, contestation of an international arbitration award is done in accordance with the New York Convention, depending on the parties to arbitration and the location of the arbitration. The Federal Court of Canada has concurrent original jurisdiction whenever relief is sought against the federal government,<sup>11</sup> but superior courts have jurisdiction if the place of arbitration is within the province.<sup>12</sup> For example, *Canada v SDMI* was the only judicial review of a Chapter 11 arbitral award undertaken by the Federal Court, while Mexico has contested several arbitration awards in the superior courts of the provinces where arbitration took place. There has thus been one judicial review of a Chapter 11 arbitral award by the Federal Court,<sup>13</sup> and four by superior courts,<sup>14</sup> totalling five. In the NAFTA context, limited judicial review is authorized under article 34 of the Model Law,<sup>15</sup> but is unavailable for awards under ICSID arbitration.<sup>16</sup> It is well established in Canadian law that judges are to show significant deference to all arbitral awards.<sup>17</sup>

A few words should be said about constitutional challenges to Chapter 11 in Canada. In *Council of Canadians v Canada (Attorney General)*, the constitutionality of Chapter 11 was under attack for allegedly violating guarantees in section 96 of the Constitution Act, which seeks to protect the core jurisdiction of the superior courts, namely all powers they exercised at the time of Confederation in 1867.<sup>18</sup> Justice Sarah E. Pepall of the Ontario Superior Court of Justice held that section 96 was not violated, since the source of arbitral decision making under Chapter 11 is a treaty commitment

4 UNCITRAL Model Law on International Commercial Arbitration, 1985, 24 ILM 1302 (entered into force 1986) [Model Law]; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) [New York Convention].

5 International Commercial Arbitration Act, RSO 1990, c I.9.

6 See Book Five, Title Two, Chapter XVIII – Arbitration Agreements arts 2638–2643, 3121, 3133, and 3148.

7 Book VII CPC.

8 Art 948 Previous CPC; arts 649–650 CPC.

9 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 17 UST 1270, 575 UNTS 15, arts 50–55 (entered into force 1966) [ICSID Convention].

10 See *supra* note 3.

11 Federal Court Act, RSC 1985, c F-7 s 17.

12 New York Convention, *supra* note 4 at art V.

13 *Canada (AG) v SD Myers, Inc.*, 2002 FCA 39; see Armand de Mestral, "Lessons of Chapter 11: Procedural Integrity" in Frédéric Bachand & Emmanuel Gaillard, eds, *Fifteen Years of NAFTA Chapter 11 Arbitration* (Huntington: Juris Publishing Inc., 2011) 57 and Henri Alvarez, "Judicial Review of NAFTA Chapter 11 Arbitral Awards" in Bachand & Gaillard, *ibid* at 103.

14 *United Mexican States v Cargill, Inc.*, 2011 ONCA 622; *Mexico v Metalclad Corp*, 2011 BCSC 664; *United Mexican States v Karpa*, [2005] OJ No 16; *Bayview Irrigation District #11 v Mexico*, [2008] OJ No 1858.

15 Model Law, *supra* note 4 art 34.

16 *Supra* note 9 at arts 50–55.

17 *Seidel v TELUS Communications, Inc.*, [2011] SCJ No 15.

18 *Council of Canadians v Canada (AG)*, [2005] OJ No 3422 [Canadians SC]; *Council of Canadians v Canada (AG)*, [2006] OJ No 4751 [Canadians OCA].

of the Government of Canada arising under NAFTA, and not under domestic Canadian law.<sup>19</sup> The Ontario Court of Appeal upheld Justice Pepall's decision, adding that arbitration under Chapter 11 derives from the treaty as "state obligations mutually undertaken in NAFTA by the three parties who signed the treaty," meaning that there was no analogous superior court jurisdiction at the time of Confederation.<sup>20</sup> *Council of Canadians* remains the only authoritative pronouncement of the matter by the judiciary, although it is probably safe to say that all relevant issues have not yet been definitively resolved.

## DOMESTIC AVAILABILITY OF REMEDIES EQUIVALENT TO THOSE PROVIDED UNDER CHAPTER 11

This section of the paper evaluates whether domestic remedies would exist for claims similar to arbitration disputes brought against Canada under Chapter 11. The first and relatively short analysis below will determine the procedural dimensions of such a claim based on Canada's judicial system. The final section will examine whether substantive remedies would exist under Canadian law based on the claims made under arbitration, then evaluate the effectiveness of those remedies. Such an evaluation will be done on a case-by-case basis.

### Domestic Claims and Chapter 11: Court Jurisdiction

Canada has three courts of first instance: superior courts, federal courts and provincial courts. Superior courts are Canada's main courts and have existed since before Confederation.<sup>21</sup> Each province has its own superior court, but they all share the same features: they are courts of inherent jurisdiction whose core jurisdiction is constitutionally protected under section 96 of the Constitution Act.<sup>22</sup> In contrast, federal and provincial courts are much more specialized. Federal courts essentially deal with matters relating to the federal government,<sup>23</sup> while the jurisdiction of provincial courts differs among the provinces but usually covers all claims up to a certain monetary amount.<sup>24</sup> Provincial appellate courts hear appeals from superior and provincial courts, while appeals from federal courts may be made at the Federal Court of Appeal. The Supreme Court of Canada is the final court of appellate jurisdiction. Claims comparable to Chapter 11 arise in civil and administrative matters. It is hard to envisage that any such claim could be characterized as a criminal matter.

Canada also has a complex set of specialized tribunals with juridical capacity. For example, the Competition Act creates the Competition Tribunal, which has exclusive primary jurisdiction to determine whether some offences have been breached,<sup>25</sup> although other offences, such as price-fixing and offences related to intellectual property, fall under the jurisdiction of the Federal Court.<sup>26</sup> More importantly, any petition to recover damages under section 36 of the Competition Act, which may only be filed for specified offences, must be done in Federal or Superior Court.<sup>27</sup> The Canadian International Trade Tribunal,<sup>28</sup> a specialized federal administrative law tribunal, has a specific mandate to rule on a range of trade issues, but has no authority to award damages. Jurisdiction of specialized tribunals is specified by statute, but superior and federal courts have general and inherent powers of judicial review.

For an investor seeking a domestic remedy similar to what may be awarded under Chapter 11 proceedings, where to sue will depend on the government entity that has committed the alleged wrong. For example, any claim against the federal government can be taken before the Federal Court,

19 *Canadians SC*, *supra* note 18 at paras 37, 43.

20 *Canadians OCA*, *supra* note 18 at 37–38.

21 *Supra* note 2 at s 129.

22 *MacMillan Bloedel Ltd. v Simpson*, [1995] 4 SCR 725; art 33 New CPC.

23 *Supra* note 11 s 91; *supra* note 2 s 101.

24 The amount is approximately CDN\$100,000. See art 35 New CPC for an example.

25 *Competition Act*, RSC 1985, c C-34 s 75.

26 *Ibid*, Part IV, s 32.

27 Superior Courts have general jurisdiction under section 92(13), while jurisdiction is granted to federal courts under section 36(3). Damages for offences outlined under the *Competition Act*, specifically Part VI, was declared constitutionally valid in *City National Leasing*, [1989] 1 SCR 641 as falling within federal jurisdiction over general trade and commerce.

28 *Canadian International Trade Tribunal Act*, RSC 1985, c 47.

since it has concurrent jurisdiction where relief is sought against the federal Crown.<sup>29</sup> In short, any proceeding that implicates the federal government as a direct party can be brought in the Federal Court, although jurisdiction will generally be concurrent with superior courts.<sup>30</sup> However, there are some exceptions to this general rule. The first exception is with respect to relief sought against federal administrative action, which is within the Federal Court of Appeal's exclusive jurisdiction.<sup>31</sup> The second exception involves subject-matter jurisdiction. For example, immigration and validity of intellectual property fall under the Federal Court's exclusive jurisdiction.<sup>32</sup>

Most claims would be susceptible to resolution by Superior and Federal Courts. All investor claims that do not involve the federal Crown would have to be brought in superior court, and if they fall below a certain monetary threshold (which varies among the provinces) must be brought to provincial court instead. Since these monetary values are all under CDN\$100,000,<sup>33</sup> for the purposes of this paper provincial courts appear irrelevant. For example, a claim brought against provincial expropriation of an investment, without federal involvement, would have to be brought at Superior Court as an action against the province. Since Superior Courts are courts of inherent jurisdiction, they will always have jurisdiction unless legislation states otherwise.

The first step in assessing whether remedies similar to those provided for under NAFTA Chapter 11, part B, exist under Canadian law has therefore been answered. In general, Federal and Superior Courts will have concurrent jurisdiction over claims brought against the federal government. The Federal Court will have exclusive jurisdiction for judicial review of federal boards, tribunals and commissions (or other decisions) — in other words, jurisdiction over judicial review of federal administrative action. Conversely, claims that do not involve the federal government in some way, such as those that solely contest provincial action, must be directed toward the Superior Court.

Finally, it must be noted that Canadian domestic courts have no jurisdiction to hear claims made on the basis of a treaty, unless the treaty remedy has been incorporated into Canadian law. The fact that a foreign investor is guaranteed certain standards of treatment by an investment treaty creates no right of action before Canadian courts. Moreover, the doctrine of sovereign immunity may act to limit an investor's domestic claim. While considerable Crown immunity remains in Canada, the Supreme Court in *Cooper v Hobart* and *Edwards v Law Society of Upper Canada* affirmed that the Crown may be liable in tort for operational decisions, although situations where a duty of care would be owed were highly limited and the government cannot be liable for policy decisions.<sup>34</sup> Crown liability is a creature of case law and provincial and federal statutes, which typically confirm that the Crown may bind itself to legal obligations.<sup>35</sup> Furthermore, the doctrine creates complete immunity from seizure of Crown property. Thus, while Canada retains considerable sovereign immunity, investors' claims would rarely be limited by sovereign immunity, since Crown liability under tort or contract is well recognized. But they would be unable to seize Crown assets in satisfaction of the judgment.

### Domestic Claims and Chapter 11: Availability of Equivalent Substantive Claims

This section examines every dispute submitted to arbitration under NAFTA's Chapter 11. The disputes will be arranged from oldest to currently ongoing, based on the date of the initial claim. It is important to note that the factual matrix of each dispute is of seminal importance to whether or not a domestic remedy exists, thus each claim will be properly contextualized.

<sup>29</sup> *Supra* note 11 at s 17.

<sup>30</sup> *Ibid.* This is true both when a claim is brought against the federal Crown, and when the Crown claims.

<sup>31</sup> *Ibid* at ss 18–18.1 for Federal Court; *ibid* at s 28 for Court of Appeal.

<sup>32</sup> Several include validity of intellectual property, citizenship, and immigration and refugee law. Only validity of intellectual property falls under exclusive Federal Court jurisdiction — other intellectual property jurisdiction (such as infringement) is concurrent with superior courts.

<sup>33</sup> *Supra* note 24.

<sup>34</sup> *Cooper v Hobart*, 2001 SCC 79; *Edwards v Law Society of Upper Canada*, 2001 SCC 80.

<sup>35</sup> *Lewis Sklar*, “R v Imperial Tobacco: More Restrictions on Public Authority Tort Liability” (2012) 50:1 Alta LR 157; see also the *Interpretation Act*, RSA 2000, c 1-8 s 14 for an example of Crown contractual or other liability.

***Signa SA de CV v Canada (1996)***<sup>36</sup>

Signa, a Mexican pharmaceutical company, brought a Chapter 11 complaint alleging that Canada's Patented Medicines (Notice of Compliance) Regulations,<sup>37</sup> enacted in 1993, breached minimum standards under article 1105 and constituted an expropriation contrary to article 1110. The legislation provided a streamlined process that allowed Bayer, the patent holder of ciprofloxacin hydrochloride, to prohibit Signa and its partner, Apotex, from selling a generic version of the drug. Under Canadian law, the only way to challenge the regulations would be through a claim of constitutional invalidity, but such a claim would be groundless since the federal Parliament has exclusive jurisdiction to legislate on patents under section 91(22) of the Constitution Act. However, Signa or Apotex could have also contested Bayer's patent through the process created by the regulations, which may have resulted in damages, if successful.<sup>38</sup> Since Signa wanted to challenge the regulations themselves, rather than use the remedy specifically outlined therein, there could be no domestic claim. The NAFTA dispute has since been withdrawn.

***Ethyl Corporation v Canada (1996)***<sup>39</sup>

Ethyl Corporation, a Virginia corporation, wholly owned Ethyl Canada, Inc. Ethyl Canada's business was based on purchasing and importing methylcyclopentadienyl manganese tricarbonyl (MMT) from its parent, which it then distributed across Canada. Its activities were banned following the passing of the Manganese-based Fuel Additives Act (MFAA) in 1997, which prohibited the flow of MMT across state and provincial borders, although local production and use remained legal.<sup>40</sup> Ethyl submitted its notice of intent in 1996, claiming that the legislation breached NAFTA articles 1102 (national treatment), 1106 (performance requirements) and 1110 (expropriation). Three Canadian provinces simultaneously challenged the legislation, resulting in the repeal of the MFAA.<sup>41</sup> Ethyl and Canada settled in June 1998 for CDN\$13 million.<sup>42</sup>

Ethyl could have potentially contested the MFAA on constitutional grounds. In fact, Ethyl and others tried to argue, in Ontario Superior Court,<sup>43</sup> that the MFAA unlawfully trespassed on provincial jurisdiction, although the issue was rendered moot by the repeal of the MFAA. Nonetheless, a constitutional claim's chances of success were undermined by *Caloil, Inc. v AG Canada*, in which the Supreme Court of Canada had upheld federal regulations that prohibited the transportation of imported oil west of the Ottawa Valley.<sup>44</sup> Justice Louis-Philippe Pigeon wrote that:

Under the circumstances, the interference with local trade, restricted as it is to an imported commodity, is an integral part of the control of imports in the furtherance of an extra-provincial trade policy and cannot be termed an unwarranted invasion of provincial jurisdiction.<sup>45</sup>

The legislation at issue in *Caloil*, which also dealt with the movement of substances across international and interprovincial borders, was therefore upheld as falling under the federal international and interprovincial trade power. The prohibition of importation or distribution of MMT, limited as it is to a specific commodity and specific public purpose, would not be an unwarranted invasion of provincial jurisdiction, following the reasoning in *Caloil*, as it too dealt with the movement of a substance across international borders. Even so, it is important to note that a successful constitutional challenge results in the invalidity of the law, but not damages.<sup>46</sup>

36 *Signa SA de CV v Canada*, Notice of Intent, 4 March 1996, online: <www.naftaclaims.com>.

37 *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133.

38 *Ibid* at s 8(4). In its Notice of Intent, Signa argued that the regulations only require a person "purporting" to hold a patent for a drug to be able to access the Notice of Compliance regime. However, section 4 clearly states that an applicant must submit detailed information regarding the patent, which may be challenged. Apotex actually used this remedy several times; see *Apotex, Inc. v Canada (Attorney General) (C.A.)* [1994] 1 FC 742.

39 *Ethyl Corp. v Canada*, Notice of Intent, 10 September 1996, (UNCITRAL), online: <www.naftaclaims.com>.

40 *Manganese-based Fuel Additives Act*, SC 1997, c 11.

41 *Government of Alberta Submission to the Dispute Regarding the Manganese-based Fuel Additives Act*, 1 December 1997, online: <www.ait-aci.ca/wp-content/pdfs/English/DisputeResolution/PanelReports/8\_eng.pdf>. The arbitration decision is not publicly available.

42 *Ethyl Corp. v Gov. of Canada*, Award on Jurisdiction (24 June 1994), online: <www.naftaclaims.com>.

43 *Ethyl Canada, Inc. v Canada (Attorney General)*, [1998] OJ No 315; *Ethyl Canada, Inc. v Canada (Attorney General)*, [1997] OJ No 4225.

44 *Caloil v AG Canada*, [1971] SCR 543 [*Caloil*].

45 *Ibid* at 544.

46 *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405.

***Sun Belt Water, Inc. v Canada (1998)***<sup>47</sup>

In 1989, the Government of British Columbia granted Snowcap Waters Ltd a license to draw water from one of the province's many rivers for export in bulk. Snowcap then entered into a joint venture with the investor, Sun Belt Water, Inc., an American company, to export water to Goleta, California, and provincial representatives advised Snowcap that it would receive an expanded export license to fulfill the Goleta contract if it met the requirements under the provincial Water Act.<sup>48</sup> However, shortly thereafter the government passed Order in Council #331, which imposed a moratorium on the issuance of licenses to export fresh water, made permanent by the enactment of the B.C. Water Protection Act.<sup>49</sup> In its notice of intent filed in 1998, Sun Belt Water, Inc. argued that as a result of these actions, the investor was denied national treatment under article 1102 and fair and equitable treatment under article 1105. The claim has been inactive since 1998.

Several arguable claims appear to exist under domestic law. Indeed, several Canadian companies have brought domestic claims based on the same facts,<sup>50</sup> as have both Sun Belt and Snowcap.<sup>51</sup> None of these cases have yet been resolved, although numerous procedures, notably one concerning summary judgment, reveal the existence of domestic claims. In *Rain Coast Water Corp. v British Columbia*, British Columbia's Superior Court determined that claims against the province alleging misfeasance in public office, unlawful interference with economic interests and negligent misrepresentation all had a reasonable chance of success meriting trial.<sup>52</sup> These actions in tort, if successful, would yield damages and could potentially be made by the investor.

A further claim, which is also currently being argued in Superior Court, would be to challenge the Water Protection Act as being unconstitutional.<sup>53</sup> Successful constitutional litigation would render the law inapplicable, but would not result in damages for the investor.<sup>54</sup> A constitutional claim appears to have the potential for a reasonable chance of success considering federal jurisdiction over navigation and shipping under section 91(10) of the Constitution Act, although section 92(10a) has been interpreted as conferring the power to regulate water onto the provinces provided it does not infringe on navigation and shipping.<sup>55</sup> Moreover, since the Water Protection Act effectively regulates licenses to export water another argument could be made that this contravenes federal powers over interprovincial and international trade. Thus, as the British Columbia Superior Court said in *Rain Coast Water*,<sup>56</sup> the constitutional claim appears arguable.

***SD Myers, Inc. v Canada (1998)***<sup>57</sup>

An American corporation named S.D. Myers, Inc. (SDMI) specialized in disposing of polychlorinated biphenyls (PCBs), a toxic substance highly regulated in Canada and the United States. In 1995, the United States allowed SDMI to import PCBs from Canada for destruction at its US facilities, which it did through its Canadian subsidiary. That same month, after lobbying by the Canadian PCB disposal industry, Canada enacted regulations prohibiting the export of PCBs. SDMI challenged this prohibition, claiming that it was enacted to protect the Canadian PCB disposal industry in contravention of national treatment, fair treatment, performance requirements and expropriation. In its 2002 decision, the tribunal found that the regulations were protectionist, awarding SDMI more than CDN\$6 million in damages, but denied the performance requirements and expropriation claims.

The protectionist measure prohibiting the export of PCBs into the United States was a fatal flaw under NAFTA, but protectionist measures are unassailable under Canadian law. Indeed, liberalizing

47 *Sun Belt Water, Inc. v Canada*, Notice of Intent (27 November 1998), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

48 *Water Act*, RSBC 1979, c 429.

49 *Order in Council #331*, 18 March 1991; *Water Protection Act*, SBC 1995, c 34.

50 *Rain Coast Water Corp. v British Columbia*, [2010] BCJ No. 59 [*Rain Coast Water*]; *Aquasource Ltd. v British Columbia (Information and Privacy Commission)*, [1998] BCJ No. 1927.

51 *Snowcap Waters Ltd v British Columbia*, [1997] BCJ No. 1010; *Snowcap Waters Ltd v British Columbia (Minister of the Environment)*, [1997] BCJ No. 1760.

52 *Rain Coast Water*, *supra* note 51 at paras 35–38.

53 *Ibid.*

54 *Supra* note 47.

55 *Reference re Waters and Water-Powers*, [1929] SCR 200 questions 8 and 9.

56 *Rain Coast Water*, *supra* note 51.

57 *SD Myers Inc. v Canada*, Damages Award (21 October 2002), (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

trade was the entire purpose of NAFTA,<sup>58</sup> and much like previous treaties that Canada has signed and ratified, such as the General Agreement on Tariffs and Trade,<sup>59</sup> was necessary precisely because there is no domestic remedy against protectionism. Protectionist legislation has long been a staple of Canadian politics, with Canada's protectionist policies toward its cultural industry being a prime example.<sup>60</sup> Canada's Supreme Court has stated that "old-fashioned" Canadian protectionism, while valid under domestic law, is not permissible under international trade rules.<sup>61</sup> Therefore, the only remedies available against protectionist policies, such as the prohibition against the export of PCBs, lie under international treaties such as NAFTA Chapter 11.

### ***Pope & Talbot, Inc. v Canada (1998)***<sup>62</sup>

Pope & Talbot is an American logging company with extensive operations in British Columbia. Timber export controls were created by Canada following the 1996 Softwood Lumber Act,<sup>63</sup> which was implemented through several regulations that set a threshold under which lumber could be exported freely.<sup>64</sup> Pope & Talbot challenged the overall scheme of Canada's implementation of the Softwood Lumber Act for violating principles of article 1102 (national treatment), article 1105 (minimum standards) and article 1110 (expropriation), which were all dismissed.<sup>65</sup> The investor also challenged a "verification review" of its accounting records undertaken by the Canadian government after the investor began NAFTA proceedings.<sup>66</sup> The tribunal's 2001 award found that the administrative body's consistent refusal to provide written reasons, copies of audits or proof of jurisdiction constituted a breach of minimum standards of treatment under NAFTA.

While no domestic claim exists to contest the implementation of the Softwood Lumber Act, Pope & Talbot could have challenged the verification review under Canadian law. In Canada the principle of parliamentary sovereignty applies to justify any law enacted by the legislature so long as such law is constitutional.<sup>67</sup> Pope & Talbot would simply have no grounds to challenge Canada's implementation of the Softwood Lumber Act, since parliamentary sovereignty applies and the Constitution does not protect economic rights.<sup>68</sup>

Two remedies might have existed against the verification review episode. The first avenue of recourse would be to challenge the lack of written reasons under the duty of procedural fairness outlined in *Baker v Canada*, which typically secures written reasons for administrative action where there is no statutory right to appeal.<sup>69</sup> The duty of fairness was arguably triggered by the verification review and would possibly entitle them to the results of the audit. The second avenue of recourse would have been under the tort of misfeasance in public office, where a claimant must show that an official knowingly engaged in unlawful conduct in the exercise of his or her public function and that the official was aware the conduct would likely injure the plaintiff.<sup>70</sup> Such a claim was essentially made by Pope & Talbot when it argued that the verification review was intended to punish them for having brought the Chapter 11 claim by officials who knowingly acted outside their authority. Unlike administrative remedies, a claim for misfeasance in public office would have resulted in damages.<sup>71</sup>

### ***Ketcham Investments, Inc. and Tysa Investments, Inc. v Canada (2000)***<sup>72</sup>

*Ketcham* brought the exact same complaint as that in *Pope & Talbot*, minus the verification review. As under *Pope & Talbot*, there is no domestic remedy for the implementation of the Softwood Lumber

58 *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994); 32 ILM 289 Chapter 1: Objectives.

59 *General Agreement on Tariffs and Trade*, 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1948); 33 ILM 1153.

60 Robert Eberschlag, "Culture Clash: Canadian Periodicals and the World Trade Organization" (2005) 26 Man LJ 65 at paras 10–23.

61 *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 178.

62 *Pope & Talbot, Inc. v Canada*, Interim Award on the Merits Phase One, (26 June 2000), (UNCITRAL); *Pope & Talbot, Inc. v Canada*, Interim Award on the Merits Phase Two, (10 April 2001), (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

63 *Softwood Lumber Agreement*, Canada and the United States, 29 May 1996, Can TS 1996 No 16 (entered into force 1 April 1996).

64 *Ibid* art II; *Softwood Lumber Products Export Permit Fees Regulations*, SOR/96-317, s 4.

65 *Supra* note 62, Award on the Merits Phase Two.

66 Award on Merits Phase Two, *ibid* at paras 156–181.

67 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2012) at 12-3 and 12-5.

68 See *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 95.

69 *Baker v Canada* (Minister of Citizenship and Immigration), [1999] SCJ No 39.

70 *Odhavji Estate v Woodhouse*, 2003 SCC 69.

71 *Ibid*; *Roncarelli v Duplessis*, [1959] SCR 121.

72 *Ketcham Investments, Inc. and Tysa Investments, Inc. v Canada*, Notice of Intent, (22 December 2000), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

Agreement by the Canadian government. The complaint was withdrawn, probably following the tribunal's finding in favour of Canada in *Pope & Talbot*.

### **United Parcel Service of America, Inc. v Canada (2000)**<sup>73</sup>

The United Parcel Service (UPS) of America is a well-known American courier company. UPS claimed that its courier services received less favourable treatment than mail imported by Canada Post, a Crown corporation with a monopoly on postal services.<sup>74</sup> Specifically, UPS contested different customs treatment between goods imported by post or courier, and the use by Canada Post's courier subsidiary (Purolator) of its monopoly infrastructure. UPS claimed these violated the principles of national treatment, most-favoured nation (MFN) and minimum standards. In its 2007 award, the tribunal concluded that there were inherent differences between goods imported by post and courier, which justified differential treatment, and that any unfair treatment was attributable to Canada Post, which retains separate legal status under NAFTA.

The first part of UPS's claim sought to contest the legislative regime granting Canada Post a monopoly over mail, notably the customs duties therein. As examined above, parliamentary supremacy applies to render constitutionally valid legislation unassailable.<sup>75</sup> However, a claim against Canada Post and Purolator would potentially have existed under the Competition Act.<sup>76</sup> Section 79 allows a claim to be brought against persons who abuse dominant market positions where they substantially control the market, engage in anti-competitive acts and have likely unduly lessened competition. This is essentially the argument made by UPS: Canada Post has a monopoly that it abuses by granting Purolator access to its monopoly infrastructure to unduly restrict competition in the adjacent courier services market.<sup>77</sup> Potential remedies under the Competition Act include prohibition orders and the removal or reduction of customs duties, at the Governor in Council's discretion, but not damages.<sup>78</sup> It would therefore appear that UPS would have an arguable claim under Canadian law, but not for damages.

### **Trammel Crow Company v Canada (2001)**<sup>79</sup>

Trammel Crow Company (TCC), a Delaware corporation that acted in Canada through its wholly-owned subsidiary, brought a complaint against Canada for the actions of Canada Post. The investor's subsidiary and Canada Post signed a request for proposal (RFP) agreement in 2000, but in 2001 Canada Post cancelled the RFP and renewed an existing service agreement with TCC's competitors. A Chapter 11 claim was then brought against Canada, but withdrawn following the tribunal's finding in *UPS* that Canada is not responsible for Canada Post's actions. As a matter of domestic law, the enterprise could try bringing a contractual claim against Canada Post, but since TCC claims that Canada Post denied "an open and transparent process for bidding on the renewed contracts,"<sup>80</sup> it is doubtful there would be a contractual remedy. In the almost certain event no contractual remedy exists, following the Supreme Court of Canada's statement in *Design Services Ltd v Canada* that no actions in tort exist when commercial parties arrange their affairs in contract,<sup>81</sup> an action in tort to recover damages appears out of reach. Thus, no domestic claim with a reasonable chance of success would be available to the investor.

### **Chemtura Corporation v Canada (2001)**<sup>82</sup>

Chemtura Corporation manufactured lindane, a pesticide that saw heavy use on canola. Following numerous international steps to restrict the use of lindane, Canada created a special review panel in the late 1990s that led to regulatory action banning the use of lindane on canola. Chemtura contested this ban, claiming that the process followed by the panel was unreasonable, a violation of MFN and

73 *United Parcel Service of America, Inc. v Canada*, Award on the Merits, (11 June 2007), (UNCITRAL), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/dispatch-diff/parcel.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/dispatch-diff/parcel.aspx?lang=eng)>.

74 *Canada Post Incorporation Act*, RSC 1985, c C-10.

75 See *Pope & Talbot, Inc. v Canada*, *supra* note 62.

76 *Supra* note 25.

77 *Supra* note 73 at paras 11–14.

78 *Supra* note 25. Section 36 allows for damages but not for the class of claim potentially available to UPS.

79 *Trammel Crow Company v Canada*, Notice of Intent, (7 December 2001), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

80 *Ibid* at para 31.

81 *Design Services Ltd. v Canada*, [2008] SCJ No 22 para 56.

82 *Chemtura Corporation v Canada*, Award, (2 August 2010), (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

minimum standards, and an expropriation. In its 2010 award, the tribunal concluded that the review process, as well as the decision to ban lindane, was reasonable. Moreover, the tribunal concluded that there was no indirect expropriation.

The investor's Chapter 11 claim sought to attack the ban on lindane-based products by challenging both the regulatory regime and the review panel's administrative process. Under domestic law, the regulatory regime would be unassailable unless it were found to be unconstitutional, but such a claim would have negligible chances of success in light of the public policy reasons for the ban — as was recognized by the tribunal. However, the administrative process could have been challenged. Indeed, the possibility of challenging a review panel's decision to ban a pest-control substance was provided for under the applicable statutes at the time, the Pest Control Products Act<sup>83</sup> and the Pest Controls Product Regulations.<sup>84</sup> Section 23 of the regulations allowed the investor to obtain a technical review of the decision — which it did by application to the Federal Court.<sup>85</sup> This judicial review was the only remedy available to Chemtura under domestic law, and it could always have further contested the actions (or enforced any remedies) in Federal Court. However, unlike a Chapter 11 claim, this administrative remedy would not result in damages. This may explain why Chemtura brought the NAFTA claim after the judicial review took place.<sup>86</sup>

### ***Albert Connolly v Canada (2004)***<sup>87</sup>

This dispute claimed that the Ontario Ministry of Northern Development and Mines' slow processing of a report by the company owned by Albert Connolly resulted in the forfeiture of the investor's property, thus constituting an unlawful expropriation under article 1110. The domestic remedy would have been judicial review, which may have resulted in the return of the investor's property, but would not result in the damages that could be awarded under NAFTA arbitration. The complaint has been inactive since the initial notice of intent in 2004.

### ***Peter Nikola Pesic v Canada (2005)***<sup>88</sup>

Peter Nikola Pesic, an American investor, brought a complaint against Canada for not issuing him a work permit in a timely enough manner, which prevented him from legally running his company in Canada. The investor primarily desired the work permit, but in the alternative sought damages under Chapter 11. In this case, the primary remedy would best be handled domestically through the process of judicial review stipulated under section 72 of the Immigration and Refugee Protection Act to ensure that the process was fair.<sup>89</sup> However, as an administrative action, this would not result in damages. Damages could be obtained through tort, but finding a duty of care owed by the government toward the investor in the immigration context is highly unlikely following *Cooper v Hobart*.<sup>90</sup> Therefore, a domestic claim could have been made under Canadian law, but not for damages. Pesic ultimately withdrew his complaint.

### ***Contractual Obligations Productions, LLC, et al v Canada (2005)***<sup>91</sup>

The investors brought a complaint challenging Canada for subsidizing its film industry, claiming it denied them national treatment and minimum standards of treatment, and that they constituted performance requirements. Under Canadian law there is absolutely nothing preventing the government from subsidizing particular industries, although such restrictions do exist under international treaties. Furthermore, there is a specific exception for cultural industries, including the film industry, in NAFTA article 2106, which rendered the investor's complaint groundless under NAFTA.<sup>92</sup> Therefore, no valid claim existed either under Canadian law or, arguably, under NAFTA. *Contractual Obligations* has been inactive since a statement of claim was filed in 2005.

83 *Pest Control Products Act*, SC 2002, c 28.

84 *Pest Control Product Regulations*, SOR/2002-374.

85 *Chemtura Corp v Canada*, Investor's Memorial, 2 June 2008, Para 263, online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

86 *Ibid* at paras 263–275.

87 *Albert Connolly v Canada*, Notice of Intent, (19 February 2004), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

88 *Peter Nikola Pesic v Gov. of Canada*, Notice of Intent, (26 July 2005), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

89 *Immigration and Refugee Protection Act*, SC 2001, c 27 s 72.

90 *Cooper v Hobart*, *supra* note 34.

91 *Contractual Obligations Productions, LLC Charles Robert Underwood, and Carl Paolino v Gov. of Canada*, Amended Statement of Claim, (16 June 2005), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

92 *NAFTA*, *supra* note 58 art 2106, Annex 2106.

**GL Farms, LLC, and Carl Adams v Canada (2006)**<sup>93</sup>

The investor, a Delaware corporation, owned the Georgian Bay Milk Company, an Ontario corporation that bought milk in Ontario for export in the United States. Milk products in Ontario are heavily subsidized. Following several World Trade Organization (WTO) cases decided against Canada, which held that the export of milk affected by subsidies contravened Canada's WTO obligations,<sup>94</sup> Ontario decided to halt all milk exports rather than terminate subsidies. This export prohibition had disastrous effects on the Georgian Bay Milk Company, which petitioned domestic courts with numerous administrative<sup>95</sup> and constitutional<sup>96</sup> claims in order to be allowed to export milk. These claims were all rejected, and ultimately the Ontario Ministry of Agriculture and Food successfully petitioned the Ontario Superior Court for an injunction prohibiting the Georgian Bay Milk Company from exporting milk.<sup>97</sup> It was only after exhausting all potential domestic remedies that the investor brought its NAFTA claim, which has been inactive since a notice of arbitration submitted in 2006.

**Merrill & Ring Forestry LP v Canada (2006)**<sup>98</sup>

*Merrill* is yet another dispute involving the export of Canadian lumber by an American corporation. *Merrill & Ring Forestry* challenged the Canadian export regime outlined under the Export and Import Permits Act, which stipulated that persons interested in exporting logs from British Columbia had to first allow domestic processors to bid to purchase the logs.<sup>99</sup> If no bids were made, or if the bids were less than market value, then an export permit could be approved. The investor argued that the regulations aimed to ensure log processors in British Columbia had access to logs at artificially suppressed prices, since persons with vested interests in log processing administered the regime. This, according to the complaint, breached national treatment, fair and equitable treatment and performance requirements, and constituted expropriation. The NAFTA Tribunal dismissed all claims in 2010, finding the export regime consistent with Chapter 11.

The domestic analysis of this case reflects the first part of *Pope & Talbot*, which sought to challenge the validity of the export regime. It would be impossible to challenge the legislative wisdom of the regime unless unconstitutionality could be argued, but such an argument has no reasonable prospect of success since export controls are wholly within federal jurisdiction. Absent constitutional challenge, parliamentary supremacy applies to render the regime unassailable, even if *Merrill's* claims that the regime was set up to be administered by persons with a direct interest in domestic log processing proved accurate (which is a claim that the tribunal rejected). Once again, there is a lack of domestic remedies.

**V. G. Gallo v Canada (2006)**<sup>100</sup>

In 2002, an Ontario corporation bought the abandoned "Adams Mine" to use as a waste disposal site. Then, in 2004, the Ontario legislature passed the Adams Mine Lake Act, which prohibited the disposal of waste at the mine under section 3 of the act<sup>101</sup> and set up compensation under section 6.<sup>102</sup> Vito Gallo, a US national who claimed to own the Ontario corporation, argued that this expropriation violated minimum standards and expropriation rules. The tribunal concluded that the claim lacked proper evidentiary basis, since Gallo was unable to submit written evidence that he was the mine's owner prior to the enactment of the Adams Mine Lake Act, and so the tribunal terminated the dispute in 2011.<sup>103</sup>

93 *GL Farms LLC and Adams v Gov. of Canada*, Notice of Arbitration, (5 June 2006), (UNCITRAL), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/farms.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/farms.aspx?lang=eng)>.

94 *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Second Recourse to Art 21.5 of the DSU by New Zealand and the United States (2002), WTO Doc WT/DS103/AB/RW2 (Appellate Body Report).

95 *Allan v Ontario (Attorney General)* [2005] OJ No 3083; *Allan v Ontario (AG)*, [2006] OJ No 1891. The investor also petitioned the administrative tribunal established under the *Milk Act* and s 16 of the *Ministry of Agriculture, Food and Rural Affairs ACT* RSO 1990, c M.16 several times.

96 *Ibid*, *Allan v Ontario* [2005].

97 *Ontario (Minister of Agriculture and Food) v Georgian Bay Milk Co.*, [2008] OJ No 485.

98 *Merrill & Ring Forestry LP v Canada*, Award of the Arbitral Tribunal, (31 March 2010), (UNCITRAL), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/merrill.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/merrill.aspx?lang=eng)>.

99 *Export and Import Permits Act*, RSC 1985, c E-19.

100 *Vito Gallo v Canada*, Award of the Arbitral Tribunal, (15 September 2011), (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

101 *Adams Mine Lake Act*, SO 2004, c 6 s 3 [AMLA].

102 *Ibid* at s 6.

103 *Supra* note 101 at para 359.

Even if Gallo had been able to prove that he owned the Adams Mine at the relevant time, he would not have a valid claim under Canadian law. The purpose of the act was twofold: first, it prohibited the disposal of waste at the mine; and second, it revoked all permits for waste disposal the numbered company (which owned the mine) had acquired between 1998 and 2004.<sup>104</sup> This first aim is protected under the principle of parliamentary sovereignty and no reasonable constitutional claim could have been made, as Canada does not have a written constitutional guarantee of property or contractual rights. The quantum of compensation could have been challenged in superior court through the regime set out in the Adams Mine Lake Act, but there are no records of this having occurred.<sup>105</sup> Gallo's only recourse, had he been eligible, was indeed under Chapter 11. On the facts, the tribunal found that the corporate records had been falsified to give the impression that Gallo had been an investor at the appropriate time.

### ***Mobil Investments, Inc. and Murphy Oil Corporation v Canada (2007)***<sup>106</sup>

Several oil companies — including Mobil Investments and Murphy Oil — developed and exploited the Hibernia and Terra Nova oil fields together. Both the federal government<sup>107</sup> and the province of Newfoundland and Labrador<sup>108</sup> enacted parallel acts to enable the group of companies to exploit those oilfields and simultaneously established the Canada-Newfoundland Offshore Petroleum Board to regulate the projects. In 2004, the board adopted its Guidelines for Research and Development Expenditures, which forced the companies to allocate a certain percentage of revenues on research and development inside the province, or otherwise pay that money into a consolidated provincial fund.<sup>109</sup> The companies' claim that the guidelines violate prohibitions against minimum standards of treatment and performance requirements under NAFTA articles 1105 and 1106 was accepted by the tribunal in their 2012 award.

An administrative remedy does exist under Canadian law to challenge the implementation of the guidelines by the board, and was actually brought in Newfoundland and Labrador Superior Court. The court rejected the administrative claim, holding that the board did have the authority to “establish reasonable levels of expenditure required to be made for R&D and education and training,”<sup>110</sup> a finding affirmed on appeal.<sup>111</sup> Thus, as a matter of national law, it was determined that the guidelines were indeed lawful, and while an administrative remedy did exist, it was denied by domestic courts. Nevertheless, since the remedy under domestic law would not recoup damages, the potential remedy was not equivalent to one under Chapter 11.

### ***Georgia Basin Holdings v Canada (2008)***<sup>112</sup>

Both the factual basis and the claim of Georgia Basin Holdings mirror *Merrill & Ring Forestry*. As in *Merrill*, the regime is in accordance with Canadian constitutional law, therefore cannot be challenged domestically. Since no domestic remedy exists, no equivalent remedy to damages under Chapter 11 exists under Canadian law. The claim has been inactive since a notice of intent in 2008.

### ***Shiell et al v Canada (2008)***<sup>113</sup>

The Shiells, US investors, brought a unique complaint. They alleged that their own lawyers, the Bank of Canada, various governmental agencies and the Shiells' trustees in bankruptcy had conspired to discriminate against them by “fraudulently forcing” their Canadian company into bankruptcy in contravention of Chapter 11. The Shiells attempted to defend themselves against this perceived conspiracy in domestic courts, launching more than seven lawsuits against various parties.<sup>114</sup> As these

104 *Supra* note 100 at ss 2, 3.

105 *Ibid* at s 6(6).

106 *Mobil Investments, Inc. and Murphy Oil Corp v Canada*, Decision on Liability and on Principles of Quantum (Public Version), (22 May 2012), (ICSID Additional Facility Rules), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

107 *Canada-Newfoundland Atlantic Accord Implementation Act*, SC 1987, c 3.

108 *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, R.S.N.L. 1990, c C-2.

109 *Guidelines for Research and Development Expenditures*, 2004, online: <[www.cnlopb.ca/pdfs/ibguide/guidelines\\_for\\_research\\_and\\_development\\_expenditures.pdf](http://www.cnlopb.ca/pdfs/ibguide/guidelines_for_research_and_development_expenditures.pdf)>.

110 *Hibernia Management and Development Co. v Canada-Newfoundland Offshore Petroleum Board*, [2007] NJ No 168.

111 *Hibernia Management and Development Co. v Canada-Newfoundland Offshore Petroleum Board* [2008] N.J. No. 310.

112 *Georgia Basin Holdings LLC v Canada*, Notice of Intent, (5 February 2008), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

113 *Janet Shiell et al v Canada*, History of the events, (14 October 2008), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

114 See for example *Brokerwood Products International (US), Inc. (Syndic de)*, [2007] QJ No 25490; *Brokerwood Products International (Canada), Inc. (Syndic de)*, [2007] JQ no 14949; and *Brokerwood Products c Litwin Boyadjian inc.*, [2006] QC no 11359.

were all unsuccessful, the claimants broadened the scope of the conspiracy to include the Quebec judiciary.<sup>115</sup> No reasonable claim exists under domestic law for such a unique case, but Canadian courts have several methods of disposing of cases taken by litigants like the Shiells.<sup>116</sup> No documents have been submitted since the initial notice of intent in 2008.

#### **David Bishop v Canada (2008)**<sup>117</sup>

The investor owned a company that sold all-inclusive hunting and fishing trips in Quebec. Following amendments to the Regulation Respecting Salmon Fishing Controlled Zones by the provincial government in 2005,<sup>118</sup> the investor experienced significant business loss, since his ability to acquire fishing rights was greatly reduced. In his notice of intent, the investor alleged that Quebec's modification of the regulations breached NAFTA articles 1102, 1103, 1104, 1105 and 1110. The claim has been inactive since 2008.

The investor would not have a remedy under domestic law. Since the investor is challenging the legislative scheme, the only claim he could bring is one of unconstitutionality. However, under Canadian law, it is settled that Quebec has jurisdiction over freshwater, anadromous and catadromous recreational fishing under section 92 of the Constitution Act, notwithstanding federal jurisdiction over oceans and fisheries under section 91(12).<sup>119</sup> Thus, there would be no way of challenging the amendment of the regulations, which would otherwise result in invalidation of unconstitutional clauses, but not damages.

#### **William Greiner and Malbaie River Outfitters v Government of Canada (2008)**<sup>120</sup>

This case follows the same facts, arguments and claims as *Bishop*, but with one small exception. The investors also had their authorizations of commerce revoked by the Quebec government, causing the investors to close down their business. Under domestic law, no remedy would be available. The authorization of commerce may freely be revoked by the Quebec government since it is a "matter of a local concern" under provincial jurisdiction as stipulated by section 92(16) of the Constitution Act. The Quebec Expropriation Act would not apply either, since compensation was expressly denied. This means there is no arguable remedy under domestic law, and the investors would have to either sell their lands or use them for some other purpose. The Chapter 11 claim was withdrawn in 2011.

#### **Clayton and Bilcon of Delaware, Inc. v Canada (2008)**<sup>121</sup>

Bilcon, a Delaware corporation under the Clayton Group umbrella, sought to open a quarry in the province of Nova Scotia. Based on representations made by Nova Scotia through official policy and by various members of government, Bilcon invested significant resources into developing the quarry, which was referred to a joint review panel for an environmental assessment. The panel's final report failed to fulfill statutory requirements by failing to recommend mitigation measures,<sup>122</sup> but nonetheless recommended rejecting the project — advice the government followed, resulting in Chapter 11 proceedings. In its 2015 award, the arbitration tribunal found Canada's actions violated the principles of non-discrimination and fair treatment, although damages have not yet been awarded.

Bilcon would have had two available claims under domestic law, the first of which would be under Canadian administrative law. Bilcon's case is interesting, since the argument that the environmental assessment failed to respect the process outlined under the applicable environmental statute has already been brought before the Supreme Court. In *MiningWatch Canada v Canada (Fisheries and Oceans)*, the Supreme Court wrote that while the responsible authority has much discretion under the Environmental Assessment Act, it must comply with the process outlined under the act.<sup>123</sup> This

115 *Supra* note 113 at 266–280, especially para 275.

116 See arts 51–56 New CCP and R 2.1 of the Ontario *Rules of Civil Procedure*, RRO 1990, Regulation 194.

117 *Bishop v Canada*, Notice of Intent, (17 October 2008), online: <www.naftaclaims.com>.

118 *Regulation Respecting Salmon Fishing Controlled Zones*, OC 810-2005, (2005) GOQ II, 3922.

119 *Supra* note 2 at ss 91, 92, and 109; property rights over fish that are not located on federal public lands belong to the provinces: *AG Canada v AGs for the Provinces of Ontario, Quebec and Nova Scotia* [1898] UKPC 29.

120 *William Greiner and Malbaie River Outfitters v Canada*, Notice of Intent, (16 September 2008), online: <www.naftaclaims.com>.

121 *Bilcon of Delaware, Inc. v Canada*, Award on Jurisdiction and Liability, (10 March 2015), (UNCITRAL), online: <www.naftaclaims.com>.

122 *Ibid*, para 546.

123 *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 [*MiningWatch Canada*].

argument could have been used to ground a domestic remedy for a new environmental assessment that could lead to approval of the quarry,<sup>124</sup> but not damages.

Thesecond domestic claim potentially available to Bilcon would have been negligent misrepresentation. A similar case against the government exists in *South Yukon Forest Corp. v Canada*, where the Federal Court of Appeal ruled against South Yukon, holding that “whatever assurances were given by the [government] were not capable of being relied upon.”<sup>125</sup> Such reasoning appears inapplicable, considering the tribunal’s finding that the investors reasonably relied on specific encouragements at the political and technical level. Of course, a domestic court could always come to the opposite conclusion. Unlike under administrative law, a claim for negligent misrepresentation would yield actual, but not contractual, damages. At least two potential remedies would, therefore, have been arguable under domestic law.

### ***Centurion Health Corp v Canada (2008)***<sup>126</sup>

This dispute involved the construction of a private health care facility by Centurion Health Corporation in British Columbia. Unfortunately, not many facts are available for this case. It appears during construction Centurion encountered numerous municipal hurdles (such as zoning requirements), and has alleged that these hurdles, combined with serious inconsistencies between the Canada Health Act and Canadian provincial health care programs, breached articles 1102 (national treatment), 1103 (MFN), 1105 (minimum standards) and 1110 (expropriation). The tribunal terminated proceedings in 2010 after Centurion failed to pay the required deposits.<sup>127</sup>

On the facts, the only potential claim available to Centurion would be under administrative law. Its claim against “serious inconsistencies between the Canada Health Act<sup>128</sup> and provincial health care programs” would be groundless domestically, since the act merely stipulates conditions that must be satisfied by provincial health care programs for eligibility for federal transfer payments. These “transfer payments” are used by the federal government to create nationwide standards in areas of provincial competence, such as health care,<sup>129</sup> by encouraging provinces to adopt federal guidelines in exchange for funding.<sup>130</sup> Judicial review by tribunal or court would be available to cover the alleged “legal hurdles” suffered by the investor, although there are not enough facts to be able to determine under which tribunal and which statute those complaints could be brought. Nonetheless, since the administrative remedy would not result in damages, there is no equivalent remedy to a Chapter 11 under Canadian law.

### ***Dow AgroSciences LLC v Government of Canada (2008)***<sup>131</sup>

In 2006, the Quebec Pesticides Management Code came into force and banned the use of pesticides containing the chemical 2,4-D.<sup>132</sup> Dow AgroSciences, a Delaware corporation that owned Dow AgroSciences Canada, Inc., produced and sold lawn care products that included 2,4-D. In light of the code’s ban on Dow’s products, Dow brought a Chapter 11 claim alleging that the Quebec government imposed the ban despite knowing that 2,4-D did not pose any health or environmental concerns, and in doing so breached NAFTA articles 1105 (minimum standards) and 1110 (expropriation). The claim was settled and published by the arbitral tribunal in 2011, which offered no compensation but stated that the Government of Quebec agreed that products containing 2,4-D did not pose any unacceptable risks if instructions on the packaging were properly followed.

Like most cases challenging legislation, the principle of parliamentary sovereignty restricts Dow’s domestic remedy to invalidating the Pesticides Management Code. In the circumstances, a constitutional claim against the legislation had no reasonable prospect of success. In Canada, environmental legislation such as the code does not fall under a general “environmental” head of

124 *Federal Court Act*, *supra* note 11 s 18.1(3)(a). A do-over was ordered in *MiningWatch Canada*, but it was overruled by the Supreme Court since MiningWatch had no personal interest in the claim and the assessment was not capricious or arbitrary. Based on the tribunal’s findings, neither of those factors are present in Bilcon’s case.

125 *South Yukon Forest Corp. v Canada*, 2012 FCA 165.

126 *Centurion Health Corp v Canada*, Revised Statement of Claim, 2 February 2009, (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

127 *Centurion Health Corp v Canada*, Order and Award, 2 August 2010, (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

128 *Canada Health Act*, RSC 1985, c C-6.

129 *Constitution Act supra* note 2 s 92(7).

130 See the Constitutional Law Group, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery Publications, 2010) at ch 12.

131 *Dow AgroSciences LLC v Canada*, Notice of Arbitration, 31 March 2009, (UNCITRAL) online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

132 *Pesticides Management Code*, OC 319-2006, c P-9, r 1.

power, since there is no specifically enumerated power over the environment in the Constitution Act. Instead, federal and provincial governments have concurrent legislation over the environment, and may pass any environmental law so long as it falls under another enumerated head of power, such as over fisheries or natural resources.<sup>133</sup> In this case, the regulation of pesticides for use on lawns within Quebec likely falls under provincial jurisdiction over either property and civil rights (section 92(13) of the Constitution Act) or matters of local concern (section 92(16)). Once again, it must be stressed that even in the hypothetical scenario that a constitutional challenge succeeds, constitutional litigation does not result in damages.

### **Lacich v Canada (2009)**<sup>134</sup>

Two American investors, Christopher and Nancy Lacich, brought a Chapter 11 claim against Canada for having reformed income trusts, despite alleged representations not to do so. The notice of intent was submitted in April 2009, but was quickly withdrawn. Translated into Canadian domestic law, the investors argued that Canada owed them a duty of care not to reform income trusts. Following the test laid out in *Cooper v Hobart*, there are clear policy reasons, a key element of the Anns-Cooper Test in determining the existence of a duty of care,<sup>135</sup> why such a duty would not exist. Indeed, it is widely known in Canada that the reform was motivated by corporations using income trusts as tax avoidance vehicles, thereby depleting one of Canada's most important tax bases.<sup>136</sup> This, combined with the holding in *Cooper* that government regulators do not owe a general duty of care to investors, favours a finding against the existence of a duty of care.<sup>137</sup> Moreover, any constitutional claim against the legislation is cut short by section 91(3) of the Constitution Act, which allows federal Parliament to raise money "by any mode or system of taxation." Thus, there would be no domestic claim under Canadian law.

### **Gottlieb Investors Group v Canada (2007)**<sup>138</sup>

*Gottlieb* mirrors *Lacich* in everything, from facts to the alleged breaches of Chapter 11. Indeed, the *Gottlieb* notice of intent is mostly a carbon copy of *Lacich*'s. A domestic claim does not exist under Canadian law for the same reasons as cited in *Lacich*. *Gottlieb* has been inactive since April 2008, and only a notice of intent has been filed.

### **AbitibiBowater, Inc. v Canada (2009)**<sup>139</sup>

On December 16, 2008, the provincial legislature of Newfoundland and Labrador passed the Abitibi-Consolidated Rights and Assets Act, which expropriated most of the assets owned by AbitibiBowater in Newfoundland and Labrador without compensation.<sup>140</sup> On February 25, 2010, AbitibiBowater served a notice of arbitration and statement of claim on Canada, claiming that the expropriation breached NAFTA articles 1102 (national treatment), 1103 (MFN), 1105 (minimum standard of treatment) and 1110 (expropriation). Ultimately, Canada settled for CDN\$130 million and the settlement was published on December 15, 2010, pursuant to UNCITRAL rules.

No claim with a reasonable chance of success exists under Canadian law. Simply put, Canada can expropriate without compensation at either the federal or provincial level. Justice John C. Major had the following to say about expropriation in *Authorson v Canada (Attorney General)*: "The government expropriation of property without compensation is discouraged by our common law tradition, but it is allowed when Parliament uses clear and unambiguous language to do so" (emphasis added).<sup>141</sup>

133 *Friends of Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para 70; see also *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 where the SCC held that pesticide regulation fell under provincial and municipal jurisdiction.

134 *Lacich v Canada*, Notice of Intent (2 April 2009), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

135 *Anns v Merton London Borough Council* [1978] AC 728; *Cooper v Hobart*, *supra* note 34.

136 Robert Yalden et al, *Business Organizations: Principles, Policies, and Practice* (Toronto: Emond Montgomery Publications, 2008) at 1172–73.

137 *Cooper v Hobart*, *supra* note 34.

138 *Gottlieb Investments v Canada*, Notice of Intent (30 October 2007), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/gottlieb-01.pdf](http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/gottlieb-01.pdf)>.

139 *AbitibiBowater, Inc. v Canada*, Consent Award, 15 December 2010, (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

140 *Abitibi-Consolidated Rights and Assets Act*, SNL 2008, c. A-1.01.

141 *Authorson v Canada*, [2003] SCJ No 40 at para 14 [*Authorson*]. The Supreme Court examined whether compensation is a requirement for expropriation under Canadian constitutional law. The answer was no.

Unlike the constitutions of other countries, the Canadian Charter of Rights and Freedoms specifically leaves out any protection for property rights.<sup>142</sup> Unfortunately for AbitibiBowater, the provincial legislature was very clear that the expropriation was without compensation. Thus, it is perfectly legal under Canadian law to expropriate the property of a foreign national without compensation, so long as the legislature does so using clear and unambiguous language, despite this falling short of the minimum requirement of compensation under customary international law captured by NAFTA article 1110.<sup>143</sup> There is no remedy available to AbitibiBowater under Canadian law — there is simply no domestic protection equivalent to NAFTA article 1110.

### **John R. Andre v Canada (2010)**<sup>144</sup>

John R. Andre, a US national, owned two businesses that sold caribou hunting packages in the Northwest Territories. Between 2007 and 2010, the legislature of the Northwest Territories amended the Big Game Hunting Regulations to prohibit the hunting of Bathurst caribou (to prevent their extinction) in the region where the investor owned significant hunting quotas.<sup>145</sup> The investor brought a notice of intent challenging the revocation of his quotas, arguing that the revocation of the permits amounted to expropriation under NAFTA article 1110. Only the notice of intent has been filed thus far, but the case is still pending. No domestic equivalent to a NAFTA claim in damages would appear to exist under Canadian law. Since hunting is a provincial matter,<sup>146</sup> the only remedy would appear to be judicial review. In fact, several applications for judicial review had been submitted to the Northwest Territories Superior Court, but none proved successful.<sup>147</sup> Under Canadian law, governments enjoy considerable discretion concerning the conservation of living natural resources, and it is quite likely that an arbitral tribunal would reach a similar conclusion. Moreover, no recourse is available under the Northwest Territories' Expropriation Act, since compensation was explicitly denied.<sup>148</sup>

### **Detroit International Bridge Company v Canada (2010)**<sup>149</sup>

The Detroit International Bridge Company, along with its Canadian subsidiary (CTC), has owned and operated the Detroit-Windsor Ambassador Bridge for almost 90 years. In 2011, the company submitted a notice of arbitration contesting various actions taken by the Government of Canada, notably the decision to build another bridge a few miles away from the Ambassador and the construction of a new highway that will connect only to the new, government-owned bridge — but not to the Ambassador. The investor claims that this breached NAFTA articles 1102 (national treatment), 1103 (MFN) and 1105 (minimum standards). The dispute was dismissed in 2015 by virtue of the Detroit International Bridge Company seeking relief in US court, thereby depriving the tribunal of jurisdiction under article 1121.

Interestingly, most of the remedies petitioned by the company would be capable of resolution by Canadian court. Indeed, in its January 31, 2013, statement of claim, the investor bases its Chapter 11 claim on statutory and contractual rights under Canadian law: "As a result of the Special Agreement and Claimant's acceptance of the offer contained therein, Claimant acquired certain [Canadian] statutory, contractual, treaty, and property rights, including the perpetual right to own, operate, maintain, and charge tolls on the Ambassador Bridge."<sup>150</sup>

The company is therefore claiming that the disregard of its rights under Canadian law by the Government of Canada constituted unfair treatment. Indeed, its litigation in Washington, DC, which proceeded on the same cause of action, sought several declaratory judgments that it has contractual and statutory rights under Canadian law that have been violated.<sup>151</sup> Of course, such a claim against

142 The Canadian position can be seen in *Quebec (AG) v Laroche*, 2002 SCC 72. Contrast this with US constitutional amendment V; *Hogg, supra* note 68 at 47–10.

143 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Alphen aan den Rijn: Kluwer Law International, 2009) at 322.

144 *John Andre v Canada*, Notice of Intent (19 March 2010), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

145 *Big Game Hunting Regulations*, NWT R 019-92.

146 *Constitution Act, supra* note 2 at 92(16).

147 Several Aboriginal band claims sought to enforce a duty to consult, which was allowed: *Enge v Mandeville*, [2013] 4 CLNR 50.

148 *Authorson, supra* note 142 at para 14.

149 *Detroit International Bridge Company v Canada*, Award on Jurisdiction, 2 April 2015, (UNCITRAL), online: <[www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/Detroit-Bridge.aspx?lang=eng](http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/Detroit-Bridge.aspx?lang=eng)>.

150 *Detroit International Bridge Company v Canada*, Statement of Claim, 31 January 2013, para 49, online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

151 *Supra* note 150 at para 331 of the Award.

Canada could be more fully resolved by Canadian courts. This hypothetical claim, if successful, could result in damages equivalent to those available under Chapter 11.

### **St. Marys VNCA v Canada (2011)**<sup>152</sup>

This dispute concerned the building of a quarry in Hamilton, Ontario. St. Marys Cement (SMC), an Ontario corporation, purchased land for a quarry, only to have the minister of municipal affairs and housing deny the project by changing the zoning to residential. Thereafter, Votorantim Group Brazil (SMC's parent) set up St. Marys VNCA (SMVNCA), a Delaware corporation, and transferred ownership of SMC. The investor argued that the zoning was changed to directly benefit politicians and claimed this breached national treatment, MFN, international standards of treatment and expropriation under Chapter 11. Canada contested SMVNCA's claim, arguing that the zoning decision was undertaken based on legitimate concerns and was otherwise at the minister's discretion under the Planning Act.<sup>153</sup> SMVNCA settled in 2013 to drop the claim, admitting that SMVNCA was a shell corporation set up to access NAFTA.<sup>154</sup>

SMC would have had a claim under administrative law, although only to review the zoning decision. SMC could appeal the decision under the mechanism provided for under Ontario's Planning Act, with the Ontario Municipal Board being the specialized tribunal.<sup>155</sup> In fact, it appears that SMC did apply to the board for review.<sup>156</sup> SMC then decided to drop its case for reasons that are not publicly available, although the lack of damages and the inherent difficulty in challenging a purely discretionary measure may have been instrumental.<sup>157</sup> Regardless of speculation, there would be no domestic remedy for SMC to recover damages following the minister's rezoning and any potential administrative challenge does not appear arguable under domestic law.

### **Mesa Power Group LLC v Canada (2011)**<sup>158</sup>

This case began with the introduction of Ontario's Feed-in Tariff (FIT) program in 2009 through the Green Energy Act.<sup>159</sup> Several of Mesa's subsidiaries wanted to build wind farms in Southwestern Ontario and made bids to determine whether Ontario would award them the FIT contract. The contracts went to Mesa's competitors, causing Mesa to issue a notice of intent to Canada for Chapter 11 proceedings, challenging the requirements and the administration of the FIT program, as well as Ontario's "arbitrary" amending of the FIT program. Indeed, Mesa claims that the regime, plus alleged preferential treatment of foreign and Canadian companies, breached articles 1102 (national treatment), 1103 (MFN), 1104 (fair and equitable treatment), 1105 (minimum standards) and 1106 (performance requirements). The dispute is currently in the final hearings stage.<sup>160</sup>

While no domestic claim for damages exists, Mesa could have sought judicial review of the amendment process and the administration of the regime. In fact, several other disgruntled industry participants who were not awarded contracts did institute proceedings for judicial review in *SkyPower CL 1 LP et al v Minister of Energy* to challenge the amendments of the FIT regime, only to have the divisional court rule in Ontario's favour. The court stated, "while it may seem unfair when rules are changed in the middle of a game, that is the nature of the game when one is dealing with government programs."<sup>161</sup> The court also addressed the administrative procedure, which it found to be fair.<sup>162</sup> The legislation itself was accepted as being *intra vires* the Ontario legislature, since section 92A(1)(c) of the Constitution Act grants provinces jurisdiction over the generation and production of electrical

152 *St Mary's VNCA, LLC v Canada*, Notice of Arbitration, 14 September 2011, online: <[www.naftaclaims.com](http://www.naftaclaims.com)> [*St Mary's VNCA*].

153 *Planning Act*, RSO 1990, c P-13 s 47(1).

154 *St Mary's VNCA*, *supra* note 153, Consent Award, 29 March 2013, (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

155 *Planning Act*, *supra* note 154; *Ontario Municipal Board Act*, RSO 1990 c O 28.

156 *St. Mary's Cement, Inc. (Canada) v Hamilton (City)*, [2011] O.M.B.D. No. 323. The only available documents are provisional orders since SMC thereafter dropped its case.

157 *Dunsmuir v New Brunswick*, 2008 SCC 9.

158 *Mesa Power Group LLC v Canada*, Investor's Memorial, 20 November 2013, (UNCITRAL), online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

159 *Ontario Green Energy Act*, SO 2009, c 12.

160 The parties were invited in the spring of 2016 to make submissions based on *Bilcon*. While at the time of the writing of this paper the dispute was ongoing, since then the tribunal issued its award dismissing the claim. See *Mesa Power Group LLC v Canada, Award*, Award, 24 March 2016, (UNCITRAL), online: <[www.pccases.com/web/view/51](http://www.pccases.com/web/view/51)>.

161 *SkyPower CL 1 LP et al v Minister of Energy*, [2012] OJ No 4458 at para 84.

162 *Ibid* at paras 62–67.

energy.<sup>163</sup> While no equivalent remedy to a Chapter 11 claim exists under Canadian law, *Skypower* shows that an administrative claim was indeed available to Mesa.

### ***Lone Pine Resources, Inc. v Canada (2012)***<sup>164</sup>

The investor, Lone Pine Resources, Inc., brought a complaint against the alleged expropriation of several oil exploration rights it owned under the St. Lawrence River by Quebec. After having acquired significant rights to exploit shale gas under the St. Lawrence throughout the mid- to late 2000s, Quebec passed Bill 18, An Act to Limit Oil and Gas Activities, that prohibited the issuance of mining rights under the St. Lawrence and revoked any existing rights without compensation.<sup>165</sup> The investor claims this revocation amounts to unlawful expropriation prohibited by NAFTA article 1110, and that it violates the minimum standard of treatment protected under article 1105. The claim is currently in the memorial phase.

This claim is ongoing, but once again, broad powers to expropriate in Canada prevent the existence of a domestic claim against expropriation. Despite mining rights being susceptible to the general regime of expropriation,<sup>166</sup> the clear and unambiguous denial of compensation under section 5 of Bill 18 limits the general rule that all expropriation will be compensated.<sup>167</sup> Thus, since compensation cannot be claimed for the expropriation under Canadian law, there would be no domestic remedy for expropriation.

### ***Windstream Energy LLC v Canada (2012)***<sup>168</sup>

Windstream Energy LLC is a Delaware corporation that wanted to create an offshore wind farm in Ontario through its subsidiary. In 2010, Windstream was awarded a lucrative FIT contract through which Ontario would purchase electricity generated by the wind farm. However, in 2011, Ontario declared a moratorium on offshore wind farms, thereby allegedly effectively cancelling Windstream's project in order to save CDN\$1.3–2.1 billion in energy costs. Despite Ontario having promised that the project was merely frozen and that it would ensure Windstream's contractual rights were respected, Windstream argues that this did not happen. Instead, the investor alleges that Ontario did everything it could to ensure that the project became worthless by delaying it to the point where Ontario could exercise its contractual right to terminate the project. Windstream claims that this breached articles 1102 (national treatment), 1103 (MFN), 1105 (minimum standards) and 1110 (expropriation). The dispute is currently ongoing.

Recent developments in Canadian contract law have made it such that Windstream does have an arguable domestic remedy. A claim for breach of contract for lack of good faith has been recognized for several years under Quebec civil law,<sup>169</sup> but has consistently been rebuffed under Anglo-Canadian common law, which would apply in this case.<sup>170</sup> This changed in 2014 with *Bhasin v Hrynew*, when the Supreme Court clarified the duty of good faith in the common law:

The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. [...] it does not require acting to serve those interests in all cases. *It merely requires that a party not seek to undermine those interests in bad faith* [emphasis added].<sup>171</sup>

Windstream is effectively arguing that the Government of Ontario seeks to delay the contract by creating a *force majeure* event (the moratorium) that would allow it to exercise its right to terminate the contract solely because it realized it is paying too much for electricity. Such an allegation could arguably ground a claim for bad faith that Ontario has sought to undermine Windstream's legitimate

163 *Constitution Act*, *supra* note 2 at s 92A(1)(c).

164 *Lone Pine Resources, Inc. v Canada*, Claimant's Memorial, 10 April 2015, (UNCITRAL), online: <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=UNCT/15/2&tab=DOC>>.

165 *An Act to Limit Oil and Gas Activities*, 2011 Bill 18, c 13 s 1.

166 *Colombie-Britannique c Tener*, [1985] 1 RCS 533.

167 *Authorson*, *supra* note 142 at para 14.

168 *Windstream Energy LLC v Canada*, Claimant's Memorial, 19 August 2014, (UNCITRAL), online: <[www.pccases.com/web/view/36](http://www.pccases.com/web/view/36)>.

169 *National Bank of Canada v Soucisse*, [1981] SCJ No. 87.

170 *Bhasin v Hrynew*, 2014 SCC 71 at paras 33–39.

171 *Ibid* at para 65.

contractual interests. Whether a domestic court would agree is debatable, but a domestic claim certainly exists. More importantly, since the remedy would be contractual damages, it would be equivalent to a Chapter 11 remedy.

### ***Mercer International, Inc. v Canada (2012)***<sup>172</sup>

This claim involves Mercer International, Inc., an American company, challenging the detrimental effects of British Columbia's regime of electricity rates on Mercer's Canadian subsidiary, Celgar. Mercer challenged British Columbia's selective supply of power to Celgar's pulp mill, arguing that the lack of a uniform power sale policy places Celgar at a disadvantage vis-à-vis its competitors. This has resulted in Celgar's inability to access cheaply generated power, which it claims breaches articles 1102 (national treatment), 1103 (MFN) and 1105 (minimum standard of treatment). The dispute is currently in the memorial phase.

Celgar tried several different avenues to have the provincial government address its concerns for access to cheap power. Attempted remedies included that set out through the statutory mechanism in the Utilities Commission Act, which empowers the Utilities Commission to review electrical rates to ensure that they are not unjust, unreasonable or discriminatory.<sup>173</sup> Celgar has experienced some judicial success, but it has not resulted in *similar* access to cheap power.<sup>174</sup> Repeated recourse to the administrative remedies set out under the Utilities Commission Act show that an administrative remedy does exist, but in practice this remedy has been ineffective, despite several favourable rulings.<sup>175</sup> Considering that the domestic remedy is limited to rectifying the situation and does not provide damages, Canadian law does not, in practice, afford Mercer an equivalent remedy to Chapter 11.

### ***Eli Lilly and Company v Canada (2013)***<sup>176</sup>

Eli Lilly is one of the largest global pharmaceutical companies, with two investments that are subject to the dispute. Zyprexa and Straterra were patented in Canada in the 1990s. After lengthy court battles with generic pharma companies, Lilly's Zyprexa patent was invalidated by the Federal Court in 2011<sup>177</sup> and Straterra in 2010.<sup>178</sup> The Federal Court of Appeal upheld both judgments,<sup>179</sup> and leave to appeal was denied.<sup>180</sup> Lilly contests judicial developments under Canadian patent law that grounded the Federal Court's decisions to invalidate its patents<sup>181</sup> as constituting a breach of articles 1110 (expropriation) and 1105(1) (fair and equitable treatment). The dispute is ongoing, although it is notable that Eli Lilly is contesting judicial developments of Canadian patent law, not the laws themselves.

The lack of domestic remedies for Lilly is straightforward. Quite simply, Eli Lilly is challenging Canadian patent case law as expressed through the two Federal Court of Canada decisions that invalidated the Zyprexa and Straterra patents. Both decisions were affirmed on appeal, and both decisions were denied leave to the Supreme Court of Canada. Domestic courts have indisputably ruled against Lilly and, since all appeals have been exhausted, there is no other possible recourse under Canadian law to challenge judicial pronouncements. Again, Lilly is not challenging the decisions themselves, but rather the development of Canadian patent law that grounded those judgments. Apart from appeal — a remedy without damages that has already been exhausted — there is no other domestic remedy. Therefore, there is no domestic equivalent to a Chapter 11 claim available to Lilly.

172 *Mercer International, Inc. v Canada*, Investor's Memorial, 16 May 2014, (ICSID Additional Facility Rules), online: <www.naftaclaims.com>.

173 *Utilities Commission Act*, RSBC 1996, c 473 s 58.

174 See for example *Fortis BC – Application for Approval of Stepped and Stand-By Rates Decision Stage II* (24 March 2015), online: Utilities Commission <www.bcuc.com>.

175 *Ibid.*

176 *Eli Lilly v Canada*, Claimant's Memorial, 29 September 2014, (UNCITRAL), online: <www.naftaclaims.com>.

177 *Eli Lilly Canada, Inc., v Novopharm Ltd.*, 2011 FC 1288.

178 *Novopharm Ltd. v Eli Lilly & Co.*, 2010 FC 915.

179 The Zyprexa appeal was dismissed in one sentence in *Eli Lilly Canada, Inc. v Novopharm Ltd.*, 2012 FCA 232 (C-147), while Straterra was dealt with in *Eli Lilly & Co. v Teva Canada Ltd.*, 2011 FCA 220.

180 Supreme Court of Canada, Case No. 35067; Supreme Court of Canada Docket No. 34396.

181 The complaint focused on the doctrine of promised utility. See *supra* note 177 for the complaint proper, and notes 178 and 179 for the Canadian cases.

***JM Longyear v Canada (2014)***<sup>182</sup>

The investor, a Michigan corporation, purchased significant forestry land in Ontario through its subsidiary, and contests the tax treatment of that forestry land. Ontario's "Managed Forest Plan" allows woodlots that satisfy certain conditions to be taxed at 25 percent of the normal tax rate. To qualify, article 9(2) of Ontario Regulation 282/98 under the Assessment Act stipulates that the land must be owned, directly or indirectly, by Canadian citizens or permanent residents.<sup>183</sup> JM Longyear argues that but for its status as an American corporation it would have qualified for the beneficial tax rate under the plan. The company argues that its exclusion from the program breaches Chapter 11 articles 1102 (national treatment) and 1103 (MFN). This dispute is still in the preliminary phase.

There is no domestic recourse available to JM Longyear. In this case, the investor is challenging the requirement that only corporations owned by Canadian citizens or permanent residents qualify for the special tax regime. In order to do so, JM Longyear must bring an action declaring the legislation unlawful for some reason, thereby having to resort to a Constitutional claim. Different treatment based on residency is the very foundation of Canadian tax law, and is most assuredly not unconstitutional. Multiple provisions in Canada's Taxation Act have similar ownership requirements to Regulation 282/98, such as the taxation of dividends.<sup>184</sup> Thus, there would be no viable ground on which to contest article 9(2) of Ontario Regulation 282/98, but even a successful challenge would not result in damages. Moreover, claims against taxation measures are generally excluded from NAFTA Chapter 11. This exclusion is a policy choice found in all bilateral investment agreements and virtually all trade agreements, but tax measures which can be proven to have been used as a means of expropriation will still fall afoul of prohibitions on expropriation.

**CONCLUSION, SUMMARY AND FINAL COMMENTS**

This paper examines whether domestic claims equivalent to remedies available under NAFTA's Chapter 11 exist under Canadian law and gives rise to a range of conclusions. Some of these are narrow, while others have a broader policy character.

Following an overview of all Chapter 11 arbitral claims submitted against Canada, it is useful to state the quantitative results. Out of the 35 disputes submitted to arbitration, two could have brought domestic claims for remedies equivalent to damages under Chapter 11, while another three could have brought domestic claims for partial damages. In addition, two cases (including one which would also have a remedy for damages) have arguable constitutional grounds to invalidate the regime challenged by the Chapter 11 dispute. A further 11 cases, including three that have arguable claims for partial damages, would have administrative remedies. Here it is important to note that the standard for judicial review in Canada is one of "reasonableness" and not "correctness," thus the effectiveness of judicial review is quite limited.<sup>185</sup> Even so, constitutional and administrative claims may provide important behavioural remedies distinct from damages, and in some cases this may be more appealing to foreign investors. Twenty-one out of 35 disputes would have no arguable remedy under Canadian law.

However, it must be noted that not all 35 NAFTA claims have been successful or will be successful under ISA. For comparison, Canada has lost or settled six of the 35 claims to date. As seen above, most of the 35 claims are either still before the tribunal or inactive. The availability of relief under these cases is speculative, thus this analysis is limited to commenting on whether a similar, but arguable, claim could have been made under Canadian law. While 21 out of 35 cases would have no arguable remedy under Canadian law, this has no bearing on whether these cases may have an arguable claim under Chapter 11. Whether these claims would succeed under NAFTA is a separate question beyond the scope of this paper. Instead, the focus rests on whether disputes submitted to NAFTA could have been brought under Canadian law. In a majority of cases, the answer is no.

182 *J.M. Longyear v Canada*, Notice of Arbitration, 20 May 2014, (UNCITRAL) online: <[www.naftaclaims.com](http://www.naftaclaims.com)>.

183 Reg 282/98, s 9(2) 1.ii; *ibid* at para 14.

184 *Income Tax Act*, RSC 1985, c 1 (5th Supp), s 212.

185 *Dunsmuir*, *supra* note 157.

The conclusion based on the above findings is self-evident: Canadian law does not generally provide foreign investors with remedies equivalent to those provided for under Chapter 11. Indeed, only 8.6 percent of the Chapter 11 disputes would have an arguable remedy for damages equivalent to those under Chapter 11, while only a total of 17.2 percent of disputes would have an arguable case for any damages whatsoever, whether equivalent or partial. There are two primary reasons for these findings concerning remedies under Canadian law. First, both provincial and federal governments in Canada have broad powers to expropriate. Quite simply, if the government decides to expropriate without compensation, and makes this explicit in the expropriating act, it can do so. The second reason is a lack of constitutional protection for property rights, as well as the non-applicability of equality and anti-discrimination safeguards to corporations under section 15 of the Canadian Charter.<sup>186</sup> This, combined with the principle of parliamentary sovereignty, makes it such that legislative regimes challenged under Chapter 11 are perfectly valid under Canadian law unless they fall afoul of the separation of powers. Nevertheless, the analysis of Chapter 11 cases submitted against Canada indicates that in the great majority of cases there is no domestic remedy equivalent to one sought under Chapter 11.

This situation also raises questions of broader policy concerning the relationship of Canadian law to international law. It also raises significant questions relating to Canadian federalism, some of which were very briefly examined in the first section of this paper and examined in more depth elsewhere in this paper series.<sup>187</sup>

A first range of policy questions flowing from this paper relates to the original purpose of NAFTA Chapter 11 Part B. ISA was included in NAFTA, unlike the 1988 Canada-United States Free Trade Agreement, due to the addition of Mexico to the equation. Both Canadian and American governments judged it advisable to include ISA to deal with the perceived lack of effective remedies against discrimination in the existing Mexican legal system. Has the existence of Chapter 11 Part B dealt with these specific concerns or has it allowed foreign investors to raise a broader range of complaints? Arguably the latter, as there have been more actions against either Canada or the United States than against Mexico. Both Canadian and American governments have been surprised by the number of ISA claims against them under Chapter 11, and have probably not welcomed them. Both governments have had to answer public criticism of Chapter 11 Part B, and have had a multitude of responses.<sup>188</sup> These include amending certain aspects of the process where they could do so under Chapter 11, adding new elements limiting or refining ISA remedies in their respective model FIPA and BIT, adding new provisions to subsequent trade and investment agreements, granting greater control of proceedings, allowing for a broader right to issue interpretations of agreements, eliminating frivolous claims and detailing much more explicit exceptions to the application of the agreements.

The United States has not yet lost a case, but this paper shows that Canada has lost or conceded a small but significant number of claims. What policy concerns does this raise? One comment made by critics is that Chapter 11 Part B has allowed the creation of property and contract protection that does not otherwise exist in Canadian law and that was explicitly rejected in the constitutional amendment process leading to the adoption of the Canadian Charter of Rights and Freedoms in 1982. For many outside Canada, this is surprising. European citizens generally enjoy property guarantees under the European Convention on Human Rights and broad property protections under EU law. The UN Covenant on Civil and Political Rights contains a guarantee of property rights. Do foreign investment protection agreements in fact create rights for foreign investors that otherwise do not exist in Canadian law? Interestingly, the US model BIT includes a proviso that it does not give foreign investors more rights than they would have under domestic law. This is not language that Canada has adopted and this paper shows that foreign investors do in fact enjoy remedies under NAFTA Chapter 11 Part B that they would not enjoy in its absence. Should Canadians be concerned that their government has conceded special rights to foreign investors under Chapter 11, or should they be more concerned that their Constitution does not assure them the guarantees of property and

186 “Individuals” under section 15 of the Charter references natural persons.

187 See Armand de Mestral, *Investor-State Arbitration between Developed Democratic Countries* (2015), Centre for International Governance Innovation (CIGI) Investor-State Arbitration Series No 1, and David Scheiderman, *Listening to Investors: Audi Alteram Partem and the Future of International Investment Law* (forthcoming 2016), CIGI Investor-State Arbitration Series.

188 See Armand de Mestral, *The Impact of the NAFTA Experience on Canadian Policy Concerning Investor-State Arbitration* (forthcoming 2016), CIGI Investor-State Arbitration Series.

contract enjoyed in the United States and Europe? Expropriation without compensation in violation of international law, which was possible under Canadian law in the *AbitibiBowater* case, would not be possible in Europe or the United States.

Another major policy question posed is whether ISA gives the foreign investor a second remedy, even when they have been unsuccessful before the courts. Although this question goes beyond the formal scope of this paper, it is worth addressing it briefly. Perhaps the most notable case is that of *Dow Chemicals*, which made an unsuccessful arbitral claim against Canada after the *Spraytech* decision, which upheld a municipal ban on a herbicide manufactured by Dow, by the Supreme Court of Canada.<sup>189</sup> In formal terms, the answer is that an arbitral claim does not deal with the same legal issues as those before the courts. Taking *Dow Chemicals* as an example, the *Spraytech* case involved the right of a province to ban a herbicide in the province on constitutional grounds, while the arbitral claim dealt with the claim of denial of fair and equitable treatment under NAFTA Chapter 11, when some provinces banned its herbicide while others did not. This claim was no more successful than the claim before the courts. A second answer to the argument that ISA provides another chance to make the same claim is that NAFTA and similar treaties specifically prohibit maintaining both a claim before the courts and in arbitration. The court claim must be abandoned for the arbitral claim to proceed, as evidenced by the decision to deny jurisdiction in the *Detroit International Bridge Company* arbitral claim. It remains true nevertheless that it is sometimes difficult for anyone but a lawyer to distinguish between claims before the courts and the claim in arbitration. A notable example of this is the *Eli Lilly and Company* claim, in which the company is alleging that the legal doctrine invoked by the Federal Court of Appeal to invalidate patents of the company constitutes expropriation and a denial of fair and equitable treatment under NAFTA. The new powers to interpret treaty provisions that have been written into the Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership, and the power to challenge legally unfounded claims, may remove some of the ambiguity surrounding this matter for future claims under those treaties.

This paper reveals that there exists considerable disparity between Canadian law and the remedies available under NAFTA Chapter 11, as well as within other foreign investment protection agreements. Does this suggest that Canada has failed to implement NAFTA Chapter 11 properly at the federal or provincial levels, or that the federal government has assumed obligations that only the provinces can implement? To the extent that elements of Chapter 11 (such as the provisions on direct expropriation) reflect customary international law, there is no issue. Similarly, to the extent that investment commitments mirror WTO law commitments already made at the federal and provincial levels, there is no issue. Ultimately, Chapter 11 is implemented by the commitment of the federal government to hold itself out as willing to arbitrate any claim in damages against Canada for a violation of the treaty, whether arising from federal or provincial action. This is not legislative implementation, but it is nevertheless a perfectly valid means of implementation.

This being said, there remain questions as to whether, in assuming the obligation to guarantee fixed standards of treatment of foreign investments or to avoid certain forms of performance requirements (over and above those proscribed by the WTO Trade-Related Investment Measures Agreement), the federal government has not submitted the provinces to obligations to which they have not formally committed or from which they have not been explicitly exempted by grandfathering provisions. These are very similar to the questions that arise with respect to the norms of the WTO or regional trade agreements, and can only be answered with respect to specific situations. Interestingly, this debate on Canadian federalism is very similar to that currently under discussion in the European Union as to whether the competence over foreign direct investment, given to the European Union in 2009, covers only the authority to admit foreign investment or all the standards of treatment in member states set out in bilateral investment agreements.

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189 See *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40.

# CIGI PUBLICATIONS

## ADVANCING POLICY IDEAS AND DEBATE

### The Investor-State Arbitration Project

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.



#### Investor-State Arbitration Between Developed Democratic Countries

*ISA Paper Series No. 1*

Armand De Mestral

Investor-state arbitration (ISA), by which a foreign investor is entitled to sue a state for damages resulting from the alleged violation of an applicable bilateral investment treaty or an investment chapter in a regional trade agreement, has come under scrutiny in many parts of the world. Criticisms in developed democracies have become sufficiently strong for it to be necessary to raise the question of whether recourse to ISA is appropriate in any form in developed democracies.

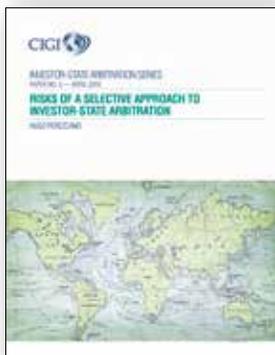


#### The European Union and Investor-State Dispute Settlement: From Investor-State Arbitration to a Permanent Investment Court

*ISA Paper Series No. 2*

August Reinisch

This paper analyzes in detail the development of the European Union's position toward the use of investor-state arbitration (ISA) as a means for settling investor-state disputes, in particular since the 2009 Treaty of Lisbon, and in light of growing public opposition in the European Union to the use of ISA.



#### Risks of a Selective Approach to Investor-State Arbitration

*ISA Paper Series No. 3*

Hugo Perezcano

This paper addresses some of the flaws in the arguments that have been advanced against investor-state arbitration (ISA). Excluding ISA from international investment agreements will not resolve any of the underlying problems, actual or perceived, the author argues. It is likely to intensify others, such as fragmentation of international investment law, and to fuel adverse reactions and political rhetoric from those countries upon which the system continues to be imposed. A better approach would be to work toward improving the system.

## ABOUT CIGI

The Centre for International Governance Innovation is an independent, non-partisan think tank on international governance. Led by experienced practitioners and distinguished academics, CIGI supports research, forms networks, advances policy debate and generates ideas for multilateral governance improvements. Conducting an active agenda of research, events and publications, CIGI's interdisciplinary work includes collaboration with policy, business and academic communities around the world.

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Le CIGI a été fondé en 2001 par Jim Balsillie, qui était alors co-chef de la direction de Research In Motion (BlackBerry). Il collabore avec de nombreux partenaires stratégiques et exprime sa reconnaissance du soutien reçu de ceux-ci, notamment de l'appui reçu du gouvernement du Canada et de celui du gouvernement de l'Ontario.

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