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NAFTA Chapter 11 Investor-State Disputes

(to October 1, 2010)

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Canadian Centre for Policy Alternatives

CLAIMS AGAINST **CANADA**

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
March 4, 1996	**Signa SA**	Mexican generic drug manufacturer claims that Canadian Patent Medicines' "Notice of Compliance" regulations deprived it of Canadian sales for its drug ciprofloxacin hydrochloride.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$CAD 50 million	Notice of intent on March 4, 1996. Arbitration never commenced. Notice withdrawn by investor.
April 14, 1997	**Ethyl Corporation**	U.S. chemical company challenges Canadian ban on import and inter-provincial trade of gasoline additive MMT, which auto-makers claim interferes with automobile on-board diagnostic systems. Manganese-based MMT is also a suspected neurotoxin.	Art 1102 (national treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$250 million	After preliminary tribunal judgments against Canada, Canadian government repealed the MMT ban, issued an apology to the company and settled out-of-court with Ethyl for $13 million.
July 22, 1998	**S.D. Myers Inc.**	U.S. waste disposal firm challenges temporary Canadian ban (Nov. 1995 to Feb. 1997) on export of toxic PCB wastes.	Art 1102 (national treatment) Art 1105 (minimum standards of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$20 million	Tribunal ruled that Canada violated NAFTA articles 1102 (national treatment) and 1105 (minimum standards of treatment). It awarded $5 million, plus interest in compensation. Canada applied to the federal court to set aside the tribunal's award. On Jan. 13, 2004 the court dismissed Canada's application.
Dec. 2, 1998	**Sun Belt Water Inc.**	U.S. water firm challenges British Columbia water protection legislation and moratorium on exports of bulk water from the province.	Art 1102 (national treatment) Art 1105 (minimum standards of treatment) Art 1110 (expropriation and compensation)	$10.5 billion	Canadian government asserts that the claim is invalid, while the investor maintains that the claim is still active.

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Dec. 24, 1998	**Pope & Talbot Inc.**	U.S. lumber company challenges lumber export quota system put in place by Canadian government to implement Canada-U.S. softwood lumber agreement.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$508 million	Tribunal ruled that Canada violated NAFTA Article 1105 (minimum standards of treatment). Canada was ordered to pay $460,000 in compensation plus interest and $20,000 in legal costs (totaling approximately $CAD 915,000).
Jan. 19, 2000	**United Parcel Service of America Inc.**	Multinational U.S. courier company alleges that Canada Post's limited monopoly over letter-mail and its public postal service infrastructure enable Canada Post to compete unfairly in express delivery. UPS also alleges that Canada Post enjoys other advantages denied to the investor (e.g. favourable customs treatment).	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1502(3) (monopolies and state enterprises) Art 1503(2) (state enterprises)	$160 million	On May 24, 2007 the tribunal, in a 2-1 decision, dismissed the investor's claims. One tribunal member dissented, in part. The Tribunal determined that key NAFTA rules concerning competition policy could not be invoked by an investor under Chapter 11 dispute procedures. It also ruled that certain activities of Canada Post were essentially arms-length from the Canadian government and therefore not subject to challenge by the investor. (Such activities could be scrutinized in a government-to-government dispute.) It also rejected claims that Canada Post unduly benefited from more favourable treatment.
Dec. 22, 2000	**Ketcham Investments Inc. & Tysa Investments Inc.**	U.S. lumber company challenges lumber export quota system put in place by Canadian government to implement Canada-U.S. softwood lumber agreement.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$30 million	Complaint withdrawn by investors in May 2001.
Sept. 7, 2001	**Trammel Crow Co.**	U.S. property management company alleges that Canada Post treated it unfairly in the outsourcing of certain real estate services.	Art 1105 (minimum standard of treatment)	$32 million	Complaint withdrawn by the investor in April 2002 after it reached an "out-of-court" settlement with Canada Post.

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Nov. 6, 2001	**Chemtura Corp. (formerly known as Crompton Corp.)**	U.S.-based agro-chemical company challenges the Canadian government ban on the sale and use of lindane, an agricultural pesticide. Lindane is a persistent neurotoxin and suspected carcinogen now banned in more than 50 countries worldwide. Following a 1998 decision by the U.S. Environmental Protection Agency to close the border to Canadian canola treated with lindane, Canada restricted, and later banned, the domestic use of lindane. Since 2004, Crompton's seed treatment business in North America has been owned by Bayer Crop Sciences, a subsidiary of the German multinational corporation, Bayer AG	Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$83 million	Chemtura filed its first notice of arbitration on Oct. 17, 2002 and a second on February 10, 2005. On August 2, 2010 the tribunal dismissed the investor's claims. Furthermore, the tribunal ordered the investor to pay the costs of the arbitration ($US 688,000) and to pay 50% of the Government of Canada's costs in defending the claim ($CAD 5.778 million).
Feb. 19, 2004	**Albert J. Connolly (Brownfields Holding)**	U.S. investor claims that actions by Ontario's Ministry of Northern Development and Mines resulted in the forfeiture of the investor's interest in a quarry site that was subsequently protected under Ontario's Living Legacy Program, a natural heritage protection program.	Art 1110 (expropriation and compensation)	Not available	Notice of intent received Feb. 26, 2004. Claim is inactive,
June 15, 2004	**Contractual Obligation Productions LLC**	U.S. animation production company challenges decision that it is ineligible for Canadian federal tax credits available only to production firms that employ Canadian citizens or residents. It is further alleged that Canadian immigration and work rules restrict U.S. citizens from working on Canadian film and television projects and are NAFTA-inconsistent.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$20 million	Notice of intent received June 15, 2004. Statement of claim submitted Jan. 31, 2005. Amended statement of claim submitted June 16, 2005. Claim is inactive.
July, 2005	**Peter Pesic**	U.S. investor claims that a Canadian government decision not to extend his temporary work visa impairs his investments in Canada.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment)	Not available	Notice of intent to submit a claim to arbitration received in July, 2005. Notice subsequently withdrawn by investor.
Feb. 28, 2006	**Great Lake Farms (U.S.A) and Carl Adams**	U.S. agribusiness challenges Canadian provincial and federal government restrictions on the export of milk. It also challenges requirements that milk producers in Ontario must obtain a quota authorized under Canada's supply-management system for dairy products.	Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation) Art 1502(3) (monopolies and state enterprises)	$78 million	Notice of intent to submit a claim to arbitration received on Feb. 28, 2006. Notice of arbitration received on June 5, 2006.

CLAIMS AGAINST CANADA

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Sept. 25, 2006	**Merrill and Ring Forestry, L.P.**	Washington-state forestry company alleges that Canadian federal and provincial regulations and policies restricting the export of unprocessed logs favour log processors in BC at Merrill and Ring's expense, expropriate its investment in BC timber lands, and violate minimum standards of treatment. Canadian log export controls are exempted from NAFTA obligations governing trade in goods (Annex 301.a.)	Art 1102 (national treatment) Art 1103 (most-favoured nation treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$25 million	Notice of intent to submit a claim to arbitration received on Sept. 25, 2006. Final award issued on March 31, 2010. The panel dismissed all the investor's claims and ordered that the costs of the proceedings be split between the two parties. The tribunal members were divided on the appropriate benchmarks to be applied regarding Art. 1105, minimum standard of treatments, but agreed that, whichever benchmarks were applied, the investor had not proven minimum standards had been violated.
Oct. 12, 2006	**V. G. Gallo**	A Canadian company (Notre) proposed to develop a man-made lake located on a former open-pit mine in northern Ontario (Adams Lake) as a site for disposal of municipal waste from Toronto. In 2002, following the breakdown of negotiations between the company and the city of Toronto, Notre transferred the Adams Lake site to a numbered company, involving a U.S. citizen, V.G. Gallo. Subsequently, in June 2004, the newly elected Ontario provincial government enacted legislation preventing the controversial project from proceeding by banning the dumping of garbage in Adams Lake or any other Ontario lake. The U.S. investor claims that this measure, and others, were "tantamount to expropriation" without compensation and deprived it of the minimum standard of treatment under international law. The Ontario law provided for compensation of expenses incurred by investors related to the proposed project. Ontario came to terms with Notre on compensation, but the Gallo enterprise did not avail itself of compensation under the provincial law.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	CAD $105 million + investor's costs	Notice of intent to submit a claim to arbitration received on Oct. 12, 2006. Statement of claim submitted June 23, 2008. Canada's statement of defence submitted September 15, 2008. Investor's memorial submitted on March 1, 2010. Hearing on merits tentatively scheduled for early 2011. The tribunal process continues.

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Aug. 3, 2007	**Mobil Investments Canada, Inc. & Murphy Oil Corporation**	Mobil Investments is the U.S.-based holding company for the Exxon-Mobil group's investments in Canada. Exxon-Mobil, the world's largest oil and gas company, is a partner in the Hibernia and Terra Nova oil and gas fields off the coast of Newfoundland and Labrador. Murphy Oil Corporation is a U.S. oil and gas company also active in the Newfoundland offshore. The investors allege that Canadian guidelines stipulating that energy companies active in the offshore invest in research and development within Newfoundland and Labrador are NAFTA-inconsistent performance requirements. The claimants previously challenged these guidelines in the Canadian courts and lost. The investors contend that 2004 requirements that companies spend a fixed minimum amount on local research and development are more onerous than pre-existing local benefits agreements, which were expressly reserved from NAFTA by Canada. The investors also allege that the provincial R&D guidelines represented a "fundamental shift" in regulation that undermined the investors' "legitimate expectations", in violation of minimum standards of treatment under customary international law.	Art 1105 (minimum standard of treatment) Art 1106 (performance requirements)	CAD $65 million	Notice of intent to submit a claim to arbitration received on August 3, 2007. Investor's memorial submitted on August 3, 2009. Canada's counter-memorial submitted on December 1, 2009. The tribunal process continues.
October 30, 2007	**Gottlieb Investors Group**	U.S.-based private investors allege that changes in the tax treatment of energy income tax trusts constituted NAFTA-inconsistent discrimination against U.S.-based energy trusts; were equivalent to expropriation of their investment in energy income trusts; and violated minimum standards of treatment since the investors had relied on the Canadian Conservative government's promise not to change the rules governing income trusts.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$6.5 million +	Notice of intent received on October 30, 2007. NAFTA Article 2103(6) provides, in the case of an investor-state claim involving taxation measures, that the competent national authorities can agree that a taxation measure is not an expropriation. In April 2008, the competent Canadian and U.S. tax authorities determined that the taxation measures at issue in the Gottlieb claim were not an expropriation under NAFTA Article 1110. The investors may proceed with the remaining claims in their notice of intent.

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February 5, 2008	**Bilcon Inc.**	Bilcon Inc. a U.S. company, proposed to construct and operate a large quarry and marine terminal in southwestern Nova Scotia. The company intended to mine basalt, crush it into aggregate, and ship it through the Bay of Fundy to the U.S. eastern seaboard. In 2007, a joint federal-provincial environmental assessment panel recommended that the proposed project be rejected because of its significant adverse environmental impacts. Following the panel report, the NS and Canadian governments notified Bilcon that they would not approve the controversial project. The investor alleges that the administration of the environmental assessment review, along with various provincial and federal government measures, were discriminatory and/ or violated minimum standards of treatment.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment)	$188 million	Notice of intent received on February 5, 2008. Statement of claim submitted on January 30, 2009. Canada's statement of defence submitted on May 4, 2009. The tribunal process continues.
February 5, 2008	**Georgia Basin Holdings LLC**	Washington-state forestry company alleges that Canadian federal and provincial regulations and policies restricting the export of raw (i.e. unprocessed) logs favour log processors in BC at the investor's expense, expropriate its investment in BC timber lands, and violate minimum standards of treatment. The claimants' allegations are very similar to those at issue in the Merrill and Ring arbitration (see above), in which the tribunal dismissed all the investors' claims.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)		Notice of intent received on February 5, 2008. In late 2007, counsel for Merrill and Ring requested that Georgia Basin Holdings be added as a party in the Merrill and Ring arbitration, which had already commenced (see above). On January 31, 2008 the tribunal decided not to allow Georgia Basin Holdings to participate in that arbitration.
July 11, 2008	**Melvin J. Howard, Centurion Health Corporation**	U.S. investor alleges that its plans to establish private, fee-for-service health clinics in Vancouver, British Columbia and Calgary, Alberta were frustrated by various local, provincial and federal regulatory measures. The investor alleges that federal regulation, in particular the Canada Health Act which prohibits extra billing for publicly insured medical services, adversely affected its planned investments.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1502(3) (monopolies and state enterprises) Art 1503(2) (state enterprises)	$4.7 million +	Notice of intent received on July 11, 2008. Notice of arbitration submitted on January 5, 2008. Revised statement of claim submitted on February 2, 2009. In August 2010 the tribunal terminated the claim on the basis that the investor had not made a deposit required to cover its share of the initial arbitration costs.

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August 25, 2008	**Dow Agro Sciences LLC**	Dow Agro Sciences LLC is a wholly owned subsidiary of the U.S-based multinational corporation, Dow Chemical Company. Dow Agro Sciences manufactures 2, 4-D, an active ingredient in many commercial herbicides. In 2006, the Province of Quebec banned the use of certain chemical pesticides, including 2, 4-D, on lawns within the province. Several other provincial and municipal governments are considering, or have already enacted, similar bans on the use of pesticides for cosmetic lawn care purposes. The constitutional validity of such pesticide bans has been upheld by the Supreme Court of Canada. Dow Agro Sciences alleges that the ban is without scientific basis and was imposed without providing a meaningful opportunity for the company to demonstrate that its product is safe. Dow further alleges that the ban is "tantamount to expropriation."	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$2 million +	Notice of intent received on August 25, 2008. Notice of arbitration received on March 31, 2009.
September 16, 2008	**William Jay Greiner and Malbaie River Outfitters Inc.**	The investor, a U.S. citizen, owns and operates an outfitting business including a hunting and fishing lodge in the Gaspé region of Quebec. The investor alleges that conservation measures taken by the Quebec provincial government to reduce the number of salmon fishing licenses and to restrict access to certain salmon fishing areas were tantamount to expropriation, discriminated against the investor in favour of Canadian-owned fishing lodges, and violated minimum standards of treatment.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$5 million	Notice of intent received on September 16, 2008.
October 8, 2008	**Shiell Family**	U.S. family group of investors alleges that the Canadian courts and various Canadian government agencies treated them improperly during the bankruptcy proceedings of their Canadian firm.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Article 1109 (transfers) Art 1110 (expropriation and compensation)	$21.3 million	Notice of intent received on October 8, 2008.

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October 17, 2008	**David Bishop**	The investor, a U.S. citizen, owns and operates an outfitting business in Quebec. The investor alleges that conservation measures taken by the Quebec provincial government to reduce the number of salmon fishing licenses and to restrict access to certain salmon fishing areas were tantamount to expropriation, discriminated against the investor in favour of Canadian-owned fishing lodges, and violated minimum standards of treatment.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$1 million	Notice of intent received on October 17, 2008.
April 2, 2009	**Christopher and Nancy Lacich**	U.S. private investors allege that changes in the tax treatment of energy income tax trusts were discriminatory; equivalent to expropriation of their investment in energy income trusts; and violated minimum standards of treatment.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$1,178.14	Notice of intent received on April 2, 2009. Notice subsequently withdrawn by investor.
April 23, 2009	**Abitibi Bowater Inc.**	AbitibiBowater, one of the world's largest pulp and paper firms, was formed in 2007 from the merger of Bowater Inc of the U.S. and Abitibi Consolidated Inc. of Canada. In 2009, AbitibiBowater filed for bankruptcy protection. In November 2008, AbitibiBowater, announced it would close its last pulp and paper mill in Newfoundland. The company had operated mills in the province since 1905. In December 2008, the provincial government of Newfoundland and Labrador enacted legislation to return the company's water use and timber rights to the crown and to expropriate certain AbitibiBowater lands and assets associated with the water and hydroelectricity rights.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$467.5 million	Notice of intent received on April 23, 2009. Statement of claim submitted February 25, 2010. In August 2010, the Canadian federal government announced that it had agreed to pay AbitibiBowater $CAD 130 million to settle the claim. The decision to settle, without even litigating, is highly significant for several reasons. First, it is the largest NAFTA-related monetary settlement to date. Second, Abitibi-Bowater was compensated, in large part, for the loss of water and timber rights on crown lands, which are not considered compensable rights under Canadian constitutional law. Finally, while the Canadian federal government has stated that it will not seek to recover the costs of the settlement from the Newfoundland government in this instance, in future it intends to hold provincial and territorial governments liable for any NAFTA-related damages paid by the federal government.

CLAIMS AGAINST CANADA

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January 25, 2010	**Detroit International Bridge Company**	Detroit International Bridge Company is the owner and operator of the Ambassador Bridge between Detroit and Windsor, one of the busiest crossings between Canada and the U.S. The investor objects to Canadian government plans to build a second bridge across the Detroit River. The dispute concerns Canadian federal legislation, the International Bridges and Tunnels Act of 2007, which gives the Government of Canada authority over the construction, operation and ownership of international bridges. The investor contends that the Act violates the Boundary Waters Treaty of 1909 and Canadian commitments to the investor made under the authority of that treaty.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$1.5 billion	Notice of intent received on January 25, 2010.
March 19, 2010	**John R. Andre**	The investor, a Montana-based businessman, operates a hunting lodge on aboriginal land in the Northwest Territories, one of Canada's northern territories. The investor alleges that conservation measures taken by the territorial government to decrease the number of caribou that can hunted annually expropriated its investment in the hunting and outfitting lodge. The investor further alleges that the allocation of the quota for caribou and other regulatory measures favoured local and aboriginal hunters and outfitters over non-residents.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$4 million +	Notice of intent received on March 19, 2010.

CLAIMS AGAINST **THE UNITED STATES**

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
October 30, 1998	**The Loewen Group Inc. and Raymond Loewen**	Loewen, a Canadian funeral home operator, challenges a civil case verdict by a jury in a Mississippi state court that awarded $500 million in compensation against it. Loewen also alleges that bond requirements for leave to appeal were excessive.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$725 million	Notice of arbitration submitted on October 30, 1998. In June 2003, the tribunal determined that it "lacked jurisdiction" to determine the investor's claims and dismissed them. During the course of the arbitration proceedings the Loewen Group went bankrupt and its assets were reorganized as a U.S. corporation. It assigned its NAFTA claims to a newly created Canadian corporation owned and controlled by the U.S. corporation. The panel ruled that this entity was not a genuine foreign investor capable of pursuing the NAFTA claim. On Oct 31, 2005 a U.S. court denied Raymond Loewen's petition to vacate the tribunal's award.
May 6, 1999	**Mondev International Ltd.**	The investor is a Canadian real estate developer which had a contract dispute with the Boston Redevelopment Authority, a municipal government body. The investor alleges that a Massachusetts state law immunizing local governments from tort liability and a subsequent Massachusetts Supreme court ruling upholding that law violate minimum standards of treatment under international law and other NAFTA obligations.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$50 million	In October 2002, the tribunal dismissed the investor's claims. The tribunal ruled that Mondev's claims were time-barred because the underlying dispute pre-dated NAFTA.
June 15, 1999	**Methanex Corp.**	Canadian chemical company challenges California's phase-out of MTBE, a gasoline additive which has contaminated ground and surface water throughout California.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$970 million	On August 9, 2005, the tribunal dismissed the investor's claims. The tribunal ordered Methanex to pay the U.S. government legal costs of approximately $3 million and the full cost of the arbitration.
Feb. 29, 2000	**ADF Group Inc.**	Canadian steel contractor challenges U.S. "Buy-America" preferences requiring that U.S. steel be used in federally-funded state highway projects.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements)	$90 million	In January 2003, the tribunal dismissed the investor's claim. The tribunal concluded that the measures in question were procurement measures exempted under Article 1108.

CLAIMS AGAINST THE UNITED STATES

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
Nov. 5, 2001	**Canfor Corp.**	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and anti-dumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$250 million	Notice of arbitration on July 9, 2002. On September 7, 2005, at the request of the U.S. government, the Canfor, Terminal and Kembec claims were consolidated into a single arbitration. On June 6, 2006, The Tribunal ruled that it had no jurisdiction on claims concerning U.S. antidumping and countervailing duty law, but that it does have jurisdiction to decide claims concerning the Byrd Amendment. Canfor withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the governments of Canada and the U.S.
Jan. 14, 2002	**Kenex Ltd.**	Canadian manufacturer of industrial hemp products challenges seizure of industrial hemp products under U.S. Drug Enforcement Agency (DEA) rules.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment)	$20 million	Notice of arbitration, August 2, 2002. In Feb. 2004, a U.S. court granted a petition by Kenex and others to prohibit enforcement of DEA rules barring non-psychoactive hemp products. Claim is inactive.
Mar. 15, 2002	**James Russell Baird**	Canadian investor challenges U.S. measures banning the disposal of radioactive wastes at sea or below the seabed.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$13.58 billion	Notice of intent on March 15, 2002. Claim is inactive.

CLAIMS AGAINST THE UNITED STATES

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May 1, 2002	**Doman Inc.**	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and anti-dumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$513 million	Notice of intent on May 1, 2002. Claim is inactive.
May 3, 2002	**Tembec Inc.**	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and anti-dumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$200 million+	Notice of arbitration and statement of claim, Dec. 3, 2004. At the request of the U.S. government, the Canfor, Terminal and Kembec claims were consolidated into a single arbitration. In Dec. 2005, Tembec withdrew its claim. It then unsuccessfully challenged the consolidation order in the U.S. courts. In July 2007, after a lengthy process, the tribunal awarded costs of the proceedings to the U.S. government, requiring a $271,000 payment by Tembec.
Sept. 9, 2002	**Paget, et. al & 800438 Ontario Limited**	An Ontario numbered company operated three subsidiaries in Florida that sold or leased bingo halls. Between 1994 and 1995, the state of Florida accused it of violating the Racketeer Influenced and Corrupt Organizations Act and subjected it to a tax audit. As a result, the state of Florida seized the company's property. Ontario Ltd. claims that the state improperly refused to return its property and destroyed its financial records	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$38 million	Notice of intent to submit a claim to arbitration on September 9, 2002. Claim is inactive.

CLAIMS AGAINST THE UNITED STATES

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June 12, 2003	**Terminal Forest Products Ltd.**	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports. The investor also challenges aspects of the Byrd Amendment authorizing the payment of countervailing and anti-dumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$90 million	Notice of arbitration, March 31, 2004. At the request of the U.S. government, the Canfor, Terminal and Kembec claims were consolidated into a single arbitration. On June 6, 2006, the tribunal ruled that it has no jurisdiction on claims concerning U.S. antidumping and countervailing duty law, but that it does have jurisdiction to decide claims concerning the Byrd Amendment. Terminal Forest Products withdrew its claim as a condition of the October 2006 Softwood Lumber Agreement between the governments of Canada and the U.S.
July 21, 2003	**Glamis Gold Ltd.**	Canadian mining company alleges that regulations intended to limit the environmental impacts of open-pit mining and to protect indigenous peoples' religious sites made its proposed gold mine in California unprofitable, thereby expropriating its investment and denying it "fair and equitable" treatment as required under NAFTA Article 1105.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$50 million+	Notice of arbitration Dec. 9, 2003. The first session of the arbitral hearing on merits was held from August 12–17, 2007 and the second hearing from Sept. 17–19, 2007. On June 8, 2009 the tribunal issued its award, dismissing Glamis's claims. The tribunal found that the economic impact of the environmental regulations on the company's investment was not substantial enough to be deemed an expropriation. It also rejected the investor's claim that a range of state and federal government measures related to the mining project violated minimum standards of treatment. The tribunal ordered the company to pay 2/3 of the costs of the proceeding.

CLAIMS AGAINST THE UNITED STATES

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
Sept. 2003	**Grand River Enterprises Six Nations ltd.**	Canadian indigenous-owned manufacturer and wholesaler of tobacco products alleges that its business was harmed by the treatment of "non-participating manufacturers" under the terms of a settlement agreement between 46 U.S. states and the major tobacco companies to recoup public monies spent to treat smoking-related illnesses.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	Between $310 and $664 million	Notice of arbitration March 10, 2004. Preliminary hearing on jurisdiction held in March 2006. Tribunal rules that aspects of the complaint are "time-barred," but that the claim can proceed in part. The arbitral hearing on merits was held in February 2010. The tribunal process continues.
Aug. 12, 2004	**Canadian Cattlemen for Fair Trade**	Canadian cattle producers challenge the U.S. ban on imports of Canadian live cattle following the discovery in 2003 of a cow infected with bovine spongiform encephalopathy (or BSE) from an Alberta herd.	Art 1102 (national treatment)	$235 million+	First notice of arbitration March 16, 2005. Approximately 100 claims were been consolidated into a single arbitration. In January 2008, the tribunal dismissed the claims on jurisdictional grounds. It ruled that the Canadian cattle producers did not have standing to bring the claim because they "do not seek to make, are not making and have not made any investments in the territory of the U.S."
April 16, 2007	**Domtar Inc.**	Domtar Inc. is a large North American pulp and paper company, with headquarters in Montreal, Quebec. Domtar alleges that the collection of U.S. antidumping and countervailing duties against Canadian softwood lumber exports was unlawful under U.S. law and inconsistent with the NAFTA obligations of the U.S. government. Furthermore, the investor challenges aspects of the Byrd Amendment authorizing the payment of countervailing and anti-dumping duties collected on Canadian softwood lumber imports to U.S. softwood lumber producers. The investor also contests aspects of the 2006 Softwood Lumber Agreement between Canada and the U.S. It asserts that these measures discriminated against Domtar, denied it minimum standards of treatment under international law and prevented the timely transfer of profits from Domtar's U.S. operations.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Article 1109 (transfers)	$200 million+	Notice of arbitration and statement of claim submitted on April 16, 2007.

CLAIMS AGAINST THE UNITED STATES

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
September 21, 2007	**Apotex Inc.**	Apotex Inc. is a Canadian pharmaceutical company which develops and manufactures generic drugs. In 2003 Apotex sought U.S. Food and Drug Administration approval to develop a generic version (sertraline) of Pfizer Inc.'s anti-depressant medication Zoloft once Pfizer's patent expired in 2006. Apotex later went to court to attempt to dispel uncertainty regarding the status of patents on Zoloft, thereby avoiding the possibility of a patent infringement lawsuit by Pfizer. The U.S. courts dismissed Apotex's suit for a declaratory judgment clarifying the patent situation. Meanwhile, a competing generic drug manufacturer was able to develop and market its own generic version of Zoloft, thereby allegedly causing further harm to Apotex. Apotex alleges that the U.S. court judgments discriminated against it, denied it minimum standard of treatment, and expropriated its investment in sertraline.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$8 million	Notice of intent submitted on September 21, 2007. Notice of arbitration submitted on December 10, 2008.
April 2, 2009	**CANACAR**	CANACAR is the association representing Mexican independent truckers. The Mexican truckers assert that the U.S. has violated its NAFTA obligations by 1) not permitting the truckers to enter the U.S. to provide cross-border trucking services and 2) barring them from investing in U.S. enterprises that provide cross-border trucking services. They further allege that the U.S. has violated minimum standards of treatment by refusing to comply with a 2001 NAFTA government-to-government panel ruling.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment)	$2 billion annually	Notice of intent submitted on April 2, 2009.

CLAIMS AGAINST THE UNITED STATES

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
June 4, 2009	**Apotex Inc.**	Apotex Inc. is a Canadian pharmaceutical company which develops and manufactures generic drugs. Apotex sought U.S. Food and Drug Administration (FDA) approval to develop a generic version (pravastatin) of the heart medication marketed by Bristol Myers Squibb (BSM) under the brand name Pravachol, once BSM's patent expired in 2006. Apotex subsequently became involved in court disputes over delays in the development of its product due to data exclusivity rights claimed by competing manufacturers of generic pravatstatin. Apotex alleges that certain U.S. court judgments and FDA decisions discriminated against it, denied it minimum standard of treatment, and expropriated its investment in pravastatin.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$8 million	Notice of arbitration submitted on June 4, 2009.
September 2009	**Cemex**	Cemex , a Mexican corporation, is one of the world's largest cement manufacturers. It is embroiled in a dispute with the state government of Texas over royalty fees on quarrying. The NAFTA claim is an attempt by Cemex to indemnify itself against potential losses in the Texan courts.	not available	not available	Notice of intent reportedly submitted in September 2009.

CLAIMS AGAINST **MEXICO**

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
April 21, 1995	**Amtrade International**	U.S. company claims it was discriminated against by a Mexican company while attempting to bid for pieces of property, in violation of a pre-existing settlement agreement.	n.a.	$20 million	Arbitration never commenced.
Oct. 2, 1996	**Metalclad Corp.**	U.S. waste management company challenges decisions by Mexican local government to refuse it a permit to operate a hazardous waste treatment facility and landfill in La Pedrera, San Luis Potosi and by the state government to create an ecological preserve in the area where the facility and site were to be located.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$90 million	In August 2000, the tribunal ruled that Mexico's failure to grant the investor a municipal permit and the state decree declaring the area an ecological zone were "tantamount to expropriation" without compensation and breached the "minimum standard of treatment" in NAFTA Article 1105. Mexico was ordered to pay $16.7 million in compensation. Mexico applied for statutory review of the tribunal award before the BC Supreme Court on the grounds that the tribunal had exceeded its jurisdiction. The court allowed most of the tribunal's award to stand. The case was settled in October, 2000 when Mexico paid undisclosed compensation to the investor.
Dec. 10, 1996	**Robert Azinian et al.(Desona)**	U.S. waste management company challenges Mexican court ruling revoking its contract for non-performance of waste disposal and management in Naucalpan de Juarez.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$17 million+	Notice of arbitration received on Nov. 10, 1997. On Nov. 1 1999, the tribunal dismissed the investor's claims.

CLAIMS AGAINST MEXICO

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
Feb. 16, 1998	**Marvin Roy Feldman Karpa (CEMSA)**	U.S. cigarette exporter challenges Mexican government decision not to rebate taxes on its cigarette exports.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$50 million	On December 16, 2002, the tribunal rejected the investor's expropriation claim, but upheld the claim of a violation of national treatment. Mexico was ordered to pay compensation of approximately $1.5 million. Mexico initiated a statutory review of the award in the Ontario Superior Court of Justice to set aside parts of the Tribunal's award. In December 2003, the judge dismissed Mexico's application. Mexico's appeal of this decision was rejected by the Ontario Court of Appeal on Jan. 11, 2005.
May 21, 1999	**Scott Ashton Blair**	U.S. citizen who purchased a residence and restaurant in Mexico claims he was victimized by Mexican government officials on the basis of his nationality.	n.a.	n.a.	Arbitration never commenced.
June 30, 1998	**U.S.A Waste Management Inc.**	U.S. waste management company challenges state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$60 million	In June 2000, the Tribunal ruled that it lacked jurisdiction because Waste Management Inc. had not properly waived domestic legal claims as required by NAFTA. The investor resubmitted its notice of intent. The tribunal subsequently confirmed its jurisdiction. In April, 2004 the tribunal dismissed the investor's claims.
Nov. 15, 1999	**Fireman's Fund Insurance Co.**	U.S. insurance company alleges that the Mexican government discriminates against if by facilitating the sale by Mexican financial institutions of peso-dominated debentures, but not the sale of U.S. dollar-denominated debentures by Fireman's Fund.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation) Art 1405 (national treatment)	$50 million	Notice of arbitration on Oct. 30, 2001. On July 17, 2006 tribunal dismissed the investor's claim. A censored version of the final award became publicly available during 2007. The tribunal determined that, while the investor had been subjected to discriminatory treatment, under the NAFTA financial services chapter rules only claims involving expropriation were open to investor-state challenge. The tribunal ruled that Mexico's treatment of the investor did not rise to the level of expropriation.

CLAIMS AGAINST MEXICO

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
Nov. 11, 2000	**Billy Joe Adams et al.**	A group of U.S. property investors disputes a Mexican superior court decision regarding title to real estate investments and related matters.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$75 million	Notice of arbitration on Feb. 16, 2001. Claim is inactive.
Aug. 28, 2001	**Lomas de Santa Fe**	U.S. investor alleges that it was unfairly treated and inadequately compensated in a dispute over the expropriation of land by Mexican Federal District authorities.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$210 million	Notice of intent on August 28, 2001. Claim is inactive.
Oct. 1, 2001	**GAMI Investments Inc.**	U.S. shareholders in a Mexican sugar company claim that their interests were harmed by Mexican government regulatory measures related to processing and export of raw and refined sugar, as well as the nationalization of failing sugar refineries.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$55 million	Notice of intent on Oct. 1, 2001. On November 15, 2004, the tribunal ruled that it had no jurisdiction and dismissed the investor's claim.
Dec. 12, 2001	**Haas**	U.S. investor in a small manufacturing company in the State of Chihuahua challenges alleges unfair treatment by the Mexican courts and authorities in a dispute with local partners in the company.	Art 1105 (minimum standard of treatment)	$35 million, approximately.	Notice of intent received January 9, 2002. Claim is inactive.
n.a.	**Halchette**	no details available	n.a.	n.a.	Notice of intent has not been made public. Arbitration never commenced.
Jan. 11, 2002	**Calmark Commercial Development Inc.**	U.S., property development company challenges decisions of the Mexican courts in a property dispute in Baja California.	Art 1105 (minimum standard of treatment) Art. 1109 (transfers) Art 1110 (expropriation and compensation)	$0.4 million	Notice of intent on Jan. 11, 2002. Claim is inactive.

CLAIMS AGAINST MEXICO

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
Feb. 12, 2002	**Robert J. Frank**	U.S. investor seeks compensation from Mexican government in dispute over development of a beachfront property in Baja California.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$1.5 million	Notice of arbitration on August 5, 2002. Claim is inactive.
March 21, 2002	**International Thunderbird Gaming Corp.**	Canadian gaming company challenges the regulation and closure of its gambling facilities by the Mexican government agency that has jurisdiction over gaming activity and enforcement.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$100 million	Notice of arbitration, August 1, 2002. On Jan. 26, 2005 the tribunal dismissed the investor's claim. Thunderbird Gaming was ordered to pay Mexico's legal costs of approximately $1.2 million and three-quarters of the cost of the arbitration. On Feb. 14, 2007 a U.S. court rejected Thunderbird Gaming's petition to vacate the NAFTA tribunal's ruling.
Jan. 28, 2003	**Corn Products International**	U.S. company challenges a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup (HFCS), including a tax on soft drinks sweetened with high-fructose corn syrup. Mexico argues that it applied the 20% tax to protect its sugar cane industry which is losing domestic market share to imported HFCS, while facing barriers in selling sugar in U.S. markets.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$325 million	In January 2008, the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. The tribunal dismissed the investor's claims that the tax was a prohibited performance requirement and tantamount to expropriation. The panel report was not publicly released until April 2009, more than a year after the award was rendered. Mexico was ordered to pay the investor $58.38 million.

CLAIMS AGAINST MEXICO

Date Complaint Filed[1]	Complaining Investor	Issue	NAFTA Articles Cited	Amount Claimed ($US)[2]	Status
Oct. 14, 2003	**Archer Daniels Midland, Tate and Lyle Ingredients**	A large U.S. agri-business and the U.S. subsidiary of a British multinational company challenge a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup, including a tax on soft drinks sweetened with high-fructose corn syrup.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$100 million	Notice of intent on October 14, 2003. In November 2007 the tribunal ruled that Mexico had violated NAFTA's national treatment obligation. In contrast to the Corn Products International panel, the tribunal ruled that the tax on HFCS also constituted a prohibited performance requirement. Mexico was ordered to pay the investors $33,510,091.
September 30, 2004	**Cargill Inc.**	A large U.S. agri-business challenges a range of Mexican government measures that allegedly discouraged the import, production and sale of high-fructose corn syrup, including a tax on soft drinks sweetened with high-fructose corn syrup.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	$100 million+	Notice of intent submitted on September 30, 2004. Notice of arbitration submitted on December 29, 2004. The tribunal found against Mexico in an award rendered on September 18, 2009. The award has not yet been publicly released. The tribunal reportedly ruled that the Mexican tax on HFCS violated NAFTA's national treatment and minimum standards of treatment obligations, and constituted an illegal performance requirement. Mexico was reportedly ordered to pay the investor $77 million plus interest.
Aug. 27, 2004	**Bayview Irrigation District, et. al.**	Seventeen Texas irrigation districts claim that the diversion of water from Mexican tributaries of the Rio Grande watershed discriminated against downstream U.S. water users, breached Mexico's commitments under bilateral water-sharing treaties and expropriated water "owned" by U.S. interests.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	$554 million	Notice of intent submitted on Aug. 27, 2004. On June 21, 2007 the tribunal dismissed the claims. The tribunal ruled that the claimants, who were U.S. nationals whose investments were located within the territory of the United States, did not qualify as foreign investors (or investments) entitled to protection under NAFTA's investment chapter, simply because their investments may have been affected by Mexico's actions. Significantly, however, the tribunal concluded that "water rights fall within [NAFTA's] definition of property."

SUMMARY OF CASES FILED UNDER **NAFTA CHAPTER 11**
(to October 1, 2010)

Respondent Country	Number of Cases Filed	Types of Measure Challenged	Total Damages Awarded[3] ($US)	Disposition of Cases
Canada	28	10 natural resources 7 environmental protection 2 postal services 2 health or drug 1 cultural policy 1 agriculture 5 other	$CAD 157 million[4]	2 decided against Canada (with compensation awarded) 3 settled "out-of-court" (2 with compensation) 4 dismissed 3 tribunal process underway 12 pending or inactive 4 withdrawn by complainant
U.S.	19	5 natural resources 5 health, food safety or drug 3 environmental protection 3 state court decisions 1 procurement 2 other	0	7 dismissed 1 tribunal process underway 9 pending or inactive 2 withdrawn by complainant
Mexico	19	6 real estate or development 4 environmental protection 4 agriculture and food 2 financial or taxation 1 gambling 2 other	$187.1 million[5]	5 decided against Mexico, with compensation awarded; 6 dismissed 8 pending or inactive

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

NOTES **1** Date of notice of intent, except where indicated. **2** All figures are in US$ except where indicated. **3** Including awards of legal costs, where available. Not including interest. **4** Including Ethyl and AbitibiBowater settlements. **5** Not including undisclosed interest or legal costs.

AN ANALYSIS OF NAFTA INVESTOR-STATE DISPUTES

Background

NAFTA's controversial investor-state dispute settlement mechanism allows foreign investors to bring claims against governments in the three signatory countries. Governments at the federal, provincial, state and local levels are increasingly being targeted by investors for alleged breaches of Chapter 11, NAFTA's investment chapter. This situation has become a legal and economic battlefield, with governments too often finding that the best interests of their citizens are trumped by the ability of multinationals to make profits. Furthermore, the threat of incurring large financial penalties to compensate foreign investors for losses stemming from regulatory measures casts a significant chill over policy-making.

All levels of government in Canada are being pressured to fall into step with the will of foreign investors. As of October 2010, 43 percent of the 66 known claims under Chapter 11 were made by foreign investors against governments in Canada. The trend over the past five years is even more alarming. The number of cases rose sharply and fully 75 percent of the new claims during this period were against Canadian governments. Canada has already paid out NAFTA damages totalling $CAD 157 million and incurred millions more in legal costs.

The significant number and variety of claims under Chapter 11 underscores how making investment rights enforceable though investor-state arbitration greatly increases both the frequency and controversy of disputes. Governments tend to be more cautious about bringing matters to formal dispute settlement. They must consider diplomatic relations and weigh the consequences for their own similar domestic policies if the challenge should succeed.[1] Private investors, on the other hand, have been far quicker to invoke dispute settlement and are much more aggressive in their interpretation of investment rights.

Arbitration can be invoked unilaterally by investors from the three NAFTA countries. Investors do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system before launching a NAFTA claim. Under Chapter 11, all three national governments have given their "unconditional, prior consent" to submit investor claims to binding arbitration, allowing investors to simply bypass the domestic courts. In effect, NAFTA establishes a private justice system exclusively for foreign investors, including the world's largest and most powerful multinational corporations.

Cases are decided by tribunals of three members: one chosen by the investor, one chosen by the challenged government and a third selected by mutual agreement. Tribunal decisions are final, although they may be reviewed on narrow procedural grounds in the domestic courts. While tribunals cannot force a government to change NAFTA-inconsistent measures, they can award monetary damages to investors. These damage awards are fully enforceable in the domestic courts.[2]

Foreign investors have used Chapter 11 to challenge a wide range of government measures that allegedly diminish the value of their investments. Since most government regulations or policies affect property interests, NAFTA's investor-state mechanism and similar investment rules in other international investment treaties have been strongly criticized for giving multinational corporations far too much power while constraining the fundamental role of democratic governments.

In a recent public statement of concern, leading experts in investment law, arbitration and regulation noted that: "awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations … that have prioritized the protection of the property of and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples." The legal experts, from 24 universities in nine countries, went on to say that the current international investment regime, typified by NAFTA's Chapter 11, "lacks fairness and balance, including basic requirements of openness and judicial independence."[3]

Number of claims

The known investor-state claims as of October 1, 2010 include 28 against Canada, 19 against the U.S. and 19 against Mexico. There may well be additional claims that have not yet been made public. Claims against Mexico, in particular, are often slow to become public. New claims continue to mount, especially against Canada. Since 2005, 15 new claims have been made against Canada and five against the U.S. No new claims against Mexico have been publicized.

More than half the claims (54%) against Canada since NAFTA came into force over 15 years ago, were initiated during the last five years. This trend reflects a growing awareness among foreign investors and corporate trade lawyers of NAFTA investment rights, and an increasing willingness to invoke them to contest public policy measures. The increase in NAFTA investment claims against Canada mirrors a large global jump (57%) in investment treaty arbitrations initiated over the last five years.[4]

Disposition of claims

Of the 28 claims against Canada, tribunals have awarded damages to the complaining investors in two instances (Pope and

Talbot, SD Myers). Canada has settled three claims "out of court," and in two of these (Ethyl Corp., AbitibiBowater) agreed to pay damages to the investor.[5] Tribunals have dismissed the investors' claims in three cases (UPS, Merrill and Ring, Chemtura.) Another claim (Centurion Health) was dismissed on procedural grounds. Four claims (Signa, Ketcham, Pesic, Lacich) were withdrawn by the complainant. Eight claims are inactive, because the investor failed to pursue them. There are currently seven active claims against Canada. Three of these (Gallo, Mobil & Murphy Oil, Bilcon) are now before a tribunal.

The United States has yet to lose a NAFTA arbitration. Of the 19 recorded claims against the U.S., tribunals have dismissed investors' claims in six cases (Loewen, Mondev, Methanex, ADF, Glamis, Cattlemen). Several of these were dismissed on procedural or jurisdictional grounds. Three claims (Canfor, Tembec, Terminal) were withdrawn by the complainants. Four claims are inactive. There are currently six active claims (Grand River, Domtar, Apotex I, CANACAR, Apotex II, Cemex) against the U.S. government.

Mexico has lost more Chapter 11 disputes than any other NAFTA party. Of the 19 known claims against Mexico, tribunals have awarded damages to the complaining investors in five cases (Metalclad, Feldman, Corn Products, ADM, Cargill). Tribunals have dismissed the investors' claims against Mexico in six cases (Azinian, Waste Management, Fireman's, GAMI, Thunderbird, Bayview). Eight claims are considered inactive. There are currently no publicly acknowledged active claims against Mexico, although, as already noted, there is no requirement for NAFTA claims to be publicized and the Mexican government has been slow to release information about previous claims.

To date, Canada has paid NAFTA claimants damages totalling $CAD 157 million. Having never lost a case, the U.S. has not paid any damages to NAFTA investors. Mexico has been compelled to pay damages of over $187 million.

All three NAFTA governments have incurred significant expenses in defending claims. The cost of administering a NAFTA arbitration panel itself typically runs from $500,000 to $1 million or more. The costs in the Merrill and Ring arbitration, for example, came to $959,500.[6] Serving on an arbitration panel is lucrative work, with arbitrators typically charging fees of $3,000 per day, plus expenses.[7] In Merrill and Ring, the chair received fees of $365,200, the claimant's arbitrator $169,675 and the respondent's arbitrator $235,895.[8] The losing party is usually required to pay the costs of the arbitration panel itself.

The costs of legal advice and representation are normally much higher. Governments routinely incur costs of several million dollars or more to defend themselves in a NAFTA claim. The U.S. federal government, for example, estimated its costs in the Grand River arbitration at $2,792,000.[9] Even in frivolous or nuisance claims that never get to a full hearing, the defending government incurs costs investigating the charges and preparing its defence. The government of Canada estimated its legal costs in the aborted Centurion Health case at $228,000, expenses which were never recovered.[10] Tribunals have complete discretion regarding how to apportion legal costs between the parties.[11]

Recent key developments

Canada

In August 2010, the Canadian federal government announced that it had agreed to pay $CAD 130 million to settle AbitibiBowater's NAFTA investment claim.[12] Ottawa's decision to settle the case without attempting to defend itself stunned many observers. This is the largest NAFTA-related monetary settlement to date and the high pay-out will undoubtedly lead to increased Chapter 11 threats against government regulation in the natural resource sector.

The dispute arose in November 2008, when AbitibiBowater announced it would close its last remaining mill in Newfoundland and Labrador. One of the world's largest pulp and paper firms, AbitibiBowater had operated in the province since 1905. Danny Williams, Premier of Newfoundland and Labrador, accused the company of breaking a century-old "covenant" with the province when it closed the mill.[13] The provincial government, seeking to protect publicly-owned resources, enacted legislation to return the company's water use and timber rights to the crown and to expropriate certain of its lands and assets in the province.

This was not simply a case of a province protecting its natural resources. After filing for bankruptcy protection, the company informed its 800 laid-off workers that they would not receive severance. The government pledged that it was "only appropriate and fair that the workers are not left behind and disadvantaged by Abitibi's decision to close this operation,"[14] and stepped in to pay benefits and severance of tens of millions of dollars.

Ottawa's decision to settle with the investor raises serious constitutional issues. Although the exact terms of the settlement have not been disclosed, the large sum of money involved undoubtedly means that AbitibiBowater was compensated, to some degree, for the loss of water and timber rights on public lands. Such rights, however, are not considered compensable under Canadian law.

The Newfoundland and Labrador legislation provided for compensation to AbitibiBowater for the fair value of its real property

(land, buildings, dams, etc.).[15] The law, however, appropriately denied AbitibiBowater compensation for the loss of its timber and water rights, which were returned to the Crown. Such natural resources are the property of the provincial Crown, representing the citizens of Newfoundland and Labrador. Access to these resources is a contingent right, based on the understanding that the resource rights holder will develop them productively, in a manner that benefits the public. AbitibiBowater was no longer willing or able to fulfill its part of that social contract.

The Newfoundland and Labrador government's actions were completely lawful, constitutional and commendable. The same cannot be said for the federal government's decision to capitulate on such favourable terms for the investor.

Provincial governments have exclusive jurisdiction regarding matters of property and civil rights within the province, including expropriation. Provinces also enjoy exclusive jurisdiction over natural resources on provincial Crown lands. In decisions concerning such resources, the interests of investors must be balanced against other legitimate interests, such as those of workers, communities and the environment. Under Canadian constitutional law, these are clearly matters to be decided by the provincial legislature. In contrast, the AbitibiBowater settlement entails an open-ended, excessive conception of property rights that goes well beyond reasonable protections and domestic legal norms.

Just as Ottawa's regrettable 1998 settlement with Ethyl Corp. triggered a wave of NAFTA claims related to environmental regulations,[16] the decision to compensate AbitibiBowater is likely to unleash a rash of resource-related compensation claims and threats. Whenever natural resource concessions are revised or revoked, however legitimate the government's reasons, investors can now be expected to invoke NAFTA's Chapter 11.

The federal government's move also sets the stage for further federal intrusion into provincial jurisdiction. While the federal Conservative government will not seek to recover costs of the AbitibiBowater settlement from the Newfoundland and Labrador government, it has put provincial and territorial governments on notice that, in future, it intends to hold them liable for any NAFTA-related damages paid by the federal government resulting from provincial and territorial government measures.[17]

Canada fared better in the recently concluded Chemtura arbitration, where the panel unanimously dismissed the investor's claims. This dispute centred on the Canadian government's phase-out of the sale and use of lindane, an agricultural insecticide. Lindane is a persistent neurotoxin and suspected carcinogen now banned in more than 50 countries. The panel acknowledged these facts as pertinent in accepting Canada's defence that it had acted in good faith and not in breach of minimum standards of treatment.

The arbitrators also rejected Chemtura's claim that the ban constituted an indirect expropriation, noting that there was "no substantial deprivation" of the company's investments and further indicating that it considered Canada's regulatory action a valid exercise of the "police powers" exception under international law.[18] In a sign of its displeasure with the investor's allegations, the tribunal ordered Chemtura to bear the costs of the arbitration and to pay half of Canada's legal costs of $CAD 5.778 Million.

The United States

The U.S. has continued its unbeaten string of victories in NAFTA Chapter 11 arbitrations. In all seven decided cases involving the U.S. government to date, the investors' claims have been dismissed. There are currently six active claims against the U.S. In contrast to the Canadian federal government, the consistent policy of the U.S. State Department, which represents the U.S. in NAFTA litigation, has been to defend all claims vigorously.

Even some tribunal decisions in cases which the U.S. won, however, are cause for concern. For example, the recent Glamis award, issued in June 2009, casually embraced the controversial concepts of "regulatory takings" and "creeping expropriation," which should raise red flags for regulators in all three countries.

The case involved a Canadian mining company's allegations that regulations intended to limit the environmental impacts of open-pit mining and to protect indigenous peoples' religious sites made its proposed gold mine in California unprofitable, thereby expropriating its investment and denying it "fair and equitable" treatment as required under NAFTA Article 1105.

The tribunal dismissed the Canadian investor's claims, but its reasoning was disquieting.

The Glamis panel accepted, in principle, that regulatory measures harmful to investors can be equivalent to expropriation, and that NAFTA's investment chapter was intended to protect investors from such takings. The tribunal explained its task as follows: "This proceeding involves the particularly thorny issue of what is commonly known as a regulatory taking. More specifically, the question presented in this proceeding is whether the administrative and legislative actions taken individually, or in concert, by the federal government and the State of California constitute an expropriation under Article 1110."[19] The tribunal also accepted the controversial idea of "creeping expropriation," which occurs when the expropriating measures are implemented over a period of time."[20]

In a complicated accounting exercise, the panel then catalogued and costed the alleged losses incurred by the Canadian mining company resulting from various California regulatory measures. These regulations included requirements such as backfilling and other reclamation procedures. The tribunal examined such minutia as whether "running loaded trucks downhill is as expensive as running them uphill and causes equal wear and tear on the equipment" and the "swell factors" of the excavated ore, waste rock and gravel required to backfill the pits. Based on such calculations, and on other factors completely unrelated to regulation such as the price of gold, the tribunal estimated that even after absorbing the costs of the backfilling, reclamation and other regulatory measures, the project retained a positive value of $20 million. The panel concluded that: "In light of this significantly positive valuation, the Tribunal holds that the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Claimant's investment."[21]

Combining the controversial notions of regulatory takings and creeping expropriation with the panel's accounting methodology leads to the disturbing conclusion that a series of increasingly stricter environmental or safety measures that result in an investment losing most or all of its value are, in principle, "tantamount to expropriation." This regulatory scenario — strengthening environmental or safety measures to safeguard citizens — is played out continually in every advanced society, as public and scientific awareness grows about the environmental, health or safety risks associated with a particular operation or industry. In this regard, the tribunal's judgments are significantly out of step with common public expectations and regulatory norms.

The Trade Promotion Act of 2002, reflecting Congressional concerns about the growing impact of international investment treaties such as NAFTA, stipulated that the provisions of international trade and investment agreements should ensure that "foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United States."[22] The Glamis decision, despite the fact that the U.S. prevailed, suggests that NAFTA's investment rules do provide foreign investors with greater rights than U.S. citizens enjoy under domestic law and raises legitimate concern that such excessive rights may impair environmental protection and other public interest regulations.

Mexico

In September 2009, Mexico was hit with the third in a series of related arbitration losses. The three adverse awards involved a dispute between transnational agribusinesses and the Mexican government over a tax on the production and sale of soft drinks using the sweetener High Fructose Corn Syrup (HFCS). The 20% tax, applied from January 2002 to January 2007, was meant to provide relief to Mexican sugar growers and manufacturers who were being hurt by U.S. imports of HFSC, while being frustrated in their own efforts to sell sugar in U.S. markets.

The tax was part of a broader trade dispute between the two countries. U.S. sugar programs limit imports and prop up domestic prices, negatively affecting Mexican producers. Mexico asserted that the tax of HFCS should accordingly be viewed in this broader context and that the tax was a legitimate counter-measure in a broader trade dispute.

All three tribunals, however, rejected the Mexican government's attempted defence. Instead, the NAFTA arbitral panels focussed in isolation on the impacts of the tax measure on the U.S. investors — agribusiness giants Cargill, Archer Daniels Midlands, Tate and Lyle (the U.S. subsidiary of a UK company) and Corn Products International.

The Mexican government was ordered to pay compensation of nearly $170 million (plus interest), a staggering amount for a developing country. The compensation exceeded the total annual GDP of the poorest 16 Mexican states, which have a combined population of over 27 million people.[23]

The decisions by the three tribunals, which dealt with essentially the same legal issues and facts, illustrate another serious problem with NAFTA arbitration — its lack of consistency. The panels reached different conclusions on a key legal issue. Two panels found that the Mexican tax constituted a performance requirement prohibited under Article 1106, while a third disagreed. These divergent rulings underline the basic arbitrariness inherent in the Chapter 11 process.

There have been no new NAFTA claims reported against Mexico since 2004. This is out of step with the experience in Canada and the United States, both of whom have experienced an increase in claims. The prospect of further NAFTA claims against Mexico, whether publicly acknowledged or not, remains an ongoing concern. In one recent high-profile dispute, the Canadian mining company Blackfire Exploration threatened to launch a NAFTA suit for $800 million in damages allegedly resulting from the closure of a mining operation embroiled in human rights and environmental controversies in the Mexican state of Chiapas.[24]

Conclusion

NAFTA investor-state litigation has resulted in governments and taxpayers being forced to pay several hundred million dollars in damages and tens of millions more in legal costs. The negative impacts on public policy development and the democratic process

itself are even more troubling than the financial costs.

Chapter 11 gives multinational corporations unprecedented power to challenge policy and regulatory initiatives. The creation of policies that protect the environment, natural resources, workers' safety and our public service systems has become a high-stakes game. The huge costs involved in any potential litigation and the Canadian government's unwillingness to defend these beneficial policies have created a chilling effect, driven by a fear of retribution. As the legal experts' public statement of concern stresses, "the award of damages as a remedy of first resort in investment arbitration poses a serious threat to democratic choice and the capacity of governments to act in the public interest by way of innovative policy-making in response to changing social, economic and environmental conditions."[25]

The statement of concern is a timely call to action. The rising number of these cases, particularly against Canada, and large payouts to investors by Canada and Mexico, demonstrate that Chapter 11 is a serious problem for North American governments and their citizens.

Though not every investor claim has been successful and some tribunals have made reasonable decisions, Chapter 11 is so deeply flawed that the best option is to eliminate it outright. The legal experts advocate a return to the domestic legal system and contract law to protect investors and to balance investor interests with those of the broader community. They note that: "Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose. There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose."[26]

The NAFTA investment regime was originally characterized as an exceptional remedy to be used only under extreme circumstances. It was supposedly aimed at situations where the domestic courts, specifically in the Mexican regime of that era, could not be trusted to redress valid investor concerns. Fifteen years of experience has clearly shown that the sweeping powers and protections afforded to investors by NAFTA have repeatedly been invoked in order to frustrate the legitimate exercise of governmental authority. In too many cases, those efforts have succeeded. It is now time for renewed public pressure on North American governments to address the serious threat to the rule of law and democratic governance posed by NAFTA's Chapter 11.

Notes

1 To date, there have been only three formal disputes under Chapter 20 of the NAFTA which handles government-to-government dispute resolution. See NAFTA Secretariat, "Dispute Settlement," www.nafta-sec-alena.org .

2 "The award is given the force of domestic law through existing structures of international commercial arbitration – represented primarily by the New York Convention – which enshrine the principle of judicial deference to arbitration tribunals." Gus Van Harten, "Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?." Draft of version appearing in: (2005) 21 Arbitration International 493, page 1. Available at http://ssrn.com/author=638855.

3 See "Public Statement on the International Investment Regime," August 31, 2010. Available at http://www.osgoode.yorku.ca/public_statement/.

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

5 The terms of the third settlement (Trammel Crow) are undisclosed.

6 Merrill and Ring v. Canada, Award, March 31, 2010, p. 107. Available at, http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/merrill_archive.aspx?lang=en.

7 International Centre for the Settlement of Investment Disputes (ICSID) arbitrators "receive reimbursement for any direct expenses reasonably incurred in the course of the arbitration, and unless otherwise agreed between them and the parties, a fee of US$3,000 per day of meetings or other work performed in connection with the proceedings." Kyla Tienhaara, Regulatory Institutions Network, Australian National University "Investor-State Dispute Settlement in the Trans-Pacific Partnership Agreement", Submission to the Australian Department of Foreign Affairs and Trade, May 19, 2010. Available at http://www.dfat.gov.au/trade/fta/tpp/subs/tpp_sub_tienhaara_100519.pdf

8 Merrill and Ring v. Canada, op. cit., p. 107.

9 Grand River Enterprises Six Nations Ltd., et. al. v. the United States of America, "U.S. Submissions on Costs," March 31, 2010. Available at http://www.state.gov/s/l/c11935.htm.

10 Centurion Health Corporation v. Government of Canada, Government of Canada's motion on termination and costs, April 29, 2010. Available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/centurion_archive.aspx?lang=en.

11 In certain instances, such as Methanex and Chemtura, tribunals have ordered investors to cover responding governments' legal expenses, but this

practice is not the norm, even where investors lose the case.

12 In an excellent blog post analysing the AbitibiBowater settlement, economist Jim Stanford notes just a few of the productive ways that the $130 million could have been spent: "And instead of paying $130 million of taxpayers' money to a bankrupt company with no promises whatsoever that it will ever create another job in Canada, here are just a few things the Harper government could have done with the money: funded the renovation and retrofit of 5,000 units of low-cost public housing - creating hundreds of construction jobs and alleviating the crisis of under-housing; funded 370,000 weeks of regular Employment Insurance benefits for Canadian workers (including forestry workers in Newfoundland) who are being thrown off the EI system every week when their benefits expire; or funded 25,000 child care spaces for a year, creating 3000 or more full-time jobs for child care workers." Jim Stanford, "Harper's 130 million giveaway," August 27, 2010. http://www.progressive-economics.ca/201%8/27/harpers-130-million-chapter-11-giveaway/

13 "Premier promises severance, benefits to laid-off AbitibiBowater workers," Canadian Press, May 19th, 2009.

14 Ibid.

15 The company did not pursue this process, turning instead to NAFTA arbitration.

16 Under the terms of a 1998 settlement with U.S. investor Ethyl Corporation, Canada agreed to repeal the challenged measure (a ban on the gasoline additive MMT, a suspected neurotoxin), issue an apology to Ethyl and pay the company damages of $US 13 million ($CAD 19.5 million at 1998 exchange rates). The cash settlement to Ethyl exceeded the total 1998 Environment Canada budget for enforcement and compliance programmes ($CAD 16.9 million). See Ken Traynor, "How Canada Became a Shill for Ethyl Corp: NAFTA and the Erosion of Federal Environmental Protection," Canadian Environmental Law Association, The Intervenor: Vol 23. No 3 July - September 1998.

17 The Conservative government wants federal-provincial negotiations to implement this unilateral decision to start soon.

18 For a concise overview and analysis of the award, see Luke Eric Peterson, "Arbitrators in Chemtura v. Canada NAFTA arbitration take economical route in finding no treaty breaches," Investment Arbitration Reporter September 15, 2010, http://www.iareporter.com.

19 Glamis Gold v. the U.S., Award, June 8, 2009, para 356, pp. 155-6.

20 Glamis Gold v. the U.S., Award, June 8, 2009. "Actions that result in an indirect taking or are 'tantamount to expropriation' include those acts that sometimes constitute what is known as "creeping expropriation". Creeping expropriation occurs when the expropriating measures are implemented over a period of time." page 155, note 702.

21 Ibid., p. 8, para. 17.

22 U.S. Bipartisan Trade Promotion Authority Act of 2002, Section 2102 (3).

23 The sixteen poorest states are Chiapas, Guerrero, Quintana Roo, Oaxaca, Morelos, Durango, Morelos, Hidalgo, Aguascalientes, Tabasco, Campeche, Zacatecas, Baja California Sur, Nayarit, Colima, and Tlaxcala. Their combined GDP in 2007 was $164, 380, 000. Source: Wikipedia, List of Mexican States by GDP. Available at http://en.wikipedia.org/wiki/List_of_Mexican_states_by_GDP, accessed October 1, 2010.

24 See Mining Watch Canada, "Blackfire Adding Threats to Injury in Mexico: Canadian Mining Firm Looks to Pocket 800 million via NAFTA Ch. 11."February 22, 2010. Available at: http://www.miningwatch.ca.

25 See "Public Statement on the International Investment Regime," op. cit.

26 Ibid., paragraph 8.

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