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A Tale of Two Treaties: A Study of NAFTA and the USMCA's Investor-State Dispute Settlement Mechanisms

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A TALE OF TWO TREATIES: A STUDY OF NAFTA AND THE USMCA'S INVESTOR-STATE DISPUTE SETTLEMENT MECHANISMS

INTRODUCTION

The United States-Mexico-Canada Agreement (USMCA)[1] has recently replaced the North American Free Trade Agreement (NAFTA) as the premier trade agreement between the three largest economies of North America.[2] The new treaty entails important changes to NAFTA's existing dispute settlement provisions, notably the near-abolition of the latter's controversial investor-state dispute settlement (ISDS) mechanism. Taken as a whole, the USMCA's ISDS mechanism strikes a balance between the need to facilitate cross-border investment, especially between Mexico and the United States, and the need to minimize the controversies that surround ISDS in academic and political circles.[3] This balance in turn helps encourage economic development across North America, by insulating the USMCA from political risks associated with ISDS that have frustrated other multilateral free-trade and investment regimes across the globe. As a result, the USMCA may prove to be a viable template for ISDS in the future.

The main body of this Comment will proceed as follows. Part I will present an overview of the existing ISDS mechanisms in NAFTA as illustrated by case studies. Part II will discuss the ISDS mechanism and other relevant clauses in the USMCA, examining the renegotiation process and major changes made compared to their NAFTA predecessors. Part III will analyze the possible impact of the new mechanism on cross-continental investment. Finally, Part IV will explore the viability of the USMCA mechanism as a template for future agreements, as well as potential points of contention that may require redress down the road.

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1 The USMCA is termed The Canada-United States-Mexico Agreement (CUSMA) by the Government of Canada, and The Tratado entre México, Estados Unidos y Canadá (T-MEC) by the Government of Mexico. This Comment will mainly employ the U.S. name "USMCA," but Canadian and Mexican sources cited may refer to the agreement by its other names. *See A new Canada-United States-Mexico Agreement*, GLOB. AFF. CAN. (July 9, 2019); *see also T-MEC*, GOBIERNO DE México (Nov. 30, 2018).

2 *USMCA: Agreement Reached on Nafta Trade Deal Replacement*, BBC (Dec. 10, 2019), https://www.bbc.com/news/business-50733120.

3 *See* Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 HOUS. J. INT'L L. 301, 302 (2003).

I. INVESTOR-STATE DISPUTE SETTLEMENT IN NAFTA: AN OVERVIEW

NAFTA's principal dispute settlement mechanisms are found in Chapters 11, 19, and 20 of the treaty. Chapter 11 contains the ISDS mechanism;[4] Chapter 19 provides an alternative to domestic courts for settling antidumping and countervailing duty (AD/CVD) cases,[5] while Chapter 20 applies to disputes over the interpretation or application of the agreement.[6]

A. NAFTA Chapter 11 Provisions

NAFTA Chapter 11 allows investors from one NAFTA country ("NAFTA investors") to sue the government of another NAFTA country ("host NAFTA country") for alleged breach of its obligations under the treaty. This arrangement is designed to provide investors with an impartial tribunal to hear their grievances,[7] while at the same time sparing their home countries the burden of taking up their case and the risk of diplomatic escalation.[8] The main investor protections offered by Chapter 11 are as follows:

- **National treatment**: a host NAFTA country cannot grant NAFTA investors and their investments less favorable treatment than that granted to domestic investors and investments;[9]
- **Most-favored-nation treatment**: a host NAFTA country cannot give NAFTA investors and their investments less favorable treatment than that accorded to domestic investors and investors from any other non-NAFTA country;[10]
- **Minimum standard of treatment**: a host NAFTA country must, *at minimum*, treat NAFTA investors and their investments in accordance with international law, in a fair and equitable manner with full protection and security;[11]
- **Ban on performance requirements**: a host NAFTA country cannot

4 North American Free Trade Agreement, Can.-Mex.-U.S., ch. 11, Dec. 17, 1992, 32 I.L.M 289 (1993) [hereinafter NAFTA].

5 *Id.* ch. 19.

6 *Id.* ch. 20.

7 *See* William L. Owens, *Investment Arbitration under NAFTA Chapter 11: A Threat to Sovereignty of Member States?*, 39 CAN.-U.S. L.J. 55, 56 (2015). The author of this article is a former Democratic congressman from New York. *See Representative William L. Owens*, U.S. CONG, https://www.congress.gov/member/william-owens/O000169 (last visited Oct. 27, 2019).

8 *See* Riyaz Dattu & Sonja Pavic, *Canada Seeks to Reform NAFTA's Investor-State Dispute Settlement Chapter*, OSLER (Aug. 23, 2017).

9 NAFTA, *supra* note 4, art. 1102.

10 *Id.* art. 1103.

11 *Id.* art. 1105.

impose specific performance requirements, such as technology transfer or minimum domestic content, on a NAFTA investor or investment;[12]

- **Free transfer of funds**: a host NAFTA country must freely permit all monetary transfers relating to an investment of a NAFTA investor without delay;[13]
- **Safeguard against expropriation**: a host NAFTA country cannot directly or indirectly expropriate, or implement a measure tantamount to expropriation against, the investment of a NAFTA investor, except for a public purpose and on a lawful, non-discriminatory basis. In such cases, fair compensation must be offered to the investor in question.[14]

A NAFTA investor who accuses a host NAFTA country of breaching its obligations under Chapter 11 may, after giving sufficient notice,[15] submit a claim to arbitration under one of the following mechanisms:

- The Convention of the International Centre for the Settlement of Investment Disputes (ICSID Convention);[16]
- The United Nations Commission on International Trade Law (UNCITRAL) Rules; or
- Domestic courts of the host NAFTA country.[17]

A final tribunal award is enforceable in domestic courts.[18] Appeals can be made to a domestic court, but the appellate court cannot rule on simple errors of fact or law, or replace the tribunal's decision with its own.[19] Opportunity for appeal is therefore limited.

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12 *Id.* art. 1106.

13 *Id.* art. 1109.

14 *Id.* art. 1110.

15 *Id.* arts. 1119–20.

16 Includes the ICSID Additional Facility Rules, which offers arbitral services in certain cases outside the scope of the original ICSID Convention, such as when one of the parties is not a member state to the ICSID. *See ICSID Additional Facility Rules*, WORLD BANK, https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/overview (last visited Oct. 20, 2019).

17 *Overview of the Dispute Settlement Provisions*, NAFTA SECRETARIAT, https://web.archive.org/web/20200202032656/https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Overview-of-the-Dispute-Settlement-Provisions.

18 *Id.*

19 Aaron Cosbey, *NAFTA's Chapter 11 and the Environment: A Briefing Paper for the CEC's Joint Public Advisory Committee*, INT'L INST. FOR SUSTAINABLE DEV. (June 2002) ("In the end this is not an appeal process; the review cannot rule on simple errors of fact or law, or substitute a decision for the one made by the tribunal.").

B. Chapter 11 Case Studies

While Chapter 11's ISDS mechanism is not exactly innovative,[20] it has remained, since its inception, one of the most controversial aspects of NAFTA.[21] Over the past two decades, the Chapter has received heavy criticism as well as support from legal, academic, and political spheres across the continent.

Critics of Chapter 11 have long slated the ISDS mechanism as primarily concerned with protecting investors at the price of weakening NAFTA countries' ability to legislate or regulate in the public or national interest.[22] Three cases, *Metalclad Corp. v. United Mexican States*, *Ethyl Corp. v. Government of Canada*, and *Clayton/Bilcon of Delaware v. Government of Canada*, are often used to illustrate this point.

1. Metalclad Corp. v. United Mexican States

Metalclad Corporation (Metalcald), an American company, sued Mexico under Articles 1105 (minimum standard of treatment) and 1110 (safeguard against expropriation) of NAFTA for preventing the company from opening an already-built hazardous waste facility.[23] The *ad hoc* tribunal ruled against Mexico, stating it had violated both articles because (1) Mexico failed to provide a transparent and predictable business environment;[24] (2) the Mexican federal government made false representations which Metalclad relied upon;[25] and (3) the local government's refusal to grant a construction permit and refusal to promulgate an ecological decree over the landfill site was improper.[26]

The tribunal notably stated its decision was not affected by Article 1114, which allows a host NAFTA country to impose restrictions on investments from another NAFTA country for environmental reasons, since Mexico had permitted

[20] David A. Gantz, *Addressing Dispute Resolution Institutions in a NAFTA Renegotiation*, BAKER INST. (Apr. 2018) ("There was nothing particularly radical about Chapter 11 for the United States. The sources were the CFTA Chapter 16 (for the obligations to investors language) and the [] bilateral investment treaties (BITs) concluded by the United States with several dozen developing nations since 1980, particularly the 1992 U.S. 'model' BIT.").

[21] *See* Staff & Lewis, *supra* note 3, at 202.

[22] Julie Soloway & Chris Tollefson *NAFTA's Chapter 11: Investor Protection, Integration, and the Public Interest*, 9 INST. FOR RSCH. ON PUB. POL'Y 4, 5 (2003); Evelyn Iritani, *Metalclad NAFTA Dispute Is Settled*, L.A. TIMES (June 14, 2001), ("Critics of globalization say these trade agreements give private firms too much power and undermine the ability of governments to protect their citizens' health and safety.").

[23] Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, ¶¶ 28-62, (Aug. 30, 2000).

[24] *Id.* ¶ 99.

[25] *Id.* ¶ 107.

[26] *Id.* ¶¶ 86, 102–12.

the construction of the facility to go ahead in the first place.[27] In the end, the tribunal awarded Metalclad more than $16 million in damages.[28]

The decision was controversial for three main reasons. First, it maintained an unusually strict standard for transparency under NAFTA Article 102, by requiring a host NAFTA country to pre-emptively determine its regulatory positions and clarify any potential points of misunderstanding—lest it breaches the "fair and equitable" requirement in Article 1105.[29] Second, it defined "expropriation" under Article 1110 more broadly than prevailing international customs.[30] Third, the decision curtailed the ability of NAFTA host countries to enact environmental regulations vis-à-vis NAFTA investments, notably by bypassing an in-depth discussion on Article 1114.[31]

Mexico appealed the award to the Supreme Court of British Columbia ("BCSC").[32] In 2001, the BCSC overturned the tribunal's ruling on Article 1105 and found the tribunal overreached in finding Mexico's misrepresentations towards Metalclad amounted to indirect expropriation under Article 1110.[33] However, the BCSC refused to do the same regarding the tribunal's "extremely broad" definition of expropriation; it also declined to qualify the tribunal's dismissal of Mexico's argument based on Article 1114 as "patently unreasonable."[34] In the end, the BCSC granted a partial award to Metalclad.[35]

The *Metalclad* saga attracted considerable notice and debate over the course of the case. Activist groups, international organizations, and even government agencies across the continent condemned the tribunal's award as abuse of the ISDS mechanism, an attack against domestic environmental legislation, and an infringement of national sovereignty.[36] Both the governments of Canada and

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27 NAFTA, *supra* note 4, art. 1114.

28 Metalclad, ¶ 131.

29 *See id.* ¶ 76; Maximo Romero Jimenez, *Considerations of NAFTA Chapter 11*, 2 CHI. J. INT'L L. 243, 247 (2001).

30 Jennifer Trousdale, *The International Investor's Guide to Retaining a Successful NAFTA Chapter 11 Award on Appeal*, 13 L. & BUS. REV. AM. 217, 222 (2007).

31 *See* Metalclad, ¶ 98; Jenny Harbine, *NAFTA Chapter 11 Arbitration: Deciding the Price of Free Trade*, 29 ECOLOGY J. Q., 371, 390 (2002).

32 The appeal was heard in this court because the arbitration was deemed to have taken place under its jurisdiction under the ICSID Additional Facility Rules. Trousdale, *supra* note 30, at 217, 222.

33 United Mexican States v. Metalclad Corp., 2001 BCSC 664, ¶¶ 72, 77–78 (Can.).

34 *Id.* ¶¶ 99, 104.

35 *Id.* ¶ 134.

36 Examples of organizations include Greenpeace, the Sierra Club of Canada, the World Wildlife Fund, and the U.S. Environmental Protection Agency. Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 MINN. J. GLOB. TRADE 209, 213–14, 276 n. 512 (2001).

Quebec joined Mexico's appeal as intervenors to argue the tribunal's interpretation of Chapter 11 was overbroad.[37]

In response to the reactions towards the *Metalclad* case, the NAFTA Free Trade Commission issued a joint interpretive statement to clarify key aspects of Chapter 11 and allay growing public concern.[38] The statement echoed the BCSC's decision in affirming that "concepts of 'fair and equitable treatment' . . . do not require treatment in addition to or beyond that which is required by the customary international law," and that "nothing in the relevant arbitral rules imposes a general duty of confidentiality" on the disputing parties to a Chapter 11 arbitration.[39]

The statement plugged some of the loopholes within Chapter 11 deplored by public opinion and the BCSC alike. Nevertheless it is important to note that while the statement spoke on specific arguments in *Metalclad* in favor of Mexico and the intervenors, it did not address the chilling effect created against domestic environmental legislation by investors abusing Article 1105 in the style of *Metalclad*.[40] Moreover, judicial review offers little recourse to the losing side of the original arbitration[41]—even if the appellate court determines the tribunal had made errors of fact or law.[42] Finally, the BCSC decision reduced the likelihood of judicial review becoming more effective in the future.[43] This means if a rerun of *Metalclad* occurs on a different aspect of the ISDS mechanism (or any other part of NAFTA), it is likely the appellate court would be equally, or perhaps even more incapable, of reviewing the tribunal's decision in a meaningful

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37 Colin Freeze, *Mexico Appeals NAFTA Ruling on Waste Dump*, GLOBE & MAIL (Feb. 19, 2001) (last updated Apr. 9, 2018), https://www.theglobeandmail.com/news/national/mexico-appeals-nafta-ruling-on-waste-dump/article4144851/.

38 *Notes of Interpretation of Certain Chapter 11 Provisions*, FOREIGN TRADE INFO. SYS. (July 31, 2001), http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

39 *Id.*

40 *See* Bronwyn Pavey & Tim Williams, *The North American Free Trade Agreement: Chapter 11*, GOV'T OF CAN. (Feb. 26, 2003), http://publications.gc.ca/Collection-R/LoPBdP/inbrief/prb0254-e.htm#TheDispute.

41 *See* Iritani, *supra* note 22 (explaining that the parties ended the case with a payout of $15.6 million from Mexico, which is not very far from the $16.685 million originally awarded to Metalclad by the tribunal).

42 Cosbey, *supra* note 19.

43 This is because the BCSC ruled that British Columbia's International Commercial Arbitration Act (ICAA), rather than the Commercial Arbitration Act, applied to the case. The former contains a far stricter standard of review than the latter. Justice Tysoe reasoned since "investing" is included in the definition of "commercial relationship" as defined in the ICAA, it should govern in this international case. While the ruling itself is confined to a single Canadian province, the reasoning behind it may set up a precedent in NAFTA/USMCA cases tackling the same question in the future (NAFTA Article 1136 states that tribunal awards do not establish binding precedence, but there is no prohibition against tribunals referring to past Chapter 11 decisions; nor is there any mention of appellate court decisions to the same effect). *See* NAFTA, *supra* note 4, art. 1136; *see also* Chris Tollefson, *Metalclad v. United Mexican States Revisited: Judicial Oversight of NAFTA's Chapter Eleven Investor-State Claim Process*, 11 MINN. J. GLOB. TRADE 183, 199, 200 (2002).

capacity. This is true unless the tribunal is deemed to have erred so greatly that it exceeded its jurisdiction—a high bar to meet. In sum, Chapter 11's detractors contend that controversy behind the *Metalclad* case highlights important flaws and weaknesses within Chapter 11 which remains to be fixed today.

2. Ethyl Corp. v. Government of Canada

In *Ethyl Corp. v. Government of Canada*, the Ethyl Corporation (Ethyl), an American chemical company, sued the Government of Canada over its partial ban of Methylcyclopentadienyl Manganese Tricarbonyl (MMT), a fuel additive.[44] MMT contains manganese, which in the form of exhaust, may cause airborne manganese poisoning in humans.[45] The additive is also suspected of interfering with on-board emissions monitoring and diagnostic systems.[46] Concerned about MMT's public health and environmental risks, the Canadian Parliament introduced the Manganese-based Fuel Additives Act ("MMT Act") in 1997, which banned the commercial importation and intra-provincial transport of MMT.[47] While the MMT Act was being deliberated in Parliament, Ethyl publicly threatened to respond with a Chapter 11 suit.[48] After the MMT Act was passed, Ethyl made good on its threat and initiated a claim against the Government of Canada, arguing the ban violated its rights under Articles 1102, 1106, and 1110.[49]

The arbitration was not focused on the substance of the case: much attention was devoted to the question of jurisdiction.[50] Most importantly, Canada argued Ethyl had violated the procedural requirements stipulated in Article 1120.[51] The company filed a Notice of Arbitration on April 14, 1997, before the expiration of the mandatory six-month waiting period following the date of the event giving

44 *Cases filed against the Government of Canada*: *Ethyl Corporation v. Government of Canada*, GLOB. AFF. CAN., https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng (last visited May 19, 2020).

45 *Id.*

46 *Id.*

47 *Id.*

48 Ray C. Jones, Comment, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 538 (2002).

49 GLOB. AFF. CAN., *supra* note 44.

50 *See* Jones, *supra* note 48, at 538–39.

51 *See Id.* ("Canada objected to the suit primarily because Ethyl had not waited six months after the passage and implementation of the ban before filing a claim. . .").

rise to Ethyl's claim.[52] According to Canada, the Notice of Arbitration referred to the entry into force of the MMT Act on June 24, 1997.[53]

While the tribunal did not reject Canada's interpretation of the timeline, it declined to withdraw jurisdiction over the case despite Ethyl's violation of Article 1120.[54] The tribunal reasoned the six-month "cooling off" period would have been of little use in the case, since it has been given "no reason to believe that any 'consultation or negotiation' pursuant to Article 1118, which Canada admitted the six-month provision in Article 1120 was designed to encourage, was even possible."[55]

Additionally, the tribunal noted that over six months had already passed since the MMT Act entered into force, and Canada had still given zero indication whether it intended to repeal or amend the act.[56] Since the facts of the case did not change, dismissing the present case would "disserve, rather than serve, the object and purpose of NAFTA."[57] Ethyl was only obliged to pay the costs of proceedings for its violation of Article 1120; the tribunal otherwise allowed the case to go forward.[58]

After the tribunal's decision, Canada settled with Ethyl for over $13 million and gave a public apology.[59] Following a separate court challenge by three Canadian provinces, Canada also withdrew its partial ban on MTT.[60]

In addition to sparking a new wave of Chapter 11 claims against Canada,[61] the *Ethyl* case also gifted ammunition to NAFTA critics, who decried the Canadian government's forced retreat on public health protection in face of a foreign investor. They argued the tribunal's decision may create a precedent where a host NAFTA country would be obliged to compensate NAFTA investors whenever the government "wishes to regulate them or their products for public health or environmental reasons."[62]

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[52] Ethyl Corp. v. Gov't of Can., UNCITRAL, Award on Jurisdiction, ¶ 81 (June 24, 1998), 38 ILM 708 (1999).

[53] *Id.* ¶ 68.

[54] *Id.* ¶¶ 79–88.

[55] *Id.* ¶ 84.

[56] *Id.* ¶ 85.

[57] *Id.*

[58] *Id.* ¶ 88.

[59] Debbie Barker, *2018 Trade Policy Assessment*, ME. CITIZEN TRADE POL'Y COMM'N (Sept. 2018), https://legislature.maine.gov/doc/3160.

[60] *Id.*

[61] Scott Sinclair, *Canada's Track Record Under NAFTA Chapter 11*, CAN. CTR. FOR POL'Y ALTS. (Jan. 2018), https://www.policyalternatives.ca/nafta2018.

[62] Michelle Sforza et al., *Ethyl Corporation vs. Government of Canada*: *Now Investors Can Use NAFTA*

Also controversial was the tribunal's apparent tolerance of Ethyl's rule-breaking behavior.[63] It accepted jurisdiction despite the fact that Ethyl violated Article 1120 of Chapter 11, which stipulates a mandatory waiting period prior to initiating arbitration.[64] Furthermore, the tribunal's decision was made despite its acknowledgement of the strong possibility that Ethyl intentionally violated Article 1120.[65] The company filed the Notice of Arbitration while the bill containing the MMT Act was still being debated in the House of Commons, in order to dissuade lawmakers from passing the bill.[66] Yet the tribunal remained undeterred, ruling that Ethyl's intentional breach with the specific aim of disrupting the domestic legislative process of a sovereign state was not enough to warrant dismissal of the suit.[67] One of the main goals of ISDS is promoting the rule of law, which invariably involves the strict adherence to established legal procedures to ensure the rights of both parties are respected.[68] If it is shown that one party can deliberately flout these procedures for political purposes without incurring any meaningful punishment, future parties would be less likely to trust NAFTA's ISDS mechanism to afford them adequate legal protection.

3. Clayton/Bilcon of Delaware v. Government of Canada

In *Clayton/Bilcon of Delaware v. Government of Canada*, the Claytons, a family of American citizens, and Bilcon of Delaware, Inc. (Bilcon), a U.S.-based company, filed suit against Canada in 2008 for rejecting their plan to develop a quarry and marine terminal in Digby Neck, Nova Scotia.[69] The claimants alleged the governments of Canada and Nova Scotia rejected their project proposal in line with the recommendations of a Joint Review Panel (JRP).[70] According to the claimants, this was not only legally unnecessary,[71] but also conducted an

to Challenge Environmental Safeguards, PUB. CITIZEN (Oct. 2, 2011).

63 *See* Jones, *supra* note 48, at 548.

64 NAFTA, *supra* note 4, art. 1120 ("Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration[.]").

65 Ethyl Corp., 38 ILM 708, ¶ 87.

66 *Id.*

67 To be clear, the *Ethyl* tribunal's dismissal of Article 1120 does not by itself speak to any defects in the text of the agreement. However, unlike in the aftermath of *Metalclad*, the NAFTA Free Trade Commission did not issue any statement to clarify or negate the more controversial aspects of the *Ethyl* decision, meaning the Commission did not consider the decision so irregular to be worthy of discussion.

68 *See* Lise Johnson et al., *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get us There?*, COLUM. CTR. FOR SUSTAINABLE INV. Dec. 11, 2017, http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/.

69 *Bilcon of Del. et al v. Gov't of Can.*, Award on Jurisdiction and Liability, Case No. 2009-04, ¶ 5 (Perm. Ct. Arb. 2015).

70 *Id.* ¶¶ 159–61.

71 *Id.*

environmental assessment of the proposal that was "unfair, politically biased[,] and discriminatory" every step of the way.[72] Specifically, the claimants contended Canada's conduct had breached Articles 1102 (national treatment), 1103 (most-favored-nation treatment), and 1105 (minimum standard of treatment) of NAFTA.[73]

After clearing the initial jurisdictional hurdles, the tribunal focused its Article 1105 analysis on one significant issue: whether the JRP's emphasis on "community core values" was fair.[74] This emphasis played a heavy role in the JRP's decision to recommend the Canadian and Nova Scotian governments to reject the project proposal.[75] The claimants cried foul over the role of this criterion in the decision-making process, claiming that they had no prior knowledge of it.[76]

The tribunal found Canada had breached Article 1105.[77] The majority's findings were based on the fact that the JRP's recommendation improperly relied upon the vague "core community values" standard, which was neither in compliance with Canadian law nor communicated to the claimants beforehand.[78] Therefore, the application of this standard violated the claimants' right to due process, since they were not given an opportunity to make or modify their case based on the standard.[79] After finding for the claimants on Article 1102 (the Article 1103 claim was not considered, since "if a breach is found in respect of Article 1102, a further finding of liability under Article 1103 would not, in any plausible scenario, [a]ffect the measure of damages."), the tribunal allowed the case to move to the damages phase.[80]

Donald McRae, one of the arbitrators on the tribunal, issued a dissenting opinion regarding the majority's finding of an Article 1105 breach. McRae disagreed with the majority's assertion that the claimants were unfairly surprised by the "community core value" standard.[81] McRae notes what the panel referred

72 *Id.* ¶ 5.

73 *Cases filed against the Government of Canada*: *Clayton/Bilcon v. Government of Canada*, GLOB. AFF. CAN., https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng (last updated Jan. 2, 2018).

74 *See generally* Bilcon of Del. Case No. 2009-04.

75 *Id.* ¶ 40.

76 *Id.* ¶ 591.

77 *Id.* ¶ 604.

78 *See id.* ¶ 591 ("The J.R.P. effectively created . . . a new standard of assessment rather than fully carrying out the mandate defined by the applicable law.").

79 *Id.* ¶ 590–92

80 *Id.* ¶¶ 716, 729.

81 Bilcon of Del. et al. v. Gov't of Can., Dissenting Opinion of Professor Donald McRae, Case No. 2009-

to as "community core values" were precisely topics "relating to the human environment," such as First Nations resource use, community history, and local heritage.[82] The claimants knew these topics were included in the environmental assessment process, but were simply not prepared to deal with.[83]

McRae also disputed the majority's characterization of the "community core value" standard as a violation of Canadian law. He noted that such a determination should be at least left to a Canadian court to make.[84] In the absence of such a determination, a tribunal with no specific expertise in the Canadian legal system should not automatically treat a *potential* breach of Canadian law as a breach of an international treaty.[85]

McRae concluded his opinion by qualifying the majority decision as a "remarkable step backward in environmental protection,"[86] a sentiment shared by environmental activists and groups.[87] However, legal critics of Chapter 11 contend the decision highlighted an even bigger problem: an international tribunal made a determination on whether a domestic government agency's actions breached domestic law, without any input from a domestic court or deference to the domestic agency.[88] In short, the *Bilcon* case raises the question of whether a Chapter 11 tribunal has the power to review domestic legislation, the answer to which may carry serious implications regarding Chapter 11's effects on the judicial sovereignty of NAFTA countries.

C. Additional Arguments and Counterpoints

The above three cases each demonstrate particular talking points used by critics of Chapter 11 to prove their case. *Metalclad* highlighted the "chilling effect" ISDS may have on domestic environmental and health regulations, as well as the weakness of judicial review in Chapter 11 cases; *Ethyl* cast doubt on the procedural integrity of Chapter 11 itself, while *Clayton/Bilcon* represented a severe case of judicial overreach by an international tribunal into a NAFTA country's domestic legal system. Yet the critics do not stop here. To some, while

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04, ¶ 25 (Perm. Ct. Arb. 2015).

82 *Id.*

83 *Id.*

84 *Id.* ¶ 34.

85 *Id.* ¶ 40.

86 *Id.* ¶ 51.

87 *See, e.g.*, Janet M. Eaton, *Digby Neck Quarry Bilcon Case*, Tribunal Decision and Dissent, SIERRA CLUB OF CAN. May 11, 2015.

88 *See* Laura Létourneau-Tremblay & Daniel F. Behn, Comment, *Judging the Misapplication of a State's Own Environmental Regulations*, 17 J. WORLD INV. & TRADE 823, 824 (2016); *see also* Nigel Bankes, *The Bilcon Award*, U. CALGARY FAC. L. BLOG (Apr. 7, 2015), https://ablawg.ca/2015/04/07/the-bilcon-award/.

these three cases highlighted the chapter's "chilling effect" on domestic health and environmental legislation, as well as the concept of national sovereignty, they are not enough to encapsulate everything that is wrong with ISDS.

In the United States, these critics come from both sides of the political spectrum. Simon Lester, a member of the libertarian think tank Cato Institute, stated his most fundamental objection towards ISDS is that it "only gives rights to foreign investors, not ordinary citizens."[89] For example, if the assets of an American investor were expropriated in Canada, it may file a claim with a Chapter 11 tribunal. But a Canadian investor facing the same situation would have no similar recourse, since Chapter 11 tribunals do not hear domestic cases, and Canadian law "lacks good rules on expropriation."[90] In a more nationalist vein, fellow Cato researcher Daniel Ikenson argues ISDS mechanisms neutralize an important American advantage—the respect for the rule of law—in the global competition to attract investment.[91]

From the left, Senators Bernie Sanders (D-VT) and Elizabeth Warren (D-MA) have also come out against Chapter 11—albeit from a different angle.[92] Aside from the aforementioned criticisms regarding national sovereignty and "regulatory chill," both senators have vaguely qualified the ISDS mechanism as a NAFTA term that "promote[s] the outsourcing of American jobs."[93] In addition, Senator Warrens questioned the integrity of Chapter 11 tribunals, calling arbitrators "highly paid corporate lawyers [who] would go back and forth between representing corporations one day and sitting in judgment the next."[94] These lawyers, the senator suggests, are unlikely to "rule against those corporations when it's [their] turn in the judge's seat."[95]

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[89] Simon Lester, *Responses to Some Criticisms on ISDS*, CATO UNBOUND (May 20, 2015), https://www.cato-unbound.org/2015/05/20/simon-lester/responses-some-criticisms-isds; *see* Peter Bondarenko, *Cato Institute*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Cato-Institute (last visited Oct. 26, 2019) ("One of the most influential libertarian think tanks in the United States, it supports peace, individual liberty, limited government, and free markets."); *see also* Simon Lester, CATO INST., https://www.cato.org/people/simon-lester (last visited Oct. 26, 2019).

[90] *Id.*

[91] Daniel J. Ikenson, *To Save NAFTA, Kill Its Controversial Dispute Settlement Provisions*, CATO INST. (Oct. 24, 2017), https://www.cato.org/publications/commentary/save-nafta-kill-its-controversial-dispute-settlement-provisions.

[92] *See* Press Release, Senator Bernie Sanders of Vermont, Progressives Call on Trump to Fundamentally Rewrite NAFTA (Feb. 2, 2018), https://www.sanders.senate.gov/newsroom/press-releases/progressives-call-on-trump-to-fundamentally-rewrite-nafta.

[93] *Id.*

[94] Elizabeth Warren, Commentary, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 26, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

[95] *Id.*

On the other hand, supporters of Chapter 11 (and by extension ISDS) say its negative effects have been exaggerated. First, they point out the record of ISDS rulings worldwide does not support the contention that arbitral tribunals are biased in favor of foreign investors. As of 2012, tribunals convened under ICSID rules have completely rejected the investor's claim in fifty-four percent of the cases.[96] Even in instances where the investor prevailed, the damages granted are typically less than forty percent of the initial amount sought.[97] In the specific context of Chapter 11, the latter figure is even lower[98] (figure 1).[99] It therefore follows that these tribunals are not the expansive vanguards of corporate interest as their detractors portray them to be. No claim by the claimant investor is taken for granted; tribunals examine each one on their factual merit to arrive at a cautious and well-reasoned conclusion.[100]

Second, the fact that investors can use litigation to influence government decision-making is not inherently an "evil" prospect.[101] Government is not perfect. Sometimes it may take an action that violates an international trade agreement it has signed and ratified/legislated into domestic law.[102] If such an act harms a foreign investor, the investor would not be wrong to seek redress from a forum whose proficiency and impartiality are ensured through a binding international agreement designed to regulate the actions of states who have voluntarily signed up to it.[103] It is a fundamental rule of international law that a state's domestic legislation cannot override its treaty obligations.[104] Failure to uphold this rule would mean the end of international law as we know it.[105] The ultimate purpose of Chapter 11 is to hold the government accountable for its actions. Far from being a corporate plot to undermine the sovereignty of states,

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96 Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 710 (2014).

97 *Id.* at 711.

98 Iritani, *supra* note 22.

99 Figures are rounded. Iritani, *supra* note 22; *Ethyl v. Canada*, U.N. CONF. ON TRADE & DEV., https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/16/ethyl-v-canada, (last visited Mar 5, 2021); Luke Eric Peterson, *Canada Ordered to Pay $7 Million for Botched Environmental Review, but NAFTA Arbitrators Reject U.S. Investors' Bid for $400+ Million in Lost Profits*, INV. ARB. REPORTER (Feb. 29, 2019), https://www.iareporter.com/articles/canada-ordered-to-pay-7-million-for-botched-environmental-review-but-nafta-arbitrators-reject-u-s-investors-bid-for-400-million-in-lost-profits/.

100 *See* Owens, *supra* note 7, at 64 ("The central theme across each of these cases is that arbitral tribunals made narrow decisions based on factual evidence.").

101 Ian A. Laird, *NAFTA Chapter 11: NAFTA Chapter 11 Meets Chicken Little*, 2 CHI. J. INT'L L. 223, 229 (2001).

102 *Id.*

103 Brower, *supra* note 95, at 720–22.

104 *Id.* at 721.

105 *Id.* at 721–22.

this is a goal that speaks to the very notions of the rule of law and government accountability.[106]

Third, even if the prospect of foreign investors holding government policy accountable through arbitration is indeed an unethical one, Chapter 11 does not go this far. Chapter 11 proceedings do not pose a direct impediment to the legislative process and decision-making capacity of a sovereign state: arbitral tribunals can impose financial penalties, but they cannot force a country to amend or repeal the offending law or policy.[107] A country may reverse course to avoid further litigation and reputational damage, but this would not violate the principle of state sovereignty, since demanding reparations from a state in breach of its treaty obligations is a staple of international law.[108] Furthermore, a Chapter 11 tribunal has neither country nor army to impose its will. It ultimately remains to the offending state to decide upon its course of action.

Fourth, on Senator Warren's claim that Chapter 11 panels are inherently biased in favor of corporations, defenders of ISDS argue her line of reasoning is supported by neither logic nor facts. Researcher Gary Clyde Hufbauer alleges Senator Warren failed to "mention that arbitrators are selected from a large panel of qualified attorneys and that each side has several opportunities to remove candidates with a potential bias," as well as the oath of impartiality every arbitrator must take before proceedings begin.[109] In another refutation of Senator Warren's claim, a blog post from the Obama White House noted arbitrators more often side with the respondent government, and the United States has "never lost an ISDS case because of the strong safeguards in the U.S. approach."[110]

Lastly, supporters argue Chapter 11 is a better alternative than leaving investors to rely on traditional state-to-state mechanisms. ISDS is designed to prevent investor-state disputes from escalating to the state-to-state level, at which the richer and more powerful country (i.e. the United States) would inevitably have its way through *forceful persuasion*.[111] By contrast, ISDS offers

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[106] Laird, *supra* note 101, at 229.

[107] Owens, *supra* note 7, at 60.

[108] *Article 27. Violation of Treaty Obligations*, 29 AM. J. INT'L L. 1077, 1079 (1935).

[109] Gary Clyde Hufbauer, *Senator Warren Distorts the Record on Investor-State Dispute Settlements*, PETERSON INST. INT'L ECON.: TRADE INV. POL'Y WATCH BLOG (Mar. 2, 2015, 3:30 PM), https://www.piie.com/blogs/trade-investment-policy-watch/senator-warren-distorts-record-investor-state-dispute.

[110] Jeffery Zients, blog, *Investor-State Dispute Settlement (ISDS) Questions and Answers*, WHITE HOUSE: BLOG (Feb. 26, 2015, 3:00 PM), https://obamawhitehouse.archives.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers.

[111] *See* Tim Samples, *Winning and Losing in Investor–State Dispute Settlement*, 56 AM. BUS. L.J. 115, 134–35 (2019); *see also* Chris Evans, *ISDS: Important Questions and Answers*, WHITE HOUSE: OFF. U.S. TRADE REPRESENTATIVE BLOG (Mar. 26, 2015, 4:49 PM), https://obamawhitehouse.archives.gov/blog/2015/03/26/

a more civilized way to resolve investor-state disputes. The benefits of this arrangement are multifaceted: the foreign investor gains access to an impartial forum, the investor's home country is relieved of the political obligation to fight the investor's battle—regardless of the merits of the case—against the host country, while the host country is insulated from any adverse action the home country might take to protect the investor.[112] ISDS may not be perfect, but it is a far better alternative than the olden days of gunboat diplomacy.

The debates on these points go back and forth. On the last point, for example, some opponents to Chapter 11 (and those to the ISDS concept as a whole) argue the choice between ISDS and traditional state-to-state politicking is a false one: not only is ISDS ineffective in de-politicizing investor-state disputes, there are other ways to resolve investor-state disputes without having to resort to either.[113] As we will see in Part III, it is apparent these debates played an important role during the negotiation of the USMCA, since the negotiators clearly drafted its ISDS mechanism with the aforementioned points and counterpoints in mind. Whether these changes are effective in addressing concerns over NAFTA Chapter 11, however, is a different story further discussed below.

II. ISDS IN THE USMCA: AN OVERVIEW

While the USMCA is not exactly a "radical overhaul" of its 1994 predecessor, the characterization is appropriate in describing the changes it made to NAFTA Chapter 11, now Chapter 14 of the USMCA.[114] The basic organization of USMCA Chapter 14 remains roughly the same to that of NAFTA Chapter 11: a list of covenants (e.g. minimum standard of treatment,

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isds-important-questions-and-answers, ("In fact, early in our history, the U.S. had to deploy 'gunboat diplomacy,' or military intervention, to protect private American commercial interests.").

[112] *See* Robert Wisner & Neil Campbell, *Bringing the Home State Back in: the Case for Home State Control in Investor-State Dispute Settlement*, INT'L BAR ASS'N (Jan. 2018), https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=522de4cb-caa3-4656-8236-f1e13f261b86.

[113] Johnson, *supra* note 68. (Explaining that ISDS is not the only way to resolve international investment disputes; one should therefore not assume that without ISDS, states would necessarily resort to force to protect investor interests.); *see See* Geoffrey Gertz et al., *Legalization and Diplomacy: American Power and the Investment Regime*, 107 WORLD DEV. 239 (2018) (finding no empirical evidence that investment treaties de-politicize investor-state disputes).

[114] *Compare* NAFTA, ch. 11, 32 I.L.M. 605 (1993) (showing Chapter 11 as "Investment"), *with* Canada-United States-Mexico Agreement ch. 14, Dec. 10, 2019, Agreement between the United States of America, the United Mexican States, and Canada, OFF. U.S. TRADE REPRESENTATIVE: FREE TRADE AGREEMENTS (Dec. 13, 2019), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between, *and Canada-United States-Mexico Agreement (CUSMA) - Table of Contents*, GLOB. AFF. CAN.: TRADE NEGOTS. AGREEMENTS (Feb. 21, 2020), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng (showing Chapter 14 as "Investment).

compensation for expropriations, etc.) made by the parties, followed by a thorough description of the ISDS mechanism towards the end of the text.[115]

An analysis of the USMCA's dispute settlement mechanisms cannot be complete without a discussion on their creative process. To understand how they have changed, it is important to also understand *why* these changes were proposed and made in the first place, especially in relation to their NAFTA predecessors. This part will therefore examine each mechanism from two perspectives: the positions taken by the parties regarding the mechanism at the beginning of negotiations, and an overview of the mechanism as presented in the actual treaty text.

A. Starting Positions

As one of NAFTA's most contentious components, ISDS naturally did not escape its share of controversy during the renegotiation process. [116] This section will discuss the impact of NAFTA Chapter 11 on each of the three countries, as well as how this impact influenced their positions towards ISDS at the start of the negotiation over the USMCA.

1. Canada

Of the three NAFTA parties, Canada is perhaps one of the most impacted by the agreement's ISDS mechanism. From January 1, 1995 to December 31, 2017, Canada has been sued 41 times under NAFTA Chapter 11 (figure 2),[117] more than Mexico or the United States. Additionally, Canada has also lost more cases than the two other countries, having to pay in eight of the seventeen cases filed it that have been settled or adjudicated by January 1, 2018.[118] The Canadian

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[115] *Id.*

[116] *See* Staff & Lewis, *supra* note 3, at 202.

[117] This figures includes cases in which the claimant has filed a Notice of Intent to Submit a Claim to Arbitration under NAFTA Article 1119, but has not yet submitted a Notice to Arbitration. *See* Sinclair, *supra* note 61, at 15–30. The list provided on the website of Global Affairs Canada seems to omit some of these cases, such as *Shiell v. Canada* and *Omnitrax. v. Canada*. *Cases Filed Against the Government of Canada*, GLOB. AFF. CAN: NAFTA - CHAPTER 11 – INV. (May 5, 2020), https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng. *See also* Elisha Dacey & Cameron MacLean, *Omnitrax Threatens NAFTA Challenge as Ottawa Files Lawsuit*, CAN. BROAD. CORP. (Nov. 14, 2017), https://www.cbc.ca/news/canada/manitoba/omnitrax-files-notice-nafta-sabatoge-1.4401393 ("Omnitrax filed a notice of intent to submit a claim under Chapter 11 . . ."); *Table of Foreign Investor-State Cases and Claims Under NAFTA and Other U.S. "Trade" Deals*, PUB. CITIZEN (Aug. 1, 2018) ("The Shiell family [. . .] claimed that it was not protected by the Canadian courts and various Canadian regulators in violation of Canada's NAFTA Chapter 11 obligations.").

[118] Sinclair, *supra* note 61, at 10.

Centre for Policy Alternatives (C.C.P.A.) projected that the total sum of penalties Canada had paid was over CAD 219 million.[119] This does not include Canada's legal costs, of which approximately CAD 95 million is deemed by the C.C.P.A. to be "unrecoverable."[120] These figures are echoed by then-Canadian foreign minister Chrystia Freeland, who stated during a House of Commons debate that NAFTA's ISDS mechanism had "cost Canadian taxpayers more than $300 million [Canadian dollars] in penalties and legal fees."[121]

Canada's unenviable track record under NAFTA Chapter 11 mobilized public opinion against ISDS. In a 2017 poll commissioned by the Council of Canadians (a non-profit political organization long opposed to Chapter 11), sixty-three percent of the respondents agreed that NAFTA's ISDS mechanism should be eliminated from its replacement entirely.[122] In the same year, a public consultation conducted by Global Affairs Canada received multiple comments expressing worry that the inclusion of an ISDS mechanism in a renegotiated NAFTA deal may "make governments less inclined to enact stronger environmental laws and regulations."[123]

Despite all of the above, Canadian negotiators initially took a lukewarm position towards ISDS. The list of renegotiation objectives outlined by Minister Freeland in August 2017 did not include the abolishment of the ISDS mechanism; rather, the list only vaguely called for its reform, so to ensure that "governments have an unassailable right to regulate in the public interest." [124] After negotiations began, further details on the Canadian position emerged: Canada was trying to keep ISDS in the NAFTA replacement (which would later become the USMCA) against the wishes of the United States, the country where the majority of Chapter 11 claims against Canada originated from.[125]

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[119] *Id.* at 1.

[120] *Id.* at 8.

[121] Canada, Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 431 (June 11, 2019) at 28890 (Hon. C. Freeland) (Can.).

[122] Janyce McGregor, *Why NAFTA's unloved investor-state dispute chapter may be in trouble*, CAN. BROAD. CORP. (Sept. 8, 2018), https://www.cbc.ca/news/politics/nafta-isds-weekend-1.4814141; *POLL: If NAFTA Results in Bad Deal for Canadians and the Environment, 76 Percent Say Walk Away*, COUNCIL OF CANADIANS (Sept. 20, 2017), https://canadians.org/update/poll-if-nafta-results-bad-deal-canadians-and-environment-76-cent-say-walk-away.

[123] *North American Free Trade Agreement negotiations – Initial environmental assessment*, GLOB. AFF. CAN. TRADE NEGOTS. AGREEMENTS (Dec. 12, 2018), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/initial_ea-ee_initiale.aspx?lang=eng#2.

[124] Alexander Panetta, *Canada's 10 NAFTA Demands: A List of What Canada Wants as Talks Start This Week*, CAN. BROAD. CORP. (Aug. 14, 2017), https://www.cbc.ca/news/politics/nafta-canada-demands-list-1.4246498.

[125] McGregor, *supra* note 122; Sean Higgins, *Canada Says 'Hard No' on Trump Change to NAFTA Dispute Resolution*, WASH. EXAM'R (Aug. 29, 2017), https://www.washingtonexaminer.com/canada-says-hard-

It is not difficult to see why this particular stance sparked widespread confusion (and indignation) among observers.[126] After all, Canada does not seem to have much to gain from the preservation of ISDS in the next iteration of NAFTA. One may posit that retaining ISDS could help Canada maintain its appeal to foreign investors, but evidence that bilateral investment treaties (BITs; these usually include an ISDS provision)[127] encourage foreign investment in already-developed countries is limited.[128] Alternatively, it may be argued that Canada does not want to see Canadian investors lose their right to sue the United States under Chapter 11 (Canadian investors will still be able to sue Mexico under the ISDS mechanism of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a different free trade agreement), but this view is not supported by history.[129] As seen above, no Canadian claimant has ever won a Chapter 11 case against an American respondent.[130]

The real answer may lie elsewhere. One possibility is the Canadian government views Chapter 11 tribunals, which are not bound by *stare decisis*,

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no-on-trump-change-to-nafta-dispute-resolution; Sinclair, *supra* note 61 at 15–30 (showing that out of the 41 cases against Canada, 40 of them were initiated by U.S. nationals and corporations).

[126] The C.C.P.A expressed its "bafflement" towards Canada's protectiveness towards the ISDS mechanism, with one researcher noting that "[w]hile a lot of the Trump administration's proposals in the NAFTA talks are harmful to Canadian interests, [its proposal to abolish ISDS] is beneficial." Dan Healing, *Report Questions Canada's Desire to Protect NAFTA's Chapter 11 Mechanism*, CTV NEWS (Jan. 16, 2018). https://www.ctvnews.ca/business/report-questions-canada-s-desire-to-protect-nafta-s-chapter-11-mechanism-1.3761313. U.S.-based lobbying group Public Citizen noted the "irony" in Canada's defense of ISDS—while being "No. 1 in the world of developed countries that has lost under investor-state [dispute settlement]." *Id.*

[127] *See*, *e.g.*, *2012 U.S. Model Bilateral Investment Treaty: Treaty Between the Government of the United States of America and the Government of the [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, OFF. OF U.S. TRADE REPRESENTATIVE, at 22–32.

[128] While studies on the relationship between ISDS provisions and FDI are relatively scarce, the existing literature largely suggests the effects of ISDS is relatively small in countries with a strong investment environment. *See* LAUGE N. SKOVGAARD POULSEN ET AL., COSTS AND BENEFITS OF AN EU-USA INVESTMENT TREATY 44–46 (Apr. 2013); SERGE SHIKHER ET AL., U.S.-MEXICO-CANADA TRADE AGREEMENT: LIKELY IMPACT ON THE U.S. ECONOMY AND ON SPECIFIC INDUSTRY SECTORS 200–01 (Apr. 2019). "[T]here is no conclusive evidence that BITs signed between advanced economies could promote investment." *Id.* "Though economic literature suggests that ISDS serves as a key credibility-enhancing mechanism in BITs, and that BITs promote FDI to developing countries, the economic literature directly assessing the impact of ISDS provisions on FDI flows does not find consistent results of such an impact." *Id. See also* Johnson, *supra* note 68 ("Moreover, evidence that investment treaties are actually effective at increasing investment flows is inconclusive, and indicates that for the vast majority of investors, [international investment agreements] are neither directly nor indirectly determinative of FDI decisions.").

[129] *See The United States-Mexico-Canada Agreement: Reduced Investment Protection in Mexico, the United States and Canada*, KIRKLAND & ELLIS (Oct. 18, 2018), https://www.kirkland.com/publications/kirkland-alert/2018/10/the-usmca-agreement-reduced-investment-protection ("The USMCA also eliminates ISDS . . . Canadian investors in Mexico. However, such investors may be able to rely on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).").

[130] Zients, *supra* note 110.

as a better alternative than having Canadian investors litigating in American courts.[131] While state courts run the obvious risk of bias with their elected judges, federal courts are obliged by Supreme Court precedent to grant large degrees of deference to federal agency actions—all but guaranteeing a disappointing result for the Canadian investor fighting to overturn an agency rule or adjudicative decision.[132] In addition, one of the purported advantages of ISDS tribunals is the decoupling of investor-state disputes from interstate politics. Given the anti-free trade and isolationist tendencies of the then-Trump administration,[133] Canadian negotiators may have felt the continued inclusion of an ISDS mechanism can help prevent future investor-state disputes from escalating into full-blown diplomatic rows that may spill over to other aspects of the Canada–U.S. relationship.

Ultimately, Canada gave in. The final draft of the USMCA does not provide for Canadian participation in its ISDS chapter.[134] Perhaps the United States strong-armed Canada into accepting this exclusion, but given the lack of public attention drawn by Canadian negotiators onto the subject, it is more likely that Canada simply traded its position on ISDS in exchange for concessions elsewhere in the treaty, such the continued inclusion of a tripartite state-to-state dispute resolution mechanism.[135] Therefore, while Canada seems to have been thwarted on this front, it is likely the concession was a mere bargaining chip used to obtain something Canadian negotiators valued more than ISDS itself.

2. *Mexico*

Tallying a total of twenty-three claims, Mexico was the second most-sued NAFTA country under Chapter 11 between 1995 and 2017 (figure 3).[136] It paid

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131 *See* John S. Baker Jr., PhD & Lindsey Keiser, *NAFTA/USMCA Dispute Settlement Mechanisms and the Constitution*, 50 U. MIA. INTER-AMERICAN L. REV. 1, 8–10 (2019).

132 *See id.*; Auer v. Robbins, 519 U.S. 452 (1997); *see also* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

133 *See* Bill Weld, *Reclaiming Republican Foreign Policy*, FOREIGN AFF. (Oct. 8, 2019), https://www.foreignaffairs.com/articles/2019-10-08/reclaiming-republican-foreign-policy; *see also* Kevin Breuninger & Christina Wilkie, *Trump's Hard-Line Views on Trade Were Formed Long Before He Targeted China With Tariffs*, CNBC: POLITICS (May 12, 2019, 10:00 AM), https://www.cnbc.com/2019/05/10/trumps-hard-line-trade-views-were-formed-long-before-china-tariffs.html.

134 Doug Beazley, *Why the U.S. Agreed to Scrap NAFTA's Chapter 11*, CAN. BAR ASS'N. (Oct. 5, 2018), https://nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/why-the-u-s-agreed-to-scrap-nafta-s-chapter-11.

135 *See* Ronald Orol, *What Does the USMCA Mean for Canadian Trade?*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 2, 2018); *see also* Alexander Panetta, *NAFTA's Third-Party Arbitration System was Canada's Big Prize . . . is it Worth Fighting For?*, THE STAR (Aug. 23, 2017), https://www.thestar.com/news/canada/2017/08/23/naftas-chapter-19-was-canadas-big-prize-but-is-it-still-worth-fighting-for.html.

136 Sinclair, *supra* note 61, at 39–45.

a total sum of $386 million in penalties during this twenty-three-year period.[137] Mexico is the only country that has never settled a Chapter 11 case: out of the twelve decided cases, it lost five and won seven.[138]

Similar to the Canadian approach, Mexico's position towards ISDS has also been one of support. In October 2018, Mexican lead negotiator Jesús Seade claimed the U.S. dropped its demand to delete ISDS from the USMCA due to Mexico's desire to preserve it.[139] Mexican industry groups also lobbied for the preservation of ISDS in the new agreement.[140]

Compared to Canada's case, it is relatively straightforward to see why Mexico is supportive of ISDS—despite the monetary losses it had suffered under Chapter 11 proceedings. While ISDS mechanisms (along with other provisions typically found in a BIT)[141] may not be particularly useful in attracting investors to advanced economies such as Canada, studies have shown their effectiveness in boosting investor confidence are more prominent in developing and transition economies such as Mexico,[142] where concepts such as the rule of law, judicial independence, and political transparency stand on relatively shaky grounds.[143]

In conclusion, Mexico's support for ISDS is due to a determination that whatever monetary penalties it was forced pay under NAFTA Chapter 11 are outweighed by the boost in foreign direct investment (FDI) it received as a result of Chapter 11.[144] If the impact of ISDS upon the Mexican economy is net

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137 *Id.*

138 *Id.*

139 *El T-MEC Pone fin a las Protecciones Legales de Empresas de EU en México*, MANUFACTURA (Oct. 22, 2018), https://manufactura.mx/industria/2018/10/22/el-t-mec-pone-fin-a-las-protecciones-legales-de-empresas-de-eu-en-mexico.

140 *Id.*

141 BITs are also called International Investment Agreements (IIAs) in a more general context, especially if there are more than two parties to the agreement. *International Investment Agreements (IIAs)*, GOVT. OF SING., https://www.mti.gov.sg/Improving-Trade/International-Investment-Agreements (last visited Feb. 5, 2020).

142 *See* SHIKHER, *supra* note 128 ("The literature generally finds that bilateral investment treaties (BITs), of which ISDS provisions form a crucial part, increase investment, though a substantial minority of papers find no effect."); Henry Bamford Parkes et al., *Mexico*, ENCYC. BRITANNICA (Dec. 29, 2019), ("Mexico has a developing market economy that is strongly tied to that of the United States. . .").

143 Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. L. 715, 715–16 (2004); *see generally Mexico*, TRANSPARENCY INT'L (2018), https://www.transparency.org/country/MEX#.

144 *See* Azam Ahmed & Elisabeth Malkin, *Mexicans Are the Nafta Winners? It's News to Them*, N.Y. TIMES (Jan. 4, 2017), ("[NAFTA] has certainly brought positive changes to Mexico, economists note. Since it went into effect at the beginning of 1994, billions of dollars in investment has been pouring into Mexico every year."); *see also U.S.-Mexico Economic Relations: Trends, Issues, and Implications*, CONG. RSCH. SERV. 2–3 (Mar. 26, 2019), ("U.S. merchandise trade with Mexico increased rapidly since NAFTA entered into force in January 1994. U.S. exports to Mexico increased from $41.6 billion in 1993 . . . to $265.0 billion in 2018. U.S. imports from Mexico increased from $39.9 billion in 1993 to $346.5 billion in 2018.").

positive, there would be no incentive for the Mexican government to seek its exclusion from the USMCA.

3. United States

The United States has been sued twenty-one times under NAFTA Chapter 11 between 1995 and 2017;[145] as of January 2018 it has not lost a single case (figure 4).[146] However, U.S. nationals and companies make up the absolute majority of claimants against Canadian and Mexican governments.[147] For example, out of the forty-one Chapter 11 cases filed against Canada from 1995 to 2017, forty originated from the United States.[148] In a similar vein, twenty-one of the twenty-three Chapter 11 cases filed against Mexico during the same period have American origins.[149]

However, the United States' favorable record under Chapter 11 has not endeared it to the current administration. While American business groups are generally in favor of maintaining an ISDS mechanism in the USMCA, the initial draft as agreed to by Mexico and the United States vastly reduced its scope and competency at the urging of U.S. negotiators.[150] U.S. Trade Representative Robert Lighthizer has been a particularly staunch opponent against ISDS: in March 2018, he outlined his main objections against the inclusion of an ISDS mechanism in the NAFTA replacement in his testimony before the House Ways and Means Committee.[151]

First, Lighthizer argued ISDS grants foreign investors in the United States protections not available to domestic investors. While domestic investors are stuck with whatever ruling that comes out of a domestic court, their foreign counterparts may simply circumvent the U.S. judiciary by resorting to an ISDS

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[145] Sinclair, *supra* note 61, at 3.

[146] Zients, *supra* note 110; Sinclair, *supra* note 61, at 4.

[147] Sinclair, *supra* note 61, at 39–45.

[148] *Id.*

[149] *Id.*

[150] Janyce McGregor, *Trump Announces U.S.-Mexico Trade Deal to Replace NAFTA, and Says 'We Will See' if Canada Can Join*, CAN. BROAD. CORP. (Aug. 27, 2018), https://www.cbc.ca/news/politics/nafta-us-mexico-progress-monday-1.4800182; *see* M. Angeles Villarreal & Ian F. Fergusson, *NAFTA Renegotiation and the Proposed United States-Mexico-Canada Agreement (USMCA)*, CONG. RSCH. SERV. 21 (Feb. 26, 2019), ("During the negotiations of the USMCA, the U.S. business community strongly opposed reported U.S. proposals to scale back or eliminate NAFTA ISDS provisions.").

[151] *User Clip: Lighthizer-Brady ISDS*, C-SPAN (Mar. 21, 2018), https://www.c-span.org/video/?c4720505/user-clip-lighthizer-brady-isds.

tribunal. This notion struck Lighthizer as not only unfair to domestic investors, but also a violation of U.S. sovereignty.[152]

Second, Lighthizer saw ISDS as a way for the U.S. Government to "underwrite" the risks of foreign investment: by signing a trade agreement that includes an ISDS mechanism with another country, it is essentially establishing a mechanism by which U.S. investors in that country would be insulated from political risks that may otherwise render the investment unviable.[153] This struck Lighthizer as an example of government overreach. In his view, investors should move their businesses abroad because it makes economic sense to do so (in which case, it would be Congress' job to fix this "problem"), not because the U.S. Government had underwritten the risks of investing abroad.[154] U.S. investors must venture abroad at their own risk; it is not the government's job to defend their interests in a foreign land.[155]

Lighthizer's comments reflect a blend of anti-ISDS sentiments prevalent in libertarian and conservative circles: not only does ISDS undermine national sovereignty, it also promotes the loss of jobs and investments to foreign states.[156] Both prospects were evidently unacceptable to the Trump administration, which had built its foreign policy doctrine upon a platform of populist nationalism.[157] It is therefore unsurprising that despite America's "winning streak" under NAFTA Chapter 11, as well as ISDS' immense popularity with the U.S. business community,[158] the Trump administration had decided to push for its deletion from the USMCA.[159]

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[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See* Stewart M. Patrick, *The Odd Couple: Democrats, Republicans, and the New Politics of Trade*, COUNCIL ON FOREIGN RELATIONS (Apr. 1, 2015), https://www.cfr.org/blog/odd-couple-democrats-republicans-and-new-politics-trade.

[157] *See* Simon Lester & Inu Manak, *The Rise of Populist Nationalism and the Renegotiation of NAFTA*, 21 J. INT'L ECON. L. 151, 151–52 (2018).

[158] *See* Villarreal, *supra* note 150 ("During the negotiations of the proposed USMCA, the U.S. business community strongly opposed reported U.S. proposals to scale back or eliminate NAFTA ISDS provisions.").

[159] Aside from total elimination, an alternative proposal pushed by the U.S. negotiation team was the addition of an "opt-in" clause to the ISDS mechanism, which would in effect eliminate ISDS for countries that do not want to make use of the mechanism. James McBride & Andrew Chatzky, *How Are Trade Disputes Resolved?*, COUNCIL ON FOREIGN RELATIONS (Jan. 6, 2020), https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved.

B. Changes Compared to NAFTA Chapter 11

Having explored the positions of the parties at the start of negotiations, this Comment will now delve into the actual contents of USMCA Chapter 14, complete with an analysis on how the starting positions of the above countries have affected its formation.

The main differences between USMCA Chapter 14 and NAFTA Chapter 11 can be summarized as follows:

- ISDS is eliminated between Canada and the United States.[160] Canadian investors in the United States will need to resolve any investor-state disputes within the U.S. court system, and vice versa;[161]
- ISDS between Mexico and the United States (Annex Parties) will be limited to certain claims and industries as defined by the agreement:[162]
    - **Chapter 14, Annex 14-D** regulates investor-state disputes between the Annex Parties. Compared to NAFTA Chapter 11, it disallows claims for indirect expropriation and contains more stringent procedural requirements;[163]
    - **Chapter 14, Annex 14-E**, as a modification of Annex 14-D, specifically covers Mexico-U.S. investment disputes regarding "covered government contracts," which are limited to agreements between an investor and a "national authority" of the respondent State related to a certain "covered sector."[164] Qualifying claimants may bring indirect expropriation claims under this annex; they need not go through domestic courts before bringing their case to arbitration.[165]

It should also be noted that while USMCA Chapter 14 does not provide an ISDS mechanism between Canada and Mexico, investors between the two countries may instead resort to the CPTPP.[166] The ISDS provisions of the

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[160] Canada-United States-Mexico Agreement, *supra* note 114, at ch. 14.

[161] Existing investments made between Jan. 1, 1994 and the termination date of NAFTA are defined as "legacy investments." Under the USMCA, Canadian, Mexican, and U.S investors may raise NAFTA Chapter 11 claims with respect to legacy investments within three years after the termination of NAFTA. In addition, this three-year window does not limit currently pending cases or any legacy claims that have already been filed under NAFTA Chapter 11. *Id.* at ch. 14, annex 14-C.

[162] *Id.* at annexes 14-D & 14-E.

[163] The more notable of these changes will be explored in detail in this section below.

[164] Includes oil and gas, power generation, telecommunications, transportation, and the ownership or management of infrastructure. Canada-United States-Mexico Agreement, *supra* note 114, at annex 14-E.

[165] *Id.* at annex 14-E.

[166] Daniel Gracia-Barragan et al., *The New NAFTA: Scaled-Back Arbitration in the USMCA*, 36 J. INT'L

CPTPP are generally less investor-friendly than those of NAFTA, but nevertheless operate along the same basic framework as NAFTA Chapter 11.[167] Therefore, in realistic terms, the greatest impact of USMCA Chapter 14 falls upon the Canada-U.S. front, with the Mexico-U.S. and Canada-Mexico fronts place at a distant second and third, respectively.

Out of the three countries, Mexico seemed to have attained the most of its objectives; it managed to maintain a partial ISDS mechanism vis-a-vis the United States, whose administration in turn succeeded in reducing the scope of ISDS in the new agreement.[168] Canada seems to have come off the worst, since it has been entirely excluded from USMCA Chapter 14 against its will.[169] Given the scaling back of the USMCA's ISDS provisions had already appeared in an initial Mexico-U.S. draft which saw no Canadian input, it is doubtful whether Canada had any meaningful opportunity to challenge its exclusion in face of the *fait accompli* presented by its negotiating partners.[170] While Canada retains an ISDS mechanism with Mexico through the CPTPP, that mechanism nevertheless belongs to a separate agreement that was happening regardless of the fate of its North American counterpart. It could, therefore, hardly be celebrated by Canada as a victory.

Taking the above developments into view, there are several other noteworthy differences between USMCA Chapter 14 and NAFTA Chapter 11, aside from Canada's withdrawal from the former mechanism. First, in disallowing indirect expropriation claims, Annex 14-D eliminated the basis for the *Metalclad*

ARB. 739, 749 (2019).

[167] *See* Beazley, *supra* note 134; *see also* Teddy Baldwin et al., *The New NAFTA – the United States-Mexico-Canada Agreement (USMCA) Brings Future Changes to ISDS*, GLOB. ARB. NEWS (Oct. 4, 2018), https://globalarbitrationnews.com/the-new-nafta-20181004/ ("The ISDS provisions under the CPTPP are narrower than those under . . . NAFTA. They impose a higher burden of proof on investors to establish breaches of investment obligations and give governments more leeway to implement public welfare measures without giving rise to claims of expropriation.").

[168] It must be noted again that U.S. companies and business groups were mainly opposed to the scaling down of ISDS in the USMCA. *See* Villarreal, *supra* note 150 ("During the negotiations of the proposed USMCA, the U.S. business community strongly opposed reported U.S. proposals to scale back or eliminate NAFTA ISDS provisions.").

[169] This did not stop Ottawa from framing the abolition of ISDS as a triumph of Canadian diplomacy. Since most of this rhetoric came after the finalization of the USMCA, the Canadian government may have simply decided to explain its defeat in the best light possible by capitalizing on anti-ISDS sentiments among the opposition and the Canadian public. *See* House of Commons Debates, *supra* note 121, at 28911.

[170] *See* McGregor, *supra* note 122 ("The preliminary trade agreement the U.S. recently reached with Mexico may offer a glimpse of what could happen with NAFTA's Chapter 11. . . opponents . . ., including the Council of Canadians, cheered the preliminary agreement with Mexico as a sign that ISDS could be weakened in a renegotiated NAFTA.").

tribunal's controversial decision to hold Mexico liable for indirectly expropriating Metalclad's investment.[171]

Second, Annex 14-D tightened procedural requirements for all ISDS claims, allowing a claim to go before a tribunal only after the claimant either received a final decision from a domestic court of the respondent state, or once thirty months passed following the initiation of proceedings in a domestic court.[172] While these additional rules—made with the intent to raise the bar of admissibility—do not explicitly forbid a tribunal from overlooking breaches of procedure in the style of *Ethyl*, they may make a rerun of the case far less likely by compelling the claimant to litigate in a domestic court before resorting to a tribunal.[173] If the claimant decides to breach this requirement by initiating proceedings before a USMCA tribunal prematurely, the tribunal would have a readily available reason to order dismissal on jurisdictional grounds. Since the case is already sitting inside a domestic court, it would save time and resources for all parties involved to at least hear back from that court before starting the whole process again in a different forum.

These procedural changes also have significant implications when placed in the context of the *Clayton/Bilcon* case. A major complaint directed against the majority's decision (as exemplified in Professor Donald McRae's dissent)[174] was that the tribunal took it upon itself to decide the JRP's "community core values" approach was not in conformity with Canadian law.[175] Under Annex 14-D, a domestic court will have the opportunity to rule on questions involving domestic law before the case is passed to a tribunal.[176]

Third, Annex 14-D requires all arbitrators to comply with the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, as well as any other "guidelines regarding direct or indirect conflicts of interest, or any supplemental guidelines or rules adopted by the Annex Parties."[177] Additionally, arbitrators cannot take orders from any organization or government regarding the case they are sitting on; nor can they act as counsel, party-appointed expert, or witness in any pending arbitration under USMCA

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171 Canada-United States-Mexico Agreement, *supra* note 114, art. 14.D.3, annex 14-D. *See* Metalclad, 40 ILM 36, at ¶¶ 102-112.

172 *Id.* art. 14.D.5.

173 Ethyl Corp., 38 ILM 708, ¶¶ 84–85, 88.

174 Bilcon of Del., Dissent, Case No. 2009-04, ¶ 34.

175 *See id.* ¶ 591 ("The JRP effectively created . . . a new standard of assessment rather than fully carrying out the mandate defined by the applicable law.").

176 Canada-United States-Mexico Agreement, *supra* note 114, art. 14.D.6, annex 14-D.

177 *Id.*

Chapter 14.[178] By mandating an internationally-recognized standard on conflicts of interest and limiting the space for improper conduct, the drafters of USMCA Chapter 14 evidently aimed to address the allegations made against the integrity and impartiality of NAFTA Chapter 11 arbitrators.[179]

Fourth, Annex 14-E applies only to a small number of heavily-regulated sectors such as energy and infrastructure, as well as a narrow range of investor-state relationships that involves the national government of an Annex Party.[180] For example, the annex takes a literal interpretation of the term "written agreement," stating specifically that permits, licenses, certificates, grants, decrees, and judgments do not fall under its scope.[181] Thus, as long as the national government of one Annex Party did not sign and execute a contract with an investor from the other Annex Party, the national government will not run the risk of facing liability under Annex 14-E—even if it had granted a permit to that investor as in the case of *Metalclad*.[182]

Finally, Articles 14.5 and 14.6, which mandate national and most-favored-nation treatment under "like circumstances," also expressly state whether treatment is accorded in "'like circumstances' . . . depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[183] In sum, the investor protections offered by USMCA Chapter 14 are more limited and less accessible than their NAFTA predecessors. As the next section demonstrates, this development will have an impact on future trade and investment relations between the three three signatory states.

III. WILL THE CHANGES BE GOOD OR BAD FOR ECONOMIC DEVELOPMENT?

Building on the overview of the changes made to NAFTA Chapter 11 in the USMCA, this section focuses on the main question posed by this Comment: will the USMCA's ISDS mechanism facilitate economic interactions between the signatory states? Over the past four centuries, there has been a broad consensus among mainstream economists that international trade and investment drives

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178 *Id.*

179 *See*, *e.g.*, Warren, *supra* note 94.

180 Canada-United States-Mexico Agreement, *supra* note 114, at annex 14-E.

181 *Id.*

182 *See* Metalclad, 40 ILM 36, ¶ 98; *see also U.S.-Canada ISDS Is Terminated*, PUB. CITIZEN, https://www.citizen.org/wp-content/uploads/nafta-2.0-and-isds-analysis.pdf.

183 Canada-United States-Mexico Agreement, *supra* note 114, arts. 14.4, 14.5.

growth and raises living standards across national borders.[184] While there are caveats to this general rule (e.g., short-term growth may be unevenly distributed among populations and industries),[185] the notion that free trade promotes economic development on a macro level remains an axiom of mainstream economics.[186]

Assuming this axiom contains a modicum of truth, will the USMCA's ISDS Mechanism promote economic development? The discussion in Section II has shown the efficacy of international investor protection treaties depends largely upon the signatory states' level of socio-economic development: the less developed the target country, the less likely potential investors will believe their investments are safe without treaty protection.[187] In the North American context, this will mean the abrogation of ISDS between Canada and the United States is unlikely to have a sustained economic impact upon either country.[188] Similarly, Canada's investment relationship with Mexico is also unlikely to change, due to both countries' participation in the CPTPP and its ISDS provisions.[189]

Therefore, the key question here plays out between Mexico and the United States, who maintain with each other an ISDS mechanism through USMCA Chapter 14. As seen in Section II above, USMCA Chapter 14 is a watered-down version of NAFTA Chapter 11 in terms of applicability and scope. Unlike its fellow signatory states, Mexico is a developing country, whose economic output and living standards remain inferior to those of the United States.[190] If the

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[184] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, BOOK IV, CHAPTER VIII: CONCLUSION OF THE MERCANTILE SYSTEM (Mar. 9, 1776) (published online Feb, 28, 2009), https://www.gutenberg.org/files/3300/3300-h/3300-h.htm. *See also*, *e.g.*, Anna Maria Mayda & Dani Rodrik, *Why Are Some People (and Countries) More Protectionist than Others?*, (Nat'l Bureau of Econ. Research, Working Paper No. 8461, 2001) ("The consensus among mainstream economists on the desirability of free trade remains almost universal."); Jeffery A. Frankel & David Romer, *Does Trade Cause Growth?*, 89 AM. ECON. REV. 379, 380–81, 394 (1999).

[185] *See*, *e.g.*, Paul Krugman, *What Economists (Including Me) Got Wrong About Globalization*, BLOOMBERG, (Oct. 10, 2019), https://www.bloomberg.com/opinion/articles/2019-10-10/inequality-globalization-and-the-missteps-of-1990s-economics.

> The pro-globalization consensus[,] . . . which concluded that trade contributed little to rising inequality, relied on models that asked how the growth of trade had affected the incomes of broad classes of workers . . . Consensus economists didn't turn much to analytic methods that focus on workers in particular industries and communities, which would have given a better picture of short-run trends. This was, I now believe, a major mistake—one in which I shared a hand.

Id.

[186] Mayda, *supra* note 184.

[187] SHIKHER, *supra* note 128.

[188] *See id.* at 200–01

[189] Gracia-Barragan, *supra* note 166, at 749.

[190] *See* Parkes, *supra* note 142.

aforementioned rule between developed economies does not apply to the Mexico-U.S. investment relationship, what will?

The 2019 International Trade Commission (USITC) report on the potential economic impacts of the USMCA may offer some insight into this question.[191] The report borrows an estimate from previous literature[192] that the ratification of a BIT is correlated with a 4.8 percent increase of a signatory state's outward FDI stock in the short term, and assumes the removal of such a treaty would reduce outward FDI stock by the same amount.[193] However, given that ISDS is only part of a typical BIT (or other multilateral investment treaties), the 4.8 percent drop is not entirely attributable to the removal of ISDS alone.[194] As seen in Section II, the USMCA only curtails ISDS between Mexico and the United States, rather than removing it. Accordingly, the USITC report estimates that USMCA Chapter 14 may result in a $2.9 billion (0.44 percent) reduction in overall (domestic and foreign) capital investment in Mexico.[195] The report further expects the decline of American and Canadian investment in Mexico to be "compensated in part by increasing investment from other countries."[196] Meanwhile, the reduction of investment in Mexico is only expected to marginally boost domestic investment within the United States.[197]

But the potential impact of USMCA Chapter 14 does not stop here. The USITC report focused on calculating the economic dimension of the USCMA and its ISDS mechanism; the socio-political dimension—which forms the heart of this Comment—is equally, if not more important, than pure economic analysis.

Why is this? Ten years after the end of the Great Recession, its socio-political effects have continued to reverberate across the developed world, long after the global economy began to recuperate at the start of the 2010s.[198] Populist politics, encouraged by rising income inequality and a slow, austerity-laced

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[191] The International Trade Commission is an independent agency of the U.S. Government. *About the USITC*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/press_room/about_usitc.htm (last visited Feb. 11, 2020).

[192] *See* Peter Egger & Valeria Merlo. *The Impact of Bilateral Investment Treaties on FDI Dynamics*, 30 WORLD ECON. 1536 (2007).

[193] SHIKHER, *supra* note 128, at 202.

[194] *Id.*

[195] *Id.* at 203.

[196] *Id.*

[197] *Id.* at 199.

[198] Press Release, Nat'l Bureau Econ. Research, US Business Cycle Expansions and Contractions (June 8, 2020).

economic recovery process,[199] made its mark in various political movements, elections, and referendums on both sides of the Atlantic,[200] challenging the oft-maligned (yet ill-defined) "neoliberal ideology" from both ends of the political spectrum.[201] Domestically, populists blame the problems in their countries on an "establishment consisting of cosmopolitan elites"; in the international context, the blame is put on international institutions, such as NAFTA and the United Nations, which are perceived as tools used by a global alliance of these cosmopolitan elites to engage in self-serving policymaking at the expense of the common man.[202]

It is not difficult to perceive the damage this new wave of populism has inflicted upon existing and prospective free-trade and investment regimes. The proposed U.S.-E.U. Transatlantic Trade and Investment Partnership (TTIP) was shelved in face of sustained populist and nationalist opposition from Europe.[203]

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[199] See Lola Fadulu, *Study Shows Income Gap Between Rich and Poor Keeps Growing, With Deadly Effects*, N.Y. TIMES (Sept. 10, 2019) for a discussion of income inequality. Fadulu notes "[i]ncome inequality has roiled American society and politics for years, animating the rise of Barack Obama out of the collapse of the financial system in 2008, energizing right-wing populism and the emergence of nationalist leaders like Donald J. Trump, and pushing the Democratic Party leftward." *Id.* See Frances Coppola, *Fiscal Austerity After The Great Recession Was A Catastrophic Mistake*, FORBES (Aug. 31, 2017) for a discussion of the economic recovery process. Coppola argues that "[t]he UK was not the only country to replace fiscal expansion with fiscal austerity, to the detriment of its recovery. Many other countries did so to, to a greater or lesser extent." *Id.*

[200] *See, e.g.*, Antonis Galanopoulos, *Why not all populism is bad populism*, NEWSWEEK (Nov. 2, 2016). Galanopoulos notes the following about populism:

> Populism has re-emerged as central to political debates across the world, from Latin America to southern Europe, from the U.S. to the U.K. Since the beginning of the economic crisis in 2008, populism has come back to the fore and its presence expands increasingly each year. . . Two prominent examples are the U.S. presidential elections and Britain's EU referendum. Donald Trump is characterized by media, commentators and politicians as a right-wing populist politician, as Bernie Sanders was previously considered a left-wing populist. . . Populism is not an unfamiliar concept in the U.S. either. . . More recently, the Occupy Wall Street movement and the Tea Party were also considered expressions of left-wing and right-wing populism, respectively.

Id.

[201] *See, e.g.*, Jeremy Corbyn (@jeremycorbyn), TWITTER (Mar. 18, 2014, 6:12 AM), https://twitter.com/jeremycorbyn/status/975313875062190080; *see also* Tucker Carlson, *John Kerry sought political help from overseas*, FOX NEWS (Oct. 8, 2019), https://www.foxnews.com/transcript/john-kerry-sought-political-help-from-overseas ("Thirty years later, ordinary Americans are poor, wages haven't moved, and all of us are less free. But China and our neoliberal elite are a lot richer."); EMMA BELL, CRIMINAL JUSTICE AND NEOLIBERALISM 139 (2011).

[202] Eric A. Posner, *Liberal Internationalism and the Populist Backlash* 1, 16 (University of Chicago Public Law and Legal Theory Paper Series, Working Paper No. 606, 2017).

[203] *See* Jeroen van der Waal & Willem de Koster, *Populism and Support for Protectionism: The Relevance of Opposition to Trade Openness for Leftist and Rightist Populist Voting in the Netherlands*, 66 POL. STUD. 560 (2017); *see also* Molly Scott Cato, *People Power is Ending TTIP and Other Unpopular EU Free-Trade Deals,* GUARDIAN (Oct. 19, 2016).

The Trans-Pacific Partnership (TPP), a free-trade agreement consisting of eleven signatory states around the Pacific Rim, was attacked by populist candidates from both the Democratic and Republican parties during the 2016 presidential election and eventually scrapped after President Trump called off U.S. involvement in 2017.[204] The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union is currently stuck in legal limbo, mainly due to the reluctance of populist European governments to ratify the deal.[205] Finally, the very subject of this Comment—the renegotiation of NAFTA—was instigated by a White House espousing a populist trade policy.[206] In cases such as the TTIP and CETA, much of the objection towards these treaties was focused on their ISDS provisions for all the reasons mentioned earlier in this Comment.[207] Some of these objections even proved to be the main obstacle to the realization of the treaty in question.[208]

The economic consequences of these setbacks can be severe. One year before the United States pulled out from the TPP, the USITC estimated the treaty would result in a 0.15 percent increase to the country's annual real GDP by 2032.[209] The World Bank was even more optimistic: it expected "the TPP [to] increase member country GDP on average by 1.1%, ranging from over 8% for Vietnam to 0.5% for the United States."[210] Since the TPP never came into being,

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204 Dominic Rushe, *Bernie Sanders Supports Trump's TPP Order While McCain Criticizes Opting Out*, GUARDIAN (Jan. 23, 2017) ("Donald Trump has officially killed the Trans-Pacific Partnership (TPP), the controversial trade deal that became a lightning rod for critics on the left and right during the election campaign. . . Trump signed an executive order formally ending the US's participation in the TPP."). *See* Ed Gerwin, *Trade Works*, U.S. NEWS (Nov. 8, 2016).

205 *See, e.g.*, Eric J. Lyman, *Giuseppe Conte: Italy's Next PM to Form Western Europe's First Populist Government*, USA TODAY (May 22, 2018); Alberto Sisto & Gavin Jones, *Italy Says it Won't Ratify EU-Canada Trade Deal; Canada Plays Down Threat*, REUTERS (July 13, 2018) ("'If so much as one Italian official . . . continues to defend treaties like CETA, they will be removed,' added Di Maio, who leads the anti-establishment 5-Star Movement, which governs the country with the right-wing League.").

206 *A Draft Deal Clarifies What Populist Trade Policy Means in Practice*, ECONOMIST (Aug. 30, 2018).

207 Samples, *supra* note 111, at 117; Alasdair R. Young, Working Paper, *Two Wrongs Make a Right? The Politicization of Trade Policy and European Trade Strategy*, (Georgia Institute of Technology, Working Paper No. GTJMCE-2019-1, 2019); Alan Morrison, *Is the Trans-Pacific Partnership Unconstitutional?*, ATLANTIC (June 23, 2015); Jonathan Weisman, *Trans-Pacific Partnership Seen as Door for Foreign Suits Against U.S.*, N.Y. TIMES (Mar. 25, 2015).

208 *See, e.g.*, Young, *supra* note 207; James Shotter & Jim Brunsden, *Poland Threatens to Block Part of EU-Canada Trade Deal*, FINANCIAL TIMES, (Sept. 7, 2017); Ezra Klein, *What the Most Controversial Part of Obama's Trade Deal Really Does*, VOX (Nov. 15, 2015); Paul Ames, *ISDS: The Most Toxic Acronym in Europe*, POLITICO (Sept. 17, 2015); *Hungary Says It Won't Ratify CETA Because of ISDS Provision*, COUNCIL OF CANADIANS (May 11, 2015).

209 James K. Jackson, *The Trans-Pacific Partnership (TPP): Analysis of Economic Studies*, CONG. RSCH. SERV. 12 (June 30, 2016).

210 *Id.* at 20.

it is highly unlikely—if not impossible—that these projections of growth will become reality in the foreseeable future.

Yet ISDS serves a purpose. Despite its relative irrelevance in the developed world, the majority of the existing literature has consistently demonstrated its usefulness in boosting foreign investment into developing and transition economies.[211] This is not to say ISDS is without controversy in the developing world: many developing countries have either tried to modify their model bilateral investment treaties (BIT) to better suit their needs, or withdrew from existing investor protection regimes altogether (although the latter group of countries tend to be run by socialist regimes who do not necessarily subscribe to the ideas of free trade and globalization).[212] It must also be stressed that while the correlation between BITs and higher FDI inflows have been shown to exist, the causal link between the two remains multi-faceted and poorly understood.[213] However, despite the academic fuzziness, the link between IIAs and foreign investment is well-established in the world of investors and their insurers: the former are often reluctant to invest in countries sans the cover of an IIA, while the latter are often reluctant to underwrite uncovered investments.[214]

Indeed, no controversy has yet managed to dampen the developing world's enthusiasm for IIAs. In the 2010s, the annual number of IIAs signed by developing countries remained largely steady except for 2019, which nevertheless saw the conclusion of twenty such agreements (figure 5).[215] Regardless of the academic debate surrounding IIAs, it seems unlikely that developing countries would be so keen to sign on if they did not believe the economic benefits of these agreements outweigh their disadvantages. Furthermore, even if developing countries are not entirely sure of the link between such agreements and investment inflow, they may nevertheless find IIAs useful for other purposes, such as advancing domestic reforms and

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[211] *See* SHIKHER, *supra* note 128, at 199–200 (reviewing past literature investigating the effects of BITs and ISDS provisions on investment flows); *see also* U.N. Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, xii-xiv, 26, U.N. Doc. UNCTAD/DIAE/IA/2009/5 (2009).

[212] *See* Armand de Mestral, *The Impact of Investor-state Arbitration on Developing Countries*, CTR. FOR INT'L GOVERNANCE INNOVATION (Nov. 22, 2017), https://www.cigionline.org/articles/impact-investor-state-arbitration-developing-countries.

[213] U.N. Conference on Trade and Development, *supra* note 211, at 6 (2009).

[214] Brower, *supra* note 95, at 702–10.

[215] Includes treaties with investment provisions. Excludes continuity agreements signed by the United Kingdom pursuant to withdrawal of the United Kingdom from the European Union. *Most Recent IIAs*, U.N. CONF. ON TRADE & DEV., https://investmentpolicy.unctad.org/international-investment-agreements, (last visited Mar 5, 2021).

signalling the advent of these reforms to potential investors.[216] At least in the developing world, it cannot be said that ISDS and the IIAs that contain them have outlived their usefulness.[217]

There is hence a need to strike a balance. On one hand, the growing irrelevancy and unpopularity of ISDS in the developed world have made it a threat to continued cross-border economic integration.[218] On the other hand, ISDS mechanisms remain eagerly sought after by developing countries to instill investor confidence.[219] Given this difference, there is an increasing need for policymakers to adopt a customized approach towards ISDS—if it is to be preserved as a means to facilitate investment in countries normally shunned by foreign investors, without becoming a tool in the hands of first-world populists to use ISDS as a pretext to tear down free trade.

UMSCA Chapter 14 is a practical approach towards striking this balance. By sidestepping the assumption that every party to the agreement must be offered the same terms, U.S. negotiators were able to limit the scope of what little remained of NAFTA Chapter 11 to a bare minimum, while their Mexican counterparts were able to tailor Chapter 14 to Mexico's specific needs.[220] Although Canada may seem ill-accommodated by this arrangement, it must be again stressed that Canada's status as a developed country and ISDS link with Mexico through the CPTPP makes its exclusion from Chapter 14 unlikely to diminish the country's investment climate in the long run. Politically, the bare-bones nature of Chapter 14, free of the pitfalls suffered by NAFTA Chapter 11 as demonstrated in cases such as *Metalclad*, *Ethyl*, and *Clayton/Bilcon*, gives little ammunition to critics of the USMCA.

In summary, the USMCA strikes the balance between the need of Mexico, a developing country, to retain ISDS with the United States, and the political need to eliminate the superfluous ISDS link between Canada and the United States—which may otherwise jeopardize not only the future of Chapter 14 itself, but also that of the whole agreement. Chapter 14 will thus able to deflect much of the

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216 Klein, *supra* note 208; Lisa E. Sachs & Karl P. Sauvant, *BITs, DTTs, and FDI Flows: An Overview*, COLUM. UNIV. (2009).

217 *See Primer: International Investment Treaties and Investor-State Dispute Settlement*, COLUMBIA CTR. ON SUSTAINABLE INV. (May 31, 2019), http://ccsi.columbia.edu/2019/06/03/primer-international-investment-treaties-and-investor-state-dispute-settlement/.

218 *See* Roderick Abbott, *et al*, *Demystifying Investor-State Dispute Settlement (ISDS)*, ECIPE (May 2014).

219 *See Most Recent IIAs*, *supra* note 215.

220 *See, e.g.*, David A. Gantz, *The United States-Mexico-Canada Agreement: Settlement of Disputes*, BAKER INST. (May 2, 2019) (discussing Mexico's desire to retain ISDS for foreign investment in its oil and gas sector, in order to assuage fears that the Mexican President Lopez Obrador's new administration may harbor anti-FDI tendencies.).

political controversy surrounding ISDS without inflicting any long-term changes on cross-border investment pattern and volume between the signatory states. Therefore, the USMCA is likely to promote economic integration and development across the North American continent.

IV. CAN USMCA CHAPTER 14 BE A TEMPLATE FOR THE FUTURE?

Outside of the North American context, the Chapter 14 model for IIAs can be interpreted and expanded into the following: ISDS between developing countries; no ISDS between developed countries; in multilateral treaties with investment provisions, ISDS will only be available to claimants who have invested in a developing signatory state. Finally, surviving ISDS mechanisms should be strictly voluntary and limited in their scope to key sectors in need of investment and a way to boost investor confidence. They must not be used to penalize governments for acting to protect public welfare. This tiered approach retains ISDS for countries who need it the most, while minimizing the political risk it poses to free-trade and investment regimes across the world.

However, this model as it stands still leaves some major points of contention unaddressed. For the sake of brevity, this Comment will select two of these points and attempt to identify potential solutions.

First, what counts as a legitimate step to protect public welfare? The need to prevent ISDS from thwarting domestic legislation that protects public health, safety, and the environment is recognized in both NAFTA and the USMCA.[221] However, it is not difficult to imagine a scenario in which future claimants argue a government's purported act to protect public welfare giving is merely a plot to usurp or sabotage its investment. Leaving the question entirely up to the tribunal may encourage more controversial rulings in the style of *Metalclad*, but attempting to define the phrase with exactitude in the treaty text would be an impracticably large undertaking.[222] Furthermore, attempting to define the phrase with exactitude would also defeat the whole point of ISDS: having tribunals settle investor-state disputes based on the particular merits of each case.

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221 Canada-United States-Mexico Agreement, *supra* note 114, art. 16.

222 Metalclad, 40 ILM 36, ¶¶ 109–12. *See The United States-Mexico-Canada Agreement: Reduced Investment Protection in Mexico, the United States and Canada*, KIRKLAND & ELLIS (Oct. 18, 2018), https://www.kirkland.com/publications/kirkland-alert/2018/10/the-usmca-agreement-reduced-investment-protection. (Concluding that in finding that the implementation of the ecological decree constituted an act of indirect expropriation, the tribunal considered its substance and potential effects on Metalclad's investment. It is likely the USMCA removed indirect expropriation as a cause of action under Chapter 14 to avoid a reoccurrence of the *Metalclad* decision in the future).

Again, there is a need for balance. Between the two aforementioned extremes, perhaps future ISDS provisions can set the scope of a legitimate step from a procedural standpoint. Either the offending legislation is passed through the legislature in full view of the public and investors, or the offending regulation goes under a process akin to notice-and-comment rulemaking in American administrative law before making it onto the government gazette (The Federal Register).[223] The goal is to grant potentially-affected investors advance warning and opportunity to be heard before the law or regulation comes into effect. In addition, this arrangement would also provide the arbitral tribunal with a "whole record" of the decision-making process, to determine whether the legislature or agency: (1) considered important factors; (2) presented adequate rationale; (3) responded to external feedback; and (4) examined relevant evidence before making a decision.[224] This standard would offer the tribunal clear guidance in its own decision-making process, without leaving it all to the drafters of the ISDS mechanism to define whether a government act is a sincere attempt to protect the public interest. As long as the four aforementioned criteria are met, the tribunal could be reasonably sure that the law or regulation in question was passed with legitimate goals in mind.

Second, given all the faults of and controversies surrounding ISDS as it stands, are there any alternatives to the traditional ISDS model that will better function as a medium to settle investor-state disputes without getting entangled in political drama? If such an alternative does exist, then it may be better for future international trade regimes to discard traditional ISDS in its entirety in favor of the newer model.

CETA may offer such an alternative, by replacing the *ad hoc* arbitral tribunals commonly found in traditional ISDS regimes with a permanent tribunal made up of fifteen members on retainer.[225] Rather than being appointed by the parties in dispute, the members are instead selected by the CETA Joint Committee, which is made up of Canadian and E.U. officials and acts as the governing body of the treaty.[226] CETA also contains a built-in appellate tribunal.[227] Unlike the NAFTA's judicial review regime, CETA's appellate

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[223] *See* 5 U.S.C. §§ 553, 706 (2006).

[224] These criteria harks back to the "arbitrary and capricious" standard used by U.S. courts. Please note that in the United States, this standard applies only to certain administrative rules, not to legislation. *See* Puerto Rico Sun Oil Co. v. U.S. E.P.A., 8 F.3d 73, 77 (1st Cir. 1993); *see generally* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[225] Comprehensive Economic and Trade Agreement, Can.-E.U., ch. 8, Oct. 30, 2016, O.J. (L 11) 23.

[226] *Id.* chs. 8, 26.

[227] *Id.* ch. 8.

tribunal can reverse the lower tribunal's decision based on errors of law or fact.[228] Finally, CETA envisages the formation of a standing international mechanism: Article 8.29 obliges Canada and the European Union to "pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes."[229] If implemented, this Multilateral Investment Court will have jurisdiction over investor-state disputes around the world.[230]

The CETA model is evidently designed to address some of the age-old criticisms that have long hounded the traditional ISDS model. For example, the *ad hoc* nature of traditional tribunals has been accused of inviting bias: arbitrators are not well-paid, and understanding the case law that has accumulated over the years requires expertise and experience possessed by very few people.[231] The convergence of these factors has made it increasingly difficult to find qualified arbitrators who do not have a conflict of interest in the case at hand.[232] A standing tribunal consisting of well-paid arbitrators serving fixed terms, who are appointed through a public process and must adhere to a strict standard of impartiality, would help alleviate these concerns.[233] Similarly, the establishment of a standing appellate tribunal with wide-ranging power to overturn decisions would address the accusation that traditional ISDS (as exemplified by NAFTA Chapter 11) may leave little room for meaningful appeal.[234]

Despite these apparent improvements, the CETA model has not been fully embraced by opponents of ISDS. Many of its opponents decry the new model for failing to sufficiently cure the defects of the traditional model, and expanding the scope of ISDS to the detriment of democracy and domestic governance.[235] However, the CETA model also elicited criticisms from investors, who worry its highly-structured nature would fill the permanent tribunal with pro-state

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228 *Id.*

229 *Id.*

230 *See The Multilateral Investment Court Project*, EUR. COMM'N (Feb. 14, 2020), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608.

231 *See* Cosbey, *supra* note 19, at 7 (internal citation omitted).

232 *Id.*

233 Comprehensive Economic and Trade Agreement, *supra* note 225.

234 *See* Cosbey, *supra* note 19; Geoffrey Gertz, *Why Mexico Should Not Fear Losing NAFTA's Investment Rules*, BROOKINGS (Mar. 20, 2018), https://www.brookings.edu/research/why-mexico-should-not-fear-losing-naftas-investment-rules/.

235 Gus Van Harten, *ISDS in the Revised CETA: Positive Steps, But Is It a "Gold Standard"?*, CTR. FOR INT'L GOVERNANCE INNOVATION (May 20, 2016), https://www.cigionline.org/publications/isds-revised-ceta-positive-steps-it-gold-standard. *See* Young, *supra* note 207, at 18.

judges, reduce regulatory clarity, and increase the length and costs of proceedings.[236]

In sum, while CETA's approach might offer some improvement over its traditional counterparts in terms of impartiality and transparency, it is unlikely to be free of the political controversies that have ensnared other iterations of ISDS. Given the relative newness of both the CETA model (CETA only came into force provisionally in September 2017) and USMCA Chapter 14, whether the former's supposed improvements over the latter can better stimulate cross-border investments remains to be seen.[237]

CONCLUSION

The USMCA entered into force in July 2020, formally replacing NAFTA as the premier economic agreement linking the three largest economies of North America.[238] Although most of the agreement does not represent a radical overhaul of its NAFTA predecessor,[239] its ISDS chapter strikes a balance between encouraging investment in developing countries and minimizing associated political risks—a trait especially useful at a time when the utility and appeal of ISDS are increasingly called into doubt. While questions regarding further revisions and potential alternatives remain, the USMCA's approach towards investor-state dispute settlement may well prove to be a competitive template for ISDS mechanisms in the future, to the benefit of economic development in parts of the world that need it the most.

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[236] Wolfgang Koeth, *Can the Investment Court System (ICS) Save TTIP and CETA?*, (Eur. Inst. of Pub. Admin., Working Paper No. 2016/w/01, 2016).

[237] *EU and Canada Agree to Set a Date for the Provisional Application of the Comprehensive Economic and Trade Agreement*, EUR. COMM'N (July 8, 2017), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_1959.

[238] *The Canada-United States-Mexico Agreement: What importers need to know*, GLOBAL AFF. CAN. (July 1, 2020).

[239] Timmons, *supra* note 114 ("Yes, the new United States Mexico Canada Agreement deal announced today (Oct. 1) has some important tweaks. Yet it is hardly a radical overhaul.").

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APPENDIX

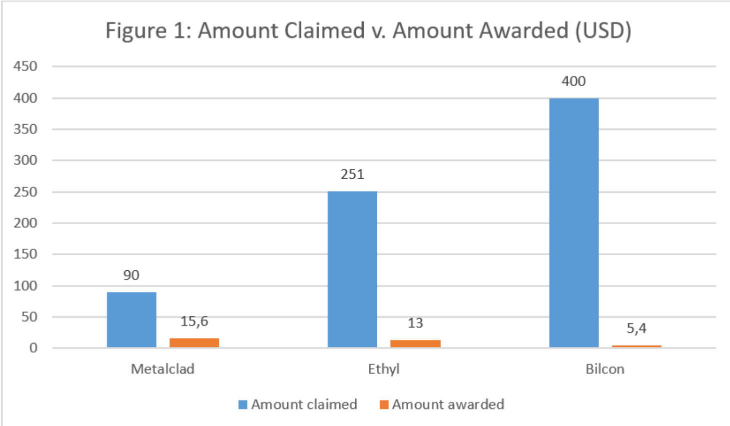
Figure 1: Amount Claimed v. Amount Awarded (USD)
450
400
350
300
250
200
150
100
50
0
90
15,6
251
13
400
5,4
Metalclad
Ethyl
Bilcon
Amount claimed
Amount awarded

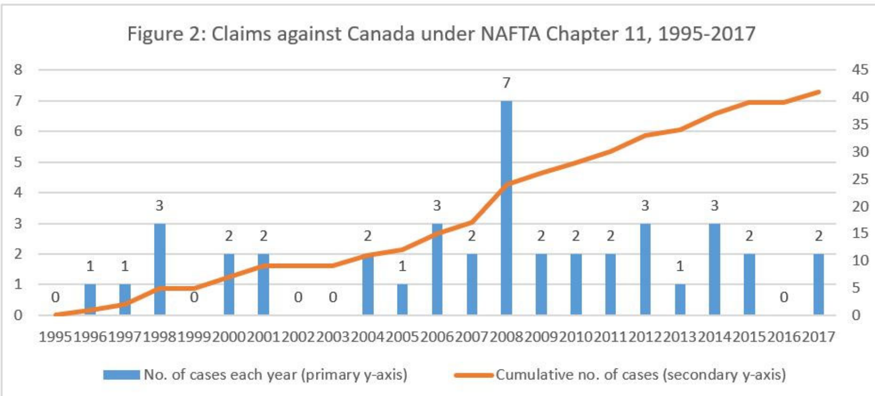
Figure 2: Claims against Canada under NAFTA Chapter 11, 1995-2017
0 1 1 3 0 2 2 0 0 2 1 3 2 7 2 2 2 3 1 3 2 0 2
1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017
No. of cases each year (primary y-axis)
Cumulative no. of cases (secondary y-axis)

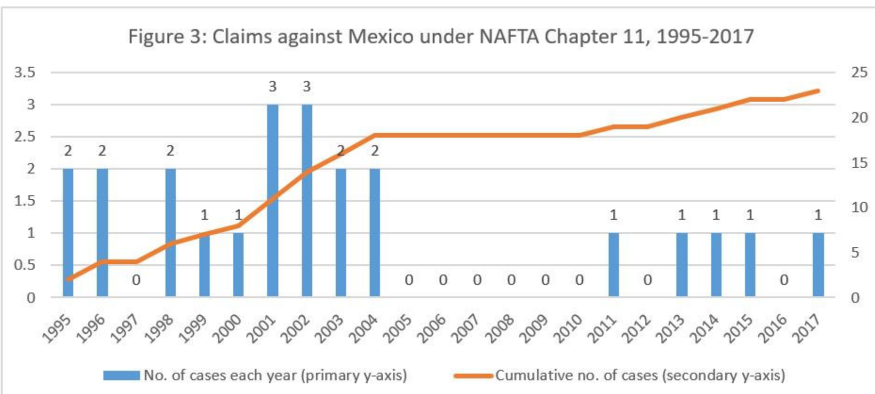
Figure 3: Claims against Mexico under NAFTA Chapter 11, 1995-2017
2 2 0 2 1 1 3 3 2 2 0 0 0 0 0 0 1 0 1 1 1 0 1
1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017
No. of cases each year (primary y-axis)
Cumulative no. of cases (secondary y-axis)

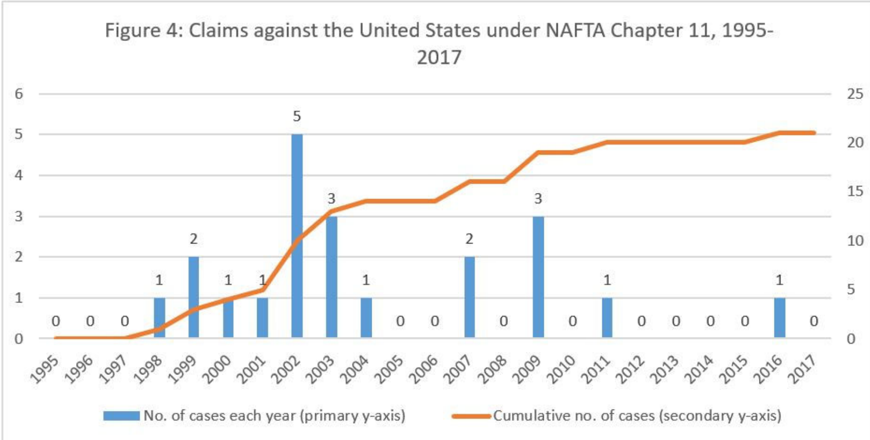
Figure 4: Claims against the United States under NAFTA Chapter 11, 1995-2017
6
5
4
3
2
1
0
25
20
15
10
5
0
0 0 0 1 2 1 1 5 3 1 0 0 2 0 3 0 1 0 0 0 0 1 0
1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017
No. of cases each year (primary y-axis)
Cumulative no. of cases (secondary y-axis)

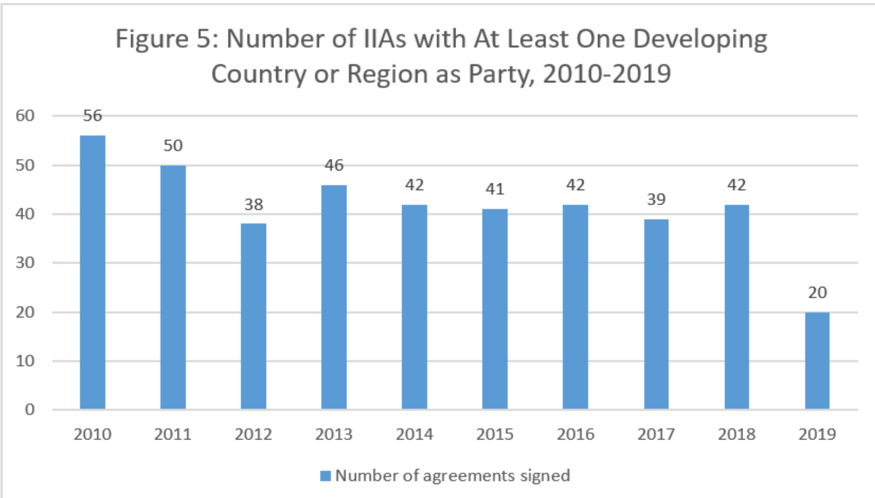
Figure 5: Number of IIAs with At Least One Developing Country or Region as Party, 2010-2019
60
50
40
30
20
10
0
56 50 38 46 42 41 42 39 42 20
2010 2011 2012 2013 2014 2015 2016 2017 2018 2019
Number of agreements signed