THE NEW NAFTA AND CANADIAN ENERGY REGULATORS

*Gordon E. Kaiser**

On July 1, 2020 the *North American Free Trade Agreement*[1] or NAFTA came to an end. After 24 years, NAFTA was replaced by a new agreement called the *Canada-United States-Mexico Agreement*.[2] The main impact as far as the energy sector is concerned was elimination of the famous Chapter 11 dispute resolution provision. Chapter 11 of NAFTA gave private investors the right to bring claims directly and unilaterally in the host country. This was unique at the time when the arbitration world was dominated by state to state proceeding. Chapter 11 requires the following:

a. the host must treat the foreign investor and its investments with 'treatment no less favourable than that it accords, in like circumstances, 'to its own investors'[3] or 'to investors of any other country';[4]

b. the host must provide investments the better of the treatment accorded to its own investors or to the investors of any other country;[5]

c. the host must provide investments 'fair and equitable treatment and full protection and security';[6]

d. the host is prohibited from imposing certain trade distorting performance requirements such as requiring a given level of domestic content;[7]

e. The host must not directly or indirectly nationalize or expropriate an investment of tale measures tantamount to nationalization or expropriation with various exceptions requiring fair market value compensation.[8]

The state to state proceedings continue under the new agreement.[9] However, the private action is gone and there are transition provisions. Investors harmed prior to July 1, 2020 have three years to bring the claim.[10]

Chapter 11 has had a major impact on the energy sector in Canada. To put things in perspective, there have been 40 NAFTA

---

* Gordon Kaiser is an arbitrator and counsel at Energy Arbitration Chambers in Toronto and Washington DC. He is a former Vice Chair at the Ontario Energy Board.

[1] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].

[2] *Canada-United States-Mexico Agreement*, 30 November 2018, Can TS 2020 No 5 (entered into force 1 July 2020) [*CUSMA*].

[3] *Ibid*, article 1102.

[4] *Ibid*, article 1103.

[5] *Ibid*, article 1104.

[6] *Ibid*, article 1105.

[7] *Ibid*, article 1106.

[8] *Ibid*, article 1110.

[9] See *Ibid*, Chapter 31.

[10] See *Ibid*, Chapter 14, Annex 14-C.

decisions to date. Of those, 17 were against Canada, 11 were against the United States, and 12 were against Mexico. Canada has managed to lose nine cases. Mexico has lost five, while the United States have lost none.

Of the 17 cases against Canada, the energy sector accounts for four[11] — with three more currently before tribunals.[12] The purpose of NAFTA was to promote foreign investment. Certainly the Canadian energy sector was a major beneficiary. Canadian oil and gas exploration as well as pipelines are dominated by American investment.

The original NAFTA agreement was negotiated over five years. An agreement in principle was signed by President Reagan and Prime Minister Mulroney at the Shamrock Summit in Québec City in 1985. It was called the Shamrock Summit because the two Irishmen treated their dinner guests to a fine rendition of the song, When Irish Eyes are Smiling. Twenty-four years later when Prime Minister Trudeau and President Trump signed the new agreement in Buenos Aires, no one was singing.

One thing the Canadians and the Americans agreed on was that Chapter 11 should be scrapped. Canada believed that it had lost too many NAFTA arbitrations. But both countries disliked the fact that foreign investors could use NAFTA to override domestic legislation that both governments believed was in the public interest. In October 2017, 230 law and economics professors asked President Trump to remove the Chapter 11 dispute resolution provision from NAFTA.[13] That letter referred to Chief Justice John Roberts' dissent in *BG Group, PLC v Republic of Argentina*[14] claiming that NAFTA arbitration panels held alarming powers to review the laws and "effectively annul the acts of its legislature and judiciary." NAFTA arbitrators, the Chief Justice said "can meet literally anywhere in the world and sit in judgment on the nation's sovereign acts." The October 2017 letter is set out in Appendix A. It is an interesting analysis.

Nowhere was this conflict clearer than in the Canadian energy sector where the decisions of Canadian energy regulators and legislation enacted by provincial governments was constantly challenged by U.S. investors.

In *Mobil Investments Canada Inc.* (Mobil) and *Murphy Oil Corporation* (Murphy), two American companies questioned a decision of the Canadian Newfoundland Offshore Board.[15] Mobil and Murphy first went to the Canadian courts.[16] When that failed they brought a NAFTA claim where they succeeded. In *Mesa Power Group LLC* and *Windstream Energy LLC*, American investors challenged the Ontario government's administration of its feed in tariff program which was used to promote renewable energy.[17] That resulted in the largest NAFTA award against Canada. In *Mercer International Inc.*, a U.S. company filed a C$250 million NAFTA claim against Canada based on the actions of the British Columbia Utilities Commission and BC Hydro, a government owned utility serving the

[11] *Mobil Investment Canada Inc. and Murphy Oil Corp. v Canada* (2015), ARB(AF)/07/4 (International Centre for Settlement of Investment Disputes) [*Mobil*]; *Mesa Power Group LLC v Government of Canada* (2016), 2012-17 (Permanent Court of Arbitration) [*Mesa*]; *Windstream Energy LLC v Government of Canada* (2016), 2013-22 (Permanent Court of Arbitration) [*Windstream*]; *Mercer International Inc. v Government of Canada* (2018), ARB(AF)12/3 (International Centre for Settlement of Investment Disputes) [*Mercer*].

[12] Lone Pine Resources Inc., "Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free trade Agreement" (6 September 2013) at para 14, (ICSID Case No. UNCT/15/2) [Lone Pine Resources]; Westmorland Mining Holdings LLC, "Notice of Arbitration and Statement of Claim Under the Arbitration Rules of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free trade Agreement" (12 August 2019), (ICSID Case No. UNCT/20/3) [Westmorland Mining]; Tennant Energy LLC, "Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and Chapter Eleven of the North American Free trade Agreement" (1 June 2017), (PCA Case No. 2018-54) [Tennant].

[13] Joseph Stiglitz et al., "230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts" (25 October 2017), online (pdf): *Columbia University* <www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2017%20Letter%20to%20Pres.pdf>.

[14] 572 US 25 (2014).

[15] *Mobile*, *supra* note 11 at para 1.

[16] *Hibernia Management and Development Co. v Canada-Newfoundland Offshore Board*, 2008 NLCA 46, aff'g 2017 NLTD 14 [*Hibernia*].

[17] *Mesa*, *supra* note 11 at para 207; *Windstream*, *supra* note 11 at para 5.

entire province.[18] Again the investors went to the Commission first. When that failed they went to NAFTA and ended up with an award.

In Lone Pine Resources Inc., a US-based exploration company launched a claim against the province of Québec's decision to suspend oil and gas exploration under the St. Lawrence River. [19] That case is still before the tribunal. Another case still before a tribunal is Westmoreland Mining Holdings LLC.[20] There, a U.S. company brought a C$470 million claim related to the Alberta government's decision to eliminate the generation of electricity by coal. The investor is not questioning the legislation but the lack of compensation they received.

Canadians have also used the NAFTA Chapter 11 provisions to advance their own interests. The most famous claim and the largest in history was the US$15 billion claim TransCanada brought against the United States when former President Barack Obama refused to grant TransCanada a permit to build the Keystone XL pipeline.[21] That claim was withdrawn when President Trump was elected. In his first day on the job President Trump granted the essential presidential permit to TransCanada. A Presidential permit was required for Keystone XL because the pipeline crossed an international boundary. That challenge is not over. There is a presidential election coming in November. The front runner, Joe Biden, has indicated he will cancel Keystone XL if elected. Stay tuned.

At the end of the day, the question is does the removal of Chapter 11 create problems for the Canadian energy industry. That is an important question and we will address it in the Conclusion. There is good news and bad news. It depends on what kind of investor is involved. Is it a Canadian investor or a U.S. investor? Is the investment in Canada or the United States? Before turning to that question, it is useful to review the NAFTA arbitrations in the Canadian energy sector to date.

THE NAFTA ENERGY ARBITRATIONS

There have been four NAFTA decisions dealing with the Canadian energy sector to date. There are three more cases underway. They all involve claims by American investors challenging the decisions of Canadian energy regulators or energy legislation enacted by provincial governments. They include decisions by the Canada-Newfoundland Offshore Petroleum Board to change its regulations, the British Columbia Utilities Commission to set electricity pricing, an Ontario government decision not to grant onshore wind contracts, an Ontario government decision to suspend offshore wind programs, a decision by the Québec government to ban fracking under the St. Lawrence River and a decision by the Alberta government to eliminate the generation of electricity by coal. These are all the decisions by provincial governments or their energy regulators. Under NAFTA, the government Canada is required to defend. If Canada loses, Canada sends the bill to the province.

Mobil Investments Canada Inc. and Murphy Oil Corporation

In August 2007, two American companies, Mobil Investments Canada (Mobil) and Murphy Oil Corporation (Murphy) filed a NAFTA claim for C$60 million against Canada.[22] The two U.S. companies were partners in an offshore drilling project off the coast of Newfoundland, which was regulated jointly by the federal government and the province through the Canada Newfoundland Offshore Petroleum Board.

In order to obtain a license to drill, the companies had been required to submit proposals to the Board to approve their development plan. That plan included commitments regarding research and development. The Board provided guidelines, none of which required specific expenditure

[18] *Mercer*, *supra* note 11 at paras 2.3–2.27, 2.68.

[19] Lone Pine Resources, *supra* note 12 at para 10.

[20] Westmoreland Mining, *supra* note 12.

[21] Trans Canada Corporation & Trans Canada Pipelines Limited, "Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and the Institution Rules and Arbitration Rules of the International Centre for Settlement of Investment Disputes and Chapter 11 of the North American Free Trade Agreement - Request for arbitration" (24 June 2016) at paras 15, 91.

[22] Mobil Investments Canada Inc. & Murphy Oil Corporation, "Request for Arbitration" (1 November 2007) at paras 1–4.

amounts. The Board changed this practice in 2004 and introduced new guidelines with specific expenditure targets. The Claimants objected to the new guidelines arguing that they represented a fundamental shift in regulation that undermined the project. Mobil and Murphy first went to the courts.[23] When that failed Mobil and Murphy brought a NAFTA claim. In May 2012, a Tribunal majority found that Canada had violated NAFTA Article 1106.[24] Three years later the tribunal ordered damages of C$13.9 million.[25] A set-aside application by Canada was dismissed by the courts.[26]

Mobil brought a second claim for future damages relating to the 2012 to 2015 time period. That was not covered in the original award.[27] Despite Canada's objections that the second claim was barred by the three-year time limit under NAFTA and the doctrine of *res judicata*, the panel allowed the claim to proceed.[28] The parties subsequently extended the damage time period to 2036, the date when the Mobil oil projects in Canada would end. The parties then reached a settlement. It was incorporated into a Consent Order issued by the tribunal on February 4, 2020, granting further damages of C$35 million.[29]

Mesa Power Group

In 2011, Mesa Power Group LLC (Mesa), a U.S. corporation owned at the time by the late Texas oil tycoon T. Boone Pickens, filed a C$775 million claim against Canada relating to the Province of Ontario's decisions in awarding power purchase agreements under the Ontario Feed-in Tariff (FIT) program.[30] These were 20 year agreements under which the government agreed to buy a fixed quantity of electricity at fixed prices. The goal was to increase the supply of renewable energy.

Mesa claimed that Canada adopted discriminatory measures, imposed minimum domestic content requirements, and failed to provide Mesa with the minimum standard of treatment, in violation of NAFTA's investment provisions. In the end, the tribunal dismissed all of Mesa's claims and ordered Mesa to bear the cost of the arbitration, C$2.2 million, as well as Canada's legal costs of nearly C$1.9 million.

Mesa argued that the reason it did not receive any FIT contracts was that the program was mismanaged and Mesa was discriminated against when Ontario granted unwarranted preferences to two other applicants.

The Ontario Power Authority (OPA) had launched the FIT program in October 2009. During the first round of contacts, the OPA reviewed 337 applications and granted 184 contracts, for a total of 2500 MW of capacity. The second round of contracts took place in February 2011. Forty FIT contracts for a total of 872 MW were issued. The third round took place in July 2011, resulting in 14 contracts totalling 749 MW.

Mesa filed six applications under the FIT program. They were unsuccessful in all three rounds. The problem was that all of the Mesa projects were located in Bruce County. In order to obtain a contract, all applicants had to demonstrate was that they had the right to connect to the transmission system. Mesa was unable to obtain transmission connection because of the transmission constraints in Bruce County. Mesa also argued that the failure to acquire transmission access was because of flaws in the contracting process and preferences granted to two other parties, namely NextEra Energy (an affiliate of Florida Power and Light) and the Korean Consortium led by Samsung.

[23] *Hibernia*, *supra* note 16.

[24] *Mobil Investments Canada Inc. and Murphy Oil Corp. v Canada* (2012), ARB (AF)/07/4 at 490 (International Centre for Settlement of Investment Disputes).

[25] *Mobil*, *supra* note 11 at para 178.

[26] *Attorney General of Canada v Mobil et al.*, 2016 ONSC 790.

[27] *Mobil Investments Canada Inc. v Canada* (2018), ARB/15/6 (International Centre for Settlement of Investment Disputes).

[28] *Ibid* at para 100.

[29] *Mobil Investments Canada Inc. v Government of Canada* (2020), ARB/15/6 at para 20 (International Centre for Settlement of Investment Disputes).

[30] Mesa Power Group LLC, "Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement" (4 October 2011) at paras 6, 72.

Mesa argued that this conduct amounted to a breach of Article 1105(1) of NAFTA, which reads: "Each Party shall accord to investments of investors of another Party treatment in accordance with International law, including fair and equitable treatment and full protection and security."

The tribunal rejected the allegation that the OPA had mismanaged the program and did not treat all applicants fairly, noting that the OPA had retained an independent monitor to administer the FIT program. The tribunal also discounted the charge that NextEra Energy had met with government officials, noting that this was common practice in the industry and there was no evidence of any preference.

The most contentious part of the Mesa allegations related to the Korean Consortium agreement. Mesa had argued that the agreement between Ontario and the Korean Consortium unfairly diminished the prospects for other investors including Mesa that were already participating in the renewable energy program by setting aside transmission capacity for the Korean Consortium that was intended for FIT applicants.

Mesa also argued that Ontario was less than transparent in negotiating the agreement, and issued inaccurate and incomplete information. Canada responded that there was nothing manifestly arbitrary or unfair when a government enters into an investment agreement that grants advantages to an investor in exchange for investment commitments. It turned that Samsung had agreed to build manufacturing facilities in Ontario.

Windstream Energy

In October 2012, Windstream Energy LLC (Windstream) filed a claim against the government of Canada for C$475 million. Following a 10-day hearing in 2016, a panel of three arbitrators issued an award of nearly $26 million, relating to Ontario's decision to suspend all offshore wind development.[31] Windstream really turned on the legitimacy of the moratorium issued by Ontario to defer all offshore wind generation and the conduct of the Ontario government following the announcement of that moratorium. The panel accepted Windstream's argument that the government's decision frustrated Windstream's ability to obtain the benefits of the 2010 contract it had signed with the OPA.[32]

In November 2009, Windstream submitted 11 FIT applications for wind power projects, including an application for a 300 MW, 130-turbine offshore wind project near Wolfe Island in Lake Ontario. The OPA offered Windstream a FIT contract in May 2010, which Windstream signed in August of that year. Under the contract, the OPA would pay Windstream a fixed price for power for 20 years. In total, the contract was worth C$5.2 billion.

During this period, the Ontario government was conducting a policy review to develop the regulatory framework for offshore wind projects, including a proposed 5 km shoreline exclusion zone. The policy review ceased on 11 February 2011, when the government of Ontario decided to suspend all offshore wind development until further research was completed.

The main ground for the Windstream claim was that the Ontario decision was arbitrary and was based on political concerns that the wind contracts would increase electricity rates. Windstream argued that the government really had no intention of pursuing scientific research. Canada, in response, said that Ontario was entitled to proceed with caution on offshore wind development and that NAFTA does not prohibit reasonable regulatory delays. Windstream made a number of claims under the NAFTA. The most important (and the only one that succeeded) was a breach of Article 1105(1), the Minimum Standard of Treatment provision, which reads: "Each Party shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." In finding that there was a breach, the tribunal questioned whether the real rationale for the moratorium was the need for more scientific research. Just as important was the tribunal finding that Ontario made little, if any, efforts to accommodate Windstream, and seemed to deliberately keep Windstream in the dark.

[31] *Windstream*, *supra* note 11 at 515.

[32] *Ibid* at para 380.

There was a further claim by Windstream that Ontario had violated Article 1102 of NAFTA by granting Windstream less favourable treatment than was accorded to other entities in similar circumstances. It was argued that the treatment of Windstream was less favourable than the treatment Ontario granted to TransCanada (now TC Energy).

Both TransCanada and Windstream were parties to power purchase agreements with the OPA that guaranteed a fixed price for electricity. Both contracts were terminated. However, when Ontario terminated the TransCanada contract, Ontario awarded TransCanada a new project and compensated TransCanada for the costs of the cancellation. In contrast, Ontario failed to do the same thing for Windstream following the offshore moratorium. The tribunal concluded that TransCanada was not in like circumstances.

There was no question that the TransCanada project was different from the Windstream project. TransCanada had a contract with the OPA to build a gas generation plant in Mississauga, near Toronto. The local residents were not happy with this, and the Liberal government cancelled the project in the heat of the provincial election. To keep TransCanada happy, the OPA negotiated an agreement that reimbursed them for their costs and gave them a new contract in another area.

The tribunal concluded that the two projects were totally different and were not "in like circumstances."

Mercer International

In 2012 Mercer International (Mercer), a U.S. company, filed a C$250 million NAFTA claim against Canada.[33] The claim related to the company's investment in a pulp mill located in Castlegar, British Columbia. The mill also operated an energy generation facility fuelled by biomass, which qualified as renewable energy under British Columbia regulation.

The claim related to actions by BC Hydro, a government owned utility, that provided electricity to most of British Columbia and the British Columbia Utilities Commission, which regulated the distribution of electricity in that province. Two utilities provided electricity in British Columbia. The first was BC Hydro, which serves most of British Columbia. The second was FortisBC, which provides electricity to a small portion of the province including the Mercer pulp mill in Castlegar.

The central issue was that Mercer was engaged in the arbitrage of power and BC Hydro and the British Columbia Utilities Commission took steps to prevent it.[34] Mercer required a significant amount electricity for its own use at its mill. For some time, Mercer was allowed to purchase that electricity from FortisBC at low cost-based rates. At the same time, Mercer was able to sell the renewable electricity generated at its facility using biomass at market rates.

Mercer alleged that BC Hydro and the British Columbia Utilities Commission through their joint action had a created new regulatory regime that required Mercer to use its own self-generated electricity first before selling electricity to the grid at market prices.[35] This removed the arbitrage profit. Mercer argued that the other pulp mills in British Columbia were doing the same thing and it was being discriminated against, contrary to NAFTA Articles 1102, 1103, and 1503. The tribunal ruled against Mercer and ordered Mercer to pay Canada's costs of C$9 million.

There were a number of complexities in this case. First, Canada argued that the BC Hydro conduct was shielded by the government procurement protections in Article 1108(7) of NAFTA. The panel also questioned whether the Commission ruling was discriminatory contrary to Article 1102, 1103, and 1503 of NAFTA.[36] It turned out that Mercer was the only pulp mill buying electricity from FortisBC, the others were being served by BC Hydro, and therefore they were not on the same footing or subject to the same regulatory ruling.

[33] Mercer International Inc, "Notice Of Intent To Submit A Claim To Arbitration Under Chapter Eleven And Articles 1503(2) And 1502(3)(A) Of The North American Free Trade Agreement" (26 January 2012) at para 91.

[34] *Mercer*, *supra* note 11 at para 2.6–2.7.

[35] *Ibid* at par. 7.53.

[36] *Ibid* at para 7.40.

There was also question of whether Mercer was late filing its claim and violated the three-year time limit under article 1116 and 1117 of NAFTA. The limitation period involved a review of the earlier NAFTA decision in Grand River.[37] The question about was what was the date that the investor first acquired or should have acquired knowledge of the alleged breach and the resulting damage. The panel ultimately found that some of the claims were time barred.[38]

It should be noted that Mercer first raised this complaint before the British Columbia Utilities Commission which ruled against it.[39] The Commission decision effectively ruled that self-generating customers had to first supply their requirements from their own production before they could purchase embedded low-cost power from FortisBC.

The panel ruled that the facts did not support a finding of discriminatory treatment, dismissing the application and awarding costs against Mercer.

Lone Pine Resources

In September 2013, Lone Pine Resources Inc. (LPRI), a U.S.-based gas and exploration company, launched a US$119 million challenge against Canada under NAFTA.[40] The claim relates to the Province of Québec's suspension of oil and gas exploration under the St. Lawrence River. The moratorium was part of a wider Québec suspension of fracking, a form of horizontal drilling that has already been suspended in different U.S. states and Canadian provinces.

Québec declared the moratorium in 2011, in order to conduct environmental impact studies concerning the use of the chemicals involved and the impact on groundwater. This was of particular concern given that the permits that Lone Pine had acquired cover land directly under the St. Lawrence River.

LPRI alleged that the moratorium contravenes Article 1105 (minimum standard of treatment) and 1110 (expropriation).[41] More specifically, the claimant alleged that the passing of the legislation that created the moratorium was arbitrary, unfair and inequitable, and was based on political and populist grounds rather than actual environmental research. The claimant alleged that the revocation of the license expropriated its investment without compensation.

The government of Canada responded that the action is a legitimate measure in the public interest that applies indiscriminately to all holders of exploration licenses that are located under or near the St. Lawrence River.[42] Canada argues that the legislation was enacted by a fundamental democratic institution in Québec and was preceded by numerous studies that established the need to achieve an important public policy objective, namely the protection of the St Lawrence River.

Canada argues that the minimum standard treatment guaranteed in Article 1105 of NAFTA does not protect investors' legitimate expectations. Even if this were the case, Canada says no representative of the government of Québec communicated to the claimant any guarantee, promise, or specific assurance that could create legitimate expectations relating to the development of hydrocarbon reserves and resources that may be found beneath the St. Lawrence River.

Canada has also argued that the disputed measure does not substantially deprive LPRI of its investment because the legislation only revokes one of five exploration licenses

---

[37] *Grand River Enterprises Six Nations Ltd. v United States of America* (2011), UNCITRAL (International Centre for Settlement of Investment Disputes).

[38] *Mercer*, *supra* note 11 at para 8.3.

[39] *Re An Application by British Columbia Hydro and Power Authority to Amend Section 2.1 of Rate Schedule 3808 ("RS 3808") Power Purchase Agreement* (6 May 2009), G-48-09, online (pdf): *BCUC* <www.bcuc.com/Documents/Proceedings/2011/DOC_27267_A2-3_05-06-09_G-48-09_BCH_Amend%20Section%2021%20RS%203808%20PPA.pdf>.

[40] Lone Pine Resources, "Claimant's Memorial" (10 April 2015) at para 408, (ICSID Case No. UNCT/15/2).

[41] Lone Pine Resources, *supra* note 12 at para 14.

[42] Government of Canada, "Réponse à l'avis d'arbitrage" (27 February 2015) at para 86 (ICSID Case No. UNCT/15/2).

granted.[43] Finally, Canada points out that the act is a legitimate exercise of the government of Québec's police power and accordingly the measure cannot constitute expropriation.

Keystone XL

In most of the NAFTA energy arbitrations, the United States is the Claimant and Canada is playing defense. The one exception took place in 2016 when TransCanada (now TC Energy), a company based in Calgary, Alberta, filed a US$15 billion NAFTA investor claim against the United States after former President Barack Obama rejected their application for a presidential permit to approve the construction of the Keystone XL pipeline.[44]

In January 2015 both the House and the Senate passed legislation that approved Keystone XL, but failed to get the two-thirds majority required to override a presidential veto.[45] When President Obama exercised his veto, TransCanada filed a claim under NAFTA arguing that the denial of the presidential permit for Keystone XL was arbitrary, unjustified, and breached the U.S. Administration's NAFTA obligations. A presidential permit was required for Keystone XL because the pipeline crossed an international boundary.

This all turned around when Donald J. Trump won the next election and moved into the White House. One of the first acts by the new president was to sign an Executive Order approving the 1179-mile line.[46] Two days later TransCanada withdrew the NAFTA claim.

Westmoreland Mining

In August 2019, Westmoreland Mining Holdings LLC (Westmoreland), a U.S. company, filed the C$470 million damage claim against the government of Canada for breaches by the province of Alberta of article 1102 and 1105 of NAFTA.[47] In 2013, Westmoreland acquired a number of coal mines, including the "mine-mouth" operations in Alberta at issue in this dispute. Mine-mouth coal operations are coal mines located adjacent to power plants so that the coal can be delivered to the power plant economically.

The value of Westmoreland's investment was threatened in November 2015 when a new Alberta provincial government announced its "Climate Leadership Plan." Alberta, which historically had relied primarily on its abundant coal supply to fuel its power plants, decided that it wanted to eliminate all power emanating from coal by 2030. Alberta agreed to pay out nearly $1.4 billion to three coal-consuming power utilities, all of which were Albertan companies. Two of the three, TransAlta and Capital Power, also owned interests in "mine-mouth" coal mines" and the compensation valued those assets. Westmoreland, unlike the three Alberta companies, was not compensated for the early closure of its mines.

When the coal payouts were issued to the companies, Alberta's Energy Minister stated that they were intended to compensate for the "economic disruption to their capital investments" caused by the sudden policy shift and to "provide investor confidence and encourage them to participate in Alberta's transition from coal." Westmoreland argued that Alberta's plan to "compensate Albertan coalmine operators for the loss of their investments, to the exclusion of the only American coalmine operator, denied Westmoreland national treatment under Article 1102 and treated the company unfairly and inequitably, in violation of NAFTA Article 1105."[48]

Canada in its defense disputes the claimant's allegation that Alberta coal mine operators were paid millions of dollars for the economic disruption to their operations when none was paid to the only American coal mine operator. Canada claims that no company or individual

[43] *Ibid* at paras 16–17.

[44] Trans Canada Corporation & Trans Canada Pipelines Limited, "Request for Arbitration" (24 June 2016) at para 91, online (pdf): <www.state.gov/wp-content/uploads/2019/05/Notice-of-Arbitration.pdf>.

[45] US, The White House, *Message from the President of the United States returning without my approval S. 1, The Keystone XL Pipeline Approval Act* (S Doc no 114-2) (Washington, DC: US Government Publishing Office).

[46] US, The White House, *January 24, 2017 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline* (Federal Register 82:18) (Washington, DC) at 8663.

[47] Westmorland Mining, *supra* note 12 at para 111.

[48] *Ibid* at para 13.

received any payment from the government of Alberta with respect to any interest in a mine under the governments 2015 Climate Leadership Plan designed in part to eliminate the generation of electricity by coal.

Canada further claims that the plan took no policy stance on continued coal mining in the province. Rather Canada argues that the payments in question were voluntary payments that the government of Alberta undertook in 2016 to provide the owners of six coal-fired generating units in the province with an incentive to reduce carbon emissions by moving from generating electricity by coal to generation by natural gas. Canada argues that the payments had two objectives. The first was to reduce emissions from electricity generation. The second goal was to ensure that the generating plants would continue operating and provide electricity to the Alberta grid. The province believed that this could be achieved by converting the coal plants to gas-fired generation plants. Put simply Canada says that Westmoreland was not a generating unit and did not qualify. In short, Westmoreland was not "similarly situated" to the electricity generators that received the payments.

This is an argument similar to the argument that Canada made in *Windstream*.[49] There Windstream had argued that Canada treated TransCanada more favourably when Ontario made significant payments to encourage TransCanada to terminate operations when at the same time no payments were made to Windstream. Canada pointed out that TransCanada was very different from Windstream. Windstream was a wind generator. TransCanada was a gas plant. They were entirely different operations and the rationale for the payments was entirely different. The tribunal in *Windstream* accepted the distinction. This argument will no doubt be central in Westmoreland.

Tennant Energy

The latest energy arbitration against Canada under NAFTA is Tennant Energy (Tennant).[50] This is a follow-on case to *Mesa* and relies on much of the evidence developed in that case. Tennant, based in Napa California filed a claim in June 2017 against Canada for C$116 million related to a breach of Article 1105 of NAFTA.

As in *Mesa* the claim related to the actions of the province of Ontario in awarding contracts under the FIT contracts developed under the *Green Energy Act*.[51] Like *Mesa*, Tennant claims that the FIT contacting process was unfairly manipulated to favour the Korean Consortium to the detriment of all the other applicants.

Tennant argues that not only was there unfair manipulation, the province deliberately failed to release information which would put all parties on a level playing field. These steps Tennant argues were inconsistent with Canada's obligations under NAFTA including Article 1105 of Chapter 11. Tennant claimed for wrongful actions:

a. Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the investors.

b. Ontario unfairly manipulated the dissemination of program information under the FIT program.

c. Ontario unfairly manipulated the awarding of Contracts under the FIT program.

d. Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.

The damages sought had a unique twist. Of the C$116 million claimed C$35 million related to "moral damages" that the investor suffered from "the improper actions of the Respondent including improper measures to suppress its wrongful conduct and for the gross unconscionable conduct of Ontario in the maladministration of the program resulting in the abuse of process and detriment to the Investment and the Investor." This is the first NAFTA case claiming moral damages. It appears to be the arbitration version of punitive

[49] Windstream, *supra* note 11.

[50] Tennant, *supra* note 12.

[51] *Green Energy and Green Economy Act*, 2009, SO 2009, c 12, Schedule A.

damages. Not only does this case borrow on the evidence from *Mesa* it also relies on evidence from *Trillium*,[52] a common law tort case discussed in the next section. *Trillium, Mesa*, and *Tennant* are all in the same boat. They are challenging arbitrary acts of the Ontario Government in connection with wind projects. Of particular interest is the fact that in *Trillium*, the plaintiff, brought an action for spoliation claiming that senior Ontario government officials destroyed documents relevant to the case. Tennant also relies on that evidence to support its claim of wrongful conduct and abuse of process. The matter is currently proceeding before the tribunal.

THE COMMON LAW REMEDIES

Disguised Expropriation

Chapter 11 is history, but no one is crying. In fact, a remedy created by the Supreme Court of Canada in 2018 may provide investors with even greater protection than Chapter 11 of NAFTA provided. In *Lorraine (Ville) v 2646-8926 Québec inc.*, the Supreme Court created a common law remedy for de facto or disguised expropriation.[53] Unlike the Chapter 11 remedy, this can be used by both foreign and domestic investors. In fact, the first application is an energy case involving LGX Oil and Gas (LGX). There, LGX brought a C$60 million claim against Canada on the basis that an order two years earlier by Environment Canada had devalued their oil and gas wells in southern Alberta.[54] That order prohibited construction and noise activities in April and May of each year, which was the mating season for the greater sage grouse.

The concept of expropriation deals with the power of a public authority to deprive a property owner of his or her property and the benefits from that property. In the *Lorraine* case, the Supreme Court Canada defined in some detail what it called "disguised expropriation" or "de facto expropriation." Essentially, disguised expropriation involves an abuse of power. That occurs when a public authority exercises its regulatory power unlawfully in a manner inconsistent with the purpose of the legislation it is acting under. At the end of the day, the court must assess the reason why the government acted in the way it did. In that sense, the court is exercising a function similar to an arbitrator in a NAFTA case. Recall that in *Windstream*, the tribunal questioned whether the real rational for the moratorium the province placed on offshore wind projects was the need for more scientific research. It was significant, the tribunal found, that Ontario made little if any effort to accommodate Windstream and seemed to deliberately keep Windstream in the dark. The word deliberate is important.

In the case of disguised expropriation, the court must determine whether the act is discriminatory on unjust. In short, there must be a finding of abuse of power and/or bad faith.

In the *Lorraine* case, the Supreme Court considered whether the environmental regulation at issue was legitimate. The plaintiff had purchased a lot in a residential area in the town of Lorraine in Quebec with the intention to subdivide the property for residential construction. A few years later the town adopted a bylaw that turned half of the property into a conservation area preventing the plaintiff from constructing residential properties.

The court indicated that the plaintiff had two remedies confirming an earlier decision of the Supreme Court in *Canadian Pacific Railway Co. v Vancouver (City)*.[55] There, the railway was unsuccessful because the court found that the City of Vancouver had not acted in bad faith,

[52] *Trillium Power Wind Corporation v Ontario (Natural Resources)*, 2013 ONCA 683 [*Trillium*].

[53] *Lorraine (Ville) v 2646-8926 Québec inc.*, 2018 SCC 35 [*Lorraine*].

[54] *LGX Oil + Gas Inc et al. v Attorney General of Canada* (3 December 2015), Calgary, Alta, ABQB 1401-10147 (Statement of Claim); See also *LGX Oil + Gas Inc (Receiver of) v Attorney General of Canada* (16 May 2018), Calgary, Alta, ABQB 1501-14562 (Amended Statement of Claim) (The Plaintiffs are LGX Oil & Gas Inc., by its Court-appointed receiver and manager Ernst & Young Inc.; The City of Medicine Hat; Lintus Resources Limited; Swade Resources Ltd.; WF Brown Exploration Ltd.; Barnwell of Canada Ltd.; and Spyglass Resources Corp. The Amended Statement of Claim revised an initial damages figure of C$60MM to C$123.6MM); See also *The City of Medicine Hat et al. v Attorney General of Canada et al.* (3 January 2014), Calgary, Alta, FC T-12-14 (S 18.1 Application for Judicial Review, LGX Oil and Gas and the City of Medicine Hat, which had interests in the Manyberries oil production site that was affected by the sage grouse order, brought a judicial review and constitutional challenge of the sage grouse order at the Federal Court of Canada.).

[55] 2006 SCC 5.

and had acted within its authority. The result in *Lorraine* was different however. The court did find that the town had acted in bad faith and stated that the plaintiff could either seek a declaration that the town had acted outside its authority or — in the alternative — could claim an indemnity or payment to reflect the value it had lost. There was however a problem in that the plaintiff had missed a limitation period but nonetheless the court's statement if respect to the law and the right's of plaintiff's in the case of disguised expropriation is very clear. The rights under the common law are just as strong as the rights that foreign investors have or at least had under NAFTA. The difference here however is that they are available to both foreign and domestic investors.

Good Faith in Contract Performance

In 2014, the Supreme Court of Canada released its decision in *Bhasin v Hrynew*,[56] a ground breaking decision that recognized a common law duty of good faith in the performance of contracts. Five years later on December 19, 2019, the same court heard two appeals together on the same issue. One case was from British Columbia,[57] the other was from Ontario.[58] The decision has yet to be released but the general view is that it will move this important area of the law forward. The court noted that the duty of honesty does not require a party to disclose material to the contracting parties, but, a party cannot actively mislead or deceive the other contracting party in relation to the performance of the contract. As Justice Cromwell explained:

> This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.

The Supreme Court decision in *Bhasin* is novel. It recognized a new common law duty that applies to all contracts. The new duty is one of honest performance which means the parties must not lie or knowingly mislead each other about matters linked to the performance of a contract. The court did recognize that the common law is not permitted to override express contract terms. Put differently defendants cannot be faulted under the good faith doctrine for performing in a manner that is entirely consistent with the contracts express terms. The law in this area in Canada is moving forward. The concept is not as strong in American law where good faith and implied obligations are restricted to filling in contractual gaps.[59]

Misfeasance in Public Office

In the last decade, the tort of misfeasance in public office has become commonplace. In Canada this cause of action dates back to 1959 and the famous *Roncarelli v Duplessis*[60] decision by the Supreme Court of Canada. There the Premier of Québec improperly ordered the manager of the Québec liquor Commission to revoke Roncarelli's liquor license because Roncarelli had provided bail money to several Jehovah witnesses arrested by the Premier. The Supreme Court of Canada found that the Premier had no grounds for ordering this and had acted with malice.

Not much happened until the House of Lords' decision in *Three Rivers District Council v Bank of England*[61] in 2001 and the Supreme Court of Canada followed suit in *Odhavji Estate*[62] two years later.

The plaintiffs in *Three Rivers* were 6000 depositors the Bank of Credit and Commerce

[56] 2014 SCC 71 [*Bhasin*].

[57] *Greater Vancouver Sewerage and Drainage District v Wastech Services Ltd.*, 2019 BCCA 66.

[58] *CM Callow Inc. v Zollinger*, 2018 ONCA 896.

[59] Stephen Burton, "Breach of Contract and Common Law Duty to Perform in Good Faith" (1980) 94 Harv L Rev 369.

[60] *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689.

[61] *Three Rivers District Council v Bank of England*, [2000] UKHL 33.

[62] *Odhavji Estate v Woodhouse*, 2003 SCC 69.

International (BCCI) in London who had suffered economic losses due to the fraud and eventual liquidation of BCCI. The depositors brought a claim for misfeasance against the senior officials of the Bank of England who they claimed had acted in bad faith in licensing BCCI as a deposit taking institution. The creditors complained that the Bank of England officials should have taken steps to close down the BCCI given that "known facts cried out for action."

The main issue in *Three Rivers* was the required state of mind of the defendant or what is typically described as malice. The general view was that malice required some degree of bias or personal ill will against the plaintiff or something that came to be known as targeted malice. In *Roncarelli*, for example, the plaintiff had established that the defendant Premier of Québec had a deliberate intention to harm the plaintiff restaurant owner for his involvement with the Jehovah Witnesses. He specifically ordered the revocation of the plaintiff's liquor license in order to cause the plaintiff financial harm.

We then move to the Supreme Court of Canada and the decision in *Odhavji Estate*. The Court of Appeal for Ontario was divided on whether mere breach of the statue was sufficient to ground a claim for misfeasance in public office or whether the tort required abuse of power or authority. The majority concluded the mere breach of statutory obligation was not sufficient for the claim and struck out the claim. The Supreme Court of Canada reversed and restored the claim. Iacobucci J. writing for a unanimous court concluded that the tort is not limited to abuse of statutory power, but was "more broadly based on unlawful conduct in the exercise of public functions." He stated that the tort "could be included in a broad range of misconduct" and the essential question was whether "the alleged misconduct is deliberate and unlawful." In addition, he stressed the public authorities disregard for the plaintiff's interest stating:

> Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interest of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties.

Around the same time, another important decision was released in England. In 2006 in *Watkins v Home Office & Ors*[63] the House of Lords established that misfeasance in public office was not actionable unless there is damage. In 2008, another important decision of the Court of Appeal in Ontario was released in *Ontario Racing Commission v O'Dwyer*.[64] Rouleau J. writing for the court found for the plaintiff where he stated the Commission had engaged in "unhelpful and misleading correspondence with the plaintiff" the and Commission officials were "reckless, indifferent or willfully blind to the illegality of their actions and the potential harm to the plaintiff." This type of language is remarkably similar to what the NAFTA panel found in *Windstream*.

The tort of misfeasance in public office has also been used in a number of Canadian energy cases. In *Granite Power Corp. v Ontario*,[65] the Court of Appeal for Ontario allowed the plaintiff to proceed with a misfeasance claim against the Ontario government for acts it took in the privatization of the Ontario power industry. The plaintiff, Granite Power, was a small private utility company located in Gananoque, Ontario. Since 1885, Granite Power had supplied electricity to Gananoque. The company had an exclusive agreement to supply power to the town from 1994 to 2014. However in 1997, the Ontario government change the provincial energy policy to allow new competition. The statute that created that regime allowed the province to grant exemptions to private suppliers like Granite to continue their exclusive agreements with small municipalities. Granite Power applied to the government for such an exemption.

Ontario granted the requested exemption in 2002. However, between 1998 and 2002 the government's communication had been

[63] [2006] UKHL 17.

[64] 2008 ONCA 446.

[65] [2004] OJ No 3257; 72 OR (3d) 194.

noncommittal and ambiguous. The government allowed advertising that suggested that Granite Power's monopoly to serve the town was likely to disappear. To add insult to injury the town used the new provincial policy to challenge the exclusive agreement it had with Granite Power. Granite Power argued that the government's delay and lack of candor had caused its supply agreement to become worthless and claimed damages from the provincial government for that loss.

The Court of Appeal for Ontario allowed Granite Power claim for misfeasance in public office to proceed finding that there were sufficient allegations that the province acted maliciously and in bad faith. Specifically it was alleged that the province had deliberately delayed its decision whether to grant an exemption to Granite Power. This made it difficult for Granite Power to make critical business decisions. The Province was also accused of promoting its new energy policy in a fashion that allowed new retailers to get a foothold in the community. The Court of Appeal concluded that these allegations, if proved, would support a successful claim for misfeasance in public office.

The next energy decision involving this cause of action was *Saskatchewan Power Corporation v Swift Current (City)* in 2007.[66] There, the plaintiff complained that Saskatchewan Power, a state owned utility, had used its monopoly position to engage in predatory pricing and had amended the terms of service in its supply contract unilaterally. The plaintiff argued that this amounted to misfeasance in public office.

The defendant brought a motion to strike the claim on the basis that the plaintiff had not identified any human being as having the requisite bad faith or malice to make up the tort. The defendant argued that the Corporation was incapable of having the necessary malice or intent. The Saskatchewan Court of Appeal held that this was not fatal to the claim. The Court interpreted public office broadly stating that there was no reason to distinguish between the officeholder and the office itself.[67] The claim was allowed to proceed.

We then come to the *Trillium* case in Ontario.[68] This case is close to the fact situations in the NAFTA arbitrations in *Mesa* and *Windstream*.

Trillium Power Wind Corporation (Trillium), a Toronto-based developer building offshore wind turbines in Lake Ontario, applied to lease provincial land under Ontario's wind power policy and had been granted applicant-of-record status by the Ministry of Natural Resources. That status gave Trillium three years to test the wind power. After that, the company could proceed with an environmental assessment and obtain authorization to operate the wind farm.

Trillium subsequently notified the Ontario Ministry of Natural Resources that the company intended to close a C$26 million financing for the project. On the same day the government of Ontario issued a moratorium on offshore wind development, including by developers like Trillium that had applicant-of-record status. The government issued a press release stating that the projects were cancelled pending further scientific research.

Trillium brought a number of claims against the Ontario government seeking $2 billion in damages. The claims included breach of contract, unjust enrichment, negligent misrepresentation, misfeasance in public office and intentional infliction of economic harm. The province brought a motion to strike the Trillium statement of claim on the basis that it did not disclose a reasonable cause of action. The motion was successful. The motion judge found that the government decision to close the wind farms was a policy decision and therefore immune from suit.

The motion judge also found that the fact that Trillium had been granted applicant-of-record status did not amount to a contractual relationship between Trillium and the government. The motion judge concluded that the claim should be struck because it was plain and obvious that the claim could not succeed at trial.

Trillium appealed on two grounds: first, misfeasance in public office was a tenable claim

[66] 2007 SKCA 27.

[67] See also *Georgian Glen Development v Barrie*, [2005] OJ No 3765; 13 MPLR (4th) 194 (Where the court found that a municipality could be a public officer for the purpose of the tort).

[68] *Trillium*, *supra* note 52.

as a matter of law; and second, the claim had been adequately pleaded. The Court of Appeal for Ontario agreed. It was not clear that the claim of misfeasance in public office would necessarily fail. Moreover, Trillium had properly pleaded that the province's actions were taken in bad faith for improper purpose. The Court also found that the government's decision was made to harm Trillium specifically. While the Court of Appeal did agree with the motions judge that a government decision involving political factors was not the basis for a cause of action, but there was an exception for irrational acts of bad faith. The facts in this case were unique. It was clear that Trillium's announcement disclosing new financing triggered the government action. And, as the court concluded, that Trillium should be entitled to proceed based on the allegations that the government specifically targeted Trillium. The court was clear that decisions motivated by political expediency do not constitute bad faith for the purpose of a tort claim, stating as follows:

> Ministerial policy decisions made on the basis of "political expediency" are part and parcel of the policy-making process and, without more, there is nothing unlawful or in the nature of "bad faith" about a government taking into account public response to a policy matter and reacting accordingly.

The court found that in order to make out "bad faith" for the purpose of the tort of misfeasance in a public office, Ontario must have acted deliberately in a manner that was "inconsistent with the obligations of its office."

Trillium never found its way to trial but *Capital Solar Power Corporation v The Ontario Power Authority*[69] did. The plaintiff, Capital Solar Power was a small business that submitted applications to the microFIT Program operated by the OPA, an agency of the Ontario government. These applications were submitted on behalf of their customers. In submitting these applications Capital Solar Power relied on the microFIT rules and pricing schedule provided by the OPA.

On October 31, 2011 the OPA announced a new pricing schedule. The rules required that the OPA provide 90 days' notice of any changes. The OPA did not provide that notice.

As result of the new price changes Capital Solar Power lost all of its potential customers. Capital Solar Power then filed a claim against the OPA for misfeasance in public office because the OPA had amended the microFIT Program without 90 days' notice.

The court rejected the claim finding that it was not issued for any improper purpose and there was no element of bad faith or dishonesty the OPA's actions. The court found the OPA made the changes in accordance with the direction from the Minister of Energy and the OPA was attempting to achieve a balance amongst common interests.

There was also some discussion of damages. The court reduced the damage claim from C$3 million to C$450,000. In the end the court did not award any damages because the plaintiff had failed to establish liability against the OPA with respect to misfeasance in public office. The case reinforces the importance of the proposition that when it comes to the tort of misfeasance in public office an essential component is that the plaintiff must establish a clear intent on the part of the public official to harm the defendant or at least that she or he should have known that harm would result. That is known as "reckless disregard."

STATE TO STATE CLAIMS

There is no question that NAFTA has had a significant impact on the Canadian energy sector. It certainly has stimulated investment in the sector. And American investors have taken advantage of Chapter 11 to question energy policy and regulatory decisions made in British Columbia, Alberta, Ontario, Québec and Newfoundland and Labrador. Ontario has been the bad boy with three cases project to date questioning the provinces management of the FIT contract program under the *Green Energy Act*.

Going forward, things will be different. Private investors from United States no longer have any right to bring a NAFTA action on their own

[69] 2019 ONSC 1137.

volition in Canada. The Canadian investors have lost a similar right in the United States. The loss impacts the American investors most. They are the ones that have been most active under Chapter 11 of NAFTA.

While the right to bring a private action is gone, the state to state action continues. This of course requires the investor to convince the government to bring an action, which is not always easy.

The new NAFTA regime is complicated in that it creates two classes of investors, priority investors and non-priority investors. The priority investors are investors that are parties to a government contractor in one of five sectors: oil and gas, power generation, telecommunications, and infrastructure. The protection available to priority investors under the new NAFTA is largely the same as under the old NAFTA.

For the non-priority investors the new NAFTA it is not nearly as attractive as the old NAFTA. First of all, there is a requirement that those investors must exhaust all legal remedies in the local courts before they can bring the claim under the new NAFTA. These investors cannot bring a NAFTA application until they have a final decision from the local courts or 30 months have passed by. This may be of little concern to the energy sector however. Investors in oil and gas and power generation qualify as priority investors and will not face this limitation.

CONCLUSION

The fact that Chapter 11 dispute resolutions has been abolished between Canada and the United States may not turn out to be that significant. The common law cases under the misfeasance in public office tort have not been that successful. But it looks like the cases under the new common law actions, disguised expropriation, and good faith in contract performance, are much more promising. There is no reason to believe that American investors will not take advantage of this developing law. In fact, non-priority investors will be required to. As far as the Canadian regulators and governments are concerned, they should pay attention to the fact that these new causes of action, unlike NAFTA, are not limited to foreign investors and include domestic investors. While the publicity surrounding NAFTA has focused on foreign investors because they were the only ones that could exercise that remedy, the fact is just as much investment in renewable energy throughout Canada comes from domestic investors as foreign investors. Put differently, the surveillance and policing of dubious policy decisions that discriminate against particular parties is not going away. If anything, it will increase.

One last comment may be in order. While investors may continue to have protection through common law remedies. A treaty is a treaty. The Government liability is clear Common law remedies however are still subject to legislation and most jurisdictions have some form legislation setting out various forms of Crown Immunity. That argument is being raised in the Trillium case before the Ontario Courts. It will be an important decision. ■

APPENDIX A

230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts

October 25, 2017

Dear President Trump:

Last year, more than 200 U.S. law professors and economics professors sent a letter urging Congress to oppose the Trans-Pacific Partnership (TPP) because it included the controversial Investor-State Dispute Settlement (ISDS) regime that is also at the heart of the North American Free Trade Agreement (NAFTA). The letter included prominent supporters of "free trade" who considered the negative consequences that ISDS poses for our legal system as overriding grounds to oppose the TPP.

We are writing to urge you to remove ISDS from NAFTA, as well as to leave ISDS out of any future trade or investment pact.

ISDS grants foreign corporations and investors rights to skirt domestic courts and instead initiate proceedings against sovereign governments before tribunals of three private-sector lawyers. In those proceedings, foreign investors can demand taxpayer compensation for laws, court rulings and other government actions that the investors claim violate loosely defined rights provided in a trade agreement or investment treaty. The merits of those rulings are not subject to appeal, but are fully enforceable against the U.S. government in U.S. courts.

As Chief Justice John Roberts noted in his dissent in BG Group PLC v. Republic of Argentina, ISDS arbitration panels hold the alarming power to review a nation's laws and "effectively annul the authoritative acts of its legislature, executive, and judiciary." ISDS arbitrators, he continued, "can meet literally anywhere in the world" and "sit in judgment" on a nation's "sovereign acts."

The problem with ISDS is not that it allows private corporations to sue the government for conduct that harms the corporations' economic interests. Indeed, U.S. domestic law already recognizes the importance of granting private citizens and entities (including foreign corporations) the power to take legal action against the government in order to help promote effective implementation of the law and adherence to the Constitution.

However, through ISDS, the federal government grants foreign investors - and foreign investors alone - the ability to bypass the robust, nuanced, and democratically-responsive U.S. legal framework. Foreign investors are able to frame questions of domestic constitutional and administrative law as treaty claims, and take those claims to a panel of private international arbitrators, circumventing local, state, or federal domestic administrative bodies and courts. ISDS thus undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law.

Over the past two centuries, the United States has established a framework of rules that govern lawsuits against the government and continually refines them through democratic processes. These include rules on court procedures and evidence, which are designed to ensure the fairness, legitimacy and reliability of proceedings; on who may bring lawsuits and under what circumstances, which are designed to balance the right to sue with the need to ensure that government action is not made impossible due to unlimited litigation; on the power of courts, which are designed to ensure that judges do not overly intrude on legitimate policy decisions made by elected legislatures or executive officials; on appropriate remedies, which are crafted to achieve policy aims such as deterrence, punishment, and compensation; and on the independence and accountability of judges

Freed from the rules of U.S. domestic procedural and substantive law that would have otherwise governed their lawsuits against the government, foreign corporations can succeed in lawsuits before ISDS tribunals even when domestic law would have clearly led to the rejection of those companies' claims. Corporations are even able to re-litigate cases they have already lost in domestic courts.

It is ISDS arbitrators, not domestic courts, who are ultimately able to determine the bounds of proper U.S. administrative, legislative, and judicial conduct.

In addition to the central problem of establishing a parallel and privileged set of legal rights and recourse for foreign economic actors operating here, ISDS proceedings lack many of the basic protections and procedures normally available in a court of law. There are no mechanisms for domestic citizens or entities affected by ISDS cases to intervene or meaningfully participate in the disputes; there is no appeals process and therefore no way of addressing errors of law or fact made in arbitral decisions; and there is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments.

Currently, NAFTA is the only ISDS-enforced agreement in force between the United States and a major capital exporting nation. That means that only a relatively small share of foreign direct investment in the United States - roughly 10 percent - is subject to ISDS claims. Yet ISDS is included in the draft text for the Transatlantic Trade and Investment Partnership (TTIP) and in the U.S. Model Bilateral Investment Treaty (BIT), which is the template for the U.S.-China BIT, both of which were being negotiated by the previous administration. The TTIP and China BIT would expand dramatically the share of foreign direct investment subject to ISDS claims in the United States - by at least 360 percent. While we have avoided losing an ISDS case to date, tribunals have ruled against the United

States on important elements of these cases, meaning it is only a matter of time before we lose a case, especially if ISDS remains in NAFTA and is further expanded in new agreements.

The United States has typically agreed to supranational adjudication only in exceptional cases and after resolving a range of complex considerations about the scope and depth of supranational authority over domestic policies and the available remedies to aggrieved parties. The inclusion of ISDS in U.S. trade and investment deals brushes aside these complex concerns and threatens to dilute constitutional protections, weaken the judicial branch, and outsource our domestic legal system to a system of private arbitration that is isolated from essential checks and balances.

Scholars across the political spectrum - from the Cato Institute's Daniel Ikenson to former Vice President Joe Biden's chief economist Jared Bernstein - have noted that there is no need for ISDS. U.S. firms that seek to offshore their investment to venues that do not have reliable domestic legal systems can purchase risk insurance or look for safer jurisdictions; remaining issues can be addressed through state-state dispute resolution, as is the norm under all other areas of international economic law. Moreover, they note, exposing the U.S. Treasury and our legal system to ISDS liability also has the perverse effect of subsidizing offshoring to or investing in countries with riskier or less developed legal systems by lowering the risk premium of relocating investment there.

For these reasons, we urge you to stop any expansion of ISDS - namely through the China BIT and the TTIP - and to eliminate ISDS from past U.S. trade deals, beginning with NAFTA.

Thank you for your consideration.

Organizational affiliation for all signatories is included for identification purposes only; individuals represent only themselves, not the institutions where they are teaching or other organizations in which they are active.

Joseph Stiglitz, Nobel Laureate in Economics, University Professor, Columbia University

Jeffrey D. Sachs, Professor of Economics, Director of Columbia University's Earth Institute, Columbia University

Robert B. Reich, Chancellor's Professor of Public Policy, University of California at Berkeley

For the complete list of authors, please refer to : www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/2017%20Letter%20to%20Pres.pdf