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# A REVIEW OF NAFTA INVESTOR-STATE DISPUTE SETTLEMENT CLAIMS FROM 2007 TO 2017

Phuong Tran\*

## I. INTRODUCTION

SINCE the North American Free Trade Agreement (NAFTA) was successfully negotiated in 1993,<sup>1</sup> the provisions for investor-state dispute settlement (ISDS) under Chapter 11 have been considered to be a threat to the legal sovereignty of its member countries.<sup>2</sup> Under Chapter 11, any investor alleging a breach by a host country can file an arbitration claim.<sup>3</sup> Critics of Chapter 11 are primarily concerned with the use of corporations' power to overturn or significantly weaken NAFTA countries' ability to legislate or regulate in the public interest.<sup>4</sup> Further, if a corporation wins its ISDS claims, taxpayers of the losing country must foot the bill.<sup>5</sup> It is likely that there will be many changes to NAFTA, especially to this controversial chapter, as promised by President Trump.<sup>6</sup> This paper will revisit the ISDS claims under Chapter 11 raised during the past ten years to now. Specifically, this paper will review the various issues raised under Chapter 11's most contested provisions.

The first part of this article briefly introduces NAFTA Chapter 11 and the ISDS mechanism. The second part of this article discusses the ISDS claims involving environmental regulations by NAFTA countries. This article concludes that it is time to review NAFTA Chapter 11 to reduce the uncertainty and unpredictability of ISDS arbitral awards and to lessen public concerns.

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

2. See William Owen, *Investment Arbitration under NAFTA Chapter 11: A Threat to Sovereignty of Member States?*, 39 CASE W. RES. CAN.-U.S. L. J. 55 (2015), 3.

3. *Id.*

4. *Id.*

5. *NAFTA Chapter 11: Corporate Cases*, PUB. CITIZEN, <http://www.citizen.org/Page.aspx?pid=1218> (last visited Mar. 27, 2017).

6. Kristen Walker, *Trump to Sign Executive Order on Plan to Renegotiate NAFTA with Mexico*, Canada, NBC NEWS (Jan. 23, 2017), <http://www.cnbc.com/2017/01/23/trump-to-sign-executive-order-to-renegotiate-nafta-and-intent-to-leave-tpp.html>.

## I. A BRIEF OVERVIEW OF NAFTA CHAPTER 11

The original purpose of including an ISDS mechanism in NAFTA was to create “a predictable environment for investment” across North America.<sup>7</sup> Chapter 11 was specifically created for Canadian and U.S. investors to ensure their investments in Mexico would not be taken without due process.<sup>8</sup> This concern stemmed from the weakness of the Mexico’s judiciary independence from the government.<sup>9</sup> In order to attract foreign investments from the United States and Canada, Mexico determined it was in its national interest to accept ISDS provisions.<sup>10</sup>

Generally, tribunal decisions do not establish precedent under international law.<sup>11</sup> Previous decisions cannot explicitly be used to influence future decisions.<sup>12</sup> If investors succeed in challenging the laws or regulations of a NAFTA member, ISDS tribunals cannot force member countries to reverse or dismantle the laws or regulations in questions.<sup>13</sup> Tribunals can only impose a financial award for monetary damages, material interest, litigation costs, or restitution of property.<sup>14</sup> A tribunal may not order a party to pay punitive damages.<sup>15</sup>

Chapter 11 includes twenty articles, *i.e.* articles 1101 to 1120.<sup>16</sup> Many NAFTA disputes are based on article 1102 (National Treatment),<sup>17</sup> article 1103 (Most Favored Nation Treatment),<sup>18</sup> article 1105 (Minimum Standard of Treatment),<sup>19</sup> and article 1110 (Expropriation and Compensation).<sup>20</sup>

Article 1102 contains the National Treatment doctrine.<sup>21</sup> This doctrine is common to many trading blocs agreements.<sup>22</sup> The National Treatment doctrine requires a member country to give investors from another member country treatment no less favorable than that it provides to its own investors in similar situations.<sup>23</sup> For example, if a tribunal decides that Canada gives preferential treatment to Canadian companies’ projects

7. NAFTA, *supra* note 1.

8. KYLA TIENHAARA, *THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY* 40 (Cambridge Univ. Press 2009).

9. Howard Mann, *Private Rights, Public Problems: A Guide to NAFTA’s Controversial Chapter on Investor Rights (2001)*, INT’L INST. SUSTAINABLE DEV., [http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf) (last visited Mar. 26 2017).

10. Owen, *supra* note 2, at 3.

11. NAFTA, *supra* note 1, art. 1136.

12. *Id.*

13. NAFTA, *supra* note 1, art. 1135.

14. *Id.*

15. *Id.*

16. NAFTA, *supra* note 1, chapter 11.

17. *Id.* art. 1102.

18. *Id.* art. 1103.

19. *Id.* art. 1105.

20. *Id.* art. 1110.

21. *Id.* art. 1102.

22. *See, e.g.*, General Agreement on Tariffs and Trade 1994, art. III, Sep. 30, 2011, 1867 U.N.T.S. 187 [hereinafter GATT].

23. NAFTA, *supra* note 1, art. 1102.

that are similar to projects of investors who are from other NAFTA countries, that tribunal may find the Canadian government liable for breach of article 1102.<sup>24</sup>

Article 1103 includes the Most Favored Nation Treatment doctrine.<sup>25</sup> This doctrine expands the National Treatment doctrine to ensure that investments of a member country's investors receive the same treatment as similar investments from a third-member country.<sup>26</sup> For example, if a Canadian company and a Mexican company have similar projects in the United States, the U.S. government must treat them equally.<sup>27</sup> If one company is treated better than the other, the U.S. government can be found liable under this article.<sup>28</sup> The Most Favored Nation Treatment is doctrine is also found in many trading blocs agreements.<sup>29</sup>

The doctrine of Minimum Standard of Treatment in accordance with International Law is embedded in NAFTA through article 1105.<sup>30</sup> This doctrine ties the expected minimum standard of treatment between Parties to the customary international law standard of fair and equitable treatment.<sup>31</sup> Different tribunals have interpreted this doctrine differently. Some decided to interpret it broadly.<sup>32</sup> Some decided to interpret it narrowly.<sup>33</sup> Because different tribunals can interpret this doctrine differently, an ISDS award can be unpredictable to both claimants and NAFTA governments.<sup>34</sup>

Article 1110 prevents NAFTA countries from nationalizing or expropriating an investment of a NAFTA investor.<sup>35</sup> A NAFTA country may only nationalize or expropriate such investment when there is a public purpose, the procedures are conducted on a non-discriminatory basis and in accordance with due process of law and article 1105(1), and the government must compensate such NAFTA investor in accordance with article 1110(2).<sup>36</sup> The key issue of this article is what "tantamount to expropriation" means. If "tantamount to expropriation" is defined too broadly, it may be difficult for governments to regulate without being sued by companies who believe their opportunities to make a profit have

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24. *Id.* art. 1102.

25. *Id.* art. 1103.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See, e.g.,* GATT, *supra* note 22, at art. I.

30. *Id.* art. 1105.

31. *Id.*

32. *See e.g.,* Clayton/Bilcon v. Gov't Canada (2008), PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 724 (Mar. 17, 2015).

33. *See* Courtney Kirkman, *Fair and Equitable Treatment: Methanex v. U.S. and the Narrowing Scope of NAFTA Article 1105*, 34 *LAW & POL'Y INT'L BUS.* 343, 366 (2002).

34. *See* Stephen Byrnes, *Balancing Investor Rights and Environmental Protection in Investor-State Dispute Settlement under CAFTA: Lessons from the NAFTA Legitimacy Crisis*, 8 *U.C. Davis Bus. L.J.* 103 (2007).

35. NAFTA, *supra* note 1, art. 1110.

36. *Id.* art. 1110(2).

been expropriated.<sup>37</sup> But, if defined too narrowly, the government will have greater leeway to regulate, possibly creating a disincentive for foreign investment.<sup>38</sup> Similar to article 1105, this article also raises the concern of the unpredictability of the ISDS mechanism to both claimants and NAFTA governments.<sup>39</sup>

Several cases from 2007 to 2017 have raised the question of whether, or in what circumstances, governments may be required to pay compensation to foreign investors because environmental protection measures violate a Chapter 11 article. These cases have also raised the legal issues of Chapter 11 regarding investor protections and the constraints on NAFTA governments' ability to protect the environment. The following section of this article focuses on those cases.

## II. ENVIRONMENTAL RELATED CASES FROM 2007 TO 2017

From 2007 to 2017, ISDS tribunals received several notable claims involving NAFTA governments' environmental regulations. These claims include *Clayton/Bilcon v. Government of Canada* (2008),<sup>40</sup> *Dow AgroSciences LLC v. Government of Canada* (2008),<sup>41</sup> *CANACAR v. United States of America* (2008),<sup>42</sup> *Windstream Energy LLC v. Government of Canada* (2009),<sup>43</sup> *Lone Pine Resources Inc. v. Government of Canada* (2012),<sup>44</sup> and *TransCanada Corporation and TransCanada Pipelines Ltd. v. the United States*.<sup>45</sup>

### A. CLAYTON/BILCON V. GOVERNMENT OF CANADA

The Clayton family and their corporation, Bilcon of Delaware Inc., are U.S. investors who own and control shares in a Canadian subsidiary named Bilcon of Nova Scotia.<sup>46</sup> On February 5, 2008, Clayton/Bilcon challenged Canadian environmental requirements affecting their plans to open a basalt quarry and a marine terminal in Nova Scotia.<sup>47</sup> The Clay-

37. Bronwyn Pavey & Tim Williams, *NAFTA: Chapter 11, SCIENCE & TECHNOLOGY DIV.*, PRB 02-54E (Feb., 26, 2003), available at <http://www.lop.parl.gc.ca/Content/LOP/ResearchPublicationsArchive/inbrief1000/prb0254-e.asp>.

38. *Id.*

39. See Byrnes, *supra* note 34.

40. Clayton/Bilcon v. Gov't Canada (2008), PCA Case No. 2009-04, available at <http://www.italaw.com/cases/1588>.

41. Dow AgroSciences v. Gov't Can., NAFTA/UNCITRAL, available at [http://www.uncitral.org/transparency-registry/registry/data/can/dow\\_agrosciences\\_llc.html](http://www.uncitral.org/transparency-registry/registry/data/can/dow_agrosciences_llc.html).

42. CANACAR v. U.S., NAFTA/UNCITRAL, Notice of Intent to Submit a Claim to Arbitration (Apr. 2, 2009), ¶¶ 2-4, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1142.pdf>.

43. Windstream Energy LLC v. Gov't Can., PCA Case No. 2013-22, available at <http://www.italaw.com/cases/1585>.

44. Lone Pine Resources Inc. v. Gov't Canada, ICSID Case No. UNCT/15/2, available at <http://www.italaw.com/cases/1606>.

45. TransCanada Corp. & TransCanada PipeLines Ltd. v. U.S., ICSID Case No. ARB/16/21, available at <http://www.italaw.com/cases/3823#sthash.B92P2UT3.dpuf>.

46. Clayton/Bilcon v. Gov't Canada (2008), PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶¶ 1, 2 (Mar. 17, 2015).

47. *Id.* ¶¶ 12-14.

ton/Bilcon brought a \$443,350,772 lawsuit under articles 1102 (National Treatment), 1103 (Most Favored Nation Treatment), and 1105 (Minimum Standard of Treatment) to a UNCITRAL tribunal.<sup>48</sup> The family originally planned to extract and to ship out large quantities of basalt from the proposed 152-hectare project, which was located in a key breeding area for several endangered species.<sup>49</sup> Because blasting activity in this sensitive area might affect the environment, the governments of Canada and Nova Scotia decided to jointly assess the environmental effects of the Bilcon's project.<sup>50</sup> After three years, the governments both determined that the project might cause significant adverse environmental effects and subsequently denied the project.<sup>51</sup> Clayton/Bilcon argued that the assessment and subsequent denial was arbitrary, discriminatory, and unfair; thus caused a violation of articles 1102, 1103, and 1105.<sup>52</sup>

In March 2015, the tribunal majority found for Clayton/Bilcon under articles 1102 and 1105(1).<sup>53</sup> The majority found that Canada liable for violating article 1102 because this provision required Canada to provide NAFTA investors treatment no less favorable than the treatment it provided to domestic investors.<sup>54</sup> The assessment standards applied against the Clayton/Bilcon had never been applied in other environmental assessments.<sup>55</sup> The tribunal also found that Canadian government also failed to show any legitimate, non-discriminatory reason for such difference in treatment.<sup>56</sup> The majority of the tribunal also found Canada liable for violating article 1105(1).<sup>57</sup> The tribunal adopted a broad interpretation of the Minimum Standard of Treatment Obligation under a former ISDS tribunal's decision in *Waste Management*.<sup>58</sup> According to the majority, article 1105(1) requires that investors of NAFTA members be treated "in accordance with international law, including fair and equitable treatment and full protection and security."<sup>59</sup> The Canadian government's denial relied on the application of a standard, "core community values," not

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48. *Id.* ¶ 11.

49. *See Cases Filed Against the Government of Canada*, Clayton/Bilcon v. Gov't Canada, GLOB. AFFAIRS CAN. (last updated Mar. 15, 2017), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng>.

50. Clayton/Bilcon v. Gov't Can. (2008), PCA Case No. 2009-04, Gov't Can. Rejoinder, ¶ 13 (Mar. 21, 2013), *available at* <http://www.italaw.com/sites/default/files/case-documents/italaw1489.pdf>.

51. *Id.* ¶ 13.

52. Clayton/Bilcon v. Gov't Canada (2008), PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 11 (Mar. 17, 2015), *available at* <http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf> [hereinafter

53. *Id.* ¶ 742.

54. *Id.*

55. *Id.*

56. *See id.* ¶¶ 723-31.

57. *Id.*

58. *Id.* ¶ 572; *see also* *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶¶ 98-99, *available at* <http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf>.

59. *Id.* ¶ 572.

found in Canadian law.<sup>60</sup>

The minority of the tribunal dissented to the majority's broad interpretation of article 1105.<sup>61</sup> The dissent criticizes the majority's decision as fundamentally departing from the standard of assessment required by the Canadian law and failed to properly assess customary international law.<sup>62</sup> The minority also warned that the decision would cause a chilling effect on Canadian government's ability to regulate environment.<sup>63</sup>

The arbitration is now in damages phase.<sup>64</sup> Parties are currently submitting evidence concerning the amount of damages and compensation awards.<sup>65</sup>

#### B. DOW AGROSCIENCES LLC v. GOVERNMENT OF CANADA

Dow AgroSciences LLC, a corporation incorporated in Delaware, is wholly owned by the U.S. Dow Chemical Company.<sup>66</sup> On August 25, 2008, the claimant filed a NAFTA Chapter 11 claim for \$1.5 million in damages.<sup>67</sup> The damages were allegedly caused by a Quebec provincial ban on the sale and particular uses of lawn pesticides containing the active ingredient 2,4-D.<sup>68</sup> Dow AgroSciences alleged that the ban violated articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation).<sup>69</sup> Quebec and other provinces explained that they banned the ingredient as an environmental precaution.<sup>70</sup> They also based their decisions in response to public support for the pesticide ban.<sup>71</sup> When Dow AgroSciences filed the NAFTA claim, other provinces were still considering the ban.<sup>72</sup>

Three years later, after five provinces followed Quebec's lead and banned the pesticides, Dow AgroSciences decided to settle with Canada

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60. *Id.*

61. See Clayton/Bilcon v. Gov't Canada (2008), PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, ¶ 1 (Mar. 10, 2015), available at <http://www.italaw.com/sites/default/files/case-documents/italaw4213.pdf>.

62. *Id.* ¶ 14.

63. *Id.* ¶¶ 48, 51.

64. Clayton/Bilcon v. Gov't Canada (2008), PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 742 (Mar. 17, 2015).

65. *Id.*

66. Dow AgroSciences v. Gov't Can., NAFTA/UNCITRAL, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of NAFTA (Aug. 25, 2008), available at [http://www.uncitral.org/res/transparency-registry/registry/data/can/dow\\_agrosciences\\_llc\\_html/dow-01.pdf](http://www.uncitral.org/res/transparency-registry/registry/data/can/dow_agrosciences_llc_html/dow-01.pdf) [hereinafter Dow AgroSciences, Notice of Intent].

67. See *Cases Filed Against the Gov't Can.*, Dow AgroSciences LLC v. Gov't Can., GLOB. AFFAIRS CAN. (last updated Dec. 31, 2015), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/agrosciences.aspx?lang=eng> [hereinafter Cases File Against Gov't Can., Dow AgroSciences].

68. Dow AgroSciences, Notice of Intent, ¶¶ 14-15.

69. *Id.*

70. See *Cases Filed Against the Gov't Can.*, Dow AgroSciences LLC v. Gov't Can., *supra* note 68.

71. See *id.*

72. *Id.*

in a deal that left the ban intact.<sup>73</sup> Dow AgroSciences did not demand monetary compensation.<sup>74</sup> Instead, Dow AgroSciences required Quebec to state, “Products containing 2,4-D do not pose an unacceptable risk to human health or the environment provided that the instructions on the label are followed.”<sup>75</sup> Dow AgroSciences used the statement as a governmental acknowledgement that the contested pesticides were safe.<sup>76</sup>

### C. CANACAR v. UNITED STATES OF AMERICA

CANACAR, a trade association representing individual carriers of the Mexican trucking industry, alleged that the U.S. Department of Transportation refused entry of CANACAR into the United States for trucking services and prohibited CANACAR from making investments in the United States to provide such services.<sup>77</sup> CANACAR brought the claim under articles 1102 (National Treatment) and 1103 (Most Favored Nation Treatment).<sup>78</sup> CANARA also alleged that the United States had failed to comply with a 2001 NAFTA Chapter 20 arbitral decision (*In the Matter of Cross-Border Trucking Services*).<sup>79</sup> Thus, CANACAR alleged that the United States violated article 1105 (Minimum Standard of Treatment under International Law).<sup>80</sup> The U.S. government, under the Clinton administration explained that studies by the U.S. Department of Transportation revealed severe safety and environmental problems with the Mexico’s truck fleet and drivers’ licensing.<sup>81</sup> Thus, the United States resisted implementing prior obligations promised under the Bush administration.<sup>82</sup> This resistance caused CANARA initiated the claim in 2008, seeking \$6 billion in damages.<sup>83</sup>

In 2014, using the ISDS mechanism as a political pressure the United States to grant such access, CANACAR announced that it would seek \$30 billion and loss of opportunities.<sup>84</sup> Nearly ten years later, CANACAR

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73. Dow AgroSciences, Settlement Agreement (May 25, 2011).

74. *Id.*

75. *Id.* ¶ 3.

76. Cases File Against Gov’t Can., Dow AgroSciences, *supra* note 68.

77. CANACAR v. U.S., NAFTA/UNCITRAL, Notice of Intent to Submit a Claim to Arbitration (Apr. 2, 2009), ¶¶ 2-4, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1142.pdf>.

78. *Id.* ¶ 4.

79. *Id.*; see also *In the Matter of Cross-Border Trucking Services*, Secretariat File No. USA-MEX-98-2008-01 (Feb. 6, 2001), available at <http://www.sice.oas.org/dispute/nafta/english/U98081ae.asp>.

80. CANACAR v. U.S., NAFTA/UNCITRAL, Notice of Intent to Submit a Claim to Arbitration (Apr. 2, 2009), ¶ 4, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1142.pdf>.

81. See *Background on NAFTA Cross-border Trucking Case*, PUB. CITIZEN, available at <http://www.citizen.org/Page.aspx?pid=5251> (last visited Mar. 27, 2017).

82. *Id.*

83. *Mexican Trucking Group Suing U.S. for \$6 Billion*, TRANSP. TOPICS (Jan. 6, 2009), <http://www.ttnews.com/articles/basetemplate.aspx?storyid=22039>.

84. CANACAR says “Ya Basta!” Starts arbitration against United States for failure to comply with NAFTA Trucking provisions, MEX. TRUCKER ONLINE (Feb. 15, 2014), <http://www.mexicotrucker.com/canacar-says-ya-basta-starts-arbitration-against-united-states-for-failure-to-comply-with-nafta-trucking-provisions/>.



first filed the claim to UNCITRAL, the claim is still pending.<sup>85</sup>

#### D. WINDSTREAM ENERGY LLC v. GOVERNMENT OF CANADA

Windstream Energy LLC (Windstream) is a U.S. company.<sup>86</sup> In November 2009, through its Canadian subsidiary, Windstream Wolfe Island Shoals (WWIS), Windstream submitted eleven applications to the Ontario Feed-in-Tariff (FIT) Program for wind power projects.<sup>87</sup> The Ontario Power Authority (OPA), an independent non-profit organization, offered Windstream a FIT contract in May 2010, after determining that Windstream applications had met the basic conditions of a FIT application.<sup>88</sup> Windstream did not sign the contract immediately.<sup>89</sup>

Instead, Windstream requested extensions while the Government of Ontario undertook a policy review on offshore wind development.<sup>90</sup> The Ontario Ministry of the Environment's Offshore Wind Policy Notice determined that work on the regulatory framework for offshore wind projects remained incomplete.<sup>91</sup> Thus, the Ministry cooperated with other ministries to develop the environmental rules and requirements, including a proposal of a five-kilometer shoreline exclusion zone for offshore wind projects.<sup>92</sup>

In 2010, before the Ministry finalized the policy review on offshore wind, Windstream decided to sign the FIT contract.<sup>93</sup> The contract required Windstream to acquire all of the necessary permits and approvals to develop the project.<sup>94</sup> In February 2011, the Government of Ontario decided to defer offshore wind development until the necessary scientific research was completed and an adequately informed policy framework could be developed.<sup>95</sup>

Windstream claims that the Government of Ontario's decision wrongfully denied its opportunity to obtain the benefits of the 2010 contract it signed with the OPA.<sup>96</sup> Windstream asked for \$354.91 million in damages.<sup>97</sup> Windstream alleges that the Government of Ontario acted in an expropriatory, arbitrary, and discriminatory manner when it deferred off-

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85. *Windstream Energy LLC v. Gov't Can.*, PCA Case No. 2013-22, Notice of Intent to Submit a Claim to Arbitration Under NAFTA Chapter 11 (Oct. 17, 2012), ¶ 3, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1141.pdf> [hereinafter *Windstream Energy LLC, Notice of Intent*].

86. *See id.* ¶¶ 4-8.

87. *Id.* ¶ 8.

88. *Id.* ¶ 14.

89. *Id.* ¶ 24.

90. *Windstream Energy LLC v. Gov't Can.*, PCA Case No. 2013-22, Can. Response to the Notice of Arbitration (Apr. 26, 2013), ¶ 25, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1612.pdf>.

91. *Id.*

92. *Id.* ¶ 26.

93. *Id.* ¶ 5.

94. *Id.*

95. *Id.* ¶ 40.

96. *Windstream Energy LLC, Notice of Intent* ¶ 7.

97. *Id.* ¶ 44.

shore wind development, resulting in the loss of Windstream's investment.<sup>98</sup> Windstream alleges that the decision was made in an arbitrary and political manner.<sup>99</sup> Windstream brought the claim under articles 1102, 1103, 1105, and 1110.<sup>100</sup>

The tribunal decided that the Government of Canada failed to accord the claimant's investments fair and equitable treatment in accordance with international law, contrary to article 1105 of NAFTA.<sup>101</sup> The tribunal dismissed the rest of the claimant's claim under articles 1102, 1103, and 1110.<sup>102</sup> The tribunal awarded \$2.175 million to the Windstream.<sup>103</sup>

The arbitration process alone was costly. While the Windstream were awarded over two millions dollars, both parties had made advances to pay for the fixed costs of arbitration in the amount of \$485,355, which is almost one-fourth of the actual arbitral award.<sup>104</sup>

#### E. LONE PINE RESOURCES INC. V. GOVERNMENT OF CANADA

Lone Pine Resources Inc. (LPRI) is a company incorporated in the State of Delaware.<sup>105</sup> LPRI owns Lone Pine Resources Canada Ltd. (LPRC).<sup>106</sup> LPRC is an oil and gas resources development and production company incorporated in Alberta.<sup>107</sup> It operates in Alberta, British Columbia, Quebec, and the Northwest Territories.<sup>108</sup> In 2006, LPRI signed an agreement with a Canadian company named Junex Inc., in which LPRI secured five exploration licenses for petroleum, natural gas and underground reservoirs located near Trois-Rivières, a city in Quebec.<sup>109</sup> Four of the exploration licenses are located on land and one is located in the St. Lawrence River.<sup>110</sup> The exploration license located in the St. Lawrence River was revoked in 2011 because of a new Quebec act—An Act to Limit Oil and Gas Activities.<sup>111</sup> The Act revokes exploration licenses located in the St. Lawrence River and limits the area of those that cross the water's edge to their land portion.<sup>112</sup>

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98. *Id.* ¶ 43.

99. *Id.* ¶ 7.

100. *Id.*

101. *Windstream Energy LLC v. Gov't Can.*, PCA Case No. 2013-22, Arbitral Award (Sep. 27, 2016), ¶ 25, available at <http://www.italaw.com/sites/default/files/case-documents/italaw7875.pdf>.

102. *Id.* ¶ 515.

103. *Id.*

104. *Id.* ¶ 509.

105. *Lone Pine Resources Inc. v. Gov't Canada*, ICSID Case No. UNCT/15/2, available at <http://www.italaw.com/cases/1606>.

106. *Lone Pine Resources Inc. v. Gov't Canada*, ICSID Case No. UNCT/15/2, Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA (Nov. 8, 2012), ¶ 7, available at <http://www.italaw.com/sites/default/files/case-documents/italaw1156.pdf>.

107. *Id.* ¶ 8.

108. *Id.*

109. *Id.* ¶ 17-19.

110. *Id.* ¶ 3.

111. *Id.*

112. *Id.* ¶ 49.

In 2012, through LPRC, LPRI brought a \$118.9 million lawsuit under articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation).<sup>113</sup> LPRI alleges that the revocation of the river license violates Canada's obligations under articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation).<sup>114</sup> Specifically, LPRI alleges that the passing of the Act is an arbitrary, unfair, and inequitable measure based on political rather than actual environmental grounds.<sup>115</sup> It also alleges that this measure violates the legitimate expectations that it had when it decided to invest in Quebec.<sup>116</sup> And, finally, LPRI alleges that the revocation of the river license expropriated its investment without any compensation.

In response to LPRI's allegations under article 1105, the Canadian government explained that the Act was passed after numerous studies on hydrocarbon development in the maritime estuary basin and the northwestern Gulf of St. Lawrence.<sup>117</sup> The studies concluded that this environment was not suitable for hydrocarbon development activities.<sup>118</sup> Other studies also showed the existence of risks to the biophysical and human environment tied to shale gas development activities involving hydraulic fracturing.<sup>119</sup> Further, the government also claimed that the Act applied indiscriminately to all holders of exploration licenses that were located fully or partially in the St. Lawrence River.<sup>120</sup>

In response to LPRI's claim under article 1110, the Government of Canada explained that the Act was not a measure that affects the claimant because it is not the holder of the exploration license owned by Junex.<sup>121</sup> Instead, the measure was enacted by a fundamental democratic institution of Quebec and was preceded by numerous scientific studies.<sup>122</sup> The purpose of the Act is to achieve an important public policy objective—the protection of the St. Lawrence River.<sup>123</sup> Further, the Act did not substantially deprive LPRI of its investment because the Act revoked only one of the five exploration licenses that LPRI obtained through the 2006 agreement with Junex.<sup>124</sup>

Currently, the ISDS tribunal is reviewing both LPRI's allegation and the responses by the Canadian Government.<sup>125</sup> The claim is still

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113. *Id.* ¶ 38.

114. *Id.*

115. *Id.*

116. *Id.* ¶ 47.

117. Lone Pine Resources Inc. v. Gov't Canada, ICSID Case No. UNCT/15/2, Response to the Notice of Arbitration (Feb. 6, 2015), ¶ 172, available at <http://www.italaw.com/sites/default/files/case-documents/italaw7092.pdf>.

118. *Id.*

119. *Id.*

120. *Id.* ¶¶ 181-83.

121. *Id.* ¶ 392.

122. *Id.* ¶ 395.

123. *Id.*

124. *Id.* ¶¶ 464-65.

125. Lone Pine Resources Inc. v. Gov't Canada, ICSID Case No. UNCT/15/2, available at <http://www.italaw.com/cases/1606>.

pending.<sup>126</sup>

F. TRANSCANADA CORPORATION AND TRANSCANADA PIPELINES  
LTD. v. THE UNITED STATES

TransCanada is a Canadian oil company.<sup>127</sup> In 2008, TransCanada requested the U.S. government's permission to build the Keystone XL (Keystone) pipeline to transport bitumen, a mixture of hydrocarbons from Alberta to Louisiana.<sup>128</sup> The southern section of the pipeline connecting Cushing, Oklahoma to the Gulf Coast is already operating.<sup>129</sup> But, the northern section of the pipeline crossing the border between Canada and the United States required permission from the President of the United States.<sup>130</sup>

Keystone became a contentious political issue in the United States.<sup>131</sup> Environmentalists pointed to the carbon-intensity of extracting oil from the Alberta tar sands, and concluded that the pipeline would run counter to the United State's efforts to reduce fossil fuel reliance.<sup>132</sup>

Seven years later, TransCanada applied for the permission, and in November 2015, President Obama rejected the project.<sup>133</sup> In January 2016, TransCanada brought an ISDS claim against the United States for "unreasonably delaying approval" of the proposed Keystone XL pipeline.<sup>134</sup> TransCanada demanded damages of over \$15 billion.<sup>135</sup> TransCanada alleges that the United States breached articles 1102, 1103, and 1105.<sup>136</sup>

In 2017, upon his election, President Trump pledged to permit the construction of the pipeline and signed a presidential memorandum to that effect.<sup>137</sup> On March 24, 2017, President Trump officially approved the

126. *Id.*

127. TransCanada Corp. & TransCanada PipeLines Ltd. v. U.S., ICSID Case No. ARB/16/21, *available at* <http://www.italaw.com/cases/3823#sthash.B92P2UT3.dpuf>.

128. TransCanada Corp. & TransCanada PipeLines Ltd. v. U.S., ICSID Case No. ARB/16/21, Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of NAFTA (Jan. 6, 2016), ¶ 13, *available at* <http://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207030.pdf> [hereinafter TransCanada Corp., Notice of Intent].

129. *Id.* ¶ 19.

130. *Id.* ¶ 9.

131. *Id.* ¶ 9.

132. *Id.* ¶ 39.

133. See Rafi Letzter, *The Keystone XL Pipeline, Which Trump Just Advanced, Will Carry the Dirtiest Fossil Fuel on the Planet*, BUS. INSIDER (Jan. 24, 2017), <http://www.businessinsider.com/keystone-xl-pipeline-tar-sand-dirtiest-fossil-fuel-danger-2017-1>.

134. See TransCanada Corp., Notice of Intent, ¶ 43.

135. See TransCanada Corp., Notice of Intent.

136. *Id.* ¶ 8.

137. See Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, WHITE HOUSE (Jan. 24, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline>.

project.<sup>138</sup> Within minutes, TransCanada dropped the suit against the United States.<sup>139</sup>

### III. CONCLUSION

The ISDS mechanism should be reformed to lessen public concerns of its vulnerability to manipulation by investors. While many investors did not succeed in their claims, Chapter 11 remains a powerful tool for private parties to create political influence and inflict financial burdens on NAFTA countries' environmental laws and regulations.

Further, there should be a detailed guideline on how to interpret articles 1105 and 1110. Past tribunal awards on these articles have shown how unpredictable and inconsistent tribunal awards can be, especially when ISDS tribunal awards are not binding. Thus, drafters for future trade deals should include detailed guidance on the interpretations of articles 1105 and 1110 for future ISDS tribunals to follow.

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138. *See President Trump Approves Construction of Keystone XL Pipeline*, REUTERS (Mar. 24, 2017), <http://www.cnn.com/2017/03/24/transcanada-gets-presidential-permit-to-construct-the-keystone-xl-pipeline.html>.

139. *See TransCanada Keystone XL rejection lawsuit dropped – arbitrator*, REUTERS (Mar. 24, 2017), <http://www.reuters.com/article/usa-pipeline-keystone-lawsuit-id/USL2N1GZ1OI>; *see also* TransCanada Corp. & TransCanada PipeLines Ltd. v. U.S., ICSID Case No. ARB/16/21, *available at* <http://www.italaw.com/cases/3823#sthash.B92P2UT3.dpuf>.