



VICTORIAN COUNCIL FOR CIVIL LIBERTIES



CATHOLIC COMMISSION FOR
**JUSTICE,
DEVELOPMENT
& PEACE**
MELBOURNE

'THE BIG CHILL?' **CONCERNS ABOUT THE INVESTOR/STATE PROVISIONS IN THE PROPOSED AUSTRALIA-US FREE TRADE AGREEMENT**

BRIEFING PAPER

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INTRODUCTION

Liberty Victoria and the Catholic Commission for Justice Development and Peace hold serious concerns about the lack of transparency surrounding the current closed negotiations for a free trade agreement between Australia and the United States. It is our view that the Australian Government should subject these negotiations and any resulting agreement to parliamentary scrutiny and full public debate, before signature.

As matters stand the US Congress has the right to scrutinise, debate and vote on any trade agreement and has a 90 day period for congressional review. By contrast, the agreement will become binding upon all levels of Australian Government – federal, state and local, upon signing. There is no review process currently planned by the Australian parliament *before* signing the agreement.

Our recommendation is based on a well founded concern that many of the social and economic consequences of the proposed agreement have not been thought through, and are not well understood by the public. The Australian Government has an obligation under the International Covenant on Economic, Social and Cultural Rights to protect human rights to health, education, and livelihood of the Australian people. No assessment has been made about the free trade agreement's impact upon these rights. We should not rush into signing an agreement by December while questions and concerns remain.

This briefing paper addresses two of the provisions of free trade agreements: firstly the ability for private investors to sue states over their domestic regulation, and secondly, the composition and powers of free trade dispute resolution mechanisms over sovereign states.

There are a growing number of disputes about environmental standards and the use of prohibited chemicals in products in the Americas. Private investors have begun to litigate domestic regulations of sovereign states designed to protect the community or the environment.

Moreover there is potential for trade dispute mechanisms to operate in a manner which lacks transparency. Ironically, the Australian Government will often ignore the views and recommendations of UN human rights committees when Australia is found to be in violation of internationally agreed standards. It has no such luxury with disputes under free trade agreements. Australia is about to sign on to a free trade agreement which would allow private investors to initiate claims for compensation under confidential dispute resolution processes, which may result in binding decisions upon the Australian Government. The power of the world's largest economy is against us if Australia does not comply with decisions in trade disputes.

Moreover these decisions can find that local laws and regulation have 'expropriated' potential profits from an investor, and potentially award compensation, at the tax payers expense, to private investors if their claim is upheld. Such decisions may have an effect on a Government; leading it to

believe that it is cheaper to avoid compensation payments by changing laws, regulations, policy and programs. The Australian Government has changed a program in the recent past to be compliant with WTO decisions.¹

The evidence for our concern comes from the investor/state provisions under Chapter 11 of the North American Free Trade Agreement (NAFTA). We believe that the NAFTA investor/state provisions may be the model used in the Australia United States Free Trade Agreement (AUSFTA) as other recent US bilateral agreements such as the Chile and Singapore agreements contain similar investor/state provisions to NAFTA.

Liberty Victoria and the Catholic Commission for Justice Development and Peace call on the Australian Government to:

1. Subject any proposed free trade agreement to scrutiny by a joint parliamentary committee and to a full parliamentary and public debate *before* signature.
2. Define 'Expropriation' in any Australia-United States Free Trade Agreement.
3. Define measures which are '*tantamount to*' or constitute '*indirect expropriation*'. The definition should be based on international law rather than United States 'takings' law. The international law definition should be included in the definition section of any agreement.
4. Require any Tribunal or dispute mechanism process be open to the public and allow interested parties should be allowed to provide *amicus* briefs.
5. Protect and define the regulatory 'police' powers of the nation state in the Agreement. The rules under international law should be included to provide some clarity.
6. Exclude judicial decisions from being regarded as 'measures' in any Agreement.
7. Agree to continuous disclosure as the development, establishment and ongoing operation of a free trade agreement occurs.

¹ Ann Capling, Australia and the Global Trade System: From Havana to Seattle, Cambridge, 2001, p173-6. Australia's Export Facilitation Scheme for cars and automotive parts was found not to be WTO compliant in a WTO decision in a dispute between Australia and the US in 1999-2000, and reconstructed.

CONCERN 1. INVESTOR STATE PROVISIONS

Chapter 11 of NAFTA has raised considerable controversy in the US, Canada and Mexico. This provision allows corporations and private investors to directly sue host-governments for compensation in the event that government legislation, regulations and administrative decisions affect the value of the foreign investors' assets. In some circumstances, this is a reasonable expectation and is recognised under international law but as explained below the expansive approach under NAFTA has witnessed an explosion in investor/state disputes and huge damages claims. As at March 2003, the total amount of claims against Canada totalled \$11,566 billion, against the US\$16,198 billion and against Mexico \$501.1 million. (See Appendix 1, Canadian Centre for Policy Alternatives for a summary of the cases and below for an outline of particular cases affecting environmental and toxic substances regulations).

While the decisions in the expropriation cases to date have been cautious, the increase in the number of cases filed suggests that investors, rather than using the provisions as a 'shield' to protect against expropriation, are in fact using them as an 'offensive weapon' by challenging government regulatory acts that traditionally under international law would not be viewed as expropriation but rather as falling within the regulatory or 'police' powers of the nation state. The 'police' powers refer to the 'power of the [nation] state to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals'.

According to Professor Brower of Vanderbilt University, US, 'no one foresaw Chapter 11's capacity to interfere with the legislative, executive and judicial systems of the NAFTA Parties, particularly Canada and the United States'. Investors have now submitted claims 'which seek billions of dollars in damages; challenge measures that ostensibly protect public health, safety, and the environment; and attack the legitimacy of important governmental services, including the state judicial systems of Massachusetts and Mississippi'.²

What is Expropriation?

Expropriation basically refers to the effective deprivation of property or interference with property that is sufficiently restrictive for foreign investors to conclude that the host government has 'taken' or 'expropriated' the foreign investors' assets denying the investor of all economically beneficial use. Under Chapter 11 of NAFTA, it includes 'action that is confiscatory, or that prevents, unreasonably interferes with or unduly delays, effective enjoyment of an alien's property'.

All US free trade agreements or bilateral investment agreements have provisions covering expropriation and investor/state rights and it is very likely that it would be included in any Australia US Free Trade Agreement. Expropriation, its broad

² Charles H Brower (2003) 'Structure, Legitimacy, and NAFTA's Investment Chapter, 36 *Vanderbilt Journal of Transnational Law* 37:39

definition and impact on regulatory autonomy has drawn criticisms from many sources including lawyers, academics, non-government organisations and the Canadian government.³

Article 1110 of NAFTA states that "no party may directly or indirectly nationalise or expropriate an investment of an investor of another party in its territory". However, Article 1110 also includes "measures *tantamount to* expropriation" or "*indirect*" appropriation, neither of which are defined. Nor is there any elucidation as to what *tantamount to* or *indirect* means in other provisions of the Agreement. Nowhere in the text of NAFTA is *tantamount to* or *indirect* defined.

Leaving these terms undefined creates the possibility that measures *tantamount to* or *indirect* may involve public interest legislation such as health or safety, environmental, or industrial laws which may affect some part of the investment or property and thereby be construed as a form of indirect expropriation. This could result in the proliferation of claims for compensation as has occurred under NAFTA. To complicate the matter further, 'measure' in NAFTA is defined very broadly as including 'any law, regulation, procedure, requirement or practice'.

This lack of clarity in the terms has resulted in claims challenging regulations covering toxic chemicals and environmental concerns, matters that could be viewed as within the police powers of the state. For example, in *Ethyl Corporation*, a US firm challenged a Canadian ban on the gasoline additive MMT. In *SD Myers Inc*, a US investor challenged a temporary Canadian ban on the import of toxic PCB wastes, and in *Crompton Corp*, a US chemical company challenged a Canadian ban on use of lindane a known carcinogen (see Appendix A for a complete list of cases and damages claimed).

In *Methanex Inc v United States*, a Canadian Chemical company challenged a ban on the chemical MTBE. The Californian state government, after extensive public consultation and a university led review process, issued an order that would ban MTBE, a gasoline additive, in all gasoline sold in that state by December 31 2002. MTBE had been listed by the Environmental Protection Authority as a potential carcinogen as exposure to the chemical from contaminated ground and service water in California had been linked to tumors and nervous systems disorders. Methanex has taken the matter to the NAFTA Tribunal claiming \$970 million in damages on the basis that the action taken by California led to a substantial interference and taking of their business (see IISD

³ International Institute for Sustainable Development (IISD) (2001) *Private Rights, Public Problems: A guide to NAFTA's controversial chapter on investment rights*, <http://www.iisd.org>; Public Citizen (2001) *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy, Lessons for Fast Track and the Free Trade Area of the Americas*, <http://www.citizen.org/publications/release.cfm?ID=7076> ; Dr Howard Mann and Dr Julie Soloway, (2002) *Untangling the Expropriation and Regulation Relationship: Is There a Way Forward?*, Report to the Ad Hoc Expert Group on Investments Rules and the Department of Foreign Affairs and International Trade, <http://www.dfait-maeci.gc.ca/tna-nac/documents/untangle-c.pdf>, for a broader view on chapter 11, specifically focusing on disputes see Andrew J Shapren (2003) 'NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?' in *17 Templeton International and Comparative Law Journal* 323; and on the issue of investor/state provisions and constitutionalism see Ari Afilalo (2001) 'constitutionalism Through the Back Door: A European Perspective on NAFTA's Investment Chapter', in *34 Journal of International Law and Politics* 1.

cited above, footnote 1 for further details). The final award in the case is still pending.⁴

Many of the cases will fail. However it is the effect that huge damages claims, made by private investors, have on governments' willingness to legislate in the public interest, in areas such as health and safety and environmental protection that may suffer. The threat of a lawsuit under NAFTA's investor/state provisions has raised concerns amongst many Canadian and US non-government organisations that the ongoing threat of litigation may cause a 'regulatory chill'. Simply put, they argue that it may induce reluctance on the part of government to enact public interest legislation due to the fact that they may be sued for compensation if such legislation or regulation imposes obligations on foreign corporations or investors.⁵

CONCERN 2. DISPUTE RESOLUTION

Under Chapter 11 of NAFTA investors can by-pass domestic courts of the host government and access binding international arbitration processes under the United Nations Commission on International Trade Law (UNCITRAL) or the International Centre for the Settlement of Investment Disputes (ICSID), or the ICSID Additional Facility.

The rules and procedure of all these bodies derive from a commercial arbitral model. These mechanisms are not open to the public nor are it required that awards finalised under these Tribunals be made public. The Dispute Settlement Mechanism found in bilateral trade agreements is questionable when one Party to a dispute involves a democratically elected government. Why so?

They are ad hoc tribunals without the fundamental principles of transparency in procedure or open hearings, they do not have to notify the public in the event of registration of a claim, nor is there any public interests requirements as found in domestic administrative law. The Panelists are not tenured experts but rather trade experts whom, before and after panel decisions, may be employed in the private business sector or in the government sector and they may have vested interests.⁶

⁴ For greater analysis on Methanex see also Steve Louthan (2001) 'A Brave New Locher Era? The Constitutionality of NAFTA Chapter 11', in 34 *Vanderbilt Journal of Transnational Law* 1443, Louthan points out that the WHO has not listed MTBE as a carcinogen however the case raises the issue as to how governments should treat chemicals in the absence of clear evidence either way, should government's exercise caution if a chemical is a suspected carcinogen and if so, should the public have to pay compensation to a corporation in the event that it regulates on the side of caution; see also Public Citizen note 1.

⁵ See footnote 2, the references listed cover concerns about the expansive definitions and impacts on government regulations.

⁶ "ICSID Rules, Chapter 1 – Establishment of the Tribunal, Rule 1 – General Obligations, see (3) Tribunal members appointed by agreement of the parties, if unable to agree upon appointment within 90 days under Rule 4, the Secretary General appoints the Tribunal members. Rule 48, section (4) states that the 'Centre shall not publish the award without the consent of the parties'. Chapter 1, section 4, Articles 13-16 cover the members of panels. Article 14 states that persons designated shall be persons of 'high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgement'. [continued p.7]

These issues may not be pertinent when two international private actors are in arbitration over commercial matters. However, when one party is a state party, which is essentially a representative of a collectivity of the people, "the policy goals of the state become implicated in the dispute". It is imperative that any dispute resolution process follows the principles underlying our domestic courts. The process must be open, transparent and accountable, and given the nature of the disputes under NAFTA, *amicus* briefs from persons or sectors, whether industry, agricultural, human rights or labour, whose rights or interests may be affected must be allowed.

Can Free Trade Tribunals Over-ride Local Courts?

A still more worrying concern has been raised by Professor Been, from the New York University School of Law, who recently pointed out that the definition of measure as interpreted by the dispute Tribunal has included 'not only legislative and administrative actions, but court decisions as well'.⁷

One can apply to a court to determine whether a government action constitutes expropriation and in the event that the court rules in favour of the complainant seek compensation. However, it has never been accepted in any jurisdiction, that should a court rule against the complainant, that the judicial decision in itself constitutes a form of expropriation. The US Supreme Court has rejected the argument that a judicial decision could ever constitute a taking or expropriation.

Nonetheless, the discussions in two NAFTA cases suggest that the judiciary in signatory states can be held to expropriate property under the investor/state dispute process.

In *Azinian v Mexico*, a Mexican corporation with US shareholders sought compensation for expropriation for a decision to cancel the corporation's contract for collection and treatment of solid waste. The Tribunal found no expropriation but in the legal discussion suggested that NAFTA Tribunals can question whether a national court's decision effected 'a denial of justice or pretence of form to achieve an internationally unlawful end'.

The NAFTA Tribunal did not define 'a pretence of form' but indicated that it would have to be shown that the national court's finding 'was so insubstantial, or so bereft of a basis in law, that the judgments were in affect arbitrary or malicious,' that the courts decision should not prevail.⁸

[continued from p.6] Panellists are designated by each Contracting State and serve for renewable periods of six years. UNCITRAL does not itself establish arbitral panel or hear arbitrations, it prepares conventions, model laws and other instruments dealing with international trade and business, it is the International Trade Law Branch of the Office of Legal Affairs of the United Nations, it also formulates the rules for international commercial arbitration, the UNCITRAL Arbitration Rules – along with ICSID, are followed in most bilateral treaties."

⁷ Vicki Been & Joel Beauvais, *The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, (2002) Working Paper#CLB-02-06, New York University Center for Law and Business, <http://papers.ssm.com/abstract=337480>.

⁸ *ibid*

Whilst this is only part of the discussion in the NAFTA tribunal decision and not part of the reasoning of the decision, it nonetheless points to a potentially serious problem, that of an ad hoc Tribunal placing itself in a position to judge a court decision implemented under a constitution of a sovereign state and subject to the rule of law.

Likewise, *Loewen Group Inc v United States*, was the first case under NAFTA to directly challenge a jury decision or to challenge the judicial system as constituting a "measure" tantamount to expropriation. Loewen alleged that in a prior Mississippi civil trial, in which emotional and punitive damages of \$500 million were entered against Loewen by a jury verdict, it had received different treatment in the judicial process than an American defendant would have received.

Loewen alleged that the Judge allowed the plaintiff's attorney to appeal to 'anti-Canadian, racial and class biases' in violation of the national treatment rules in NAFTA Article 1102. Loewen claimed that continued reference to the foreign status of the company amounted to a denial of justice and inequitable treatment. The US government argued in response, that comments by a private lawyer in a private contract dispute did not constitute a government "measure" in order to bring it within the ambit of the NAFTA rules.

In an interim decision in 2001, the NAFTA Tribunal rejected the US argument that private contract litigation did not constitute a "measure" under the NAFTA rules.

Should such a development be permitted under a trade agreement, it means that a non-tenured, non-transparent and non-accountable ad hoc Tribunal would have appellate jurisdiction over domestic courts. This is in direct conflict with the principles of the rule of law. Decisions by courts should not be reviewable by essentially secretive and unaccountable Tribunals.

NAFTA Chapter 11 Investor-State Disputes

(to March 2003)

compiled by the Trade and Investment Research Project

Canadian Centre for Policy Alternatives

Date Complaint Filed ¹	Complaining Investor	Issue	NAFTA articles cited	Amount Claimed (\$U.S.) ²	Status
Claims against Canada					
April 14, 1997	Ethyl Corporation	U.S. chemical company challenges Canadian ban on import and inter-provincial trade in gasoline additive MMT, which auto makers claim interferes with automobile on-board diagnostic systems. Manganese-based MMT is also a suspected neurotoxin.	Art 1102 (national treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$250 million	After preliminary tribunal judgments against Canada, Canadian government repealed the MMT ban, issued an apology to the company and settled "out-of-court" with Ethyl for \$13 million (U.S.). (The inter-provincial aspect of the trade ban had previously been found to violate Canada's non-binding Agreement on Internal Trade.)
July 22, 1998	S.D. Myers Inc.	U.S. waste disposal firm challenges temporary Canadian ban (Nov. 1995 to Feb. 1997) on export of toxic PCB wastes.	Art 1102 (national treatment) Art 1105 (minimum standards of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$20 million	Tribunal ruled that Canada violated NAFTA articles 1102 (national treatment) and 1105 (minimum standards of treatment). It awarded \$5 million (U.S.) plus interest in damages. Canada has applied to the federal court to set aside the tribunal's award. This court case is pending.
Dec. 2, 1998	Sun Belt Water Inc.	US water firm challenges British Columbia water protection legislation and moratorium on exports of bulk water from the province.	Art 1102 (national treatment) Art 1105 (minimum standards of treatment) Art 1110 (expropriation and compensation)	\$10.5 billion	Canadian government asserts that the claim is inactive, while the investor asserts that it is still pending.

Dec. 24, 1998	Pope & Talbot Inc.	U.S. lumber company challenges lumber export quota system put in place by Canadian government to implement Canada-U.S. softwood lumber agreement.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$508 million	Tribunal ruled that Canada violated NAFTA Article 1105 (minimum standards of treatment). Canada was ordered to pay \$460,000 US in damages plus interest and \$120,000 US in legal costs (totaling approximately \$915,000 Cdn).
Jan. 19, 2000	United Parcel Service of America Inc.	Multinational U.S. courier company alleges that Canada Post's public service monopoly over letter-mail enables Canada Post to compete unfairly in express delivery. UPS also alleges that Canada Post enjoys other advantages denied to the investor (e.g. favourable customs treatment).	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1502(3) (monopolies and state enterprises) Art 1503(2) (state enterprises)	\$160 million	Tribunal process is underway.
Dec. 22, 2000	Ketcham Investments Inc. & Tysa Investments Inc.	U.S. lumber company challenges lumber export quota system put in place by Canadian government to implement Canada-U.S. softwood lumber agreement.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$30 million	Complaint withdrawn by investors in May 2001.
Sept. 7, 2001	Trammel Crow Co.	U.S. property management company alleged that Canada Post treated it unfairly in the outsourcing of certain real estate services.	Art 1105 (minimum standard of treatment)	\$32 million	Complaint withdrawn by the investor in April 2002 after it reached an "out-of-court" settlement with Canada Post.

Nov. 6, 2001	Crompton Corp.	U.S. chemical company challenges Canadian ban on use of lindane, a known carcinogen, in canola seeds and seed treatments.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$100 million Cdn.	Tribunal process pending.
	Signa SA	No details available.			Notice of intent not made public. Arbitration never commenced.

Date Complaint Filed	Complaining Investor	Reason for Complaint	NAFTA articles cited	Amount Claimed (\$U.S.)	Status
Claims against the United States					
July 29, 1998	The Loewen Group Inc.	Loewen, a Canadian funeral home operator, challenges a civil case ruling against it by a jury in Mississippi state court and bond requirements for leave to appeal.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$725 million	Tribunal process underway.
May 6, 1999	Mondev International Ltd.	Canadian real estate developer challenges Massachusetts Supreme court ruling that Boston Redevelopment Authority, a municipal government body, is protected by local government sovereign immunity.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$50 million	In October 2002 , the tribunal dismissed the investor's claims.

June 15, 1999	Methanex Corp.	Canadian chemical company challenges California's phase-out of MTBE, a gasoline additive which has contaminated ground and surface water throughout California.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$970 million	Tribunal has accepted admissibility of case, asked Methanex for more evidence to support their allegation that California Governor Gray Davis was improperly influenced by a competitor when he ordered the ban.
Feb. 29, 2000	ADF Group Inc.	Canadian steel contractor challenges U.S. "Buy-America" preferences requiring that U.S. steel be used in federally-funded state highway projects.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements)	\$90 million	In January 2003, the tribunal dismissed the investor's claim in its entirety. The tribunal concluded that the measures in question were procurement measures exempted under Article 1108.
Nov. 5, 2001	Canfor Corp.	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$250 million	Tribunal process pending.
Jan. 14, 2002	Kenex Ltd.	Canadian manufacturer of industrial hemp products challenges seizure of industrial hemp products under U.S. Drug Enforcement Agency rules.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment)	\$20 million	Tribunal process pending.
May 3, 2002	Tembec Inc.	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports.	no details available		Tribunal process pending.

May 1, 2002	Doman Inc.	Canadian lumber company challenges U.S. antidumping and countervailing duties against Canadian softwood lumber exports.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$513 million	Tribunal process pending.
Mar. 15, 2002	James Russell Baird	Canadian investor challenges US measures banning the disposal of radioactive wastes at sea or below the seabed.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$13, 580 billion	Notice of intent on March 15, 2002.

Date Complaint Filed	Complaining Investor	Reason for Complaint	NAFTA articles cited	Amount Claimed (\$U.S.)	Status
Claims against Mexico					
Dec. 10, 1996	Robert Azinian <i>et al.</i> (<i>Desona</i>)	U.S. waste management company challenges Mexican court ruling revoking its contract for non-performance of waste disposal and management in Naucalpan de Juarez.	not available	\$19.2 million	In Nov. 1999, the tribunal dismissed the investor's claims.
Oct. 2, 1996	Metalclad Corp.	U.S. waste management company challenges decisions by Mexican local government to refuse it a permit to operate a hazardous waste landfill in La Pedrera, San Luis Potosi and by state government to create an ecological preserve in the area.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$90 million	Tribunal ruled that Mexico violated NAFTA articles 1105 (minimum standards of treatment) and 1110 (expropriation and compensation). Mexico was ordered to pay \$16.7 million US in damages. Mexico applied for statutory review of the tribunal award before the BC Supreme Court on the grounds that the tribunal had exceeded its jurisdiction. The court allowed most of the tribunal award to stand. The case was settled in October, 200 and Mexico paid undisclosed damages to the investor.
Feb. 16, 1998	Marvin Roy Feldman Karpa (CEMSA)	U.S. cigarette exporter challenges Mexican government decision not to rebate taxes on its cigarettes exports.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$50 million	On December 16, 2002, the tribunal rejected the investor's expropriation claim, but upheld the claim of a violation of national treatment. Mexico was ordered to pay damages of approximately US\$1.5 million.
June 30, 1998	USA Waste Management Inc.	U.S. waste management company challenges state and local government actions in contract dispute with a Mexican subsidiary over waste disposal services in Acapulco.	Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$60 million	In June 2000 the Tribunal ruled that it lacked jurisdiction because Waste Management Inc. had not properly waived domestic legal claims as required by NAFTA. The investor resubmitted its notice of intent. The tribunal subsequently confirmed its jurisdiction and the claim is proceeding.

Feb. 16, 2001	Billy Joe Adams <i>et al.</i>	A group of U.S. property investors dispute a Mexican superior court decision regarding title to real estate investments and related matters.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$75 million	Tribunal process pending.
Jan. 11, 2002	Calmark Commercial Development Inc.	U.S., property development company challenges decisions of the Mexican courts in a property dispute in Baja California.	Art 1105 (minimum standard of treatment) Art. 1109 (transfers) Art 1110 (expropriation and compensation)	\$0.4 million	Tribunal process pending. Notice of intent has not been made public. Notice of arbitration filed on Jan. 11, 2002.
Oct. 30, 2001	Fireman's Fund Insurance Co.	U.S. insurance company alleges that the Mexican government discriminates against it by facilitating the sale by Mexican financial institutions of peso-dominated debentures, but not the sale of U.S. dollar-denominated debentures by Fireman's Fund.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation) Art 1405 (national treatment)	\$50 million	Tribunal process pending. Notice of intent has not been made public. Notice of arbitration on Oct. 30, 2001.
Feb. 12, 2002	Robert J. Frank	U.S. investor seeks damages from Mexican government in dispute over development of a beachfront property in Baja California.	Art 1102 (national treatment) Art 1103 (most-favoured-nation treatment) Art 1105 (minimum standard of treatment) Art 1106 (performance requirements) Art 1110 (expropriation and compensation)	\$1.5 million	Tribunal process pending.
April 9, 2002	GAMI Investments Inc.	U.S. company challenges Mexican regulations regarding processing and export of raw and refined sugar, and the nationalization of failing sugar refineries.	Art 1102 (national treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$55 million	Tribunal process pending. Notice of intent not made public. Notice of arbitration on April 9, 2002.

2002	Corn Products International	no details available			Tribunal process underway according to www.naftaclaims.com .
2002	International Thunderbird Gaming Corp.	Canadian gaming company challenges the regulation and closure of its gambling facilities by the Mexican government agency that has jurisdiction over gaming activity and enforcement.	Art 1102 (national treatment) Art 1103 (most-favoured- nation treatment) Art 1104 (standard of treatment) Art 1105 (minimum standard of treatment) Art 1110 (expropriation and compensation)	\$100 million	Tribunal process pending. No documents publicly available.
	Halchette	no details available			Notice of intent not made public. Arbitration never commenced.

Summary of Cases Filed Under NAFTA Chapter 11

(to March 2003)

Respondent Country	Number of Cases Filed	Types of measure challenged	Total Damages Claimed (\$U.S.)	Total Damages Awarded ³ (\$U.S.)	Disposition
Canada	9	4 environmental protection 2 softwood lumber 2 postal services 1 other	\$11.566 billion \$1.066 billion (excluding Sunbelt)	\$27 million Cdn. ⁴	2 settled "out-of-court"; 2 decided against Canada with damages awarded; 3 pending; 1 withdrawn by complainant; 1 other.
U.S.	9	2 environmental protection 3 softwood lumber 2 state court decisions 1 procurement 1 drug enforcement	\$16.198 billion \$2.618 billion (excluding Baird)	0	6 pending; 2 dismissed.
Mexico	10	3 environmental protection 3 property development 1 financial services 1 industrial policy (sugar) 1 gambling 1 cigarette taxation	\$501.1 million	\$18.2 million ⁵	2 decided against Mexico with damages awarded; 1 dismissed; 7 pending.

Sources: Government of Canada, Department of Foreign Affairs and International Trade website (www.dfait-maeci.gc.ca), U.S. Department of State website (www.state.gov), NAFTA Claims (www.naftaclaims.com).

1. As of March 2003.



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¹ Date of notice of intent, except where indicated.

² All figures are in US\$ except where indicated.

³ Including awards of legal costs, where available. Not including interest.

⁴ Including Ethyl settlement of approximately \$20 million Cdn.

⁵ not including undisclosed interest and legal costs.