



DISPUTE SETTLEMENT UNDER THE CANADA-UNITED STATES-MEXICO AGREEMENT: PERSPECTIVES FROM NORTH AMERICA AND EUROPE

November 5, 2021

Key Observations

- There are issues with how Investor-State Dispute Settlement (ISDS) developed under the North American Free Trade Agreement (NAFTA) however total abandonment of ISDS and reverting to domestic courts is not the only alternative. Some ideas have been proposed including an Investment Court, which is being discussed in the European Union (EU).
- If ISDS is to remain, then there needs to be serious reforms to address concerns, including arbitral independence, regulatory chill, and transparency. ISDS was never meant to be a system but in reality, it has become systemized and needs to be developed appropriately as such.
- There is consensus that there are opportunities to improve dispute resolution in international investment law. How things can be shaped and improved is up for debate.

Purpose of the Note

On November 5th, 2021, the Viscount Bennett Professor of Law at the Schulich School of Law, in collaboration with the MacEachen Institute, the Jean Monnet European Union Centre of Excellence and the Boston College of Law hosted a panel of speakers to discuss dispute settlement under the Canada-United States-Mexico Agreement (CUSMA). This event was the first Viscount Bennett Roundtable on International Economic Law.

Speakers

[Camille Martini](#) (Associate, Cleary Gottlieb Steen & Hamilton LLP), [Frank Garcia](#) (Professor of Law, Boston College Law School), [Sergio Puig](#) (Professor of Law, University of Arizona James E. Rogers College of Law), and [Andrea Bjorklund](#) (L. Yves Fortier Chair in International Arbitration and International Commercial Law, McGill Faculty of Law). The panel was moderated by [Olabisi D. Akinkugbe](#) (Viscount Bennett Professor of Law, Dalhousie University Schulich School of Law).

About the MacEachen Institute

The MacEachen Institute for Public Policy and Governance at Dalhousie University is a nationally focused, non-partisan, interdisciplinary institute designed to support the development of progressive public policy and to encourage greater citizen engagement.

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Event Abstract

The first Viscount Bennett Roundtable on International Economic Law brought together experts from North-America and Europe to interrogate the Canada-United States-Mexico Agreement (CUSMA). The experts shared their views on the dispute settlement regime, comparative insights in relation to developments in Europe; and how changes within ISDS and the new labour dispute settlement can enhance labour and environmental policy among others.

Introduction

On July 1, 2020, the [Canada-United States-Mexico Agreement \(CUSMA\)](#) came into effect, replacing its longstanding predecessor, the North American Free Trade Agreement (NAFTA). Reopening the 23-year-old agreement was one of President Trump's election promises, in a time where anti-trade and globalization sentiments were on the rise in the United States and abroad. However, all three parties to the agreement had issues with it that they hoped to be addressed in a new reformed agreement. Among the reforms to the CUSMA, one of the most significant was Canada's [withdrawal from the controversial Investor-State Dispute Settlement \(ISDS\)](#) mechanism chapter, which allowed investors to sue governments through an independent arbitration process when an investor felt they had been discriminated against or their rights as an investor had been violated. The panelists discussed these changes in CUSMA, its potential impact, and possible alternative dispute mechanism solutions.

Investor-State Dispute Settlement

Under NAFTA, investors had access to ISDS under Chapter 11 of the agreement if they felt that a host state had not complied with its obligations under the treaty to give investors equitable treatment or had expropriated their investment. ISDS was heavily criticized for its broad license for investors to sue governments for policy and regulatory decisions that impacted investments, especially in Canada, who was party to the greatest number of disputes. Under [NAFTA, 66 disputes have been initiated](#) (27 against Canada, 22 against Mexico, 17 against the US) with 5 unfavourable results for both Canada and Mexico but 0 for the United States. Chapter 14 of CUSMA replaced Chapter 11 of NAFTA and addressed many of the concerns including introducing stronger protections for party countries who infringe on an investment through regulation or expropriation. However, Canada opted out of the Chapter altogether, possibly assuming it was not worth subscribing to given the number of challenges brought against it under NAFTA. Canadian investors in Mexico and Mexican investors in Canada can still opt for ISDS under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ([CPTPP](#)), a multilateral trade agreement which both countries are party to and has a similar ISDS chapter to CUSMA. Canadian investors in the United States and American investors in Canada will now have to take their disputes to domestic courts. It is yet to be seen how this will play out, as CUSMA has a [sunset clause](#) on NAFTA ISDS claims set for July 1, 2023. Whether ISDS should be reformed or completely abandoned has been a subject of contentious debate. Alternative solutions exist, including proposals for an investment court, which is in the process of being established under the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU.

Speaker Observations

Camille Martini

- There have been a number of claims filed to meet the three-year sunset clause under NAFTA ISDS, set to expire on July 1, 2023. It is yet to be seen how the new ISDS chapter and Canada's exclusion will impact the volume of disputes.
- One proposed alternative to ISDS, which has been discussed for many years and now the European Union is looking to potentially implement, is an investment court. This is already under development in CETA between Canada and the European Union.
- An investment court has the potential to address many of the concerns with ISDS, including establishing rules of procedure, permanent appointed jurists by the treaty parties, and allowing for development of a jurisprudence under an agreement.

Sergio Puig

- The CUSMA was agreed to during a time where there is an increasing mistrust of international trade and organizations both in the United States and abroad.
- There are some interesting reforms in CUSMA, including the requirement for arbitrators to have environmental expertise in state-to-state disputes under Chapter 24 and a rapid response mechanism that can be used for labour issues. Energy reforms in Mexico will have interesting implications for the relationship between Chapter 14 and 24.
- There are political and economic interests at play but there needs to be pragmatism in improving ISDS rather than abandoning it. If there are concerns about ISDS promoting fossil fuels, then those sectors can be excluded from the mechanism. Lawyers and arbitrators are also benefiting from ISDS monetarily, there needs to be a return to balance of the original purpose of the system and the disputes under it.

Andrea Bjorklund

- The political shift in the United States means that the traditional bipartisan pro trade coalition in the political centre has eroded. The Biden Administration also does not seem to have free trade as a priority in its current agenda, given how many other issues it is currently dealing with.
- Resorting to domestic courts to settle disputes is not necessarily the best alternative. Transparency norms vary by country and jurisdiction, even within developed regimes, and do not necessarily meet all the elements of procedural justice.
- If double-hatting is a serious concern, then the establishment of an investment court can perhaps remedy the issue. [Double-hatting](#) is generally understood in the context of investor-State dispute settlement (ISDS) as the practice by which one individual acts in two different roles in ISDS cases simultaneously or within a short time period. Often it refers to being an arbitrator and a counsel simultaneously, but may extend to other roles such as acting as an expert witness or mediator in separate ISDS proceedings.
- ISDS does not primarily result in fossil fuel companies suing against regulations, the Spanish and Italian solar cases demonstrate that it can also help hold a government to account when they do not live up to promised clean energy incentives.
- ISDS was never meant to be a system. Perhaps the reforms do not go far enough but there needs to be a serious look at how to develop ISDS instead of totally abandoning it.

Frank Garcia

- Procedural justice relies on a dispute settlement process that needs to encompass four key elements in order for its participants to have faith in the system: (1) Independence and impartiality of decisionmakers; (2) Transparency; (3) Participation; and (4) Mechanism for the correction of error. CUSMA provides modest improvements but does not go far enough.
 - **Independence** – CUSMA imposes rules on double-hatting and follows the International Bar Association conflict of interest rules for the independent arbitrators but does not go far enough. The CPTPP prohibits double hatting more strongly than CUSMA.
 - **Transparency** – Pleadings, memos, and proceedings need to be made public. There also needs to be rules around disclosing who third party funders of litigation are.
 - **Participation** – there is no improvement from NAFTA
 - **Mechanism of Correcting Error** – The CUSMA Commission can correct error by setting guidance on how the treaty should be interpreted. Tribunals can now circulate drafts of the award to the parties before they are published. There is also more flexibility about the seat of arbitration, the tribunal can be seated in any *New York Convention* jurisdiction.
- Through analysis, Garcia reached the unexpected conclusion that domestic courts are more robust in meeting the procedural justice criteria and are a better alternative to ISDS.
- Empirically, the nonexistence of ISDS does not show to inhibit or encourage investment. If ISDS is to remain, then changes need to be pragmatic and incremental. If ISDS is to be a fully functional system of its own, then all issues need to be fully looked at in its development.

Conclusion

The panelists shared different views on the best dispute resolution mechanism to be employed in CUSMA and international investment agreements moving forward; however, there was consensus that there is opportunity for improvement from the original ISDS model in NAFTA and the provisions that accompanied it. Those opportunities include solutions to address improvements in procedural justice, labour protection, climate change considerations, and shifting the system back to its original purpose to focus on the parties in the dispute rather than the legal bureaucracy that supports it. Nonetheless, there is plenty of optimism that international investment law and treaties are progressing in a forward direction to provide better outcomes and protections for all parties involved.

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The Institute is working to create resources and policy discussions focussed on the COVID-19 crisis. These include briefing notes as well as panel discussions, videos and media commentary. You can find [all resources related to COVID-19 on our website](#).

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- [Climate Adaptation in Nova Scotia: Overblown or Underwater?](#)
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- [COVID-19: Leaders from the Health Community Identify Lessons from the First Wave and Concerns for the Second](#)
- [Lessons Learned from the First Wave or Lessons Merely Identified? Improving Nova Scotia and New Brunswick's health system for the second wave of COVID-19 and beyond](#)
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