

Intelligence MEMOS



From: Lawrence Herman
To: Canadians Concerned about Trade Disputes
Date: November 11, 2019
Re: **KEEPING SCORE OF THE US-CANADA TRADE DISPUTES**

US investor-state disputes against Canada still loom under NAFTA, with five unresolved claims outstanding and the possibility that more could emerge.

In my new C.D. Howe Institute [report](#), I outline the history of trade disputes and show that the ratification of the new Canada United States Mexico trade agreement (CUSMA) would not put an immediate end to investor-State claims under Chapter 11 of NAFTA. Chapter 11 allows companies to sue governments for practices that they allege discriminate against them.

While there are many political uncertainties in play, should the US Congress eventually approve CUSMA, the window will begin to close on the ability of US investors to launch new claims against Canada. Passage would trigger a three-year transition period for filing any new cases. If the deal dies in the Congress, on the other hand, the NAFTA will continue and American investors would remain free to file new claims, including against Canadian provinces.

Canada has borne the brunt of Chapter 11 investment claims by American companies over the 25 years of the NAFTA – 23 in total, five of which are still in process. Of interest is that the record shows US claimants have had decidedly mixed success, most cases against Canada having been dismissed by NAFTA panels.

Canada's success in these arbitrations is often overlooked in public commentary, but the record of wins is quite impressive. It shows that the total of panel awards against Canada comes to about \$32.4 million, a relatively modest sum compared to the billions of dollars originally claimed.

Nevertheless, the current and possible future disputes could mean Canada is on the hook for more money. And if CUSMA is not ratified, the door will remain open for future claims to be filed.

As to the basic question of whether investor-state arbitration is appropriate or necessary in Canada-US relations, the agreement to put an end to this in CUSMA makes sense.

Canada and the US are mature democracies governed by the rule of law and respect for procedural and substantive rights of private parties, with recourse guaranteed through the ordinary court system, unlike other parts of the world where these safeguards are lacking and where investors need recourse to third-party protection.

Let's hope CUSMA proceeds to ratification and these kinds of investment claims are ultimately removed from the agenda as bilateral irritants.

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