Certainty is key to doing business internationally. Dispute resolution mechanisms offer comfort and a means of addressing conflict and commercial disagreements, whether in a private transaction or through a treaty.

This seminar will address dispute resolution in an international context. It will also provide updates on the dispute resolution mechanisms available under the North American Free Trade Agreement and the Comprehensive Economic and Trade Agreement between Canada and the European Union.

In this webinar, our expert lawyers from Canada and the UK highlight the latest developments in international commercial arbitration and the resolution of disputes under international trade and investment treaties.

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**Transcript**

**Gordon Bell:** Hello everyone. I'm Gordon Bell and welcome to this Gowling WLG webinar on international arbitration and trade dispute resolution. Our program today should run for just under an hour. On your browser you have the facility to ask questions as we go through our presentations. We should have time at the end to answer a few of those questions, if you post them, and we'll reply to any others by email over the next few days. Just by way of introduction, I'm the co-leader of our firm's international arbitration practice. I'm based here in London. That's London, England rather than London, Ontario, if you haven't picked up the accent yet. With me in Ottawa are my fellow partners Wendy Wagner and Rick Dearden. Wendy is a partner in our advocacy department. She has a broad international trade law practice that comprises trade agreements, investor state arbitration, export controls and sanctions and laws relevant to goods and services imported and exported. Recently Wendy represented Eli Lilly in an investor state dispute against Canada brought under the NAFTA Chapter 11. Rick is a fellow of the American College of Trial Lawyers. Rick acted for the Government of Mexico during the negotiations of NAFTA, chaired a Chapter 19 bi-national panel involving softwood lumber exports to the USA. He also appeared as counsel to Eli Lilly in the same NAFTA arbitration as Wendy. I'm also pleased to say we have Mark Crane in our Toronto office. Mark is a partner in our advocacy department. He's an active member of the firm's commercial litigation, construction and engineering and energy and mining group and he's the national leader of the firm's arbitration group. He's an experience litigator acting for clients in international arbitration.

There are two halves to our webinar today. In the first half Mark and I will look at why parties involved in international commercial transactions prefer to resolve disputes through arbitration as opposed to national courts. We will also take a look at some of the trends we are seeing in international arbitration at the moment. In the second half Wendy will take a look at bilateral investment treaties which are entered into by countries to benefit their nations, or their nationals, who are investors in a foreign state. As we will see these treaties invariably include agreements to arbitrate disputes. Following Wendy we have Rick who will examine some of the provisions of NAFTA including the provisions dealing with disputes. Given the reports coming out of the USA, today, concerning steel tariffs, the session from Rick probably could not have been more timely.
Let's start with the first half and we'll take a look at commercial arbitration and the reasons why parties arbitrate. But first, if we can start with a simple definition of international arbitration, as you can see it is a method of private, binding enforceable dispute resolution which may be chosen by parties as an alternative to litigation before national courts. I'll come back to some of these highlighted words in a moment. The first one I want to focus on is the word "chosen". Arbitration is a consensual process and parties have to agree in advance to arbitrate. If not, the default position is national courts and litigation. Arbitration is not ADR. If we ask the question maybe 10 years ago whether arbitration was ADR I think the answer would have been yes but things have moved on. It's not an alternative dispute resolution form. It is actually dispute resolution which now rivals litigation throughout the world. It's not litigation like, as it's been said before, it's just different. It is true that the rules can be shortened. It is true that the process can be shortened. It is true that there is limited discovery. It is true that there is, perhaps, less cross-examination but it's still a quasi-judicial process that leads to a binding conclusion. Commercial arbitration has become the dispute resolution mechanism of choice for international transactions and projects. In a recent study from White & Case, and Queen Mary College here in London, noted that 98% of those surveyed said that they would prefer international arbitration for international disputes rather than litigation before court. We've also seen a remarkable growth of trade and treaty claims in the past 5 to 10 years and that's the focus of the talk, or the second half of the talk, from Wendy and Rick.

Let's look at these reasons why people do prefer to arbitrate rather than litigate. In no particular order, the first one we look at, is confidentiality. You may recall from the definition that I put up that I said that arbitration was private. Well, private has two meanings in that definition. First, arbitration can only take place between those parties who agree to arbitrate. In other words, you can't join third parties into the arbitration process unless everyone else agrees. This sometimes presents difficulties in some projects. For example, construction, where the contractor would like to blame the sub-contractor but unless the employer of the contractor and the sub-contractor agreed in advance, the sub-contractor cannot be brought in to that piece of litigation, or arbitration, in this context. But arbitration is also private in the sense that it's confidential. The public cannot attend arbitration processes and documents disclosed or exchanged in arbitration are not made public. This can be a very important issue for commercial parties where they do not want third parties to know that they're in dispute and they do not want the documentation that's produced in disclosure to be made available to third parties. However, we cannot say that arbitration is always confidential. In some jurisdictions the law says that's it not confidential and in other jurisdictions, if an arbitral award is brought
before the court, the challenge or enforcement, confidentiality may be lost. If you're arbitrating under some of the common rules of arbitration, like the ICC, the LCIA, or the ICDR rules, it is worth noting that those rules either do require confidentiality, or at least give the tribunal the power to make the proceedings confidential, which in practice they often do. Finally, on this subject, or this topic, it's worth noting that treaty arbitration is often not confidential and documents and awards are often published on the ICSID website. You can even watch the proceedings through live streaming. The reason often given for this is that treaty arbitrations invoke claims involving states and therefore should be open to the people.

The second reason we have for the arbitration preference is neutrality. There remains a perception, whether it's fair or unfair, that a national court, or its judges, may have an intrinsic bias towards nationals as opposed to foreigners. As such, a non-national often prefers arbitration. Whether that perception is fair, or not, the more subtle point is that both parties should be treated with equality and litigation in a foreign court will include processes and procedures which are unfamiliar to foreign parties. There will be a different cultural approach and possibly even different languages before local courts. In sporting terms, the home party will almost certainly have home field advantage, whereas arbitration tends to neutralize this. Of course arbitrators, like judges, still need to be independent and impartial. Arbitration should not be a way to get your arbitrator to help decide a case in your client's favour. I should note here that in recent times there appears to have been more challenges to the independence and impartiality of tribunals than we've seen historically. The reason for that, probably, is not as clear as it might be but one theory is that it's becomes so difficult to challenge arbitral awards that parties are having to look at other means to avoid defeat, and this could result in accusations made against arbitrators of bias, so as to have them removed and the award set aside. In a recent report, here in London, the LCIA published the outcome of challenges made to the LCIA arbitrators over the last number of years and it does indicate that very few challenges to arbitrators have actually succeeded. So as I say, we're seeing lots more challenges but probably very few that are getting through.

Finally, the third and I would say the main reason why the parties prefer to arbitrate rather than litigate international contractual disputes, is enforcement. As the definition said, arbitration is final and binding. Although it varies from jurisdiction to jurisdiction the general position is that there is limited scope to challenge or appeal an arbitral award. Once given, arbitral awards are recognized and enforced throughout the world through the mechanisms of the New York Convention. And more than 150 countries have given recognition to the New York Convention. In effect, if an award has been made in any one
of those 150 countries, it should be recognized and enforced in any of the other 150 or so countries. There are other treaties and conventions that allow for enforcement of arbitral awards, and compared to the treaties and conventions in place which allow enforcement of judgments from national courts, it is obvious that the New York Convention provides greater route to enforcement. Enforcement is likely to require assistance of the local courts. When you go to enforce your award you probably will need the assistance of the court in enforcement and challenges can be made to enforcement at that time. But again, they have very limited, and set out in the New York Convention, those sort of challenges of enforcement tend to be in relation to issues of public policy.

Those are the three main reasons why parties choose to arbitrate and I'll hand you to Mark Crane who will talk a little bit about recent trends and developments.

**Mark Crane**: Thank you Gordon. For the next 12 minutes, or so, I'm going to be speaking about some of the recent trends that we have seen in Canada and that have impact on the landscape for arbitrations, including international arbitrations in this jurisdiction. Very briefly, these are deference and standard of review, interim measures and preliminary order, issues relating to cost, the continued development of third party funding industry in Canada and then just Canada, generally, as an increasing consideration for the seat or venue for international arbitration.

Turning now to the first issue of deference and standard of review, looking first at deference, within Canada one of the trends that's been developing for some time has been the level of deference that's been afforded to arbitrators. Both in terms of determining their own jurisdiction and also with respect to the courts being loathe to intrude upon the decision of an arbitrator, generally speaking. Similar to our administrative tribunal regime, commercial arbitrators in this day and age will generally be considered by the courts to be subject area experts, and as a result, they'll generally be afforded significant discretion before their decisions will be exposed to judicial scrutiny. Subject area expertise is one of the drivers that's pushing forward this level of discretion. But apart from that, and in addition to that, the courts here in Canada are also recognizing that sophisticated parties, who have entered into sophisticated commercial agreements and international agreements and who have identified arbitration as the dispute resolution vehicle in their commercial contracts, and they may have done so for many of the reasons described by Gordon including privacy, the expertise of the arbitrator or enforceability, or whatever the reasons were, the courts are recognizing this and they want to honour the contract that's been bargained to by these parties. Those are the drivers that seem to be affording this level of discretion and deference to arbitrators. Following that theme is the standard of review of a decision of an arbitrator. Following the theme of deference, the
courts in Canada have found that, and this too has been developing for a number of years including from the Supreme Court of Canada, that the standard of review that is applicable to administrative tribunals, being the standard of reasonableness and correctness, ought to also apply to commercial arbitrations. Just to pause there for a moment, generally, questions of law as many of you will know, questions of law arising out of an administrative tribunal in a commercial arbitration, historically are held to a standard of correctness and questions of fact, or a mixed fact of law, slide towards the scale of reasonableness. The standard that they'll be held to for appellate review. What the Supreme Court of Canada has recently said is that because commercial arbitration takes place under a "tightly defined regime selected by contracting parties they applicable standard of review is almost always reasonableness." Reasonableness is the standard that's almost always going to be held in the context of commercial arbitration when considering judicial or appellate review. The context here is that for the purposes of commercial contractual interpretation, in the context of a commercial arbitration, the questions will almost always involve a mix of law and fact. That makes some sense in the sense that the commercial agreement that will involve contractual law principles but there will also be facts that led to the factual nature that led to the formation of that contract and how it was executed. That, I think, gives some colour or context as to why the courts are saying that it's almost always going to be held to a standard of reasonableness which in turn affords greater discretion that the decision of the arbitrator will be upheld. The take away, as you can see from the image up on the screen, is that those parties who seek to appeal a decision from a commercial arbitrator will likely face a challenging and difficult task. There is obviously ways to do it. It is the presumption about subject area of expertise can obviously be overcome but in my view it will be rare.

The second main theme I want to touch on is the clarity that's been brought, particularly with respect to interim measures. With the recent enactment of the updated International Commercial Arbitration Act 2017 in Ontario, Ontario continues to adopt the model laws it has done for some time. But what this 2017 Act incorporates is all the developments, the more recent developments of the model law, that have been enacted by way of this legislation and brought forward and many of those model law enactments occurred back in 2006. What this has afforded us here in Ontario, and there'll be similar regimes across the country, is there's now a, unless the parties agree to otherwise and the parties are always entitled to do so in their commercial agreement, but unless they do so otherwise the Act provides a comprehensive interim measure regime applicable to international commercial arbitration and disputes. The take away is that arbitral tribunals have been granted the authority, very similar to the courts have in terms of being able to order interim measures, and the test for the ordering of such an interim measure such as an injunction.
As you go through the legislation the test to order an interim measure, such as an injunction, would be whether the awarding of damages would be an inadequate remedy in the circumstances. That would be a prerequisite before the interim measure could be ordered. Secondly, that on a balance of probabilities greater harm would arise to the party requesting the relief if the interim measure were not ordered. Finally, that the requesting party’s position has merits, appears to have merits, and a reasonable prospect of success. If I stop there for a moment, some of you on the call will recognize that this test that’s been laid out on the model law is very similar to our common law test laid out by the Supreme Court of Canada in RJR-MacDonald which, essentially, now affords arbitrators the same discretion as the courts. The impact of this is two-fold. One, it identifies that the discretion is there, absent the parties bargaining out of it. But, two, it provides clarity because I think oftentimes the parties may enter into a contractual agreement, a dispute may arise, and you may not know. They may spin their wheels as to what jurisdiction an arbitrator has, if any, with respect to interim measures and I think this assists to provide that clarity for the parties. The take away here is I think this assists to further clarify the role of the arbitrator and his or her jurisdiction in carrying out their duties.

The next issue I want to touch on, briefly, is the issue of costs. Gordon’s talked about some of the motivation that drives parties to arbitrate, and I’ve touched on some of the themes here in Canada, and one of the issue of cost, that’s not limited to Canada because it’s also identified in the survey that Gordon made reference to, but the issue of cost continues to be identified by parties as an area of concern with respect to international arbitration and, as I mentioned, this was reflected in the White & Case survey. This too would fall true in Canada. I think costs are continued to be a concern with parties. What I would say that in response to these trends and concerns, arbitration bodies have instituted, and are actively promoting their expedited rules with a view to an arbitration being resolved more quickly, and presumably less expensively. So organizations such as the ICC and the Stockholm Chamber of Commerce, internationally, and others have implemented expedited rules. I was involved in a matter recently with the Stockholm expedited process and I can tell you that decision, from start to finish, is intended to be done within 3 months. Obviously here, within Canada, we have the ADR Institute of Canada who also has a simplified arbitration procedure not dissimilar to the one I just described, where all pre-hearing matters are to be completed within 90 days and a decision rendered within 14 days of the hearing date. Cost, I think there are ways, and the institutions are moving towards ways of managing that where it would be appropriate for the parties to do so. The last point on costs I raise is that the parties are considering in some cases, and this too came out of the survey, that arbitration being considered in conjunction with ADR and whether that’s a mediation, where the contract built in steps that
must occur before an arbitration, but the parties identify this as a growing trend towards arbitration co-mingling it with ADR.

The fourth trend I'm going to touch on is the continued growth of third party funders. Third party funding agreements are no longer new to the world of arbitration in Canada, and in particularly, international arbitration in recent years have seen an increase in the number of funders in existence. The number of cases being funded and, indeed, in the number of firms working with funders. While the development of third party funding in Ontario and Canada has been slower than other common law jurisdictions, such like the United States and the United Kingdom and Australia, the third party funding industry has now planted seeds in Canada and is growing quickly. While a few years ago there were no third party litigation funders who had a bricks and mortar presence in Ontario now there are two and others such as Burford Capital that continue to work remotely. I come to this, just briefly, but I mentioned costs and perhaps what dovetails with cost is what the benefits of third party funders can provide. But obviously it provides access to justice to those parties who may not have the resources to robustly participate in the arbitration process without having to deal with monthly or quarterly legal bills. Sort of the David and Goliath analogy. It can level the playing field in those circumstances. But beyond that it also allows the party who may, indeed, have resources but simply doesn't want to incur the monthly cash burden on its cash flows to also participate robustly in the arbitration process. As you can see from the slide it can provide cost certainty which I think is of value to in-house counsel and CFO's who appreciate that value. It can allow for a sharing of a risks which we're finding clients find increasing comfort and value in. There's good reason for this continued growth that we're seeing in Canada.

Finally I would say, Gordon mentioned the preference arising out of the survey of parties identifying arbitration as their dispute resolution preferred choice for trans-national disputes, you would find a similar context here in Canada as to that sharing and growth of that preference. So there's a continued growth in the use of arbitration and international arbitration with parties as we're finding across the country. It's interesting why you see that and I would share the same experience that I think in reasoning that Gordon's identified. But if you look at Canada, and Toronto in particular, I think given the presence of the Toronto Stock Exchange where you often have an issuer who has a presence in Canada but their assets may be abroad, and this gives rise to, given the base of the Canadian economy, resource based, the assets are often abroad, there's certainly lots of experience in dealing with international commerce and international commercial disputes. And certainly, while Toronto doesn't compete with New York or London or other seats, it seems to becoming a growing seat of preference for international arbitration and some of
the reasons why that may exist is both the existence of a common and civil law background. The existence of neutrality that Gordon touched on that would exist here, obviously, and many other places but including here. The multi-cultural community that comprises Canada and a sophisticated and experienced roster of arbitrators.

In conclusion, while Gordon and I have focused upon some of the benefits, issues and trends relating to arbitration, I'm going to pass you now over to Wendy who's going to speak to you about investment treaties and the dispute resolution process.

Wendy Wagner: Thanks Mark. Good afternoon everyone, or good morning, depending on where you are. As Mark has stated I’m going to move on to quite a different type of investment dispute resolution process, the bilateral investment treaty or BIT framework of arbitration. There are some parallels to what you've just heard about in terms of commercial arbitration from Gordon and Mark. For example, third party funding is now becoming quite prevalent in the investment dispute arena and a lot of that is associated with the fact that, in terms of cost, investors state disputes tend to be large disputes that are quite expensive. That's definitely something that's becoming a prominent feature.

What are bilateral investment treaties? They're a state to state agreement between countries that allows an individual investor, operating within the foreign country, to bring a claim against a host government in which they have their investments if their investments are not being given adequate treatment by the host state. The treaties commonly give protection to an investor against actions like illegal expropriation of the investment by the host government and also just guarantee a minimum standard of treatment of the investment. The primary advantage of the treaties is that they allow the foreign investor to sue the state directly by submitting a claim for breach of the bilateral investment treaty rather than bringing a proceeding before the local court.

The obligations are not limited to protection against expropriation or other similar unlawful acts, but also will impose other obligations such as not requiring the foreign investors to meet performance requirements, like the need to export a certain percentage of their production or the need to employ a certain number of nationals as part of the investment. But every bilateral investment treaty will actually have a different set of obligations. Each treaty is structured differently. That's one of the things we're going to discuss because at the outset it may be possible to structure an investment to take advantage of more advantageous bilateral investment treaties, or of course, to take advantage of a treaty. If there isn't a treaty between two countries there may be a possibility to take advantage of another treaty.

Just reviewing, again, the common obligations that are set out in the treaties. National
treatment is commonly part of the treaty and that requires the host government to provide treatment that’s no less favourable than would be provided to nationals of the host state. Most favoured nation treatment is similar but it’s treatment that’s no less favourable than would be accorded to investors from a third country. Fair and equitable treatment, which are sometimes termed as full protection and security, that is a variable obligation that does depend somewhat on the wording of the specific treaty, but it generally comprises the obligation of the host state to provide protection to the investment and not to act in a capricious or arbitrary or discriminatory manner against the investment. It may comprise obligation not to act contrary to the legitimate expectations of the investor. Then of course compensation in the event of an expropriation and that will commonly include, not only direct expropriations, but other forms of removal of the substantial value of the investment through regulatory measures or other measures taken by the state. As I’d already referred to, BIT's may also include protection against certain types of performance requirements, and disciplines on monopolies and state enterprises. They may protect against restrictions on the transfer of funds and some treaties will address various types of taxation measures. We’re not going to go through all these slides but this is just set out for your reference. Canada has a number of bilateral investment treaties that are in force and also have some that are under negotiation, currently, and Canada often refers to these treaties as foreign investment protection agreements or FIPA's. But that is essentially the same thing as a BIT. These are the ongoing negotiations that have been concluded and also the ongoing negotiations.

Canada also has investor state protections that are embedded within most of its free trade agreements as a Chapter of the agreement. CETA, Canada-European Union Comprehensive Economic and Trade Agreement, is an agreement that Rick will discuss but it does have a Chapter providing the BIT protection. But it's not actually in force because that Chapter is one that requires ratification by each of the European nations. That's not occurred yet. NAFTA has investor state provisions and Rick will speak a bit about that. There’s a number of other Canadian free trade agreements that do have a Chapter.

Bilateral investment treaties are by no means limited to Canada and Canada is not at all unique when it comes to having these forms of agreements. It’s essentially a global system and there’s the latest statistics from UNCTAD are that there are 2,362 BIT's that are in force globally. Some countries, as you can see from this list, have negotiated a very high number of BIT's to ensure protection for their investors abroad. For example, Germany has well over 100 BIT's in force, UK has a high number of BIT's and when you think of the total number of countries, absolutely, globally, countries like Germany will
basically be affording protection for their investors no matter where in the world they're investing.

BIT’s do continue to be negotiated. Notwithstanding that there is a fair amount of controversy regarding the whole investors state dispute settlement system. There’s a sector of the globe that holds the opinion that these treaties can interfere with the capacity of states to regulate because it an investor has a compliant about the regulatory framework and the way it has affected it's investment it can bring a claim against the host government. That controversy has led to some alterations in the procedural structure of BIT's and how arbitrations are addressed. Gordon, at the outset, had referenced confidentiality as something that's sometimes perceived as a benefit associated with commercial arbitration but in the newer environment with BIT's there is a greater level of transparency. One of the main set of rules that investors proceed under, the UNCITRAL arbitration rules, now requires for new claims the application of the UNCITRAL rules on transparency. A lot more transparency has been injected into the system with the objective of quelling some of that controversy around the use of the system.

At the outset, when an investor is considering investing in a country, and in particular in a country that has a high level of political risk, the first issue to look at is whether there's going to be BIT protection available. The treaties generally provide protection to investors, and investors will be a defined term, and those investors normally have to be nationals of one of the contracting parties to the bilateral investment treaty. For example, if Canada has a bilateral investment treaty with Venezuela then that treaty will protect the Canadian incorporated company that’s going to make an investment in Venezuela but it won't protect, for example, a US company that’s going to make an investment in Venezuela. That company may have protection under a US-Venezuela bilateral investment treaty.

That raises the issue of the ability to potentially structure an investment to take advantage of a bilateral investment treaty. Because if the investor's home country doesn't have a treaty in place with the foreign country in which they're planning to invest it may be possible to look and see if the investment can be structured through another country so as to take advantage of a treaty that does exist between those two countries. For example, if Canada doesn't have a BIT with Kyrgyzstan but the United States does the question is, is there a possibility of structuring the investment through a US subsidiary so that it will be possible to take advantage of the US-Kyrgyzstan BIT. One issue with the ability to do this, and something that will have to be carefully considered in that context, is whether the treaty will have something that's called a denial of benefits clause. For example, in our US-Kyrgyzstan scenario, a Canadian investor who incorporates in the US so as to take advantage of that US-Kyrgyzstan BIT could actually be denied the benefit of the BIT if it
has no substantial business activity in the US because of the presence of that denial of benefits clause within that specific treaty. That's where you get into a situation where it may be advantageous to look to see what other treaties are out there with Kyrgyzstan. What other countries have treaties with Kyrgyzstan. For example, the UK treaty with Kyrgyzstan doesn't have a similar denial of benefits clause. The investment could be, potentially, structured through a UK company without the requirement to have a substantial business activity in the UK.

Another thing to look at when deciding how the investment will be structured, and whether BIT protection may be available, is the particular substantive obligations that are a part of the BIT that may apply in that context. Each BIT is structured a little bit differently and sometimes BIT's will, for example, provide protection only for certain types of investments but exclude other types of investments from the scope of the BIT. For example, if your investment was essentially an intellectual property right or non-tangible property you'd want to look to see does that BIT consider intangible property to be a protected investment under the BIT. Then, of course, there's the protections that are owed to the investor under the BIT and how comprehensive those protections are. They may be made broader in some BIT's versus other BIT's. For example, some of the treaties exclude taxation measures from the scope of protection. If the host government adopts a taxation measure that has the effect of depriving the investment of substantially all of its value, you may not be able to complain about that as an investor if it's not part of the rights supported under the treaty.

Another thing to look at will be the type of dispute settlement or the methods of dispute settlement that are available under the treaty. Some of the bilateral investment treaties will only allow investors, for example, to proceed under the ICSID Convention rules or dispute settlement. The fact that the ICSID Convention puts the arbitration under the framework of an international treaty might actually be disadvantageous in some circumstances. For example, the Convention itself, will modify how investment is defined for purposes of the ability to bring a claim, and in order to bring a claim, will require a more substantial investment in the host government of a certain duration and of a certain contribution to the host government. That is another factor to consider when determining what treaty may be available.

I had mentioned earlier that investor state arbitration certainly has garnered some controversy. This has led, and other factors have led, to some countries unilaterally withdrawing from their bilateral investment treaties. But as I had mentioned, the other treaties are still being negotiated, and there's still thousands of these bilateral investment treaties in force. It's still a frequently used mechanism. There's some very notable awards
such as Exxon Mobile Corporations $1.6 billion award for the 2007 nationalization of its oil project in Venezuela. It's a very significant and well known award. UNCTAD actually has a database that indicates that there have been some 548 concluded investor state disputes that they are aware of. There are currently 297 disputes that are pending. Those numbers would not include the disputes that were brought but settled which would likely be a fairly large proportion of disputes as well. While it's a very unique form of arbitration and of dispute settlement it's certainly not one that's rarely used. It has a particular context in which it's used but continues to be something that is quite prevalent.

I think with that I will turn it over to Rick to give an update on the NAFTA.

**Rick Dearden**: Good afternoon everybody and thanks for joining us. The outline of my presentation will be I'll deal with the three dispute resolution mechanisms in the NAFTA that state to state disputes Chapter 19 panels for dumping and counter billing, duty cases in investor state arbitrations. Then I'll give you an update on the NAFTA renegotiations. And there has been breaking news this morning on the US withdrawing the exemption of Canada from tariffs on aluminum and steel which is not going to be making those renegotiations a pleasant room to be in. Then lastly, very briefly, just mentioning CETA's investor state arbitration provisions.

As I said we have those three mechanisms. Let's deal with state to state first. Chapter 20 contains provisions for the avoidance of settlement disputes over interpretation or application of NAFTA or over an actual proposed measure that is, or would be, inconsistent with obligations of NAFTA. The parties, namely the government of Canada, Mexico or the US, can attempt to resolve those disputes through consultations or through the NAFTA free trade commission. If that doesn't work there is a mechanism for the creation of arbitral panels that can deal with the disputes. There's only been three NAFTA Chapter 20 reports that were final. But the last one was in 2001 and why is that? Because the US refused to agree to panelists, the appointment of panelists, to create a Chapter 20 panel. As an aside the US is doing the same thing today in the world trade organization with respect to the appellate body where the US is refusing to agree to appoint members to the appellant body to replace members whose terms have expired. We have 4 out of 7 members whose terms have not expired today but 3 of those terms are going to expire next year. The US is not agreeing to the reappointment of anybody. What we'll have is a paralysis at the WTO because you need 3 appellate body members to be a quorum. They won't have a quorum next year and there will be no resolution of WTO disputes. It's quite a serious crisis that the WTO is facing there. But that's for another webinar. The Chapter 19 panels, these are panels that review final anti-dumping, countervailing duty determinations. For instance, if the Canada Border Services Agency makes a final
determination of dumping against US exporters, for instance, they have the choice of going to federal court or to a Chapter 19 panel. This is a unique mechanism that was created back in the Canada-US free trade agreement days. That was because Canada was feeling that it was being treated unfairly in the US on anti-dumping and countervail cases and the courts weren't reviewing commerce department decisions, or international trade commission decisions, the way they should. This was actually a deal breaker back in the Canada-US free trade negotiations where if Canada didn't have this it was walking away and it was not going to sign an agreement with the US. That was ancient history. The Chapter 19 panels were continued, or carried forward, into the NAFTA in a more sophisticated manner and my prediction is that the US wanting to eliminate these Chapter 19 panels in the NAFTA renegotiations is a deal breaker because Canada feels that they're very important to having our exporters treated fairly.

The next slide lists the investment obligations that are found in Chapter 11. The main action is the expropriation and compensation article 11.10 and the fair and equitable treatment article like you see in 11.05. These obligations, Wendy mentioned in her presentation. International treatment also comes up often in these disputes.

Let's skip to the claim for damages. NAFTA Chapter 11 sets out provisions that govern the settlement of disputes between the NAFTA party and an investor of another NAFTA party. Investors can submit to arbitration a claim for damages incurred because of a breach of an investment obligation. Those are cases against Canada. Cases against the USA. I'm losing my voice here. I apologize. Just go back to the USA cases. The USA has never lost a NAFTA Chapter 11 case. They're batting a thousand. Here are a list of cases against Mexico. To date Canada has paid out approximately $182 million in the five NAFTA Chapter 11 cases that is has lost. There's been a recent federal court decision of Justice MacTavish in the Bilcon case where Bilcon did win a Chapter 11 arbitration against Canada. Basically Canada's argument was the panel, the tribunal in that arbitration, were really acting like they were a domestic court in reviewing the decision to not allow this quarry and marine terminal project to go forward. But Justice MacTavish refused to set aside that arbitral aware because in the absence of a true jurisdictional error on the part of the tribunal the court had no power to intervene and consequently the application was dismissed. I do predict that that decision will be appealed by the government of Canada to the Federal Court of Appeal. Stay tuned there.

The NAFTA renegotiations update. What's the status to day? Well, the good news is there still is renegotiations going on. That President Trump has not provided notice that USA is withdrawing from NAFTA as a party. But there are major issues that have yet to be resolved in these renegotiations. The so called "poison pill" USA demands. For example,
they want to eliminate the Chapter 19 panels which, as I said, I predict will be a deal breaker for Canada. Auto rules of origin has been getting a lot of publicity. The US wants more content that is made in USA in those automobiles as opposed to Mexican or Canadian content. The US doesn't want Chapter 20 panel. That's not much of a concern because there hasn't been one since 2001. Investor state arbitration is interesting. USTR Lighthizer says that that is a form of risk protection for US investors and he's thinking Mexico. The thinking goes that they would not invest in Mexico without that protection. Now, it is a form of risk insurance, as Wendy had mentioned in her presentation, but whether that is going to cause a US investor who was thinking of investing in Mexico to make that investment in US very much remains to be seen. It's interesting that the US wants to eliminate investor state arbitration from NAFTA because the vast majority of US industry wants investor state arbitration to remain. They're adamantly opposed to its elimination from a renegotiated NAFTA. We'll see where that goes. The breaking news. In March, Canada, Mexico and the European Union were temporarily exempted from new tariffs that the US imposed on aluminum and steel. That exemption is up today. The reason for the 10% tariffs on aluminum and 25% on steel was because of US national security. As far as Canada and Mexico was concerned it was really a hook to the NAFTA renegotiations but somehow, I guess, make Canada or Mexico cave in on certain US demands with the carrot that they would continue to be exempt from these aluminum and steel additional tariffs. This morning US Commerce Secretary Wilbur Ross announced the end of the temporary exemption so they kick in at midnight tonight. So we're about to enter a trade war with the USA, as is Mexico, as is the EU. Secretary Ross, in his announcement today, said the White House would have to see how its allies responded to the new tariffs before deciding what to do next. Well, they didn't have to wait long because Mexico's already announced its retaliating on a number of USA products like steel, apples, grapes, blueberries, pork and cheeses. The EU announced its retaliation list a number of weeks ago and Canada has a retaliation plan but as of noon today, when we started this webinar, I had not seen it publicly announced. But there will be retaliation. Bottom line, not helpful to coming to a final solution on what the new NAFTA will look like. The temperature in the room just went up drastically. Why they did this is beyond me but, of course, it's not in our control.

The last slide here will be CETA. Just very briefly, there are investment obligations similar to NAFTA except the expropriation and fair and equitable treatment obligations are a lot more narrowly defined, making it a lot more difficult for an investor’s claim to succeed. But 98% of the tariff lines are duty free and are in place today, and as Wendy mentioned in her slide, the investors state arbitration provisions have not been implemented and Gordon will now have a few remarks on that. So, Gordon, over to you.
Gordon: Yeah, thanks Rick. It's a slightly difficult subject for us in the UK at the moment, talking about CETA, being that it's a treaty between Canada, the EU and the 27 member states because in 12 months' time we may not be a party to that agreement. But the current position is it still needs to be ratified by the EU and the 27 member states and it's already been ratified by about half a dozen and there are another 6 or 7 that have prepared the necessary papers to put before their own government to have it ratified. But there are around about 20 states that still need to ratify. But we also have a case that has been submitted to the European Court of Justice by Belgium to consider whether the dispute provisions, within CETA, comply with the EU law at all. So until those issues have been resolved CETA's not going to be ratified quickly. It's in process of ratification but I think we're going to have to look at it many months down the line for finalization.

That brings us to the end of the formal presentations. We've got about 5 minutes left and we've had a few questions that have come in and I'll try and share them between the four speakers. Maybe we can start with you, Rick, since you were the last on. The question, and again it may be even more relevant today as to whether or not there'll be more disputes under NAFTA, but the question that was posed is, "Will investor state arbitration be available to investors in a renegotiated NAFTA?"

Rick: Well, I don't think this is a hill that Canada's willing to die on versus maintaining the Chapter 19 panel but it does seem very strange that there would not be a Canada-US investor state arbitration mechanism available in light of the voluminous BIT's and investment treaties that both Canada and the US have entered into with other countries. If Chapter 11 arbitration can be traded off for something more important, like auto rules of origin or Chapter 19 panels, then why wouldn't Canada drop investor state arbitration if the US was insisting on that, being as what it does allow is for the government to be sued. So, if you don't get sued anymore I guess that's not so bad. We won't know. There's many moving parts in this as to whether we'll see that Chapter 11 maintained in a renegotiated NAFTA.

Gordon: Okay. Thank you. Wendy, you spoke a little bit about the controversy and debate over investors using bilateral investment treaties as a means to resolve disputes. Does that make it more horrible, or less attractive, in terms of resolving disputes to take claims to arbitration through treaties?

Wendy: Yeah, I think it is a factor. Definitely when an investor is considering bringing in investor state claim that there's going to be a lot of publicity, or could be a lot of publicity, associated with that. I don't know that there's oftentimes a lot of publicity if the dispute is between, for example, a US investor suing the Canadian government, or a Canadian
investor bringing a claim against the US government. I don't think there's often as much
attention paid to some of the other disputes that, for example, Canada against a country
that's just not as much in the news. Still, I think it depends on the dispute and it also
depends on what is being challenged. I mean, if it's a situation where the host government
has come in and essentially nationalized an investment then I'm not sure that's at all a
controversial application of the system. The disputes that tend to be a bit more
controversial are when it involves a regulatory measure taken by the host state and that's
the measure that's being challenged. I think the answer is it depends. They're generally
quite large disputes. I don't think it's an everyday type of occurrence. It has to be a pretty
significant event that will cause an investor to bring a claim.

Gordon: Okay. Thank you. Just 2 questions to finish. I'll take the first one. The comment
was made, "Nobody's mentioned yet how long arbitration takes. Is it quicker than
litigation?" I think the short answer there is it depends. Litigation in the UK, from start to
finish, if there's no appeal can take something like 18 months. It it's appealed it can take
somewhere between 2 and 3 years. In other jurisdictions litigation can take as long as 10
or 20 years because of the difficulties with the court system. So, certainly there is a
balance. Arbitration used to be seen as much quicker than litigation. I think arbitration is
now taking a little bit longer than you would expect, probably to get through an arbitration,
in about 18 to 24 months. So, it will depend, maybe country to country.

Final question for you, Mark, is, "In arbitration does the winning party recover its costs
from the losing party?"

Mark: I think the first place, in order to consider that question, Gordon, the first place
you'd want to look is at the contract that was entered into between the parties. I think
contracting parties can agree amongst themselves. If the contract, however, is silent as to
the issue of costs then I think you'd want to look at the rules. Or it would be important to
look at the rules that are going to govern the arbitration. So whether that's the ICC or the
Stockholm rules or the ADR, or what have you, and those rules then will dictate the issue
of costs. But as a general proposition, a generally absent agreement by the parties
stating otherwise, generally the winning party will be entitled to recover at least a portion
of their costs and there'll be a sliding scale on that as you would anticipate given the
behaviour of the parties, or what was advanced and what was successful and what
wasn't. But certainly the cost regime will probably be absent agreement by the parties not
dissimilar to what you'd see in Canada in the court system.

Gordon: Okay. Thank you Mark. That brings us to the end of the questions and answers.
There are some other questions that have been posed and as I said at the outset we will
email responses to the ones we were not able to get to in this session. To conclude, thank you very much for attending. For the audience, we've had a very good numbers and static numbers through the last hour. I hope you've appreciated the presentations. Some food for thought and some interesting breaking news in Rick's presentation, in particular. We'll be doing more of these so please keep a look out on our website. We'll post more invitations in the future. Thank you very much for attending and have a good day everyone. Thank you.

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<tr>
<td>Email</td>
</tr>
<tr>
<td><a href="mailto:gordon.bell@gowlingwlg.com">gordon.bell@gowlingwlg.com</a></td>
</tr>
<tr>
<td>Phone</td>
</tr>
<tr>
<td>+44 (0)20 7759 6703</td>
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