INTERNATIONAL ARBITRATION TEAM

International Investment Arbitration in North America: Year in Review 2015

International investment arbitration – also known as investment treaty arbitration or investor-State arbitration – is a procedure whereby foreign investors may seek a binding adjudication of claims against host States that have either violated investment protection treaty obligations or, in some circumstances, breached their contractual commitments or their national foreign investment law. Canada and the United States are parties to numerous bilateral and multilateral investment treaties which are intended to promote investment by ensuring fair treatment of foreign investors and which permit arbitration of investor claims before the International Centre for Settlement of Investment Disputes (ICSID) or similar fora.

North America experienced steady yet tempered growth in 2015. Although Canada's economy lagged in the first half of 2015, it bounced back by the end of 2015, largely spurred by growth in exports and consumer spending, with an estimated real GDP growth of 1.2 percent. This growth is projected to continue in 2016 and 2017. Despite the growth, the Canadian dollar experienced a decline of 15 percent compared to the U.S. dollar. The loss in value is attributed to the decrease in oil prices and the increase in U.S. federal interest rates. In the United States, GDP increased 2.4 percent, maintaining the same rate of growth as in 2014. The rate of growth was highest at 3.7 percent in the second quarter and fell steadily throughout the year to 2 percent in the third quarter and 0.7 percent in the fourth. The growth in 2015 was stimulated most significantly by consumer spending on services such as healthcare and the purchase of goods.

The number of new investment arbitrations in North America in 2015 remained in line with the previous five years with approximately 5-7 new arbitrations being initiated each year. Although the extractive industries have traditionally been the dominant sector for arbitrations involving Canada and the United States, other industries such as energy and pharmaceuticals also see multiple pending disputes. Two oil, gas and mining arbitrations were initiated in 2015, and one each in the pharmaceutical, construction and electric power sectors.

Canada and the United States have concluded at least 173 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions). In 2015, the United States concluded only one treaty – a trade and investment framework agreement with Armenia – while Canada concluded bilateral investment treaties with Guinea and Burkina Faso.

In 2015, Canada and the United States intensified negotiations of the Trans-Pacific Partnership (TPP), a free trade agreement with Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The TPP countries first commenced discussion of the trade pact in 2008. Negotiations culminated in a final agreement on October 5, 2015 and the agreement was signed on February 4, 2016. The TPP aims to strengthen trade relations in the Pacific Rim, promote job growth, increase capital

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benefits, and standardize treatment of labor, environmental, and intellectual property. Commentators in both Canada and the United States remain divided on the domestic benefits likely to result from the TPP. Although the TPP potentially cements the United States as a trade powerhouse in the Pacific Rim, diverting supremacy from China, others fear that another broad free trade agreement will see U.S. domestic manufacturing and employment rates continue to deteriorate. Similarly, Canadians favored the potential broad economic benefits of the TPP but have expressed doubts about the effect the TPP will have on employment in local communities. The TPP will now undergo a two-year ratification period in which at least six countries that account for 85 percent of the combined gross domestic production of the 12 TPP nations must approve the final text for the treaty to enter into force. Given their size, both the United States and Japan would need to ratify the treaty. Should the treaty enter into force, practical issues will include (1) to what extent the TPP displaces arbitration among Canada, Mexico, and the United States under the North American Free Trade Agreement (NAFTA), (2) whether there will be an increase in investment arbitration among the TPP countries, and (3) how the revamped arbitration system under the TPP functions particularly in areas of transparency, compliance with environmental goals, and arbitrator conduct.

For purposes of this review, North America is composed of Canada and the United States. This region does not include Mexico, Central America, or the Caribbean countries, some of which may be represented in our Year in Review on Latin America.

Investment Arbitration in the Region[1]

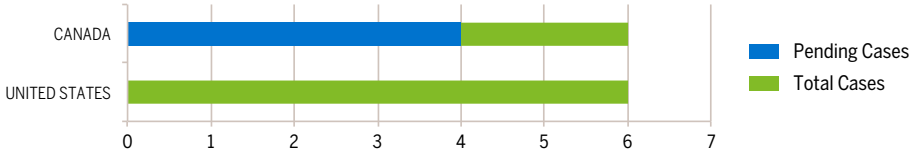
A total of 135 ICSID cases have involved Canada and the United States as either claimant investors, respondent States or both. The first arbitration brought by a North American investor was filed in 1974 by a U.S. investor against Jamaica in the oil, gas and mining sector. The first arbitration brought against a North American country was filed in 1998 by Canadian investors against the United States in the services and trade sector under NAFTA.

Claims against Canada and the United States have been made most frequently by investors from the countries themselves. All six claims made against Canada were filed by investors from the United States pursuant to NAFTA. Of the six claims, two were concluded and four were pending as of the end of 2015. The earliest claim was filed in December 2007 and the most recent in 2015.

Of the six claims made against the United States, five were commenced by Canadian investors and one by an investor from Equatorial Guinea. The arbitrations commenced by Canadian investors were all commenced under NAFTA, with the newest initiated in 2012. The remaining arbitration was commenced in 2012 under a contract and concerned an oil and gas enterprise. There were no arbitrations pending against the United States as of the end of 2015, with the last arbitration (involving the claimant from Equatorial Guinea) concluding in May 2015.

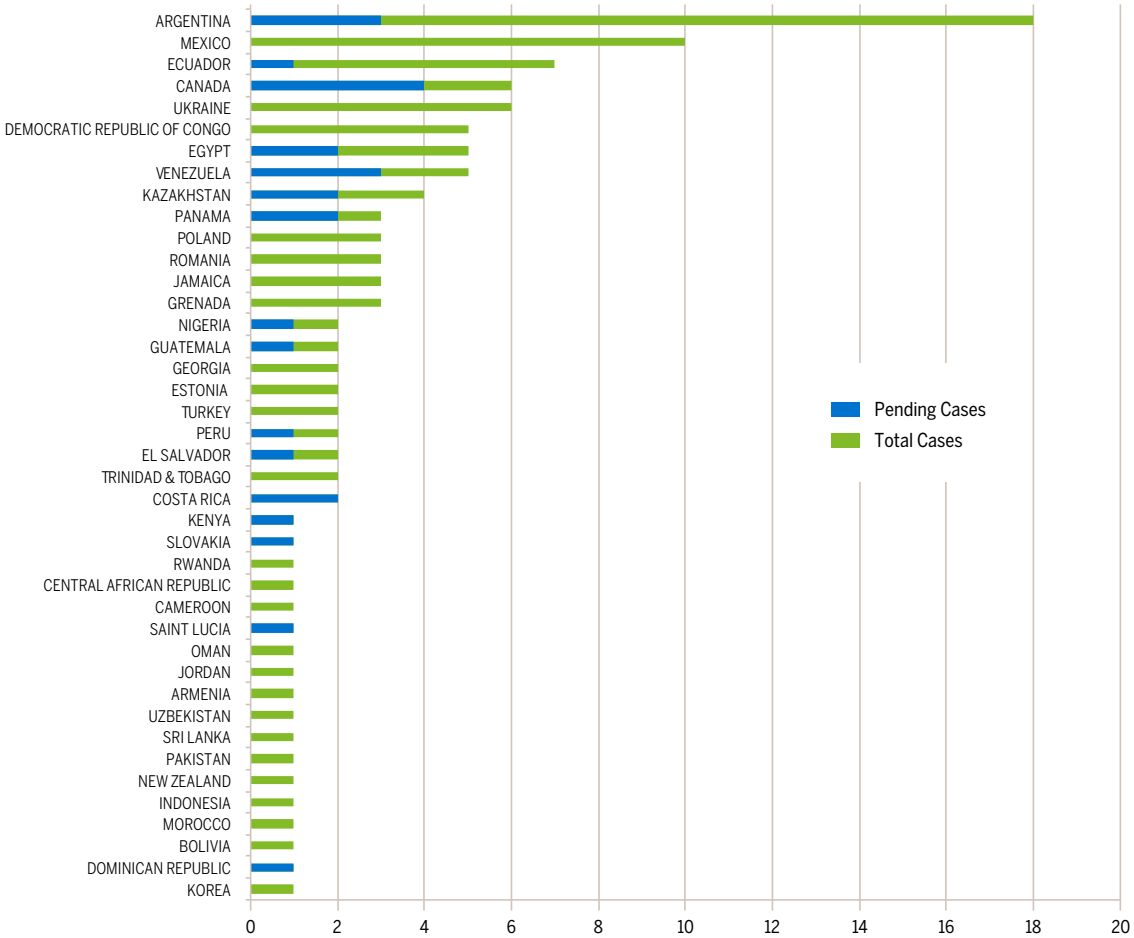
[1] This publication considers only investment arbitrations brought under the auspices of ICSID, which are the significant majority of investment treaty arbitrations in the region. Canada was not a party to the ICSID Convention until 2013 so its previous arbitrations (both as claimant and respondent) were conducted under the auspices of the ICSID Additional Facility.

Arbitrations Brought Against North American Countries



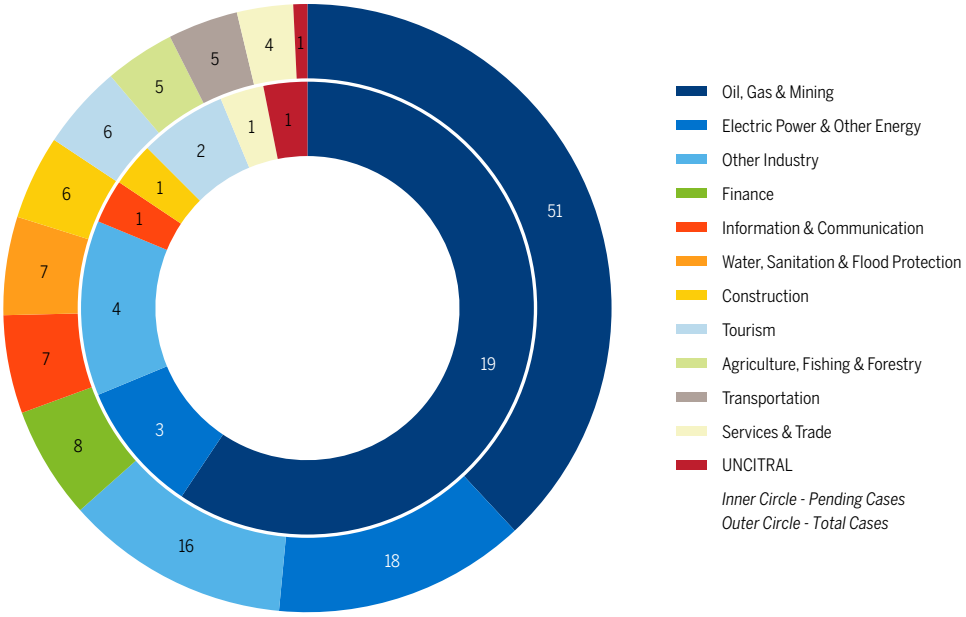
The United States is the home State of the overwhelming majority of claimants from the region that have initiated ICSID arbitrations. U.S. claimants have accounted for 117 arbitrations out of a total of 557 arbitrations commenced at ICSID since 1972 – approximately 21 percent. The countries that have faced the most cases brought by U.S. investors are Argentina (18), Mexico (10), and Ecuador (7). U.S. investors have brought claims in every region of the world, with most claims brought against Latin American countries – approximately 50 percent.

Countries Facing Claims from U.S. Investors



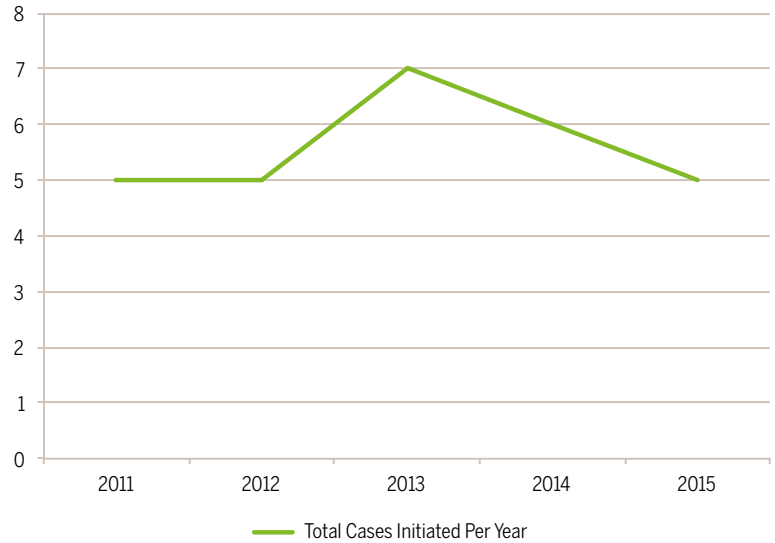
Investment disputes in the region have arisen most frequently in the oil, gas and mining industry, which has generated approximately 38 percent of the arbitrations involving Canada or the United States overall. Of the disputes pending in 2015, approximately 67 percent involved this industry.

Investment Cases by Industry



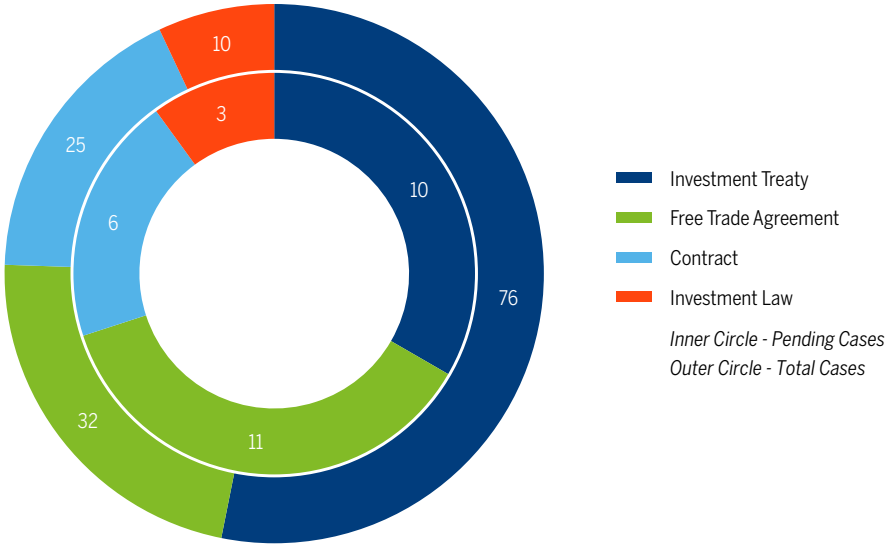
The number of investment arbitrations initiated annually against North American countries over the past five years has remained steady, with between five and seven arbitrations being registered each year.

Total Cases Initiated Per Year



The basis for arbitral jurisdiction in most cases involving a North American party has been an investment treaty (typically a bilateral investment treaty), although claims brought under regional free trade agreements – NAFTA and CAFTA – have constituted a significant proportion of cases since these agreements entered into force in 1994 and the mid to late 2000s[2] respectively.

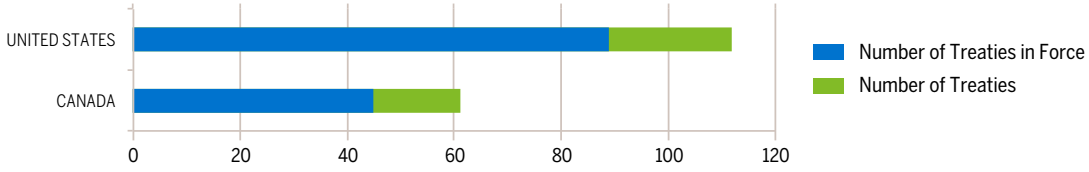
Instrument Invoked to Establish ICSID Jurisdiction



Of the 100 concluded arbitrations in the region, 17 cases have involved further proceedings seeking to annul the arbitral award. Applications for annulment were partially successful in two cases and rejected in nine cases, and six were discontinued. Of the 35 pending arbitrations in the region, five annulment applications remained pending as of the end of 2015, all involving U.S. claimants.

Investment Treaties Involving Canada and the United States

Canada and the United States have been prolific in concluding investment treaties with a total of 173 treaties signed – 61 by Canada and 112 by the United States. For each of these countries, the majority of treaties are in force.



Of the 173 investment treaties, three were signed in 2015, with Canada concluding two treaties with Guinea and Burkina Faso and the United States concluding a treaty with Armenia.

[2] CAFTA entered into force at different times for different countries. For example, CAFTA entered into force for El Salvador, Honduras, Nicaragua, and Guatemala in 2006; the Dominican Republic in 2007; and Costa Rica in 2009.

Other Developments in 2015

- The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, which was signed in September 2014, has not yet entered into force. The consolidated CETA text is currently undergoing legal-linguistic review before the approval and ratification processes may begin. CETA will ultimately replace the eight existing bilateral investment agreements between Canada and individual EU Member States.
- The United States and India have been negotiating a new bilateral investment treaty. The two countries concluded the U.S.-India Trade Policy Form in October 2015 with India sharing a draft of its model bilateral investment treaty with a view to speeding up the negotiating process as it continues into 2016.
- The United States also continued negotiations to conclude a separate bilateral investment treaty with China. Although these negotiations have been somewhat overshadowed by the negotiation of the TPP (discussed above), a U.S.-China bilateral investment treaty could have a significant impact. The two economic powerhouses had bilateral trade flows totaling nearly $600 billion in 2015.
- On December 16, 2015, U.S. President Barack Obama appointed Bryan Cave Partner Pedro J. Martinez-Fraga as a member of the ICSID Panel of Conciliators. Mr. Martinez-Fraga will serve for a renewable term of six years. As a conciliator listed on the panel, he is available for selection to ICSID tribunals, conciliation commissions, and ad hoc committees.

Critical Times to Consult Counsel

INVESTORS:

- At the outset – when structuring an investment and negotiating project contracts
- As soon as difficulties arise – when facing operational, regulatory or other issues in the host country
- In discussions with the host country – when trying to resolve difficulties amicably
- Before commencing a claim – when deciding whether and how to make a claim against the host country
- In post-award proceedings – when seeking to collect on an award or reach a settlement with the host country
- In getting the business relationship back on track – when moving forward in the wake of a dispute

STATES:

- At the outset – when negotiating and drafting investment treaties and national investment laws
- In the pre-investment process – when inviting and accepting foreign investment
- In the investment phase – when negotiating project contracts
- As soon as notice of a dispute is given – when consulting with an investor about a potential investment arbitration claim
- Upon receipt of a claim – when formulating an arbitral strategy in the initial stages of a dispute
- In implementing or challenging an award – when considering next steps after the arbitration concludes

About Our Team

Bryan Cave's **International Arbitration Team** provides a comprehensive service to clients around the world embracing all aspects of international dispute resolution. With offices in the most popular seats of arbitration, including London, Paris, Hong Kong, Singapore and New York, we handle a broad range of matters, including international commercial and investment arbitration, public international law and complex commercial litigation, for a wide variety of business, financial, institutional and individual clients, including publicly-held multinational corporations, large and mid-sized privately-held companies, partnerships and emerging enterprises. We also advise sovereign clients with regard to their particular complex legal, regulatory and commercial challenges.

Recognized by *Global Arbitration Review* in its GAR 100, our team features many practitioners who serve as both counsel and arbitrator and draws on the full range of subject-matter and industry experience across the firm, including in construction, energy, finance, manufacturing, mining and natural resources, pharmaceuticals, technology, telecommunications, tourism, transportation and many other sectors. Combining the common law and civil law traditions, members of our team are admitted to practice in many jurisdictions across the globe and speak a variety of languages. In addition, we work with an established network of local counsel in places where we do not have a direct presence, ensuring our strong market knowledge and quality of service on matters worldwide.

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