

International Investment Arbitration in North America: Year in Review 2016

INTERNATIONAL ARBITRATION TEAM

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 initially slow growth in 2016 but recovered by the end of the year. Canada's economy had a rocky start to 2016, with a GDP growth rate of only 1.3% by the second quarter. Commentators suspect the slow growth was caused largely by the forest fires in Alberta that lowered oil output and exports. The growth rate rebounded in the third quarter, rising to 3.5% with oil production normalizing. Economists predict continued growth in 2017 and 2018 with a rise in non-energy exports.

In the United States, the GDP growth rate was at 1.9% by the end of 2016, half a percentage point lower the growth rate of 2.4% in 2015. The highest rate of growth in 2016 occurred in the third quarter (3.5%), rapidly increasing from a shaky first quarter (0.8%) and rising second quarter (1.4%). The dip from 3.5% to 1.9% in the fourth quarter was caused in part by growing imports, lower exports, and lower oil prices resulting in diminished energy production and development. The United States also experienced an 11% growth in flow of foreign direct investment. Growth expectations are tempered for 2017, with commentators challenging the feasibility of President Donald J. Trump's prediction that the growth rate will rise to 4%. However, economists remain optimistic that the growth rate will rise to the mid to high 2% range in the second half of 2017 and 2018.

The number of new ICSID arbitrations in North America in 2016 increased from previous years. While the period from 2012-2015 saw approximately five to seven new arbitrations being initiated each year, 11 arbitrations were registered in 2016 that involved North American countries as either claimants or respondents. Although the extractive industries have traditionally been the dominant sector for arbitrations involving Canada and the United States, other industries also see multiple pending disputes. Five oil, gas and mining arbitrations were initiated in 2016, and one each in the agriculture, fishing and forestry, construction, information and communication, cotton processing and trading, gaming, and tire and rubber products sectors. Eight arbitrations were concluded in 2016—two brought by Canadian claimants and six brought by United States claimants. Five concluded cases were in the oil, gas and mining sector and one each in the tourism, services & trade, electric power & other energy.

For questions about international investment arbitration, please contact a member of our International Arbitration Team, or the authors of this review:

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Canada and the United States have entered into at least 178 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions). In 2016, the United States signed only one treaty—the Trans-Pacific Partnership (TPP)—while Canada concluded bilateral investment treaties with Mongolia, the European Union and China/Hong Kong, in addition to signing the TPP.

The election of President Trump presents a challenge for the proliferation of investment and free trade treaties involving the United States in 2017 and beyond. Following the signing of the TPP in early 2016, President Trump formally withdrew the United States from the treaty on January 23, 2017, in one of the first executive orders of his presidency. President Trump also announced that he intends to renegotiate the North American Free Trade Agreement (NAFTA).

For purposes of this review, North America is comprised 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 the Year in Review on Latin America.

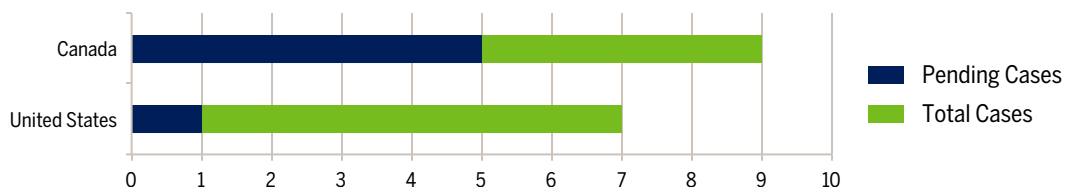
Investment Arbitration in the Region¹

A total of 147 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 1972 by a U.S. investor against Morocco in the tourism 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. Eight of the nine claims made against Canada were filed by investors from the United States pursuant to NAFTA. The other claim was made by an Egyptian investor in June 2016 pursuant to the Canada-Egypt BIT and in the Information & Communication sector. Of the total nine claims against Canada, four were concluded and five were pending as of the end of 2016. The earliest claim was filed in April 2000 and the most recent, as noted above, in June 2016.

Of the seven claims made against the United States, six 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 July 2016. The remaining arbitration was commenced in 2012 under a contract and concerned an oil and gas enterprise. There is one arbitration pending against the United States as of the end of 2016.

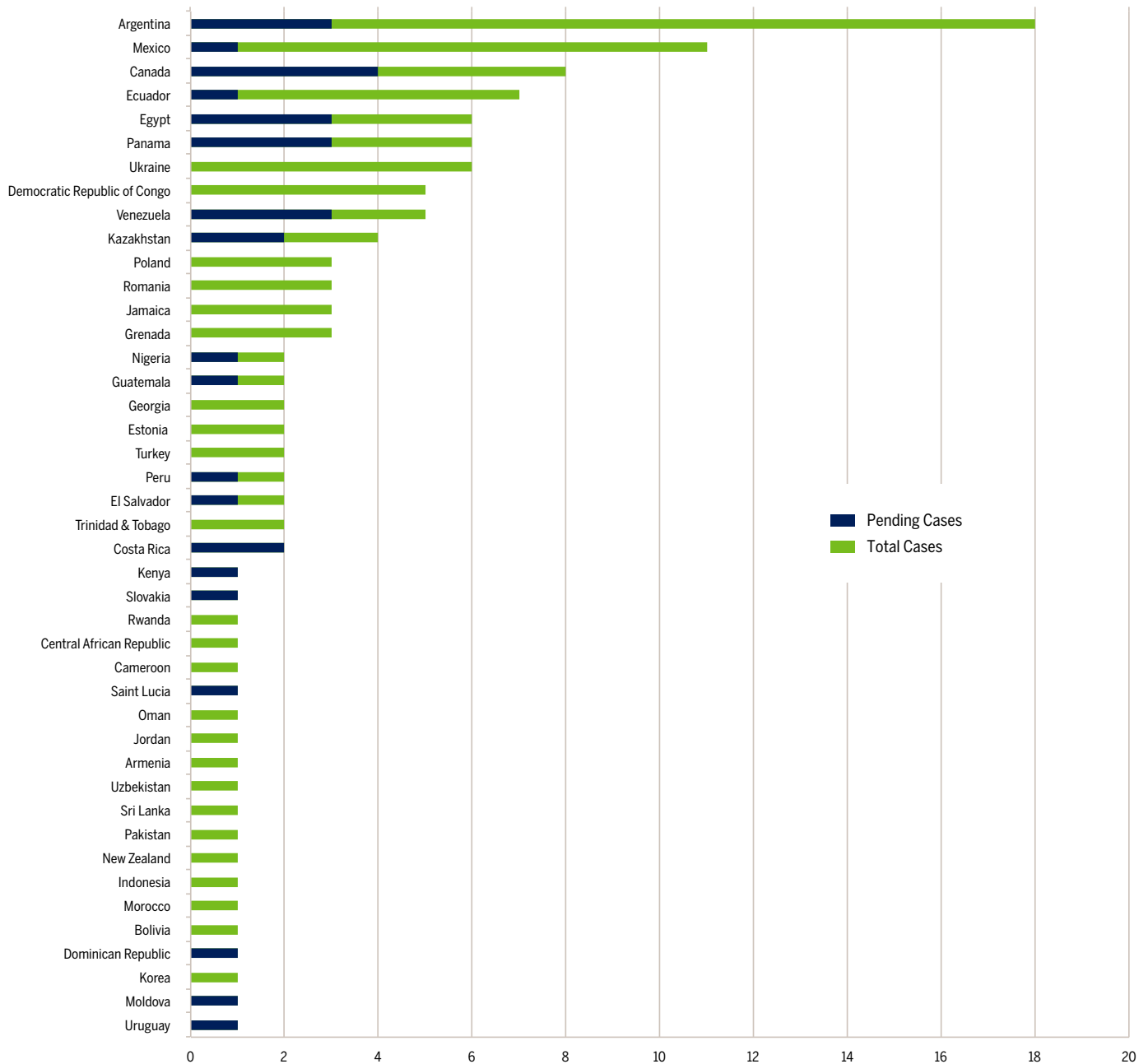
Arbitrations Brought Against North American Countries



¹ This publication considers only investment arbitrations brought under the auspices of ICSID, which are the majority of investment treaty arbitrations. Canada was not a party to the ICSID Convention until 2013 so previous arbitrations involving Canada (both as the home State of investor claimants and as the respondent host State) were conducted under the auspices of the ICSID Additional Facility.

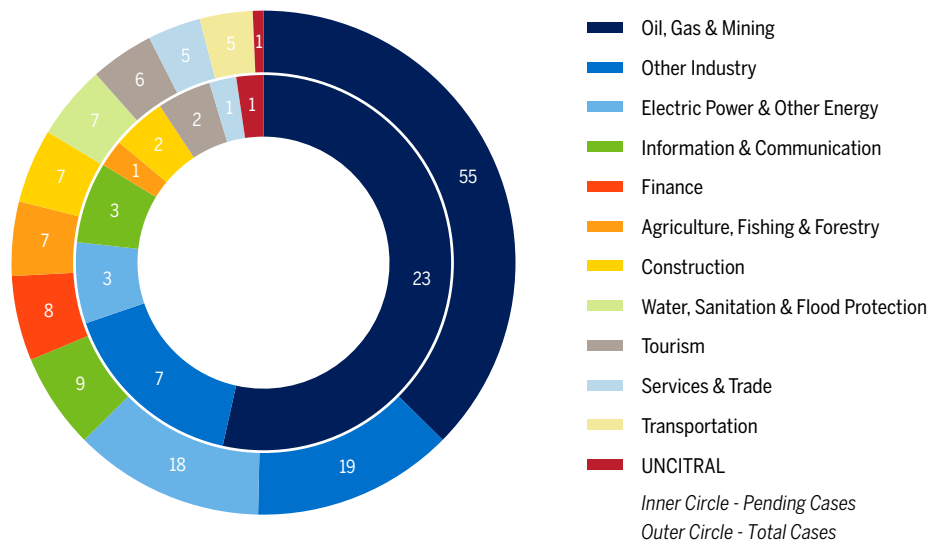
The United States is the home State of the overwhelming majority of claimants from the region that have initiated ICSID arbitrations. U.S. claimants have accounted for 126 arbitrations out of a total of 607 arbitrations commenced at ICSID between 1972 and 2016—approximately 21%. The countries that have faced the most cases brought by U.S. investors are Argentina (18), Mexico (11), and Ecuador (7). U.S. investors have brought claims in every region of the world, with most claims brought against Latin American countries (64)—approximately 51%.

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 37% of the ICSID arbitrations involving Canada or the United States overall. Of the disputes pending in 2016, more than half (55%) involved this industry.

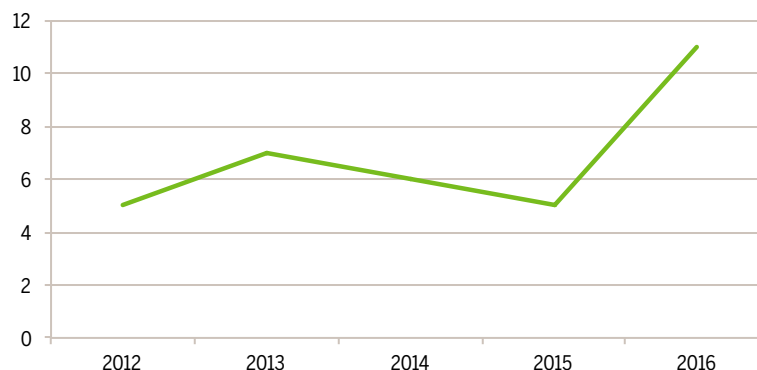
Investment Cases by Industry



The number of investment arbitrations initiated annually by North American claimants has remained steady from 2012-2016, with between five to seven arbitrations being registered each year. There was uptick in 2016, with ten arbitrations commenced by claimants from either Canada or the United States.

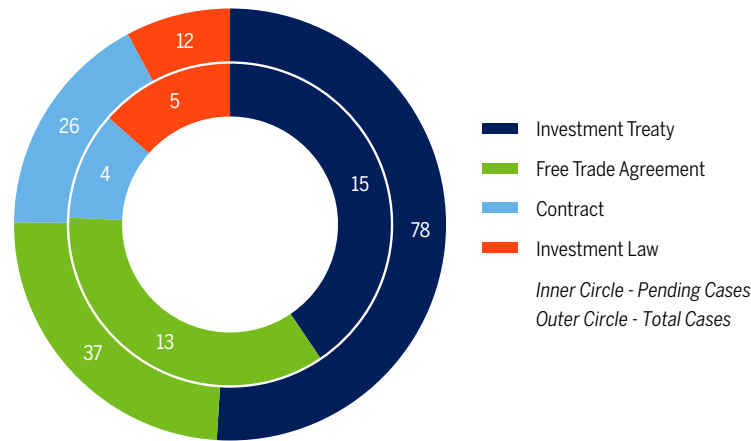
The number of investment arbitrations initiated annually against North American countries has remained low from 2012-2016, with between one and three arbitrations being registered each year, and none in 2014. In 2016, only two arbitrations were commenced—one each against Canada and the United States.

Total Cases Initiated Per Year



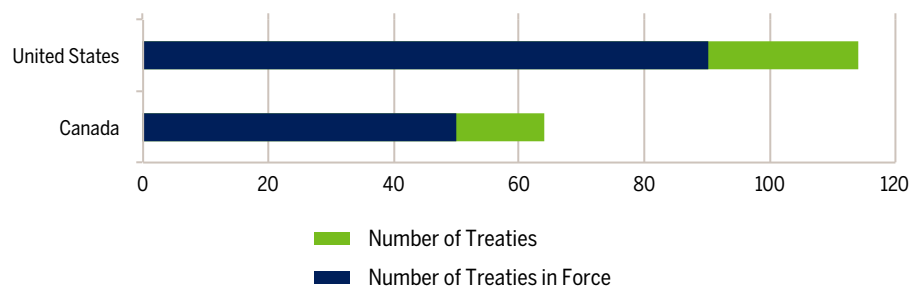
The basis for arbitral jurisdiction in most cases involving a North American party has been an investment treaty (typically a bilateral investment treaty), although claims brought under regional free trade agreements—NAFTA and CAFTA—have constituted a significant proportion of cases since these agreements entered into force in 1994 and the mid to late 2000s² respectively.

Instrument Invoked to Establish ICSID Jurisdiction



Of the 111 concluded arbitrations in the region, 19 cases have involved further proceedings seeking to annul the arbitral award. Applications for annulment were partially successful in four cases, rejected in nine cases, and discontinued in six. Five annulment applications remained pending as of the end of 2016, 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 178 treaties signed—64 by Canada and 114 by the United States. For each of these countries, the majority of treaties are in force.

Of the 178 investment treaties, four were signed in 2016, with Canada concluding three investment treaties with China/Hong Kong, Mongolia, and the European Union, and both Canada and the United States signing the TPP in February 2016.

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 2016

- On October 30, 2016, Canada and the European Union signed the Comprehensive Economic and Trade Agreement (CETA). CETA will ultimately replace the eight existing bilateral investment agreements between Canada and individual EU Member States. On February 15, 2017, the European Parliament voted in favor of CETA. CETA now awaits the approval of all European Union Member State parliaments in order to enter into force.
- On February 4, 2016, Canada and the United States signed the long-awaited TPP, a free trade agreement with Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam whose negotiation first commenced in 2008. The TPP aimed to strengthen trade relations in the Pacific Rim, promote job growth, increase capital benefits, and standardize treatment of labor, environmental, and intellectual property. However, President Trump formally withdrew the United States from the TPP on January 23, 2017, in one of the first executive orders of his presidency.

Following President Trump’s withdrawal of the United States from the TPP, this long-awaited free trade agreement remains in limbo in 2017. The TPP was slated to undergo a two-year ratification period following its signing in February 2016 in which at least six countries that account for 85% of the

combined gross domestic production of the 12 TPP nations must approve the final text for the treaty enter into force. Given their size, both the United States and Japan would have needed to ratify the treaty in order for it to enter into force. Thus, President Trump’s withdrawal extinguishes hopes of increase in investment arbitration among the prospective TPP countries under a revamped arbitration system with greater transparency, compliance with environmental goals, and arbitrator conduct.

- The prospect of the United States entering into further investment treaties and free trade agreements is uncertain under the new U.S. administration. Despite continued negotiating efforts in 2016 under the previous administration, the United States did not conclude bilateral investment treaties with India and China. It seems doubtful that either of these bilateral investment treaties will be inked during President Trump’s term in office.
- On November 14, 2016, ICSID announced an initiative to revise its rules and regulations. The goal of the revisions is to streamline procedures in order to decrease time and cost expenditures. The last revisions to the rules and regulations occurred in 2006.

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

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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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