GAR INVESTMENT TREATY ARBITRATION

# Canada

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# Overview of investment treaty programme

## 1 What are the key features of the investment treaties to which this country is a party?

| BIT Contracting party or MIT[i] | Substantive protections | | | | | Procedural rights | | |
|---|---|---|---|---|---|---|---|---|
| | Fair and Equitable Treatment (FET) | Expropriation | Protection and security | Most-favoured-nation (MFN) | Umbrella clause | Cooling-off period[ii] | Local courts[iii] | Arbitration |
| Argentina (29 April 1993) | Yes | Yes | Yes | Yes | No | 18-month domestic litigation requirement[iv] | unrestricted | Yes |
| Armenia (29 March 1999) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Barbados (17 January 1997) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Benin (12 May 2014) | Yes | Yes | Yes | Yes | No | 90 days | limited | Yes |
| Burkina Faso (11 October 2017) | Yes | Yes | Yes | Yes | No | 180 days | limited except declaratory relief | Yes |
| Cameroon (16 December 2016) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| China (01 October 2014) | Yes | Yes | Yes | Yes | No | idiosyncratic[v] | limited[vi] | Yes |
| Costa Rica (29 September 1999)[vii] | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Côte D'Ivoire (14 December 2015) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Croatia (30 January 2001) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Czech Republic (22 January 2012) | Yes | Yes | Yes | Yes | No | 6 months | limited except declaratory relief | Yes |
| Ecuador (06 June 1997)[viii] | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Egypt (03 November 1997) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Guinea (27 March 2017) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Honduras FTA (1 October 2014) | Yes | Yes | Yes | Yes | No | 6 months | limited except declaratory relief | Yes |
| Hong Kong (6 September 2016) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Hungary (21 November 1993) | Yes | Yes | Yes | Yes | No | 6 months | unrestricted | Yes[ix] |
| Jordan (14 December 2009)[x] | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Kosovo (19 December 2018) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Kuwait (19 February 2014) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Latvia (24 November 2011) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| LebaNon (19 June 1999) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |

| BIT Contracting party or MIT[i] | Substantive protections | | | | | Procedural rights | | |
|---|---|---|---|---|---|---|---|---|
| | Fair and Equitable Treatment (FET) | Expropriation | Protection and security | Most-favoured-nation (MFN) | Umbrella clause | Cooling-off period[ii] | Local courts[iii] | Arbitration |
| Mali (8 June 2016) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Moldova (23 August 2019) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Mongolia (24 February 2017) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Nigeria (signed, Not in force) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Panama (13 February 1998) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Philippines (13 November 1996) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Poland (22 November 1990) | Yes | Yes | Yes | Yes | No | 6 months | unrestricted | Yes |
| Romania (23 November 2011 | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Russia (27 June 1991) [xi] | Yes | Yes | Yes | Yes | No | 6 months | unrestricted | Yes |
| Senegal (5 August 2016) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Republic of Serbia (27 April 2015) | Yes | Yes | Yes | Yes | No | 90 days | limited except declaratory relief | Yes |
| Slovak Republic (14 March 2012) | Yes | Yes | Yes | Yes | No | 6 months | limited except declaratory relief | Yes |
| Tanzania (9 December 2013) | Yes | Yes | Yes | Yes | No | 180 days | limited except declaratory relief | Yes |
| Thailand (24 September 1998) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Trinidad & Tobago (08 July 1996) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Ukraine (24 July 1995) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Uruguay (2 June 1999) | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |
| Venezuela (28 January 1998 | Yes | Yes | Yes | Yes | No | 6 months | limited | Yes |

| FTAs | Substantive protections | | | | | Procedural rights | | |
|---|---|---|---|---|---|---|---|---|
| | Fair and Equitable Treatment (FET) | Expropriation | Protection and security | Most-favoured-nation (MFN) | Umbrella clause | Cooling-off period | Local courts | Arbitration |
| Canada–United States–Mexico Agreement (1 July 2020) (superseded NAFTA) | Yes | Yes | Yes | Yes | No | 90 days | Limited except declaratory relief | Only as between the United States and Mexico |
| European Union Comprehensive Economic and Trade Agreement (21 September 2017) (provisional effect but investment protection provisions suspended) | Yes | Yes | Yes | Yes | No | 180 days | Limited | Yes |

| FTAs | Substantive protections | | | | | Procedural rights | | |
|---|---|---|---|---|---|---|---|---|
| | Fair and Equitable Treatment (FET) | Expropriation | Protection and security | Most-favoured-nation (MFN) | Umbrella clause | Cooling-off period | Local courts | Arbitration |
| UK (1 April 2021) (rolls over most of CETA – provisional effect but investment protection provisions suspended) | Yes | Yes | Yes | Yes | No | 180 days | Limited | Yes |
| Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (30 December 2018) | Yes | Yes | Yes | Yes | No (provisions on submission of a claim to arbitration in relation to an investment authorization or investment agreement are suspended) | 6 months | Limited except declaratory relief | Yes |
| Trans-Pacific Partnership (Signed, Not in force) | Yes | Yes | Yes | Yes | No | 6 months | Limited except declaratory relief | Yes |
| Chile FTA (5 July 1997) (Amended 5 Feb 2019) | Yes | Yes | Yes | Yes | No | 180 days | Limited except declaratory relief | Yes |
| Colombia FTA (15 August 2011) | Yes | Yes | Yes | Yes | No | 6 months | Limited except declaratory relief | Yes |
| Korea FTA (1 January 2015) | Yes | Yes | Yes | Yes | No | 90 days | Limited except declaratory relief | Yes |
| Panama FTA (1 April 2013) | Yes | Yes | Yes | Yes | No | 90 days | Limited except declaratory relief | Yes |
| Peru FTA (1 August 2009) | Yes | Yes | Yes | Yes | No | 6 months | Limited except declaratory relief | Yes |

[i] The majority of Canada's bilateral investment treaties (BITs) are known as Foreign Investment Promotion and Protection Agreements (FIPAs). Canada is also party to a number of free trade agreements (FTAs) that include investment protections and provide for investor-state dispute settlement, including the North American Free Trade Agreement (CUSMA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). However, while most of the CETA is provisionally in effect, its investment protection and investor-state dispute settlement provisions are not. In addition to the treaties listed on its website as being in force or signed (but not yet in force), Canada has concluded negotiations of FIPAs with Albania, Bahrain, Madagascar, Moldova, the United Arab Emirates and Zambia. It is also engaged in ongoing FIPA and FTA negotiations, some of which are more active than others, with a variety of countries.

A current list of Canada's treaties in force, signed, or for which negotiations are concluded or ongoing negotiation is available at: Government of Canada – Trade and Investment Agreements.

Certain treaties, such as the Canada – Israel Free Trade Agreement (CIFTA) and the Canada–European Free Trade Association (EFTA) FTA, do not contain investment protection provisions and are not included in the table.

[ii] A cooling-off period is one that requires the parties to negotiate for a period of time prior to submitting their dispute to arbitration or litigation. An example is the Luxembourg–Egypt BIT, article 9(2) of which states that 'should there be no amicable settlement by direct arrangement between the parties to the dispute or through conciliation by diplomatic means during the six (6) months from the notification thereof, the dispute shall be subject, at the request of one or other of the parties to the dispute, to arbitration…'. In the column designated for cooling-off period in this table, please indicate simply 'none' or the length of the cooling-off period (eg 6 months in the case of the Luxembourg-Egypt BIT).

Canada's second-generation treaties typically provide for a waiting period of six months from the date the dispute was first initiated. Canada's FTAs and more recent FIPAs typically provide a notice period of 90 days (four months in the case of China) plus a requirement for the passage of six months from the occurrence of the events giving rise to the claim before it can be submitted to arbitration. The 'cooling-off period' shown here is the prescribed waiting period following the initiation of a dispute or giving notice of intent to submit a claim to arbitration, as the case may be, but practitioners should be mindful of other conditions precedent to submission of a claim.

[iii] Canada's earliest treaties contain no restrictions on access to the local courts of the host state and are thus shown as 'Unrestricted'. Canada's second generation of treaties typically provide that 'An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: […] (b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind'. An analogous requirement usually exists for cases where the claim is brought on behalf of an enterprise owned or controlled by the claimant investor that is incorporated under the law of the respondent state. These treaties are shown as 'Limited'. Most of Canada's recent treaties contain a similar provision but permit

the claimant investor to initiate or continue proceedings for 'injunctive, declaratory or other extraordinary relief, not involving the payment of damages'. These are shown as 'Limited except for declaratory relief'.

[v] The Canada-China FIPA contains a detailed set of requirements for initiating arbitration. Among these requirements is a 30-day cooling-off period for consultation after the delivery of a notice of intent to commence arbitration. However, this is only one of several procedural prerequisites to filing an arbitration claim, with others set out in article 21 of the FIPA.

[vi] Article 21(2)(e) of the treaty requires the claimant investor to waive its right to initiate or continue dispute settlement proceedings under any agreement between a third state and the respondent host state in relation to the measure(s) at issue. Annex C. 21(2) provides that 'An investor who has initiated proceedings before any court of China with respect to the measure of China alleged to be a breach of an obligation under Part B may only submit a claim to arbitration under Article 20 if the investor has withdrawn the case from the national court before judgment has been made on the dispute. This requirement does not apply to the domestic administrative reconsideration procedure referred to in paragraph 1'.

[vii] Canada and Costa Rica are also parties to an FTA of 1 November 2002, which refers to the earlier FIPA with respect to investment protection. There were discussions in an effort to broaden and modernise the FTA with Costa Rica. However, Global Affairs Canada's website no longer includes Costa Rica as a party to any ongoing or exploratory negotiations. Therefore, it is unclear if the modernisation of the FTA will come to fruition

[viii] On 19 May 2017, Canada received a notice by the government of Ecuador terminating the Canada-Ecuador FIPA.

[ix] Article IX(2) of the treaty provides: 'Any dispute that may arise under this Agreement between one Contracting Party and an investor of the other Contracting Party, other than a dispute mentioned in paragraph (1) of this Article [i.e., expropriation], shall, to the extent possible, be settled amicably. If the dispute has not been settled amicably within a period of six months from the date on which the dispute was initiated, it shall be submitted to arbitration in accordance with paragraph (3) of this article, upon agreement between that contracting party and the investor.'

[x] The Canada–Jordan FTA was brought into force on 1 October 2012, but contains no investment chapter.

[xi] Further to the dissolution of the USSR in 1991, the treaty now binds Russia as the continuing state.

## Qualifying criteria - any unique or distinguishing features?

### 2 What are the distinguishing features of the definition of "investor" in this country's investment treaties?

| Issue | Distinguishing features in relation to the definition of 'investor' |
|---|---|
| Dual citizenship | Treatment of dual citizenship varies. The latest Model BIT relies on effective and dominant citizenship to invoke the BIT, as do several newer treaties (eg, Peru, Senegal, Serbia). Permanent residence is also subordinated to citizenship (2021 Model BIT, Korea, Honduras, Ivory Coast).<br>Other treaties have no mention of dual citizenship (eg, Argentina, Czech Republic, Hungary and Chile). Yet others exclude dual nationals. Investors of these states cannot hold Canadian citizenship (eg, Armenia, Ecuador, Latvia, Panama, the Philippines, Thailand and Ukraine). For others, a mutual exclusion applies so that an investor cannot possess the citizenship of the other state (eg, Barbados, China and Costa Rica).<br>Finally, the Lebanon treaty considers dual citizens as Canadian citizens in Canada and Lebanese citizens in Lebanon. |

### 3 What are the distinguishing features of the definition of "investment" in this country's investment treaties?

| Issue | Distinguishing features in relation to the concept of 'investment' |
|---|---|
| Direct or indirect investment | All of Canada's investment treaties define an 'investment' with some variations, such as describing what constitutes a qualifying indirect investment (eg, '...any kind of asset owned or controlled either directly, or indirectly...') |
| Indirect control of assets/enterprises | In general, most if not all Canadian treaties apply to investments controlled indirectly by an investor of a contracting state.<br>Certain treaties expressly address this issue. In some treaties, an investment is covered if an investor controls the enterprise that owns the investment (eg, CETA and CUSMA, Benin, Ivory Coast, Croatia and Hong Kong).<br>In other treaties, investments made through an investor of a third state are also expressly covered (eg, China, Peru, Slovak Republic and Poland). |
| Eligible assets | Many treaties have a non-exhaustive list of eligible assets that count as investments (eg, Barbados – includes movable and immovable property and any related property rights, such as mortgages, liens or pledges). |

| Issue | Distinguishing features in relation to the concept of 'investment' |
|---|---|
| Specified inclusions and peculiarities | Some Canadian treaties contain more unique provisions relating to qualifying investments, including:<br>• investments related to financial institutions (eg, Peru);<br>• investments relating to a loan to an enterprise (eg, CETA, China, Kosovo, Mongolia and Jordan);<br>• loan or debt security issued by a financial institution that is treated as regulatory capital by the party in whose territory the financial institution is located, (eg, Kosovo, Mali, Moldova, Nigeria, Senegal and CPTPP);<br>• Investments as loans directly related to a specific investment (eg, Argentina);<br>• investments that have changed in form requiring local approval (eg, Thailand); and<br>• investments relating to intellectual property rights specifically listed in the treaties (eg, Argentina, Benin, CETA, Chile, Hungary, Moldova, Mongolia, Peru, Russia, Tanzania and CPTPP). |

## Substantive protections - any unique or distinguishing features?

### 4 What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties?

| Issue | Distinguishing features of the fair and equitable treatment standard |
|---|---|
| Principles of international law | Several of Canada's treaties differ with respect to the application of the principles of international law in determining the scope of the FET standard, including:<br>• no reference to principles of international law at all in the treaty with Hungary;<br>• no stated requirement that FET treatment be 'in accordance with principles of international law' in the treaties with the Czech Republic, CETA, Peru, Romania, Slovak Republic, Colombia, Chile and Panama; and<br>• FET standard treatment limited to that required by the customary international law minimum standard of treatment of aliens in the treaties with the Benin, Chile, Czech Republic, Jordan, Kosovo, Kuwait, Latvia, Moldova, Peru, Romania, Slovak Republic, Tanzania, Chile, Colombia, Mongolia, NAFTA, Cameroon, Korea, Serbia, Honduras, Burkina Faso, China, Ivory Coast, Guinea, Hong Kong, Mali, Nigeria, Serbia, Senegal and CUSMA and CPTPP. Specific content of the minimum standard may be subject to debate. |
| Due process | FET includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process in the treaty with Chile, Colombia, CETA, CUSMA, CPTPP and Korea. |
| Constrained Standard | Contrary to the common wording of many Freedom of Information and Protection of Privacy Act (FIPPAs), the CETA contains a list of six grounds that would constitute a breach of the obligation of FET:<br>'(a) denial of justice in criminal, civil or administrative proceedings;<br>(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;<br>(c) manifest arbitrariness;<br>(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;<br>(e) abusive treatment of investors, such as coercion, duress and harassment; or<br>(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of [article 8.10].' |

### 5 What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

| Issue | Distinguishing features of the 'expropriation' standard |
|---|---|
| Compensation for expropriation | Canada's treaties use different language with respect to the calculation of compensation for expropriation, including: fair market value (FMV), market value and genuine value.<br>Treaties with China, Philippines, Thailand, Korea, CUSMA and CPTPP use FMV; treaties with Hungary use market value; and treaties with Argentina, Armenia, Ecuador, and more use genuine value. |

| Issue | Distinguishing features of the 'expropriation' standard |
|---|---|
| Compensation payable (interest and applicable period) | Canada's treaties have varied approaches regarding interest as it applies to compensation owed for the expropriation of an investment. For example:<br>• Lebanon: the interest rate is equivalent to the rate paid by the government of the territory where expropriation took place in its general borrowing;<br>• The Philippines: there is no mention of the applicable interest rate until payment;<br>• Russia: the compensation shall be made within two months of the date of expropriation.<br>Other treaties have different approaches. |
| Indirect expropriation | Most of Canada's treaties cover 'indirect expropriation' by prohibiting measures tantamount to expropriation.<br>Certain treaties include an explicit reference to 'indirect expropriation', eg, CETA, CPTPP, CUSMA, Czech Republic, Hong Kong, Jordan, Kosovo, Peru, Romania and Tanzania. |
| Exceptions to expropriation | Certain Canadian treaties also include exceptions to expropriation, including:<br>• intellectual property rights related measures that are consistent with an international agreement to which both contracting parties are signatories are excluded in the treaty with China;<br>• intellectual property rights related measures that are consistent with World Trade Organization are excluded in the treaties with Benin, Jordan, Kosovo, Kuwait, Moldova, Peru, Tanzania, Chile, Colombia, Panama, NAFTA, Honduras, and Cameroon, Burkina Faso, Ivory Coast, Guinea, Hong Kong, Mali, Nigeria, Senegal and Serbia; and<br>• Issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement in the CUSMA and CPTPP. |
| Review by a judicial authority | In certain treaties (eg, Panama, Honduras, Cameroon, and Korea) a Canadian "judicial authority" is defined to include courts and "any other competent administrative or quasi-judicial authority".<br>Various treaties grant an affected investor the right to a prompt review by a judicial authority of the party making the expropriation (eg, Burkina Faso, China, Ivory Coast, Guinea, Kosovo, Mali, Nigeria and Senegal). |
| Taxation | Specific conditions for bringing expropriation claims for taxation measures are set out in certain treaties (eg, CUSMA, CPTPP, CETA, Burkina Faso, China, Hong Kong, Kosovo, Mali, Moldova, Nigeria and Serbia).<br>Other, mostly older, BITs contain no separate taxation procedures (eg, Argentina, Chile, Czech Republic, Hungary, Poland, Russia and the Slovak Republic). |

## 6 What are the distinguishing features of the national treatment/most-favoured-nation treatment standard in this country's investment treaties?

| Issue | Distinguishing features of the "national treatment" and/or "most favoured nation" standard |
|---|---|
| Scope of MFN treatment | Generally, Canadian treaties limit the scope of MFN or national treatment to claims regarding the management, use, enjoyment or disposal of investments and returns, although the 2021 Model FIPA expands this to include establishment, acquisition and expansion. |
| Common exceptions to MFN and national treatment | Several Canadian treaties contain common exceptions to MFN treatment (including exceptions regarding sectors, such as aviation and/or telecommunications sectors, and exceptions with respect of treaties signed after a certain date).<br>See, eg, Armenia, Barbados, China, CETA, CUSMA, Ecuador, Egypt, Latvia, Panama, South Africa, Ukraine, Venezuela, Côte d'Ivoire, Guinea, Hong Kong, Mali, Nigeria and Senegal.<br>Given the breadth of application, these common exceptions are set out in detail with reference to the Armenia treaty, as follows:<br>• Excludes MFN treatment to any existing or future bilateral or multilateral agreement: (a) establishing, strengthening or expanding a free trade area or customs union; (b) negotiated within the framework of the GATT or its successor organisation and liberalising trade in services; or (c) relating to: (i) aviation; (ii) telecommunications transport networks and telecommunications transport services; (iii) fisheries; (iv) maritime matters, including salvage; or (v) financial services; and<br>• Excludes national treatment to (a)(i) any existing non-conforming measures maintained within the territory of a contracting party; and (ii) any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government's equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership of equity interests or assets or imposes nationality requirements relating to senior management or members of the board of directors; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); (c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with those obligations; (d) the right of each contracting party to make or maintain exceptions within the sectors or matters listed in the Annex to this Agreement.. |

| Issue | Distinguishing features of the "national treatment" and/or "most favoured nation" standard |
|---|---|
| Specified exceptions related only to MFN treatment | Certain Canadian treaties contain other specific exceptions from MFN treatment, including:<br>• importation of dispute resolution mechanisms in another treaty (*Maffezini*-type claims[1]) (eg, CETA, Cameroon, Chile, China and Peru);<br>• aviation, fisheries and maritime matters including salvage and any bilateral/multilateral agreement in force prior to 1 January 1994 (eg, Benin, Kuwait, Tanzania, Peru (FTA) and China);<br>• financial services (eg, Benin, Burkina Faso, Ivory Coast, Guinea and Mali);<br>• ownership of real estate by nationals of Arab States (eg, Lebanon);<br>• taxation (Thailand);<br>• current and future technical assistance and development aid programmes under any treaty (Mongolia);<br>• measures falling within article 5 of the TRIPS Agreement, or an exception to, or derogation from the National Treatment obligations or the obligations which are imposed by article 4 of TRIPS (CPTPP and CUSMA);<br>• existing or future treaties relating to road, rail and inland waterway transportation (eg Mali); and<br>• previously agreed bilateral or multilateral treaties, both in force or signed (eg, Burkina Faso, Ivory Coast, Guinea, Hong Kong, Mali, Nigeria, Senegal and Serbia). |
| Other specified MFN and national treatment exceptions | Certain Canadian treaties contain other specific exceptions to MFN and national treatment, including:<br>• agreements that (i) establish a free trade area or customs union; (ii) liberalise trade in services; (iii) for mutual economic assistance, integration or cooperation; or (iv) relate to taxation (eg Armenia, Argentina, Hungary, Poland, Romania, Russia and Cameroon);<br>• with respect to CETA, (i) procurement by a party of a good or service purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of a good or service for commercial sale, whether or not that procurement is "covered procurement" within the meaning of article 19.2 (Scope and coverage); or (ii) subsidies, or government support relating to trade in services, provided by a party;<br>• with respect to CPTPP, any treatment referred to does not encompass international dispute resolution procedures or mechanisms, such as those included Investor-State Dispute Settlement;<br>• with respect to CUSMA, any measure that is an exception to, or derogation from, the obligations under CUSMA article 14.12; any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex I or II of CUSMA;<br>• certain treaties and measures with specified third states (eg, in the treaty with China: measures in respect of investors or investments of investors of Peru);<br>• civil aviation, real property, customs brokers, customs clerks, gambling, betting and lotteries in the treaty with Trinidad and Tobago;<br>• Existing non-conforming measures (eg, Benin, Ivory Coast, Guinea, Hong Kong, Jordan, Kosovo, Moldova, Nigeria, Serbia and Tanzania)<br>• Procurements, grants and subsidies (eg, Benin, Cameroon, Chile, China, Hong Kong, Jordan, Kuwait and Peru);<br>• review decisions under the Investment Canada Act (eg, Benin, Chile, Kuwait, Tanzania, Honduras and Korea);<br>• the rights or preferences provided to aboriginal peoples (eg, Burkina Faso, Ivory Coast, Guinea, Hong Kong, Kosovo, Mali, Moldova, Nigeria, Senegal and Serbia);<br>• adopting or maintaining non-conforming measures with respect to: maritime cabotage; licensing fishing or fishing-related activities including entry of foreign fishing vessels to Canada's exclusive economic zone, territorial sea, internal waters or ports, and use of any services therein (eg Burkina Faso, Ivory Coast, Guinea, Hong Kong, Mali, Nigeria, Senegal and Serbia). |
| Specified exceptions related only to national treatment | Certain Canadian treaties contain other specific exceptions relating only to national treatment, including:<br>• adopting or maintaining non-conforming measures with respect to: the rights or preferences provided to socially or economically disadvantaged minorities, residency requirements for ownership of oceanfront land, government securities, telecommunications services and the establishment or acquisition in Canada of an investment in the services sector (eg Burkina Faso, Ivory Coast, Guinea, Hong Kong, Mali, Nigeria, Senegal and Serbia);<br>• acquisition of real estate situated within ten kilometres of the borders; retail trade; provision of postal and telegraphic services; fishing for domestic sale; and broadcasting (eg, Panama);<br>• atomic agency; air transportation; overseas and coastal shipping; telephone/telegraph services; submarine cable services (eg, Croatia);<br>• business in agriculture, commerce and service as well as building construction and business in industry and handicrafts (eg, Thailand);<br>• enterprises in industries including nuclear, maritime, air transport, state budget financed sectors, salt extraction, rare earths extraction, television or radio and land (eg, Ukraine); are<br>• with respect to CUSMA and CPTPP, national treatment does not apply to any measure that falls within an exception to, or derogation from, the obligations which are imposed by the relevant article on National Treatment (CUSMA article 20.8; CPTPP article 18.8) or article 3 of the TRIPS Agreement. |

| Issue | Distinguishing features of the "national treatment" and/or "most favoured nation" standard |
|---|---|
| Specified inclusions related to MFN and national treatment | Certain Canadian treaties contain specific inclusions for national and MFN treatment, including:<br>• in the treaty with Chile: the better of the treatment required under the Decree Law 600 of 1974 or the treaty;<br>• in the treaty with China: an expansion of national treatment only with respect to the expansion, management, conduct, operation and sale or other disposition of investment, not acquisition and new investment and only to sectors that do not require prior approval and subject to prescribed formalities and other information requirements. Intellectual property is included as long as it is consistent with international agreements to which both contracting states are parties. |

[1] See *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7 (Decision on Jurisdiction).

## 7 What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

| Issue | Distinguishing features of the 'protection and security' standard |
|---|---|
| Full protection and security | All of Canada's investment treaties feature 'full protection and security'. |

## 8 What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

| Issue | Distinguishing features of any 'umbrella clause' |
|---|---|
| Umbrella clauses specifically limited to particular uses | Canada's investment treaties do not contain umbrella clauses. However, certain Canadian treaties contain limited umbrella clauses in respect of taxation measures that breach an agreement with an investor, by way of exception to the general tax carve-out (eg, Cameroon and Ecuador). |

## 9 What are the other most important substantive rights provided to qualifying investors in this country?

| Issue | Other substantive protections |
|---|---|
| Compensation in case of armed conflict/civil unrest | All of Canada's treaties provide some measure of protection against armed conflict or civil unrest, and some include natural disasters, such as guaranteeing non-discriminatory treatment in respect of compensatory measures.<br>Examples of the types of events included in the scope of this protection include:<br>• 'revolution and civil strife' (eg, Argentina);<br>• 'armed conflict, state of emergency or natural disaster' (eg, CETA);<br>• 'civil disturbance' (eg, Czech Republic);<br>• 'war, state of national emergency, revolt, insurrection or riot' (eg, Tanzania); and<br>• 'armed conflict, revolution, revolt, insurrection, riot, civil strife, a state of national emergency or natural disaster' (eg, Hong Kong). |

## 10 Do this country's investment treaties exclude liability through carve-outs, non-precluded measures clauses, or denial of benefits clauses?

| Issue | Other substantive protections |
|---|---|
| Denial of benefits | Canada's newer FIPAs and FTAs include a denial of benefits clause that permits the disputing state to deny the application of the agreement to the investor if it is owned or controlled by an investor of a third State against whom the disputing party maintains sanctions or similar measures (eg, China). |
| Subject-matter exclusions | Most Canadian treaties include an exception for cultural industries, including publishing, newspapers, film, music, and radio. The exception applies either by exempting investments in a cultural industry (eg, Ecuador) or by providing that the treaty does not apply to measures relating to a cultural industry (eg, Cameroon).<br>Various treaties also include exclusions for environmental and other measures to protect human, animal or plant life or health (eg, China, Mali). |
| Reviews under the Investment Canada Act | As noted above, certain treaties exempt Investment Canada Act reviews from national treatment and/or MFN. Other treaties, however, exempt such review from dispute resolution entirely (eg, Burkina Faso, Cameroon, China). |

| Issue | Other substantive protections |
|---|---|
| Taxation measures | Most Canadian treaties include a limited carve-out for taxation measures. In many cases, this provides for a particular process to be followed before a claim relating to a tax measure can be brought under the treaty.<br>For example, in certain treaties a claim cannot be brought under the treaty unless the tax authorities of the contracting States fail to reach a determination in respect of the impugned measures within a specified time (usually six months) (eg, Ecuador).<br>Other treaties limit claims about taxation measures to particular forms of treatment, such as expropriation (eg, China, Ecuador), MFN and national treatment (eg, Burkina Faso, Mali), or to particular taxes (eg, Cameroon). |
| Restriction on arbitrable matters | Certain Canadian treaties contain restrictions on arbitrable matters. For example:<br>• claims brought by financial institutions are restricted in various ways in certain treaties (eg, Benin, China, Jordan, Kosovo, Hong Kong, Latvia, Mongolia, Nigeria, Peru, Senegal and Tanzania); and<br>• claims based on new business enterprise permit decisions or on acquisition (or share of) of an existing enterprise (eg, Costa Rica and Croatia). |

## Procedural rights in this country's investment treaties

### 11 Are there any relevant issues related to procedural rights in this country's investment treaties?

| Issue | Procedural Rights |
|---|---|
| Fork in the road and waiver of local remedies | Canada's treaties do not contain pure fork-in-the-road provisions. As noted in relation to the designations used in the Table at section I above, Canada's earliest treaties contain no restrictions on access to the local courts of the host state and are thus shown as 'Unrestricted'. Canada's second generation of treaties typically provide that:<br>'[a]n investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if: (b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind'.<br>An analogous requirement usually exists for cases where the claim is brought on behalf of an enterprise owned or controlled by the claimant investor that is incorporated under the law of the respondent state. These treaties are shown as 'Limited'. Most of Canada's recent treaties contain a similar provision but permit the claimant investor to initiate or continue proceedings for 'injunctive, declaratory or other extraordinary relief, not involving the payment of damages'. These are shown as 'Limited except for declaratory relief'. |
| Arbitrator appointment | Certain Canadian treaties explicitly specify the procedure for arbitrator appointment (eg, Benin, CETA, Chile, China, Ivory Coast, CPTPP, CUSMA, Hong Kong, Jordan, Kosovo, Peru). |
| Choice of forum | Most of Canada's investment treaties provide for ICSID (including Additional Facility) or UNCITRAL ad hoc arbitration, at the election of the disputing investor with some exceptions. Notably, certain treaties provide for other forums subject to agreement between the disputing or state parties (eg, Burkina Faso, Jordan, Kuwait, Peru). |
| Domestic requirement | The Costa Rica treaty provides that where Costa Rica is a respondent, there should be no prior judgment on the subject matter of the dispute rendered by a Costa Rican court.<br>Conditions precedent based on timing, notice and filing requirements exist in various other treaties, such as the treaties with Burkina Faso, Ivory Coast, Guinea, Hong Kong, Mali, Nigeria, Senegal and Serbia. |
| Notice periods | The majority of Canada's treaties require advance notice or consultations prior to the submission of a claim to arbitration. There are several variations of this requirement, the details of which are reflected in the table in question 1. |
| Mandatory commencement | The Argentina treaty is the only treaty that has a mandatory commencement provision that triggers three months after written notification is issued using the UNCITRAL Rules. |
| Restriction on the type and timing of award | Canada's treaties generally address the type and timing of awards. For example, awards are generally restricted to covering issues of liability, the quantum of monetary damages and restitution of property, and the time limit for rendering an award is generally three years; punitive damages, although generally not considered recoverable, are expressly prohibited in the treaties with Benin, Burkina Faso, CETA, China, Ivory Coast, Guinea, Hong Kong, Jordan, Kosovo, Kuwait, Mali, Moldova, Mongolia, Nigeria, Peru, Senegal, Serbia, Tanzania, Chile, Colombia, Panama, Honduras, Korea, CPTPP and Cameroon. |

### 12 What is the approach taken in this country's investment treaties to standing dispute resolution bodies, bilateral or multilateral?

The only treaty that makes provision for a standing dispute resolution body is the CETA, which provides for a permanent Tribunal intended to function like a court. The Tribunal will consist of 15 members, divided into three pools. Five members must be Canadian nationals, five EU nationals, and five third-state nationals. Members must hold the qualifications to be a judge or a "jurist of recognised competence".

Crucially, disputing parties will have no control over the members allocated to hear their case. Instead, the president of the Tribunal will allocate members to sit in a "division" of three, drawn from each of the three pools. The division will then hear the case. The CETA also makes provision for an Appellate Tribunal which may review awards, including based upon errors of law or "manifest errors" of fact, in addition to the grounds in article 52(1)(a) to (e) of the ICSID Convention.

### 13 What is the status of this country's investment treaties?

Canada continues to build its investment treaty network. The two most significant recent developments are the abandonment of Investor-State Dispute Settlement (ISDS) with the US and Mexico in the CUSMA, and the new 2021 Model FIPA.

The CUSMA entered into force on 1 July 2020, bringing an end to ISDS between Canada and the US or Mexico. Similarly, although the CETA took provisional effect in September 2017, the investment provisions (including the permanent Tribunal) were excluded from the provisional effect and remain suspended. The investment chapter of the CPTPP also remains suspended since entry into force on 30 December 2018.

The 2021 Model FIPA provides a basis for resuming a FIPA negotiation program and signals Canada's intention to resume bilateral treaty negotiation. Despite the abandonment of ISDS in the CUSMA, the Model FIPA does include detailed provisions for ISDS, including ICSID or UNCITRAL arbitration.

## Practicalities of commencing an investment treaty claim against this country

### 14 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

| | |
|---|---|
| Government entity to which claim notices are sent | Office of the Deputy Attorney General of Canada<br>Justice Building<br>284 Wellington Street<br>Ottawa, Ontario<br>K1A 0H8<br>Canada |

### 15 Which government department or departments manage investment treaty arbitrations on behalf of this country?

| Government department that manages investment treaty arbitrations | |
|---|---|
| Global Affairs Canada and the Department of Justice | The Government of Canada's Trade Law Bureau (JLT), a joint unit of Global Affairs Canada and the Department of Justice manage Canada's investment treaty arbitrations. |

### 16 Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

| | |
|---|---|
| Internal/External counsel | Internal counsel: Trade Law Bureau (JLT), Global Affairs Canada and Justice Canada.<br>External counsel are generally not used. |

## Practicalities of enforcing an investment treaty claim against this country

### 17 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

| | |
|---|---|
| Washington Convention implementing legislation | Canada signed the ICSID Convention on 15 December 2006. The Canadian federal government passed the Settlement of International Investment Disputes Act, S.C. 2008, c.8 to ratify the ICSID Convention in March 2008. On 1 November 2013, Canada ratified the Convention and it entered into force on 1 December 2013. Quebec is the only province that has not adopted specific implementing legislation. |

### 18 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

| | |
|---|---|
| New York Convention implementing legislation | The New York Convention came into force in Canada on 10 August 1986 (ratified 12 May 1986) via the United Nations Foreign Arbitral Awards Convention Act, R.S.C., 1985, c. 16 (2nd Supp.). Canada declared, however, that the Convention applies only to differences arising out of commercial legal relationships, whether contractual or not. Each province and territory has separately enacted legislation adopting the Convention except Quebec, although Quebec's Code of Civil Procedure 25.01 article 652 allows consideration of the New York Convention. |

### 19 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

| | |
|---|---|
| Legislation governing non ICSID arbitrations | Federally, article 5(4) of the Commercial Arbitration Act, R.S.C., 1985, c. 17 (2nd Supp.) provides that Canada interprets the expression 'commercial arbitration' in article 1(1) of the attached Commercial Arbitration Code (based on the UNCITRAL Model Law) to include investment dispute claims under certain of its Free Trade Agreements (Colombia, Chile and Peru). Each provincial or territorial jurisdiction, with the exception of Quebec (although Quebec's Code of Civil Procedure 25.01 article 649 allows consideration of the Model Law), has enacted legislation adopting the UNCITRAL Model Law (eg, British Columbia's International Commercial Arbitration Act, R.S.B.C. 1996, c. 55). In March 2014, the Uniform Law Conference of Canada (ULCC) finalised a new Uniform International Commercial Arbitration Act, which the Provinces have been asked to consider adopting. The ULCC adopted the act on 1 December 2016 as the Uniform Arbitration Act (2016). |

### 20 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

| | |
|---|---|
| Compliance with adverse awards | Generally, Canada is compliant. Canada unsuccessfully sought to set aside an adverse award made in favour of SD Myers Inc, pursuant to NAFTA Chapter 11 (Decision of the Federal Court rendered on 13 January 2004). On 2 May 2018, the Federal Court of Canada denied Canada's application for the set aside of the Tribunal's award in *Bilcon of Delaware et al v Government of Canada*, PCA Case No. 2009-04, issued on 17 March 2015. More recently, the Government of Canada unsuccessfully attempted to set aside the final award in this case in *Canada (Attorney General) v Clayton*, 2018 FC 436. |

### 21 Describe the national government's attitude towards investment treaty arbitration

| | |
|---|---|
| Attitude of government towards investment treaty arbitration | The government of Canada's current attitude toward investment arbitration can best be described as ambivalent. Canada agreed with the United States not to carry investment arbitration over from NAFTA to the CUSMA. Canada also agreed in the CETA with the European Union to replace traditional investment arbitration with a new model that features a standing "investment court" with an appellate body in place of ad hoc tribunals. Canada had suspended its negotiation for new investment treaties pending the finalisation of a new model FIPA, which was unveiled in 2021, and leaves traditional bilateral arbitration ISDS firmly in place. |

### 22 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

| | |
|---|---|
| Attitude of local courts towards investment treaty arbitration | Canadian courts generally recognise and enforce investment arbitration awards, including when the application for review is made by the government of Canada (*SD Myers Inc and Bilcon*). In reviewing applications to set aside investment arbitration awards, provincial courts generally rule according to the criteria set out in provincial legislation implementing the New York Convention and/or the UNCITRAL Model Law (see, eg, *Metalclad v Mexico,Bayview v Mexico, Cargill v Mexico* and *Feldman v Mexico*). For an example of enforcement see *Sistem v Kyrgyzstan*.<br>Canadian courts have similarly been slow to set aside awards, even where one or more of the grounds set out in the UNCITRAL Model Law are established (see *Popack v Lipszyc*). Multiple courts have confirmed rights to interim relief, including worldwide Mareva injunctions (*Sociedade de Fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Ltd*; *CE International Resources Holdings LLC v Yeap, SA Minerals Ltd Partnership and Tantalum Technology Inc*). |
| More recent attitudes of local courts towards investment treaty arbitration | More recently, large awards issued against states have been enforced in Ontario, including a C$1.2 billion award in favour of Crystallex International Corporation against Venezuela, although the application at the Superior Court level was unopposed by Venezuela. See also, *SA Minerals Ltd. Partnership and Tantalum Technology Inc; China Citic Bank Corporation Limited v Yan*; *Stans Energy Corp v The Kyrgyz Republic*; and *Belokon v Kyrgyz Republic*. |

## National legislation protecting inward investments

### 23 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

| National legislation | | | Procedural rights | |
|---|---|---|---|---|
| N/A | Expropriation | Other | Local courts | Arbitration |
| | N/A | N/A | N/A | N/A |

## National legislation protecting outgoing foreign investment

### 24 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

| Relevant guarantee scheme | Qualifying criteria, substantive protections provided and practical considerations |
|---|---|
| Export Development Canada (EDC) | EDC is Canada's export credit agency supporting and developing export trade by providing insurance, among other services, to Canadian companies. Political risk insurance can cover up to 90 per cent of losses to investments caused by a broad range of risks resulting from unpredictable events (eg, breach of contract, creeping or outright expropriation, political violence, currency conversion or transfer, repossession, non-payment by a government). |

| Relevant guarantee scheme | Qualifying criteria, substantive protections provided and practical considerations |
|---|---|
| Multilateral Investment Guarantee Agency (MIGA) | Canada is one of the 29 original members of MIGA. The MIGA Convention was ratified through the Bretton Woods and Related Agreements Act, R.S.C., 1985, B-7 (Schedule V) in Canada. With this multilateral political risk insurance for medium or long-term investments, Canadian citizens and entities may benefit from MIGA's protection against the risks of transfer restriction (including inconvertibility), expropriation, war and civil disturbance, breach of contract and non-honouring of sovereign financial obligations. MIGA can also insure Canadian-funded investment through an investor of the host country. |

# Awards

## 25 Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties.

| Awards |
|---|
| *Peter A. Allard (Canada) v The Government of Barbados* (Barbados-Canada FIPPA, UNCITRAL) – Award, 27 June 2016 |
| *Abitibi Bowater Inc v The Government of Canada* (NAFTA, UNCITRAL) – Consent Award, 15 December 2010 |
| *ADF Group Inc v United States of America* (NAFTA, ICSID Additional Facility) – Award, 9 January 2003 |
| Alasdair Ross Anderson and others v Republic of Costa Rica (Canada–Costa Rica FIPPA, ICSID Additional Facility) – Award, 19 May 2010 |
| *Apotex Holdings Incand Apotex Inc v United States of America* (NAFTA, ICSID Additional Facility) – Award, 25 August 2014 |
| *Apotex Inc v United States of America* (NAFTA, UNCITRAL) – Award on jurisdiction and admissibility, 14 June 2013 |
| *Bear Creek Mining Corporation v Republic of Peru* (Canada–Peru FTA, ICSID) – Award, 30 November 2017 |
| *Bilcon of Delaware et al v The Government of Canada* (NAFTA, PCA Case No. 2009-04) – Award on Jurisdiction and Liability, 17 March 2015; Award set-aside application denied by Federal Court on 2 May 2018; Award on damages, 10 January 2019 |
| *Canfor Corporation v United States of America, Tembec et al v United States of America and Terminal Forest Products Ltd v United States of America* (NAFTA, UNCITRAL) – Joint Order of the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings, 19 July 2007 |
| *The Canadian Cattlemen for Fair Trade v United States of America* (NAFTA, UNCITRAL) – Award on Jurisdiction, 28 January 2008 |
| *Chemtura Corporation v The Government of Canada* (NAFTA, UNCITRAL) – Award, 2 August 2010 |
| *Copper Mesa Mining Corporation v Republic of Ecuador* (Canada–Ecuador FIPPA, UNCITRAL) – Redacted Award 15 March 2016 |
| *Crystallex International Corporation v Bolivarian Republic of Venezuela* (Canada–Venezuela FIPPA, ICSID Additional Facility) – Award, 4 April 2016 |
| *Detroit International Bridge Company v The Government of Canada* (NAFTA, UNCITRAL) – Award on jurisdiction 2 April 2015; Award on costs 17 August 2015 |
| *Dow Agro Sciences LLC v The Government of Canada* (NAFTA, UNCITRAL) – Settled on 25 May 2011 |
| *Eli Lilly and Company v The Government of Canada* (NAFTA, UNCITRAL) – Award, 16 March 2017 |
| *EnCana Corporation v Republic of Ecuador* (Canada–Ecuador FIPPA, UNCITRAL, Administered by LCIA) – Award, 3 February 2006 |
| *Ethyl Corporation v The Government of Canada* (NAFTA, UNCTIRAL) – Award on Jurisdiction, 24 June 1998, settled |
| *EuroGas Inc. and Belmont Resources Inc v Slovak Republic* (Canada–Slovak Republic FIPPA, ICSID Case No. ARB/14/14) – Award, 18 August 2017 |
| *Frontier Petroleum Services Ltd v Czech Republic* (Canada–Czech and Slovak Federal Republic FIPPA, UNCITRAL) – Award 12 November 2010 |
| Awards |
| *Glamis Gold Ltd V United States of America* (NAFTA, UNCITRAL) – Award, 8 June 2009 |
| *Global Telecom Holding SAE v Canada* (Canada–Egypt FIPPA, ICSID Case No. ARB/16/16) – Award 27 March 2020 |
| *Gold Reserve Inc v Bolivarian Republic of Venezuela* (Canada–Venezuela FIPPA, ICSID Additional Facility) – Award, 22 September 2014; Decision issued on request for correction, 15 December 2014 |
| *Grand River Enterprises Six Nations Ltd, et al v United States of America* (NAFTA, UNCITRAL) – Award, 12 January 2011 |
| *Hussein Nuaman Soufraki v United Arab Emirates* (Italy–United Arab Emirates FIPPA, ICSID) – Annulment of Award, 5 June 2007 |
| *JML Heirs LLC and JM Longyear LLC v Canada* (NAFTA) – Discontinued 26 June 2015 |
| *The Loewen Group Inc and Raymond L Loewen v United States of America* (NAFTA, ICSID Additional Facility) – Award, 26 June 2003; Supplementary Decision issued 13 September 2004 |
| *Melvin J Howard, Centurion Health Corp & Howard Family Trust v The Government of Canada* (NAFTA, UNCITRAL) – Order For the Termination of the Proceedings and Award on Costs, 2 August 2010; Correction issued 9 August 2010 |
| *Mercer International Inc v Canada* (NAFTA, ICSID) – Award, 6 March 2018; Decision on request for supplementary decision, 10 December 2018 |
| *Merrill & Ring Forestry LP v The Government of Canada* (NAFTA, UNCITRAL) – Award, 31 March 2010 |

| Awards |
|---|
| *Mesa Power Group LLC v The Government of Canada* (NAFTA, UNCITRAL) – Award, 24 March 2016; Correction to award, 1 June 2016; Decision of US Court for District of Columbia denying Mesa Power's petition to vacate the award |
| *Methanex Corporation v United States of America* (NAFTA, UNCITRAL) – Award, 3 August 2005 |
| *Mobil Investments Inc and Murphy Oil Corporation v The Government of Canada* (NAFTA, ICSID Case No. ARB(AF)/07/4) – Award, 20 February 2015 |
| *Mobil Investments Canada Inc and Murphy Oil Corporation v The Government of Canada* (NAFTA, No. ARB/15/6) – Award, 4 February 2020 |
| *Mondev International Ltd v United States of America* (NAFTA, ICSID Additional Facility) – Award, October 11, 2002 |
| *Nova Scotia Power Incorporated v Bolivian Republic of Venezuela* (Canada–Venezuela FIPPA, ICSID Additional Facility) – Partial Award on Jurisdiction, 22 April 2010; Award, 30 April 2014 |
| *Pope & Talbot Inc v The Government of Canada* (NAFTA, UNCITRAL) – Award, 31 May 2002 (on damages), 26 November 2002 (on costs) |
| *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc v Republic of Costa Rica* (Canada-Costa Rica FIPPA, ICSID Additional Facility) – Discontinued, 27 October 2010 |
| *Rusoro Mining Ltd v Bolivarian Republic of Venezuela* (Canada–Venezuela FIPPA, ICSID Additional Facility) – Award, 22 August 2016 |
| *SD Myers, Inc v The Government of Canada* (NAFTA, UNCITRAL) – Partial Award (13 November 2000); Final Award, 30 December 2002 |
| *Saint Marys VCNA, LLC v Government of Canada* (NAFTA) – Consent Award, 29 March 2013 |
| *TransCanada Corporation and TransCanada PipeLines Limited v The United States of America* (NAFTA) – Discontinued, 24 March 2017 |
| *United Parcel Service of America Inc v The Government of Canada* (NAFTA, UNCITRAL) – Award, June 11, 2007 |
| *Vannessa Ventures Ltd v Bolivarian Republic of Venezuela* (Canada-Venezuela FIPPA, ICSID Additional Facility) – Award, 16 January 2013 |
| *Vito G Gallo v The Government of Canada* (NAFTA, UNCITRAL) – Award, 15 September 2011 |
| WalAm Energy Inc v Republic of Kenya (ICSID, ARB/15/7) |
| *Windstream Energy LLC v The Government of Canada* (NAFTA, UNCITRAL) – Award, 27 September 2016 |
| **Pending proceedings** |
| *Aecon Construction Group Inc. (Canada) v The Republic of Ecuador (Canada–Ecuador FIPA, UNCITRAL), PCA Case 2020-19* |
| *Air Canada v Bolivarian Republic of Venezuela* (Canada–Venezuela FIPPA, ICSID Additional Facility Case No. ARB(AF)/17/1) |
| *Alhambra Resources Ltd. and Alhambra Cooperatief U.A. v Republic of Kazakhstan (ICSID ARB/16/12)* |
| *Carlos Sastre and others Eco Oro Minerals Corp v Republic of Colombia* (Canada–Colombia FTA United Mexican States (NAFTA, ICSID Case No. ARB/16/41UNCT/20/2) |
| *Eco Oro Minerals Corp v Republic of Colombia* (Canada–Colombia FTA, ICSID Case No. ARB/16/41) |
| *Espiritu Santo Holdings, LP v United Mexican States* (NAFTA, ICSID Case No. ARB/20/13) |
| *First Majestic Silver Corp. v United Mexican States (NAFTA, ICSID Case No. ARB/21/14)* |
| *Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania* (Canada–Romania FIPPA, ICSID Case No. ARB/15/31) |
| *Galway Gold Inc v Republic of Colombia* (Canada–Colombia FTA, ICSID Case No. ARB/18/13) |
| *Geophysical Service Inc v Canada* (NAFTA, UNCITRAL), Notice of Arbitration 18 April 2019 |
| *Gran Colombia Gold Corp v Republic of Colombia* (Canada–Colombia FTA, ICSID Case No. Arb/18/23) |
| *Infinito Gold Ltd v Republic of Costa Rica* (Canada–Costa Rica FIPPA, ICSID Case No. ARB/14/5) |
| *Koch Industries, Inc. and Koch Supply & Trading, LP v Canada (NAFTA, CUSMA, ICSID Case No. ARB/20/52)* |
| *Lion Mexico Consolidated LP v United Mexican States* (NAFTA, ICSID Case No. ARB(AF)/15/2) |
| *Lone Pine Resources Inc v The Government of Canada* (NAFTA, UNCITRAL, ICSID Case No. UNCT/15/2) |
| *Lupaka Gold Corp. v Republic of Peru* (Canada–Peru FTA, ICSID Case No. ARB/20/46) |
| *Montero Mining and Exploration Ltd v United Republic of Tanzania* (Canada–Tanzania, ICSID Case No. ARB/21/6) |
| *Rand Investments Ltd and others v Republic of Serbia* (Canada-Serbia FIPPA, ICSID Case No. ARB/18/8) |
| *Red Eagle Exploration Limited v Republic of Colombia* (Canada-Colombia FTA, ICSID Case No. ARB/18/12) |
| *Resolute Forest Products Inc v The Government of Canada* (NAFTA, UNCITRAL, PCA Case No. 2016-13) |
| *Sanitek S.a.r.l., Sari Haddad and Elias Doumet v Republic of Armenia (Canada–Armenia, ICSID Case No. ARB/21/17)* |
| *Spanish Solar 1 Limited and Spanish Solar 2 Limited v Kingdom of Spain (ICSID Case No. ARB/21/39)* |
| *Tennant Energy, LLC v The Government of Canada* (NAFTA, UNCITRAL, PCA Case No. 2018-54) |
| *CEN Biotech IncMercer International Inc v The Government of Canada* (NAFTA) |
| *Winshear Gold Corp v United Republic of Tanzania* (ICSID Case No. ARB/20/25) |
| *Westmoreland Mining Holdings LLC v Canada* (ICSID Case No. UNCT/20/3) |
| *Resolute Forest Products Inc v Government of Canada* (UNCITRAL) |
| *WalAm Energy Inc v Republic of Kenya* (ICSID) |

# Reading List

## 26 Please provide a list of any articles or books that discuss this country's investment treaties.

**General**


- Hugh M Kindred & Phillip M Saunders et al., *International Law: Chiefly as interpreted and applied in Canada*, 7th Ed. (Toronto: Emond Montgomery Publications, 2006) – provides the Canadian perspective of international law including its treaty-making practice
- Frédéric Bachand, 'Overcoming Immunity-Based Objections to the Recognition and Enforcement in Canada of Investor-State Awards' (2009) 26:1 *Journal of International Arbitration* 56 – focuses on recognition and enforcement in Canada
- Gus Van Harten, 'Reform of Investor-State Arbitration: A Perspective from Canada', online: (2011) SSRN (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960729) – Canada-specific content on reform
- Meg Kinnear, Andrea Bjorklund, John F Hannaford, 'Investment Disputes under NAFTA' (2006) www.kluwerarbitration.com/book-toc.aspx?book=TOC_Kinnear_2006_V02 – provides a comprehensive review of the history of NAFTA disputes at the time
- Meg Kinnear and Robin Hansen, 'The Influence of NAFTA Chapter 11 in the BIT Landscape' (2005) 12 U.C. Davis J. *Int'l L. & Pol'y* 101 – NAFTA investment arbitration practice description
- Tim Kennish, 'NAFTA and Investment – A Canadian Perspective' in Seymour J Rubin & Dean C Alexander (Eds.), NAFTA and Investment (Unknown: Kluwer Law International, 1995) at 1 – provides the Canadian understanding of the NAFTA
- Ian Laird, Borzu Sabahi, Frederic Sourgens and Todd Weiler, eds, Investment Treaty Arbitration and International Law, Vol 7 (New York, USA: JurisNet, LLC, 2014) – focuses on international investment treaty arbitration in the energy sector
- Barry Leon, Andrew McDougall and John Siwiec, 'Canada and investment treaty arbitration: three prominent issues – ICSID ratification, constituent subdivisions, and health and environmental regulation' (2011) 8 S.C. *J. Int'l L. & Bus.* 63
- James A.R. Nafziger & Angela M. Wanak, 'United Parcel Service, Inc., v. Government of Canada: An Example of a Trend in the Arbitration of NAFTA-Related Investment Disputes' (2009) 17 Willamette J. *Int'l L. & Disp. Resol.* 49 – a description of prevailing practice at the time
- Sergio Puig and Meg N. Kinnear, 'NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration' (2010) 25 ICSID Review – F.I.L.J. 225 – one of the most recent surveys of the NAFTA investment arbitration in practice
- Huan Qi, 'The Definition of Investment and Its Development: For the Reference of the Future BIT between China and Canada' (2011) 45 Revue Juridique Themis 541 – discusses one of the most highly anticipated treaties Canada has concluded in recent times
- J Anthony VanDuzer, 'NAFTA Chapter 11: 'Canada' in the Legal Protection of Foreign Investment: A Comparative Study', online: (2012) SSRN (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298693) – discussion of Canada's domestic law and international commitments related to inward foreign investment
- Todd Weiler, NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Unknown: Transnational Publication, 2004) – provides an insight into the NAFTA investment arbitration practice 10 years after it came into force.
- Paul Meyer, John A Terry and Elliot J Feldman, 'North American dispute resolution', *Canada-United States Law Journal* Spring 2010: 399
- Anthony J VanDuzer, 'Enhancing the procedural legitimacy of investor-state arbitration through transparency and amicus curiae participation', *McGill Law Journal* Winter 2007: 681
- Gus Van Harten, and Dayna Nadine Scott, 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada' (7 December 2015). Osgoode Legal Studies Research Paper No. 26/2016. Available at SSRN: http://ssrn.com/abstract=2700238 or http://dx.doi.org/10.2139/ssrn.2700238
- Harten, Gus Van and Scott, Dayna Nadine. 'Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada (Part 2)' in Lisa E. Sachs and Lise Johnson, *Yearbook on International Investment Law & Policy* 2015–2016, Oxford University Press, 2018.
- Anthony J. VanDuzer, 'Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa?' (5 July 2016). Society of International Economic Law (SIEL), Fifth Biennial Global Conference Working Paper No. 2016/23. Available at SSRN: http://ssrn.com/abstract=2804907
- Dan Ciuriak and Dmitry Lysenko and Jingliang Xiao, 'Province-Level Impacts of Canada's Trade Agreements: Ontario and the Canada-Korea FTA' (24 December 2014). *International Trade Journal*, published online 11 September 2015, DOI: 10.1080/08853908.2015.1064333. Available at SSRN: http://ssrn.com/abstract=2542568 or http://dx.doi.org/10.2139/ssrn.2542568
- Dan Ciuriak, 'Advantages and Disadvantages for Canada of Multilateral, Regional and Bilateral Trade Agreements', Regional and Bilateral Trade Agreements (18 February 2016) (2016).
- Matthew Levine, 'Canada-China FIPPA & Canada-Korea FTA: Recent Canadian Pieces in the Pacific-Rim Investment Treaty Jig-Saw', *Transnational Dispute Management* (TDM) 12.1 (2015).
- Pratyush Nath Upreti, 'Eli Lilly v Canada: The Tale of Promise v. Expectation', International Arbitration Law Review (2018) 3. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126159
- Daniel J Gervais and Jared Doster, 'Investment Treaties and Intellectual Property: Eli Lilly V. Canada and Phillip Morris V. Uruguay', Vanderbilt Law Research Paper No. 18-38 (2018). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188745v
- Gagné, Gilbert. 'The Canadian Policy on the Protection of Foreign Investment and the Canada-China Bilateral Investment Treaty.' Beijing Law Review 10.03 (2019): 361–377.
- McIlroy, J. 'Canada's New Foreign Investment Protection and Promotion Agreement.' *Journal of World Investment and Trade* 5.4 (2019): 621–646. Web.

**CETA**

- Kurt Hubner, Anne-Sophie Deman and Tugce Balik, 'EU and trade policy-making: the contentious case of CETA', *Journal of European Integration*, Volume 39, 2017 – analyses the CETA agreement critically and assesses how CETA was pushed by a coalition of sectoral actors amongst an anti-free trade background
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## Notes

1 The majority of Canada's bilateral investment treaties (BITs) are known as Foreign Investment Promotion and Protection Agreements (FIPPAs). Canada is also party to a number of free trade agreements (FTAs) that include investment protections and provide for investor-state dispute settlement, including the North American Free Trade Agreement (NAFTA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Canada–European Union Comprehensive Economic and Trade Agreement (CETA). However, while most of the CETA is provisionally in effect, its investment protection and investor-state dispute settlement provisions are not. In addition to the treaties listed on its website as being in force or signed (but not yet in force), Canada has concluded negotiations of FIPPAs with Albania, Bahrain, Madagascar, Moldova, the United Arab Emirates and Zambia. It is also engaged in ongoing FIPPA and FTA negotiations, some of which are more active than others, with a variety of countries.

A current list of Canada's treaties in force, signed, or for which negotiations are concluded or ongoing negotiation is available at: Government of Canada – Trade and Investment Agreements.

Certain treaties, such as the Canada–Israel Free Trade Agreement (CIFTA) and the Canada–European Free Trade Association (EFTA) FTA, do not contain investment protection provisions and are not included in the table.

2 Canada's second generation treaties typically provide for a waiting period of six months from the date the dispute was first initiated. Canada's FTAs and more recent FIPPAs typically provide a notice period of 90 days (four months in the case of China) plus a requirement for the passage of six months from the occurrence of the events giving rise to the claim before it can be submitted to arbitration. The 'cooling-off period' shown here is the prescribed waiting period following the initiation of a dispute or giving notice of intent to submit a claim to arbitration, as the case may be, but practitioners should be mindful of other conditions precedent to submission of a claim.

3 Canada's earliest treaties contain no restrictions on access to the local courts of the host state and are thus shown as 'Unrestricted'. Canada's second generation of treaties typically provide that 'An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with para-graph (4) only if: [...] (b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind'. An analogous requirement usually exists for cases where the claim is brought on behalf of an enterprise owned or controlled by the claimant investor that is incorporated under the law of the respondent state. These treaties are shown as 'Limited'. Most of Canada's recent treaties contain a similar provision but permit the claimant investor to initiate or continue proceedings for 'injunctive, declaratory or other extraordinary relief, not involving the payment of damages'. These are shown as 'Limited except for declaratory relief'.

4 Article X(3) of the treaty provides that: 'The aforementioned disputes may be submitted to international arbitration by one of the parties to the dispute in one of the following circumstances: (i) where the Contracting Party and the investor have so agreed; (ii) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision; (iii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute.'

5 The Canada–China FIPPA contains a detailed set of requirements for initiating arbitration. Among these requirements is a 30-day cooling-off period for consultation after the delivery of a notice of intent to commence arbitration. However, this is only one of several procedural prerequisites to filing an arbitration claim, with others set out in article 21 of the FIPPA.

6 Article 21(2)(e) of the treaty requires the claimant investor to waive its right to initiate or continue dispute settlement proceedings under any agreement between a third state and the respondent host state in relation to the measure(s) at issue. Annex C. 21(2) provides that 'An investor who has initiated proceedings before any court of China with respect to the measure of China alleged to be a breach of an obligation under Part B may only submit a claim to arbitration under Article 20 if the investor has withdrawn the case from the national court before judgment has been made on the dispute. This requirement does not apply to the domestic administrative reconsideration procedure referred to in paragraph 1'.

7 Section D of the treaty includes special provisions regarding arbitration for disputes arising from juridical stability contracts.

8 Canada and Costa Rica are also parties to an FTA of 1 November 2002, which refers to the earlier FIPPA with respect to investment protection. There were discussions in an effort to broaden and modernise the FTA with Costa Rica. However, Global Affairs Canada's website no longer includes Costa Rica as a party to any ongoing or exploratory negotiations. Therefore, it is unclear if the modernisation of the FTA will come to fruition.

9 On 19 May 2017, Canada received a notice by the government of Ecuador terminating the Canada–Ecuador FIPPA.

10 Article IX(2) of the treaty provides: 'Any dispute that may arise under this Agreement between one Contracting Party and an investor of the other Contracting Party, other than a dispute mentioned in paragraph (1) of this Article [ie, expropriation], shall, to the extent possible, be settled amicably. If the dispute has not been settled amicably within a period of six months from the date on which the dispute was initiated, it shall be submitted to arbitration in accordance with paragraph (3) of this article, upon agreement between that Contracting Party and the investor.'

11 The Canada–Jordan FTA was brought into force on 1 October 2012, but contains no investment chapter. The 2009 FIPPA still applies.

12 The 2007 FIPPA was superseded by the investment chapter in the Canada-Peru FTA (1 August 2009), but remains in force with respect to measures occurring prior to the entry in force of the FTA (see Canada–Peru FTA article 801(2)).

13 Further to the dissolution of the USSR in 1991, the treaty now binds Russia as the continuing state.

14 Global Affairs Canada's website no longer includes this treaty in its list of FIPPAs for which negotiations have been concluded. There is, therefore ,no expectation that it will enter into force in the foreseeable future.

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Craig R Chiasson is a partner in BLG's international arbitration group in its Vancouver office. He has extensive experience in investment treaty and international commercial arbitration matters. He has been involved in investment treaty arbitrations as counsel for both investors and states and as tribunal secretary, and he has acted as counsel in international commercial arbitrations seated in Europe, North America and Asia and governed by numerous substantive laws. Mr Chiasson practiced in the international arbitration group of Freshfields Bruckhaus Deringer in Paris for almost six years before returning to BLG where he began his career in 2001. He is a Member of the Canadian Committee of the ICC, ICCA, the IBA Arbitration Committee, the ITA and the LCIA, and active

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