

INVESTMENT TREATY ARBITRATION

Canada



Investment Treaty Arbitration

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Quick reference guide enabling side-by-side comparison of local insights, including into foreign investment profile and investment agreement legislation; international legal obligations under investment treaties and relevant conventions; foreign investment promotion, domestic laws, regulatory and disputes agencies; investment treaty practice; investment arbitration history; enforcement of awards against the state; and recent trends.

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About

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He has represented leading HNW investors, publicly listed companies, Government companies, large family holding companies, and multinationals in multi-billion-dollar litigation and arbitration proceedings and is regularly published and interviewed in leading news outlets.

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Mahmoud also serves as Vice-President of The Hague Institute for Global Justice in the Netherlands and is Co-Chair of International Development of the Harvard Alumni Entrepreneurs.

Mahmoud is regularly published and interviewed by leading outlets such as LexisNexis, Thomson Reuters, MEED Magazine, Gulf Business, Gulf News, and Law.com.

Clients describe him as *"being a quick thinker"*, *"an outstanding gentleman"*, *"a great professional lawyer"*, *"a master at his game"*, and an *"unstoppable force"*.

BACKGROUND

Foreign investment

What is the prevailing attitude towards foreign investment?

Canada is the eighth largest economy in the world with a GDP of approximately US\$1.6 trillion – making it a heavy-hitting economy – with the GDP spread across a relatively modest population of approximately 38 million people.

Canada has a high level of stability and confidence with a well-managed economy and a strong and stable government. It also has robust service, agricultural, mining, manufacturing and energy industries.

Canada has 45 bilateral investment treaties in place with markets such as Hong Kong, China, Lebanon, Egypt, Argentina and Poland, among others. It also has 20 treaties that contain investment provisions with markets such as Singapore, Australia, Japan and Korea.

Canada is also party to 20 treaties with investor-state dispute settlement mechanisms such as the Canada–United States–Mexico Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Canada–European Union Comprehensive Economic and Trade Agreement.

Canada is an advanced industrial democracy. The benefits that come with this stature include a reliable financial system, a transparent justice system and an educated workforce. Some key figures and statistics are as follows.

- Global companies invested around C\$75 billion in Canada in 2021, bringing foreign direct investment to its highest rate since 2006.
- The Economic Intelligence Unit ranks Canada among the top three countries of the G20 to do business in.
- The World Bank ranked Canada as the easiest place to start a business in the G20.
- Between 2015 and 2019, Canada had the second-largest foreign direct investment stop to GDP ratio among the G20 according to the United Nations Conference on Trade and Development.
- According to the Organisation for Economic Co-operation and Development (OECD), Canada has one of the lowest tax rates in the G7.
- Canada also offers substantial tariff and tax incentives on imports of inputs and machinery for manufacturing in Canada.
- The banking system in Canada ranks second in the G20 and sixth out of 141 countries according to the World Economic Forum.

The United States accounts for a substantial portion of foreign direct investment with Canada. However, other countries have strong trade and investment relations with Canada including countries within the European Union, China, the United Kingdom, Japan, Mexico, South Korea, India, Hong Kong and others.

The prevailing attitude is that Canada is a strong, stable and attractive destination for foreign investment.

Law stated - 30 September 2022

What are the main sectors for foreign investment in the state?

The top foreign direct investment sectors in Canada are construction, public infrastructure, manufacturing, mining, oil and gas, finance and insurance, trade and professional services.

Other industries that attract foreign investment include real estate, transportation, agriculture, forestry, fishing and hospitality.

Public works

There are substantial public works projects across Canada, such as a C\$16 billion hydroelectric project in British Columbia; a C\$15 billion rail project in Ontario; and a C\$13 billion nuclear project in Ontario.

In 2022 there were C\$275 billion worth of public works projects across Canada, with most taking place in Ontario, British Columbia and Quebec.

Many of the projects include foreign contractors and vendors from South Korea, Spain, Italy, China, Hong Kong, France and so on, in consortium with domestic contractors and service providers.

Manufacturing

Manufacturers in Canada export more than C\$350 billion each year with the main export destinations being China, the United States, Germany, the Netherlands, Hong Kong, Korea and Japan.

Most manufacturing is of durable goods including wood products; non-metallic mineral products; primary metals; fabricated metal products; machinery, computer and electronic products; electrical equipment; appliances and components; transportation equipment; and furniture and related products.

The next most common manufacturing exports are non-durable goods including food; beverage and tobacco products; textile mills; textile product mills; clothing; leather and allied products; paper; printing and related support activities; petroleum and coal products; chemicals; and plastics and rubber products.

Mining

The value of Canada's mineral production is above C\$40 billion with gold being the top ranked commodity with a value of C\$12 billion. Canada produces 60 minerals and metals at around 200 mines and 6,500 sand, gravel and stone quarries.

Canada's mineral production includes about C\$29 billion worth of metals, about C\$11 billion worth of non-metals and about C\$4 billion worth of coal.

Canada has a global ranking of first for potash, second for uranium and third for platinum group metals.

Most mining takes place in Quebec, Ontario, British Columbia and Saskatchewan.

Large urban areas, such as Toronto and Vancouver, are also recognised as global hubs for mining and mineral exploration, financing and legal services.

Canadian mining assets are worth approximately a quarter trillion Canadian dollars with about C\$180 billion located in almost one hundred foreign countries including the United States, Chile, Panama, Brazil, Zambia, Peru, Mexico, Argentina, Mali and the Congo.

Most mineral trade takes place with the United States, the United Kingdom, China, Japan, Germany, South Korea, the Netherlands, India, Norway and Belgium.

Oil and gas

According to the Canadian Association of Petroleum Producers, Canada's oil and natural gas industry is active in 12 of 13 provinces and territories. Canada is the fifth largest producer of oil in the world and the fourth largest producer of natural gas in the world.

Canadian oil and natural gas provided US\$105 billion to Canada's GDP and supported almost 400,000 jobs across the

country in 2020. For the period 2019 to 2029, the natural gas industry's impact on Canadian GDP is projected to be US \$250 billion.

Alberta is Canada's largest oil and natural gas producer and is home to vast deposits of both resources. British Columbia is Canada's second largest natural gas producer, home to the Horn River and Montney natural gas basins.

Saskatchewan is the second largest oil producer in Canada.

Ontario's manufacturing sector is an important supplier for Canada's oil and natural gas industry.

Quebec has over 580 companies that directly supply the oil sands industry with goods and services, and has a refining capacity of 370,000 barrels per day with an abundance of natural gas.

Newfoundland and Labrador currently have four producing projects offshore oil projects and significant exploration activity. Nova Scotia's first offshore well was drilled in 1967, with the first offshore discovery at Sable Island in 1971. To date, about 127 exploration wells have been drilled offshore Nova Scotia, yielding 23 significant discoveries.

The Northwest Territories, Nunavut and Yukon have large untapped resources of crude oil and natural gas.

Law stated - 30 September 2022

Is there a net inflow or outflow of foreign direct investment?

According to the Organisation for Economic Co-operation and Development (OECD), in 2021 Canada was the third most popular foreign direct investment destination worldwide with an inflow of US\$60 billion, after the United States and China. In the same year, the foreign direct investment outflows from Canada amounted to almost US\$90 billion.

Much of the increase in outflows from Canada and other OECD markets was due to large outflows from the United States, resulting in record high reinvestment of earnings into foreign entities. For Canada as well, major merger and acquisition deals completed in 2021 resulted in a surge in outflow of foreign direct investment.

Law stated - 30 September 2022

Investment agreement legislation

Describe domestic legislation governing investment agreements with the state or state-owned entities.

Canada is a commonwealth, which affects its attitude towards investment agreements with the government or government-owned entities.

The federal government is reluctant to enter into legal partnerships with non-government entities because of the potential liabilities and risks of holding the Crown (government) liable, and such liabilities exceeding the authorised funding of a federal party, potentially putting that party in conflict with Parliament.

The government and government entities generally pursue collaborative structures, such as partnerships for funding and incentives in sustainable development technology, industrial research, infrastructure, and national mining collaborations.

Otherwise, federal procurement is governed by the following principal instruments:

- the Financial Administration Act;
- the Government Contract Regulations;
- the Department of Public Works and Government Services Act;
- the Integrity Regime;

- the Canadian International Trade Tribunal Act; and
- the Procurement Inquiry Regulations.

Moreover, there are standard terms and conditions set out in the Standard Acquisition Clauses and Conditions Manual, which all federal contracts are subject to.

The Public Services Procurement Canada (the authority responsible for public works) manages federal contracts, but procuring entities have the liberty to set respective requirements for the works.

Law stated - 30 September 2022

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Canada has 14 free trade agreements in place with 51 countries.

Canada is a signatory to the New York Convention and the ICSID Convention, including 30 other investment related instruments such as the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Canada is also a signatory to 45 bilateral investment treaties, 40 of which are in force.

About 20 treaties with investment provisions are in force with Canada as a signatory, including:

- the Canada–Korea Free Trade Agreement;
- the Canada–European Free Trade Association Free Trade Agreement;
- the Australia–Canada Cooperation Agreement;
- the Comprehensive and Progressive Agreement for Trans–Pacific Partnership (which includes Japan, Malaysia and Singapore among others);
- the United States–Mexico–Canada Agreement; and
- the Canada–United Kingdom Trade Continuity Agreement.

Canada is a member of the Energy Charter Treaty. One of the more notable recent Canadian investor–state dispute settlement (ISDS) claims was by Vermilion, a Canadian oil and gas company responsible for 75 per cent of oil and gas production in France. Vermilion threatened to file an ISDS claim against the French state under the Energy Charter Treaty due to a proposed Act that would see the majority of extraction programmes forced to shut down by 2030 and a total ban of oil and gas extraction by 2040, in compliance with the Paris Agreement.

Law stated - 30 September 2022

If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Canada does not have any overseas territories.

Law stated - 30 September 2022

Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

In June 2021, the House of Commons held proceedings to discuss ISDS mechanisms as many of Canada's trade and investment agreements contain an ISDS mechanism.

The House of Commons concluded that ISDS mechanisms may give rise to regulatory chill; thus, exceptions that permit actions to be taken in the public interest are vitally important.

The government of Canada is currently carrying out a review of its trade and investment agreements to identify areas requiring reform. It is also compiling a report on all past and present litigation against the government of Canada and against foreign states brought by Canadian businesses under ISDS mechanisms and the amount of damages claimed.

Law stated - 30 September 2022

Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

Treaties have been terminated, including the North American Free Trade Agreement (which was replaced with the United States–Mexico–Canada Agreement), but Canada has not in recent record unilaterally terminated an investment treaty to which it is a party.

Law stated - 30 September 2022

Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Yes. Canada has entered into multiple bilateral or multilateral investment treaties with overlapping membership. Overlapping treaties continue to operate in parallel and are either addressed on a case-by-case basis or have an explicit provision to address the overlap therein. For example, the Canada–European Union Comprehensive Economic and Trade Agreement explicitly provides the parties with reaffirmation of their rights and obligations under the General Agreement on Tariffs and Trade.

Law stated - 30 September 2022

ICSID Convention

Is the state party to the ICSID Convention?

Canada signed the ICSID Convention on 15 December 2006.

On 1 November 2013, Canada deposited its Instrument of Ratification of the ICSID Convention with the World Bank.

The ICSID Convention entered into force for Canada on 1 December 2013.

Law stated - 30 September 2022

Mauritius Convention

Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

Canada signed the Mauritius Convention on 17 March 2015 and ratified it on 12 December 2016.

The Mauritius Convention entered into force for Canada on 18 October 2017.

Law stated - 30 September 2022

Investment treaty programme

Does the state have an investment treaty programme?

Canada does not have an explicit investment treaty programme. However, the government of Canada espouses an ongoing progressive and inclusive policy to its foreign investment agenda as part of its policy development.

On 15 August 2018, the Ministry of International Trade Diversification announced the launch of a public consultation on Canada's foreign investment promotion and protection agreements.

After years of public consultations, on 13 May 2021 the Foreign Investment Promotion and Protection Agreement Model was published by Global Affairs Canada.

Canada is currently engaged in about 30 negotiations related to investment treaties including for a free trade agreement with the Association of Southeast Asian Nations, Caribbean Community, India, Japan, Qatar and Singapore among other countries and is in negotiations to join the Trade in Services Agreement.

Law stated - 30 September 2022

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

Does the state have a foreign investment promotion programme?

Invest in Canada is a departmental corporation that works directly with global investors to unlock investment opportunities and facilitate expansion in Canada.

Invest in Canada provides multiple incentives for foreign direct investment, such as the following.

- Monetary incentives, including:
 - scientific research and experimental development with tax incentive programmes;
 - accelerated investment incentive with enhanced capital cost allowance on equipment purchases and full expensing in the first year for manufacturing and processing and clean energy equipment purchases; and
 - a strategic innovation fund supporting research and development, industrial advancement, national innovation and other streams.
- Programs and initiatives, including:
 - global skills strategy with pathways to quick entry for skilled workers;
 - pan-Canadian AI strategy aimed at increasing AI capacities; and
 - the Innovation Superclusters Initiative combining the technology clusters across the country.

Law stated - 30 September 2022

Applicable domestic laws

Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

The principal legislation that applies to foreign investors and foreign investment is the Investment Canada Act, which aims 'to provide for the review of significant investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment opportunities in Canada and to provide for the review of investments in Canada by non-Canadians that could be injurious to national security'.

National security review may be conducted on any foreign investment into a Canadian business if the investment poses a risk to national security. Special rules apply to cultural businesses under the Investment Canada Act; this includes film, audio and video production and production and distribution of books. Special rules with enhanced scrutiny apply for foreign state-owned enterprises. Specific industry legislation applies for certain sectors such as banking, telecommunications and transport.

Depending on whether certain financial thresholds are met, an acquisition of control of a Canadian business by a foreign investor may be subject to notification or review requirements. Notifications must be made with the Director of Investments within 30 days of the closing of the transaction.

Law stated - 30 September 2022

Relevant regulatory agency

Identify the state agency that regulates and promotes inbound foreign investment.

The Investment Canada Act is overseen by the Ministry of Innovation, Science and Economic Development.

Law stated - 30 September 2022

Relevant dispute agency

Identify the state agency that must be served with process in a dispute with a foreign investor.

Notifications of a dispute by a foreign investor are served to the Office of the Deputy Attorney General of Canada (unless the relevant treaty states otherwise).

The Trade Law Bureau is a joint unit of Global Affairs Canada and the Department of Justice, mandated to provide international trade and investment law services to all Canadian government departments and agencies.

The federal government lawyers at the Trade Law Bureau litigate all of Canada's disputes (including investor-state disputes) except domestic litigation in Canada or another country.

When the Crown (the state) is sued in federal court, service must be on the Attorney General as set out in Rule 133 of the Federal Courts Rules.

If a proceeding is to be commenced in provincial court against the Crown (the state), the Attorney General of Canada or any other minister of the Crown, the Deputy Attorney General of Canada must be served, either at the office of the Deputy Attorney General in Ottawa or at the appropriate regional office of the Department of Justice Canada.

Law stated - 30 September 2022

INVESTMENT TREATY PRACTICE

Model BIT

Does the state have a model BIT?

In May 2021, Canada published an updated model bilateral investment treaty named the Model Foreign Investment Promotion and Protection Agreement updating its 2004 predecessor. The 2021 model BIT made substantial changes, as outlined below.

- The procedure for investment arbitration under article 25 of the 2021 model BIT now requires the investor to submit a written request for consultations to be held within 90 days of the delivery of the request for consultations in the capital city of the receiving party. The request for consultations is a mandatory prerequisite to commencing arbitration, and the request for arbitration must be filed within one year of the delivery of the request for consultations.
- article 27 of the 2021 model BIT permits the investor to submit a claim to dispute settlement under different arbitration rules, including:
 - the ICSID Convention, provided that both parties are parties to the ICSID Convention;
 - the ICSID Additional Facility Rules, if only one party is a party to the ICSID Convention;
 - the UNCITRAL Arbitration Rules; or
 - any other rules on agreement of the disputing parties.
- In promoting efficient processes, article 47 of the 2021 model BIT provides for expedited arbitration when the damages claimed do not exceed C\$10 million, providing a practical avenue for lesser value claims and more accessibility for smaller investors.
- Indirect expropriation was previously defined as ‘measures having an effect equivalent to nationalisation or expropriation’. Article 9(3) of the 2021 model BIT provides a much more comprehensive consideration on a case-by-case fact-based inquiry to determine whether an act is indirect expropriation, including considering:
 - the economic impact of the measure or the series of measures, although the sole fact that a measure or a series of measures of a party has an adverse effect on the economic value of a covered investment does not establish that an indirect expropriation has occurred;
 - the duration of the measure or series of measures of a party;
 - the extent to which the measure or the series of measures interferes with distinct, reasonable investment-backed expectations; and
 - the character of the measure or the series of measures.
- The most-favoured-nation treatment now provides under article 6(7) of the 2021 model BIT that ‘substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach’. The new language in the 2021 model BIT restricts investors from treaty shopping and picking protections and procedures available under other Canadian bilateral investment treaties.
- article 8 of the 2021 model BIT excludes fair and equitable treatment from the minimum standard of treatment and instead provides a list of actions that would determine a breach, including denial of justice; breach of due process; manifest arbitrariness; targeted discrimination; abusive treatment; and failure to provide full protection and security.

The 2021 model BIT also focuses on small and medium-sized enterprises; corporate social responsibility; indigenous-owned businesses and peoples; and women's economic empowerment.

Law stated - 30 September 2022

Preparatory materials

Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

The Treaty Law Division maintains the original text or a certified copy of treaties signed by Canada. It also maintains a registry of many non-treaty arrangements or understandings entered into by the government of Canada; government departments and agencies; and Canadian provinces. The Treaty Law Division of the Department of Foreign Affairs and International Trade is part of the Department's Legal Affairs Bureau.

The Treaty Law Division is also responsible for publishing on an annual basis in the Canada Treaty Series the texts of those agreements that have come into force for Canada, as well as the registration with the United Nations, in accordance with the relevant provisions of the United Nations Charter, of those treaties to which Canada becomes a party.

In the few cases where Canada has been designated as a depository for the treaty, the Treaty Law Division carries out the obligations that the role entails. These include providing certified copies of the text of the treaty to each of its signatories; receiving instruments of ratification or accession from states becoming parties to the treaty and ensuring that they are in good and due form; and informing each individual signatory government through diplomatic channels of ratifications or accessions.

As of 1 April 2014, the treaties published in the Canada Treaty Series are only available in electronic format.

Law stated - 30 September 2022

Scope and coverage

What is the typical scope of coverage of investment treaties?

Investment treaties that Canada is a signatory to generally provide protection to foreign investors for a broad range of investments in an enterprise, including:

- a share, stock or other form of equity participation in an enterprise;
- a bond, debenture or other debt instrument of an enterprise;
- a loan to an enterprise;
- an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution; or
- an interest arising from the commitment of capital or other resources to economic activity, such as under a contract involving the presence of an investor's property, including a turnkey or construction contract, or a concession, or a contract under which remuneration depends substantially on the production, revenues or profits of an enterprise, or intellectual property rights, and any other tangible or intangible, movable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose.

The 2021 model BIT excludes from covered investments a claim to money that arises solely from a commercial contract for the sale of a good or service by a national or enterprise, or the extension of credit in connection with a commercial transaction, such as trade financing, and an order or judgment in a judicial or administrative action.

The 2021 model BIT distinguishes between a foreign investor and a foreign enterprise. A foreign investor is considered a national or an enterprise of a party, that seeks to make, is making or has made an investment. A foreign enterprise is considered an enterprise that is lawfully constituted or organised and that has substantial business activities in the host territory, or an enterprise that is directly or indirectly owned or controlled by a national or an enterprise as recognised for foreign investor qualification purposes.

The qualifications of an investor and investment under the 2021 model BIT are generally reflective of the investment treaties Canada is currently a signatory to.

Law stated - 30 September 2022

Protections

What substantive protections are typically available?

Substantive protections are similar across the investment treaties Canada is a signatory to, although modifications in scope and language may be seen in different instruments. However, most of the investment treaties Canada is a signatory to do not include an umbrella clause. The principal protections available include:

- national treatment and most-favoured-nation treatment whereby Canada cannot discriminate against foreign investors in favour of domestic investors or investors from another country;
- the requirement that Canada provides the minimum standard of treatment in accordance with customary international law for foreign investments;
- performance requirements that prevent Canada from placing conditions on investments in favour of the domestic market, such as mandating that a foreign investor purchase domestic goods;
- fair and equitable treatment provisions, which (as guided by findings of tribunals) include requirements for full protection and security; due process and access to justice; adherence to investors' legitimate expectations; no coercion or harassment by the organs of the state; offering a stable and predictable legal framework; transparency of the legal framework; and no arbitrary or discriminatory treatment; and
- no direct or indirect expropriation that prevents Canada from taking property belonging to a foreign investor directly through mandatory transfer or physical seizure, or indirectly through regulatory measures, prevention of contractual rights, or other actions – including methods of 'creeping' expropriation where the expropriation occurs gradually.

Law stated - 30 September 2022

Dispute resolution

What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

Most investor-state claims against Canada so far have been triggered pursuant to the (now terminated) North American Free Trade Agreement (NAFTA), which permits arbitration proceedings to be conducted using ICSID or UNCITRAL arbitration rules. There have been about five NAFTA investment claims under ICSID rules and about 25 NAFTA claims under UNCITRAL rules.

Other recent cases – for example – have been triggered under other treaties such as the Canada–Egypt BIT and

subject to ICSID rules.

Law stated - 30 September 2022

Confidentiality

Does the state have an established practice of requiring confidentiality in investment arbitration?

Canada is represented in investor-state disputes by internal counsel at the Trade Law Bureau and hence attempts to provide as much transparency as possible with respect to investor-state dispute settlement claims. For example, Global Affairs Canada maintains a list of NAFTA-related disputes with details and links to substantive documents.

Law stated - 30 September 2022

Insurance

Does the state have an investment insurance agency or programme?

Export Development Canada (Canada's export credit agency and a state-owned enterprise wholly owned by the government of Canada) provides credit insurance and performance security insurance that covers commercial risks and political risks for outbound investments. Insurance is not contingent on the existence of an investment treaty between Canada and the host state.

Canada is also a member of the World Bank's Multilateral Investment Guarantee Agency programme, which guarantees protect investments against non-commercial risks and can help investors obtain access to funding sources with improved financial terms and conditions.

Law stated - 30 September 2022

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

How many known investment treaty arbitrations has the state been involved in?

There have been about 50 investment disputes against Canada publicly disclosed since 1995 with about six withdrawn; eight settled; six won by the state and five won by investors; five dismissed on jurisdictional grounds; eight inactive (ie, discontinued); and six pending.

Clayton/Bilcon v Government of Canada

Clayton/Bilcon are US investors who allege that the Environmental Assessment (EA) that was undertaken by the government of Canada and the government of Nova Scotia for the Whites Point project, along with the administration and conduct of the EA, were arbitrary, discriminatory and unfair. The EA was referred to a Joint Review Panel (JRP). The JRP gathered information on the environmental effects of the Whites Point project, held public hearings, and issued a recommendation to government decision-makers that the Whites Point project should not be permitted to proceed because it would have a significant and adverse environmental effect.

The US investors claimed US\$101 million in damages. The tribunal found that the government of Canada was liable, and the damages phase is now ongoing to determine the damages to be awarded to the US investors.

Global Telecom Holdings SAE v Government of Canada

Global Telecom Holding SAE (GTH) is an Egyptian-incorporated integrated telecommunications services company that operates in markets around the world. In 2008, GTH entered the Canadian telecommunications market through an investment in a Canadian company (Globalive Wireless Management Corporation), which would later provide mobile telecommunications services in parts of Canada as Wind Mobile.

Over the investment period, GTH alleged that Canada failed to create a fair, competitive and favourable regulatory environment for new investors in this sector. This was particularly due to a 2013 Transfer Framework policy that allowed Canada's government agency for trade and economy to conduct reviews of license transfers. GTH argued that Canada had breached fair and equitable treatment by:

- the 2013 Framework, which had the effect of stopping GTH from selling Wind Mobile to an incumbent; and
- subjecting GTH to an arbitrary national security review that lacked due process.

The finding of the tribunal was that the Canada–Egypt BIT permitted the government of Canada to afford different treatment to foreign investors than to Canadian nationals in the telecommunications industry.

Member of the tribunal Gary Born issued a dissenting opinion on this point, finding that 'the Tribunal's interpretation of article 4(2)(d) on this issue is impossible to reconcile with either the language of the BIT or the evident object and purpose of the Treaty.'

Windstream Energy v Canada

Windstream Energy was in the business of developing an offshore wind electricity generation project in the province of Ontario, Canada. In 2009, Ontario introduced a tender for renewable energy producers and Windstream secured a contract. After various delays, Ontario imposed a moratorium on offshore wind projects because additional scientific research was necessary. Other contract holders – other than Windstream – were offered alternative investment opportunities. Canada was ordered to pay Windstream more than US\$22 million for unfair or inequitable treatment in accordance with the customary international law minimum standard of treatment.

Law stated - 30 September 2022

Industries and sectors

Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Most claims have generally risen from Canada's environmental protection and natural resource management measures, which account for about 60 per cent of the investor-state claims against Canada. Other notable industries include the pharmaceutical and telecommunication industry.

Law stated - 30 September 2022

Selecting arbitrator

Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

To date, Canada has participated actively in the defence of all investment treaty claims brought against it, including in

the selection of arbitrators.

Law stated - 30 September 2022

Defence

Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Canada typically defends itself with the internal counsel of the Trade Law Bureau of Global Affairs Canada.

In the recent case of *GSI v Canada*, the claimant (GSI) petitioned the Federal Court of Canada to provide relief by disqualifying one of the internal counsels of the Trade Law Bureau for having prior obtained confidential information relating to the arbitration prior to their employment with the Bureau.

The Federal Court found that the composition of the Trade Law Bureau legal team was not a public issue granting the Federal Court authority to conduct judicial review, and that there was no jurisdiction to intervene as the tribunal was found to be the proper forum to deal with the issue.

The tribunal ultimately disqualified the Trade Law Bureau counsel in question having found that there was:

'clear evidence of a material risk that [the Counsel] and [the team member] have received confidential information from Claimants about the dispute that could be of significance in the present proceedings such that there would be prejudice to the fair disposition of the dispute in this arbitration if Respondent were allowed to continue being represented by them.'

Law stated - 30 September 2022

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Canada is a party to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards which came into force in Canada on 10 August 1986. Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such limitation.

Canada is also a party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) which came into force for Canada on 1 December 2013.

Law stated - 30 September 2022

Award compliance

Does the state usually comply voluntarily with investment treaty awards rendered against it?

Canada generally complies voluntarily with investment treaty awards.

Law stated - 30 September 2022

Unfavourable awards

If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

Not generally, but in the recent case of *Clayton/Bilcon v Government of Canada*, where the claim is for US\$101 million and in which Canada was found to have breached investment liability, Canada filed a notice of application in the Federal Court of Canada for the set aside of the tribunal's award on jurisdiction and liability. In the set aside proceedings, Canada argues that the award on jurisdiction and liability contains decisions on matters beyond the scope of the submission to arbitration and is in conflict with the public policy of Canada, contrary to articles of the Commercial Arbitration Code as enacted and set out in the Schedule to the Commercial Arbitration Act.

Law stated - 30 September 2022

Provisions hindering enforcement

Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

Enforcement of non-ICSID international arbitral awards in Canada is governed by the New York Convention, and the international commercial arbitration acts of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. The federal government and each of the provinces adopted the UNCITRAL Model Law on International Commercial Arbitration.

Refusal to recognise or enforce an arbitral award could be ordered if:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was invalid;
- there was lack of procedural fairness;
- the award deals with matters beyond the tribunal's jurisdiction;
- there were defects in the appointment of the arbitrators;
- the award is not binding or has been set aside or suspended;
- the subject matter of the dispute is not arbitrable under the law of the enforcing province; or
- the recognition or enforcement of the award would be contrary to public policy.

Public policy grounds for set-aside of an international arbitration award in investor-state disputes was best summed up in *United Mexican States v Karpa*, where Mexico attempted to set aside a NAFTA arbitration award on the basis of violation of public policy. The Court of Appeal for Ontario dismissed the argument that the award violated public policy reasoning that:

The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.

Enforcement of ICSID international arbitral awards would be subject to article 54 of the ICSID Convention which requires the domestic courts of Canada to recognise the award as binding and enforce the award as if it were a final judgment of a Canadian court.

Article 53 of the ICSID Convention permits limited revision and annulment remedies against an ICSID award as provided for in the Convention, where a party may request limited revision or annulment before a three-member ad hoc committee the ICSID appoints. Enforcement may be stayed (not set-aside) as the committee reviews the application. article 55 of the convention states that nothing in article 54 shall be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution.

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UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in your jurisdiction?

The replacement of the NAFTA convention with the United States–Mexico–Canada Agreement (USMCA) is intended to significantly reduce the number of investor-state disputes brought against Canada by North American investors, as the USMCA no longer provides for investment arbitration with the exception of legacy claims for investments brought before the USMCA came into force on 1 July 2020, based on measures taken by Canada after the coming into force, for a period of three years therefrom.

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the 28 European Union countries has been ratified by 15 member states as of February 2022 and is expected to conclude ratification in due course. The CETA will establish a permanent tribunal of 15 members to hear investor claims. Each particular case would be heard by three of the 15 members.

On 16 November 2021, Canada and the Association of Southeast Asian Nations (ASEAN) agreed to proceed with free trade agreement negotiations. ASEAN is a regional intergovernmental organisation comprising 10 member states.

Canada is also negotiating various investment protection agreements with large trade partners such as India, many African countries, and Gulf Cooperation Council countries.

Law stated - 30 September 2022

Jurisdictions

	Bangladesh	Vertex International Consulting
	Belgium	Linklaters LLP
	Canada	Wasel & Wasel
	China	Zhong Lun Law Firm
	Egypt	Shahid Law Firm
	European Union	Van Bael & Bellis
	France	Laborde Law
	Japan	Anderson Mōri & Tomotsune
	Malaysia	Cecil Abraham & Partners
	Romania	STOICA & Asociații
	Russia	BGP Litigation
	Switzerland	Schellenberg Wittmer
	United Kingdom	Quinn Emanuel Urquhart & Sullivan LLP
	USA	Quinn Emanuel Urquhart & Sullivan LLP
	Uzbekistan	Putilin Dispute Management
	Vietnam	LNT & Partners

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