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A Losing Proposition

The Failure of Canadian ISDS Policy at Home and Abroad

Hadrian Mertins-Kirkwood

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ABBREVIATIONS

BIT bilateral investment treaty

CDIA Canadian direct investment abroad

FDI foreign direct investment

FIPA Foreign Investment Promotion and Protection Agreement

FTA free trade agreement

IIA international investment agreement

ICSID International Centre for Settlement of Investment Disputes

ISDS investor–state dispute settlement

NAFTA North American Free Trade Agreement

UNCITRAL United Nations Commission on International Trade Law

Summary

THE CANADIAN GOVERNMENT often points to the quantity of trade and investment agreements it signs as proof of the overall success of its trade-based economic agenda. The current federal government is responsible for nine of the 29 Foreign Investment Promotion and Protection Agreements (FIPAs) to which Canada is a party and it has signed or is negotiating a further 14. According to the government, these treaties, and the investment chapters within Canada's many free trade agreements (FTAs), provide a more "transparent and predictable climate for Canadian investors abroad." Most of these new FIPAs are with developing countries where the bulk of Canadian investment is in oil, gas, or mining projects. This suggests the government's more specific policy objective is to create a predictable investment climate mainly for Canadian resource companies.

The most important tool in Canada's FIPAs and FTAs for "protecting" investors is the investor–state dispute settlement (ISDS) mechanism. ISDS is a quasi-judicial process through which an individual investor or corporation can dispute a government decision or policy as a violation of the state's broadly worded FIPA or FTA obligations toward foreign investment. ISDS cases are heard by a private arbitration panel rather than national courts. Since the mid-1990s Canada has itself been a target of foreign (mostly U.S.) ISDS lawsuits under NAFTA's generous investment protections, with many cases related to the federal and provincial governments' management of natural resources. The damage so far has been significant: in addition to paying out hundreds of millions of dollars to investors, Canada has been pres-

sured by NAFTA tribunals to backtrack on a number of public health and environmental regulations.

Despite the proven threat that ISDS poses to democratic governance here in Canada — or perhaps because of it — the federal government continues to aggressively promote ISDS in international treaties. It could be the government believes that if NAFTA so thoroughly protects foreign investors from provincial and federal decisions that affect the value of their investments in Canada, surely Canadian investors abroad will be able to successfully use ISDS to their advantage in countries with which Canada has a FIPA or FTA in place.

Based on the data presented in this report, it is not at all evident that the supposed benefits of these treaties for Canadian investors outweigh the proven social, political, and economic costs incurred by ISDS disputes at home. This study collects and analyzes the 55 known cases of Canadian investors resorting to investor–state dispute settlement against foreign states. It finds the following:

- 62% of cases involve a Canadian resource or energy company. Since 2006, these companies account for 78% of new ISDS cases involving Canadian investors.
- 18% of Canadian investors using ISDS are "treaty shopping" by initiating their claims through shell companies or subsidiaries in other countries.
- 56% of cases have been brought against developing countries. Since 2006, 72% of cases have involved a developing country, increasingly in South and Central America.
- The investors in 58% of cases challenged government measures related to resource management or environmental protection. Since 2006, the proportion is 72%.
- Canadian investors have only won or favourably settled four out of 28 concluded cases — a "success" rate of 14%.
- None of the winning "Canadian" investors were both based in Canada *and* invoking a Canadian investment treaty.
- 17 ISDS cases involving Canadian investors are still in progress.

Though the poor success rate contradicts federal government statements on the importance of FIPAs to Canadian investors abroad, these findings

cannot predict how that rate might change in the future. More important is the extent to which Canadian investors have abused the ISDS process to challenge legitimate social and environmental regulations in developing countries. The combination of these two pieces of evidence — that investment treaties have not so far provided a "predictable climate" for Canadian investors abroad, and that Canadian investors have abused their rights in FIPAs and FTAs to dispute legitimate public policy choices — does not support the continued expansion and intensification of Canada's ISDS regime.

Introduction

INVESTOR–STATE DISPUTE SETTLEMENT (ISDS) is a quasi-judicial process for resolving investment disputes between foreign investors and national governments. Typically, states consent to this system by including an ISDS mechanism in international investment agreements (IIAs) or free trade agreements (FTAs). If a foreign investor feels they have not been treated fairly by a state under the terms of such an agreement, they can initiate international arbitration. The judges in these cases — three-person panels of independent, private-sector trade lawyers — are able to award monetary damages or other redress to the investor.

A debate over ISDS has raged since the first major trade agreement containing this system, the North American Free Trade Agreement (NAFTA), was signed in the 1990s. The debate continues to play out in the context of recent and ongoing trade agreement negotiations in Canada and around the world. Proponents of ISDS have described it as "an important contribution to the rule of law" or otherwise necessary for ensuring the fair treatment of foreign investors in potentially hostile political environments.[1] They argue that in cases where an investment (e.g., a mining concession) has been seized, or otherwise made unprofitable by government actions, there should be a means for the investor to ensure they are appropriately compensated. In this scenario, ISDS is intended to guarantee restitution where domestic court systems are considered not independent, impartial, or robust enough to adjudicate these disputes.

Critics of ISDS point out that the process is often used, at great expense, to challenge legitimate actions taken by states to protect the environment and public health or to make other important public policy decisions. Investors have used ISDS — in Canada as elsewhere — to demand compensation where completely reasonable (and legal) government measures have the unintended effect of lowering the value of an investment or hurting potential future profits. This benefit, it should be noted, is not available to domestic investors; only foreign investment is guaranteed under IIAs.

Consequently, ISDS poses a fundamental threat to democratic decision-making. Where domestic court systems are adequate for resolving legitimate disputes with government policy, as in Canada, the U.S. and Europe, they should be the only venue available to foreign investors. Where the courts are deficient, investors have always had access to private means (e.g., insurance) for securing their assets and investments. In the case of resource concessions, firms can also build recourse to arbitration directly into contracts with governments. Governments might more fruitfully protect investors from unfair treatment abroad by helping strengthen foreign legal systems rather than signing treaties that effectively bypass them.

In the Canadian context, discussions of investor–state dispute settlement have focused on its use by foreign corporations to challenge public interest regulations. Using the investment provisions and ISDS process in chapter 11 of NAFTA, foreign investors have made claims against the government of Canada for hundreds of millions of dollars in damages. Canada is the most-sued developed country in the world through ISDS and it has lost roughly half of decided cases. Canada has not only paid out significant sums as a result of those losses, but it has also backtracked on important public health and environmental regulations that allegedly affected foreign investors' profitability.[2]

This largely negative experience with NAFTA has raised eyebrows about our government's continued advocacy of ISDS in new Foreign Investment Promotion and Protection Agreements (FIPAs) and FTAs. Why would Canada subject itself to these undemocratic and costly international tribunals when it already has a robust domestic legal system for addressing investment disputes? The government says it supports ISDS not because of its purported benefits within Canada, but because ISDS creates a "transparent and predictable climate for Canadian investors abroad."[3] The government is so committed to the regime that it provides diplomatic assistance to Canadian investors who wish to initiate arbitration claims in other countries.[4] Canada's FIPAs and FTAs containing ISDS presumably provide enough protec-

tion to Canadian investors abroad to make the policy worthwhile, but this rationale has largely gone untested.

Scott Sinclair, a senior trade researcher with the Canadian Centre for Policy Alternatives, concluded in a recent paper on ISDS in Canada that the "pervasive threat of investor–state challenge…has warped the relationship between multinational corporations and democratically elected governments to the detriment of other social groups and the broader public interest."[5] In this study, we reverse the question to ask: *what has been the experience of Canadian investors using ISDS abroad?* This outward-looking perspective might help us understand the Canadian government's enthusiastic support of ISDS in the face of such discouraging evidence at home. What the report makes clear, however, is that the government's claims — that its trade and investment agenda provides stability to Canadian investors abroad without undermining governments' right to regulate — are not consistent with the evidence, providing further proof that the ISDS regime is more trouble than it's worth.

The data collected for this study is presented in an accompanying appendix. This report analyzes that data. The first section provides background on the investor–state dispute settlement process and an overview of Canada's current ISDS commitments under international investment agreements (FIPAs and FTAs). The second section provides comprehensive quantitative analysis of the data to identify statistical patterns and trends in the use of ISDS by Canadian investors. The third section explores some of the political, social, and legal dimensions of ISDS through a pair of case studies. The report concludes by synthesizing the quantitative and qualitative data and discussing policy implications for Canada.

Methodological Notes

The table that accompanies this analysis is the most up-to-date, comprehensive database of all known ISDS cases involving Canadian investors.[6] There are nine data points for each case, including the date it was initiated, the parties involved, and the outcome or current status of the dispute. The table also includes a brief background on the case and a description of the tribunal process. It is modeled on and should be seen as a companion piece to Sinclair's *NAFTA Chapter 11 Investor–State Disputes to January 1, 2015* (referenced above). As such, descriptions of cases that appear in the NAFTA table are not repeated here.

The parties in an ISDS dispute are not always obligated to disclose the case, so the actual number of ISDS cases initiated by Canadian investors abroad cannot be known for sure. The list of cases presented here is only as comprehensive as public information allows. Investors, states, or arbitrators themselves have made many of these cases public, particularly when they involve developed countries as respondents, and there are several existing databases of known ISDS cases.[7] Where the parties do not acknowledge a dispute, local and international journalists often report on them. These and other primary and secondary sources have been used to compile as complete a database as possible. The table includes disputes initiated by Canadian investors through a shell company[8] as well as those initiated by non-Canadian investors through a Canadian shell company. The distinction is discussed in more detail in the statistical section.

All facts and figures in the table are taken from arbitral awards and other official documents where available. If documents have not been made public, press releases and third party sources are used. Amounts claimed and case outcomes that have not been confirmed by official sources are denoted with "Reported" in the table. A complete list of sources is available at the end of the table.

The "industry" and "type of measure challenged" categories are determined by the author. Because investors are sometimes involved in more than one industry, and the measures challenged frequently affect more than one policy area, these categories refer to the principal industry and policy sectors. Each case is coded using the same methodology as Sinclair's NAFTA table in order to make direct comparisons possible.

When reading the table, please note that where a claim is brought by a subsidiary or other shell company on behalf of an investor in a third jurisdiction, both the parent and the subsidiary are listed as claimants. However, only the shell company or subsidiary (listed second and denoted with "via") is technically the claimant in these cases. Each claimant's headquarters or place of origin is included where available.

The "date initiated" category refers to the earliest confirmed date of proceedings, which is not always directly comparable across cases. Typically, the listed date is the claimant's notice of arbitration (under UNCITRAL rules) or request for arbitration (under ICSID rules). If no specific date can be confirmed, the closest known month or year is given.

Background

What Is Investor–State Dispute Settlement?

Investor–state dispute settlement (ISDS), also known as international investment arbitration, is a supranational, quasi-judicial process through which foreign investors can seek binding arbitration, outside of local courts, to resolve disputes with national governments. ISDS is generally an enforcement tool for commitments that states make in international investment agreements (IIAs), which include bilateral investment treaties (BITs) — Foreign Investment Promotion and Protection Agreements (FIPAs) in Canada's case — and the investment chapters in free trade agreements (FTAs). The process elevates private investors to a status on par with sovereign states. As Sinclair explains in the context of NAFTA's investment chapter,

> Investors do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system before launching a NAFTA claim. Under Chapter 11, [Canada, Mexico and the U.S.] have given their "unconditional, prior consent" to submit investor claims to binding arbitration, allowing investors to simply bypass the domestic courts.... Tribunal decisions are final, and beyond the reach or review of domestic courts.[9]

The commitments that states make in these IIAs can sound concrete and reasonable. For example, states are typically required to treat foreign investors "fairly and equitably," to treat foreign investors *at least* as well as

they treat domestic investors ("national treatment"), and to provide compensation in the event of direct or indirect expropriation (e.g., where a decision results in the loss of an investor's current assets or expected profits). In practice, arbitrators in ISDS cases have interpreted these guarantees quite loosely and inconsistently, deciding, for example, that investors had been treated unfairly even where a government's actions (e.g., cancelling a resource concession) were entirely legal and reasonable.

States also tend to be barred by IIAs from imposing local development requirements (e.g., local content, training or hiring quotas on a major infrastructure project), or imposing capital controls on foreign investors. If a foreign investor believes they were harmed by a government in violation of one of these obligations, that investor (the "claimant") can allege a breach of the agreement, initiate ISDS arbitration, and claim monetary compensation or other remedies from the state (the "respondent"). Cases typically last for several years and end when the tribunal issues a binding ruling or the parties negotiate a settlement. In most cases, a tribunal's decision cannot be appealed or even reviewed.[10] To reiterate, the right to ISDS is *only* available to foreign investors; domestic investors are limited to the domestic legal system in the event of a dispute.

There are thousands of IIAs that provide grounds for ISDS claims, but there are only a handful of bodies that facilitate arbitration. The two most prominent are the World Bank's International Centre for Settlement of Investment Disputes (ICSID), created in 1965, and the United Nations Commission on International Trade Law (UNCITRAL), created in 1966. Each has slightly different procedural rules. Both the respondent state and the claimant's home state must be members of either body for a case to be brought, although there are some exceptions and loopholes. Canada acceded to UNCITRAL in 1991 and ratified the ICSID Convention in 2013.

When deciding ISDS cases, these tribunals have been reluctant to consider human rights law, environmental treaties, or any other international obligations that states have entered into. The only question they claim to answer is whether a state has breached its obligations to an investor under one IIA or another.

Canadian ISDS Coverage

As of June 2015, Canada has signed or concluded 43 FIPAs. Of those, 29 are currently in force.[11] Canada has also signed or concluded 12 FTAs covering

44 countries. Of those, 11 agreements covering 15 countries are currently in force.[12] Dozens more FIPAs and FTAs are under negotiation, including the highly controversial Trans-Pacific Partnership (TPP).[13] Almost all of these international agreements contain some form of an investor–state dispute settlement mechanism.[14] If the recently completed (though not yet signed or ratified) Canada–European Union Comprehensive Economic and Trade Agreement (CETA) is included, the amount of foreign direct investment (FDI) in Canada that will soon be covered by an ISDS mechanism is $607 billion, or approximately 83% of all FDI in Canada.[15]

ISDS goes both ways, which means Canadian investors in countries with which Canada has an IIA in place have access to the same arbitration mechanisms that foreign investors from partner countries have in Canada — even if the substantive obligations are not always reciprocal, as is the case in Canada's FIPA with China (which is a much better deal for Chinese investors here than Canadian investors in China).[16] If CETA is included once again, the stock of Canadian foreign direct investment that could soon be protected by ISDS is $656 billion, or approximately 79% of all Canadian direct investment abroad (CDIA).[17]

Foreign direct investment is a problematic indicator for a variety of reasons. Due to complicated corporate structures and the extensive use of shell companies the actual amount of direct investment entering and leaving Canada may be higher or lower than official figures indicate. For example, nearly 14% of all CDIA ($71 billion) is in Barbados. Much of that money is "invested" in order to avoid taxation in Canada, so classifying it as FDI — in the same category as greenfield investment in the United States or Ecuador, for example — is misleading.

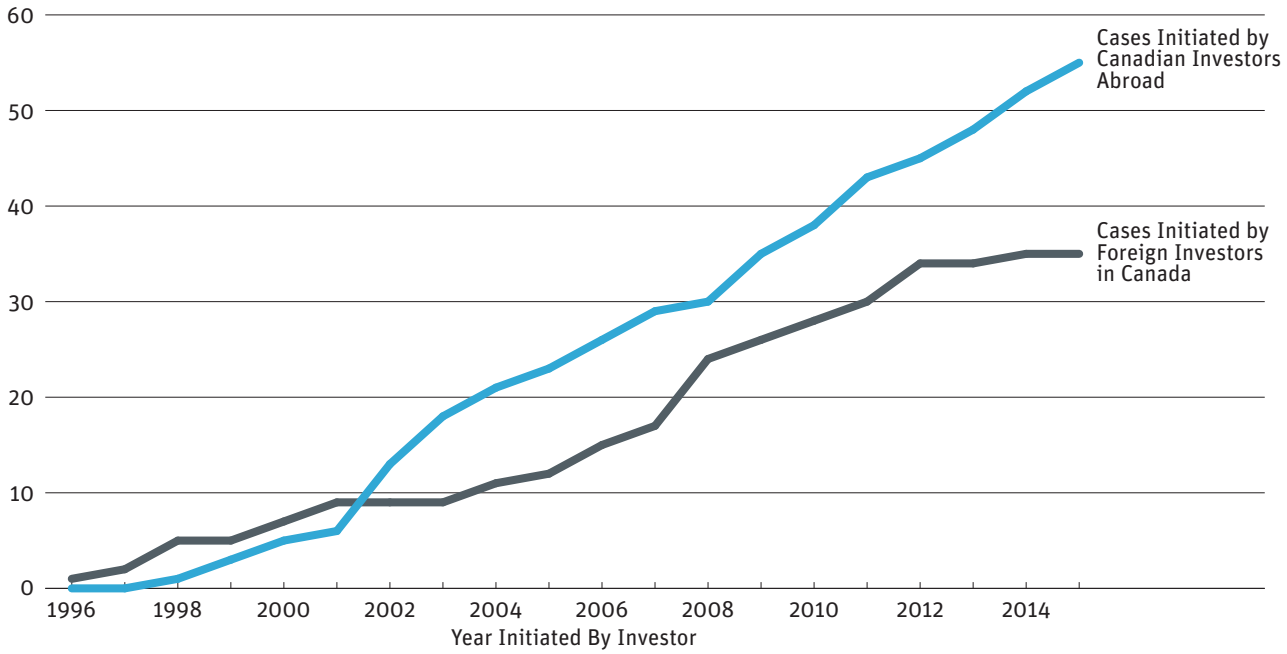
Nevertheless, it is clear that ISDS now applies — or will soon apply, since many of these agreements have only been completed in the past few years — to the majority of investment both into and out of Canada. ISDS is no longer a fringe benefit for investors from select partner countries, but widely available to the majority of Canadian investors abroad and to an even greater share of foreign investors in Canada, particularly from major investment hubs like the U.S., China, and possibly, if CETA is ratified in the next few years, the European Union.[18]

Statistical Analysis of Investor–State Disputes Involving Canadian Investors

AS OF JULY 2015, Canadian investors have been involved in 55 known arbitration claims against governments using investor–state dispute settlement. ISDS affects states and investors even where conflicts do not lead to formal disputes. This is because the mere presence of an ISDS mechanism may be a factor in so-called regulatory chill, or it may encourage a foreign corporation to make a new investment (although there is little evidence to suggest that ISDS leads to greater FDI).[19] However, for the purposes of the present statistical analysis, this sample of 55 cases comprises the total experience of Canadian investors under ISDS.

In this section, each of the nine data points collected for the study is analyzed independently to identify patterns in the use of ISDS by Canadian investors. For the purpose of describing trends, 2006 is used as a reference year. As roughly the halfway point for Canada's modern free trade era, which began in the 1990s, 2006 serves as a useful benchmark. It is also the year Canada's current federal government took power and made trade and investment liberalization a central pillar of its economic strategy.[20]

FIGURE 1 Number of ISDS Cases Involving Canada or Canadian Investors (Running Total)



Dates Initiated

The first known ISDS case initiated by a Canadian investor was *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* in 1998. Since then, Canadian investors have initiated an average of three new ISDS claims per year. The number of new ISDS claims brought by Canadian investors each year has been relatively steady — 2.9 new claims per year before 2006 and 3.2 per year since then — and has roughly kept pace with the number of new cases initiated by foreign investors against Canada (see *Figure 1*).

The total cumulative number of ISDS cases worldwide has ballooned in recent years, more than doubling from under 300 in 2006 to 608 by the end of 2014.[21] The annual number of new cases worldwide is accelerating, peaking at 59 new cases in 2013.[22] Most of these new cases involve developing countries as respondents and investors from developed countries as claimants, with Canada the sixth most common home country, trailing only the U.S., Netherlands, U.K., Germany, and France.

Therefore, although Canadian investors are keeping pace with investors from other developed countries in terms of new ISDS claims, the high number of new cases facing Canada make it an outlier among developed countries.

TABLE 1 Primary Legal Instruments Invoked by Canadian Investors in ISDS Cases

Legal instrument	Cases	Share of total cases
NAFTA	22	40%
Canadian FIPA or bilateral FTA	20	36%
Contract	7	13%
Other IIA	6	11%
Total	**55**	**100%**

Treaties Invoked

The majority of ISDS claims involving Canadian investors are grounded in Canadian IIAs (see *Table 1*). NAFTA has been invoked most frequently, in 22 cases, followed by the Canada–Venezuela FIPA in six cases. In total, Canada's FTAs and FIPAs account for 76% of all cases. The remaining claims are grounded in IIAs to which Canada is not party — by Canadian investors using shell companies or subsidiaries to gain access to other agreements — or in contractual agreements between an investor and the country in which it is investing.

Sometimes, Canadian investors who do not have access to ISDS through an IIA will negotiate an arbitration clause in a government contract instead. If the government then violates the contract, the investor can bring an ISDS claim based on the terms of the contract even outside of any international treaty. This process can be effective for companies, as *Khan Resources v. Mongolia* illustrates (see case study in next section). Contract-based arbitration is one of many alternatives to the overly broad and undemocratic protections granted to foreign investors in treaty-based ISDS.

The number of known ISDS claims initiated by Canadian investors through contracts, by shell companies, or otherwise outside of Canadian IIAs is increasing. The share of claims in these categories has risen from 13% before 2006 to 31% since. Notably, contract-based arbitration cases are not always disclosed so their total number may be much higher than indicated here.

Arbitration Rules

About half of ISDS cases involving Canadian investors have been arbitrated under UNCITRAL rules. Two-fifths have followed ICSID rules (see *Table 2*). The proportion has stayed about the same over time.

TABLE 2 Arbitration Rules Used in ISDS Cases Involving Canadian Investors

Arbitration rules	Cases	Share of total cases
UNCITRAL	25	45%
ICSID — Additional Facility	11	20%
ICSID — Convention	11	20%
Other	2	4%
Unknown	6	11%
Total	**55**	**100%**

TABLE 3 Province of Origin of Canadian Investors Involved in ISDS Cases

Claimants' province of origin	Cases	Share of total cases
British Columbia	16	29%
Ontario	14	25%
Alberta	8	15%
Quebec	5	9%
Nova Scotia	2	4%
Other/unknown province	7	13%
Outside Canada	3	5%
Total	**55**	**100%**

Canada did not ratify the ICSID Convention until 2013, but Canadian investors were previously able to use ICSID's Additional Facility rules to bring claims. The differences are mainly superficial, though as a ratifying member of the ICSID Convention, Canada loses even the limited right to judicial appeal of ISDS decisions afforded under the Additional Facility rules.

Origins of Claimant Investor

The majority of investors in the sample are Canadian-registered companies headquartered in Canada. The most common provinces of origin are British Columbia, Ontario, and Alberta (see *Table 3*). The most common city of origin is Vancouver, where the claimants in 11 cases are based.

However, the "Canadian investors" who have lodged ISDS claims are not uniformly "Canadian." About a quarter of all cases fit into one of the follow-

ing three categories: claims made by a Canadian-based investor through a shell company registered in a third country (10 cases), claims made by an investor in a third country through a shell company registered in Canada (three cases), or joint claims made by a Canadian-based investor and an investor in a third country (four cases). In almost all of these cases, investors have used shell companies, subsidiaries, or partnerships to gain access to more favourable investment protections than would normally be available to them.

For example, in *South American Silver v. Bolivia*, the Vancouver-based investor initiated an ISDS claim through its subsidiary incorporated in Bermuda. Canada does not have an IIA with Bolivia that would normally allow South American Silver, as a Canadian company, to initiate an ISDS case. However, Bermuda is part of the United Kingdom and therefore subject to the U.K.-Bolivia Bilateral Investment Treaty, which provided a legal basis for South American Silver's subsidiary to launch a claim. In its notice of arbitration, the company provided a diagram of its corporate structure that effectively illustrates how far multinational corporations are willing to go to gain access to more favourable taxation and legal protections (see *Figure 2*).

Also notable are the three cases in which a Canadian investor has brought a claim against the government of Canada using a shell company or affiliate registered in another country. These cases are significant because ISDS is supposedly intended for use by bona fide foreign investors in order to encourage inward foreign direct investment. Some Canadian companies, however, have found ways to take advantage of these added protections for foreign investors. For example, in *AbitibiBowater v. Canada* the Montreal-based pulp and paper manufacturer (now called Resolute Forest Products) made use of its incorporation in Delaware to launch a claim as a U.S. investor against the government of Canada. The company ended up winning $130 million in a negotiated settlement.

The prevalence of disputes involving shell companies, subsidiaries, or partnerships is increasing. Of the 17 cases that fit the three categories described above, 14 have been initiated since 2006.

Industries of Claimant Investor

Disputes involving Canadian investors are overwhelmingly concentrated in the resource and energy sectors (see *Table 4*). Resource companies are at the centre of 25 disputes, nearly half the total, while energy companies are in-

FIGURE 2 Claimant's Corporate Structure in *South American Silver v. Bolivia*[23]

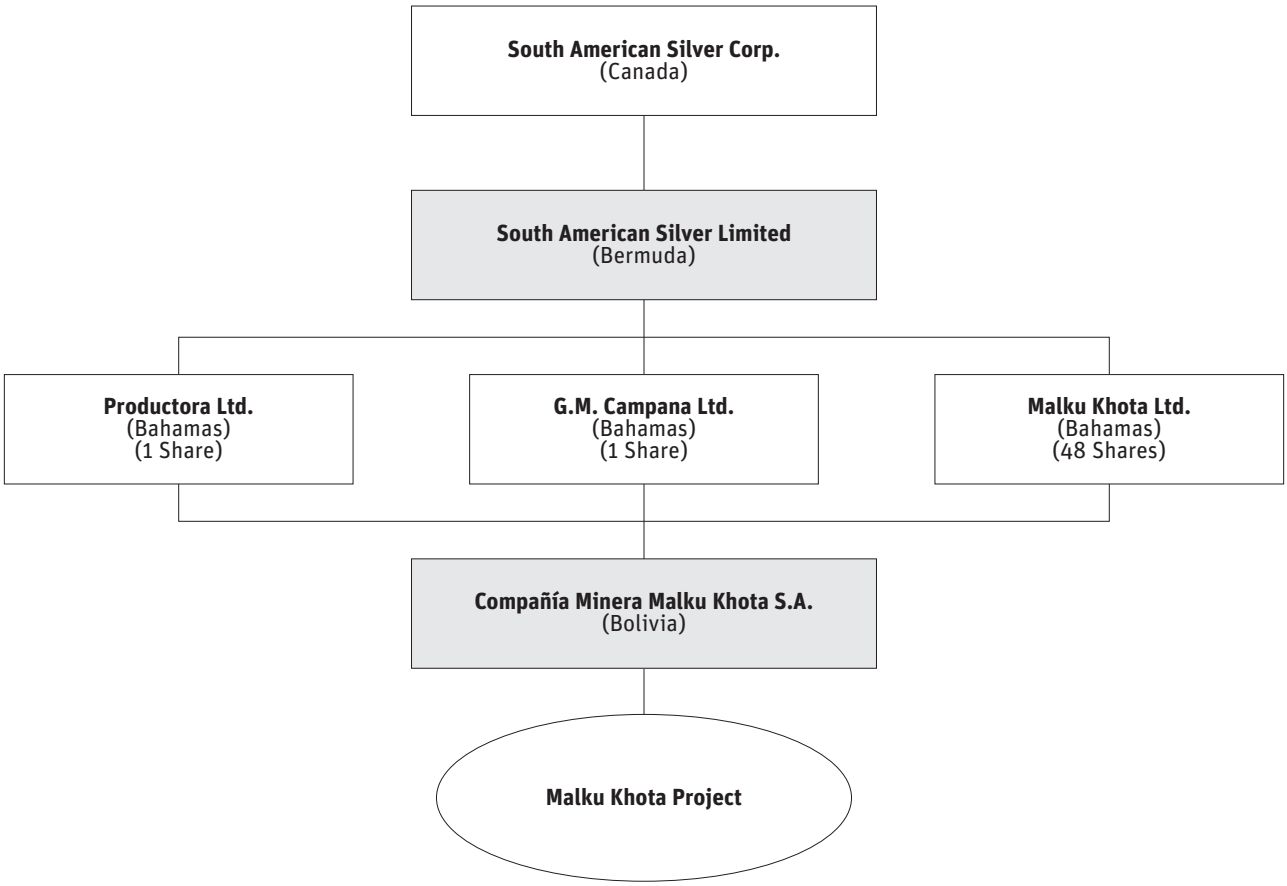
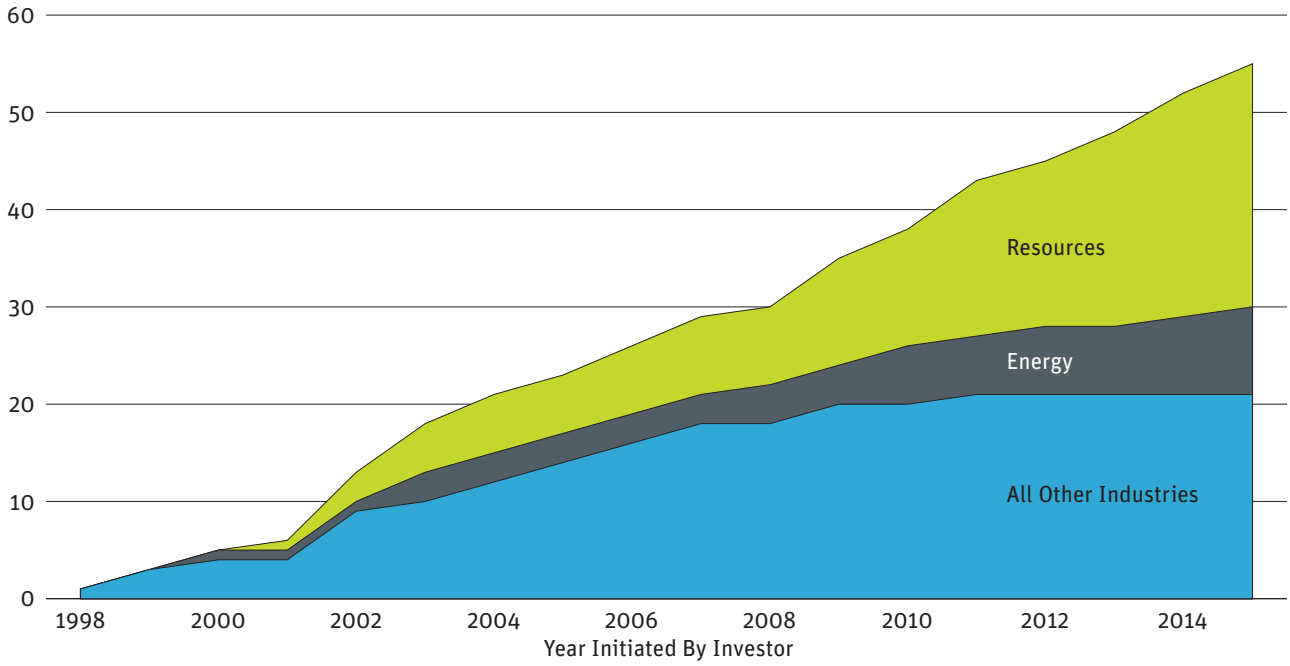


TABLE 4 Industries of Canadian Investors Involved in ISDS Cases

Claimants' industry	Cases	Share of total cases
Resources	25	45%
Energy	9	16%
Private Investor	5	9%
Agriculture	3	5%
Pharmaceuticals	3	5%
Other	10	20%
Total	**55**	**100%**

FIGURE 3 Number of ISDS Cases Involving Canadian Investors by Industry (Running Totals)



volved in nine disputes. Private investors (Canadian citizens who are not a registered corporation) are the next most common claimants with five disputes. The remaining cases are in a range of industries including agriculture, pharmaceuticals, entertainment, and finance. Overall, we can identify 14 distinct industries among the claimants.

The trends here are especially clear (see *Figure 3*). Although ISDS claims by Canadian resource companies have always led other industries, the proportion has skewed in recent years. Before 2006, only a quarter of cases were in the resource industry; since then, 59% of all new cases have been brought by resource companies. The share of claims brought by energy companies has increased to a lesser degree, from 13% before 2006 to 19% since. Together, the resource and energy industries account for 78% of new cases since 2006. Moreover, these industries account for 94% of all pending/ongoing cases.

Notably, the distribution of ISDS cases by industry does not match the character of Canadian direct investment generally. Energy and resource investment makes up only 18% of total CDIA. In comparison, 38% of CDIA is in finance and insurance.[24]

TABLE 5 Geographical Region of Respondent States in ISDS Cases Involving Canadian Investors

Respondents' region	Cases	Share of total cases
North America	23	42%
South & Central America	16	29%
Asia & Oceania	7	13%
Africa	5	9%
Europe	4	7%
Total	**55**	**100%**

Respondent States

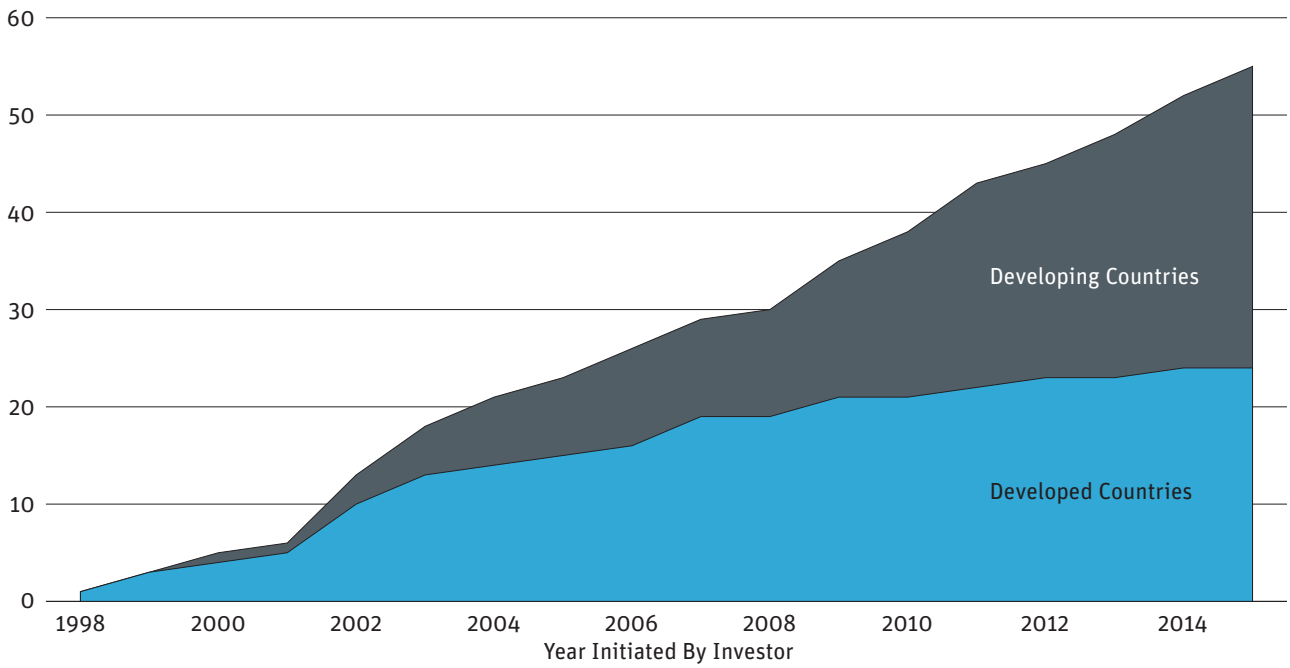
Canadian investors have initiated ISDS claims against 24 different countries in every region of the world. The United States has faced the greatest number of ISDS claims by Canadian investors (18 cases) followed by Venezuela (six cases). Canada, Costa Rica, Ecuador, and Kenya have each faced three ISDS claims from Canadian investors.

By region, the majority of disputes are in North America and South and Central America (see *Table 5*). Of the 24 countries involved in ISDS cases with Canadian investors, 19 are considered developing countries by the International Monetary Fund.

The composition of respondent states has shifted significantly in the past decade. Although the United States was the respondent in 61% of cases before 2006, it has only been the respondent in 13% of cases since. The trend in Canadian-led ISDS cases has been toward developing countries (see *Figure 4*), especially in South and Central America. Before 2006, only 35% of cases initiated by Canadian investors involved a developing country and only 17% of cases involved a South or Central American respondent. Since 2006, 72% of cases have involved a developing country and 38% of cases have involved a South or Central American respondent.

This pattern coincides with the rise in claims brought by Canadian resource companies, which are extremely active in developing countries such as Venezuela and Kenya. The shift toward arbitration with developing countries may be at least partly explained by Canadian investors' lack of ISDS success in NAFTA. To date, arbitrators have dismissed every ISDS case brought by a Canadian investor against the U.S. Investors have been marginally more successful in ISDS cases lodged against developing countries; with the ex-

FIGURE 4 Composition of Respondent States in ISDS Cases Involving Canadian Investors (Running Totals)



ception of the AbitibiBowater case, the only Canadian "wins" have come against Mongolia, Niger, and Venezuela.

Government Measures Challenged by Investors

The specific government measure leading to a dispute is different in each case, so categorizing them requires a degree of subjectivity. Nevertheless, it is possible to roughly group the cases by the kinds of government actions that the investor alleges violated the state's treaty, contractual, or legislative obligations (see *Table 6*).

Measures related to resource management are most commonly challenged by Canadian investors. This category is largely made up of cases where states have nationalized mining projects or otherwise ended an investor's claim to a natural resource on non-environmental grounds. Government actions related to environmental protection are the next most common basis for a dispute, followed by claims related to the administration of justice.

TABLE 6 types of Government Measures Challenged in ISDS Cases Involving Canadian Investors

Type of measure challenged	Cases	Share of total cases
Resource management	20	36%
Environmental protection	12	22%
Administration of justice	8	15%
Financial regulation & taxation	3	5%
Health care & pharmaceutical regulation	3	5%
Trade remedies	3	5%
Other	5	9%
Unknown	1	2%
Total	**55**	**100%**

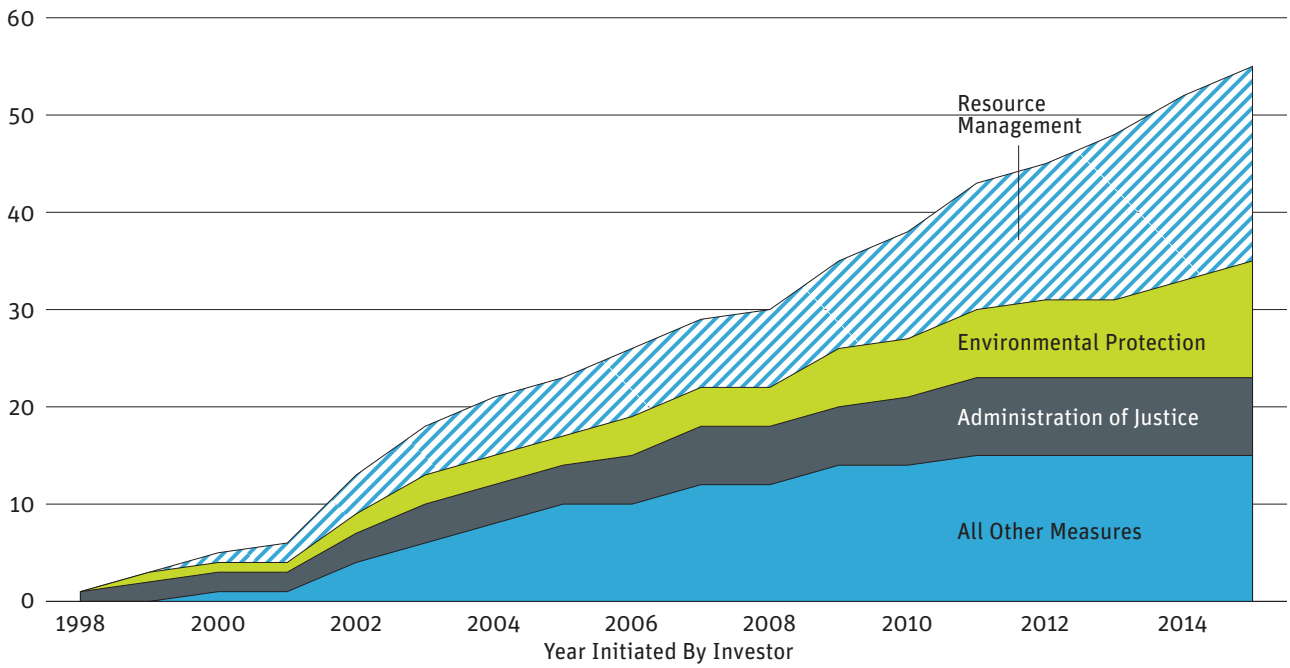
Environmental protection cases usually occur where a government has granted concessions to an energy or resource company but later decides that the project will have unacceptable environmental consequences; in many of these cases, the state terminates the concession in response to public pressure. Administration of justice cases usually occur where an investor has first initiated a dispute through the domestic judicial system and is either dissatisfied with the outcome or was successful in the case but the decision was not enforced.

Consistent with the increase in cases in the resource and energy industries, disputes related to resource management and environmental protection have increased significantly (see *Figure 5*). Before 2006, Canadian investors challenged resource management measures 26% of the time and environmental protection measures 13% of the time. Since 2006, those figures are 44% and 28% respectively. Together, disputes in these two areas account for 94% of all pending/ongoing cases.

Amounts Claimed by Investors in Compensation

The amounts claimed in each case vary widely, ranging from a few million to several billion dollars in damages. It is difficult to analyze these data statistically since figures are often inflated, disputed, or unknown. Some of the more outlandish claims initiated by private investors, like the US$13.5 billion claimed in *James Russell Baird v. United States*, further distort the data.

FIGURE 5 Number of ISDS Cases Involving Canadian Investors by Government Measure Challenged (Running Totals)



Very generally speaking, the amounts claimed have increased over time — the share of billion dollar claims is growing and claims of less than $100 million are now uncommon. Venezuela alone has faced three claims in excess of $1 billion from Canadian investors since 2006; it has lost one of those cases and the other two are ongoing.

A 2012 report published by Corporate Europe Observatory and the Transnational Institute suggests that the investment arbitration industry itself — the small number of lawyers and arbitrators who handle the vast majority of cases — could be contributing to the growing dollar amount of ISDS claims.[25]

Case Outcomes

Of the 55 known ISDS cases involving Canadian investors, about half (26 cases) have ended with a tribunal decision (see *Table 7*). In two cases, the investor and the state reached a negotiated settlement. In 10 cases, the investor formally withdrew their claim or otherwise abandoned arbitration

TABLE 7 Outcome or Current Status of ISDS Cases Involving Canadian Investors

Outcome/status	Cases	Share of total cases	Share of decided cases
State wins	4	7%	15%
Investor wins	2	4%	8%
Dismissed	20	36%	77%
Total Decided	**26**	**47%**	**100%**
Settlement	2	4%	
Withdrawn	5	9%	
Inactive	5	9%	
Pending	17	31%	
Total	**55**	**100%**	

before the tribunal ruled and without settling with the government. The remaining 17 cases are still navigating the arbitration process.

In those cases where an arbitration panel has ruled, tribunals have dismissed Canadian investors' claims on jurisdictional or other technical grounds three-quarters of the time — i.e., the case was dismissed before the parties' substantive arguments were heard. Of the six cases that made it to a discussion of merits, tribunals ruled in the investor's favour only twice. Put another way, Canadian investors have only "won" 8% of all the ISDS cases that have been decided so far — 14% if favourable settlements are included. In contrast, foreign investors have won or favourably settled seven of 15 decided cases against Canada — a "success" rate of almost 50%.

Canadian investors' success rate in tribunal rulings is trending slightly upward: in cases brought since 2009, investors have two wins, zero losses, and only three outright dismissals. It is entirely possible that some or even most of the 17 pending cases will be decided in favour of the investor, but at this point the sample of recent case outcomes is too small to suggest a clear pattern. The only definitive long-term trend is the repeated failure of Canadian investors in international investment arbitration.

In fact, the overall experience of Canadian investors appears even bleaker when the four ISDS cases that ended in payouts (two tribunal rulings and two negotiated settlements) are considered. In the first case, *TG World v. Niger*, the investor was a Canadian company but brought the claim using a shell company incorporated in the Bahamas. The investor won a favourable settlement that included a carried interest in the disputed project. In the second case, *AbitibiBowater v. Canada*, the investor was a Canadian-based

company that sued its own government based on the company's corporate registration in the U.S state of Delaware, as noted above. AbitibiBowater "won" $130 million in a negotiated settlement that let the company off the hook for environmental clean-up costs and labour force settlements. In the third case, *Gold Reserve v. Venezuela*, the investor was a U.S.-based company incorporated in the Yukon. Gold Reserve was awarded US$740 million in compensation. In the final case, *Khan Resources v. Mongolia*, the Canadian investor's case was based on its contract with the government and domestic Mongolian law, not a Canadian IIA. The investor was awarded US$104 million in compensation.

In sum, none of the winning investors were both based in Canada *and* invoking a Canadian agreement. In other words, the ISDS success rate for Canadian investors pursuing international investment arbitration "by the book" is *zero*.

Summary

A quantitative analysis of the 55 known ISDS cases involving Canadian investors reveals a number of interesting patterns. Geographically, Canadian investors have used ISDS in every part of the world and against every kind of government. However, investors are increasingly targeting developing countries, especially in South and Central America. This may be due to Canadian investors' historical lack of success in disputes with the United States and other developed countries, but it could also relate to the expansion of Canadian investment in these regions.

The total number of ISDS claims initiated by Canadian investors has grown steadily over the past 20 years. Canadian investors in the resource and energy sectors account for a growing share of these cases (20 of the past 21 ISDS claims) while claims in most other industries have completely stopped. Although the actual amounts vary dramatically, investors' claims for compensation are typically in the hundreds of millions of dollars and increasingly in the billions of dollars.

The government actions most commonly challenged by Canadian investors are decisions related to resource management and environmental protection. The growing share of cases that fall into these two categories is directly tied to the growing number of cases initiated by Canadian investors in the resource and energy industries, particularly in developing countries.

The phrase "Canadian investor" should be understood as a fuzzy concept, as it would be for investors of any other country. Although the majority of cases in this study involve a Canadian citizen or a company legitimately owned and operated in Canada, a large number of cases involve shell companies or other legal entities with no substantive ties to Canada. In these cases, investors have initiated ISDS claims from the jurisdictions with the most favourable investor protections, not necessarily the jurisdictions in which they operate or have headquarters.

Finally, Canadian investors have lost the vast majority of concluded cases. In three-quarters of tribunal decisions, Canadian investors' claims were thrown out before the arbitrators even heard their substantive arguments. Only a handful of Canadian investors have ever won an award or a favourable settlement in an ISDS case. Of those winners, none was an investor both based in Canada and invoking a Canadian IIA.

Taken together, these observations suggest a particular narrative for the prevailing use of ISDS by Canadian investors to date:

1. A Canadian resource or energy company initiates an ISDS claim (increasingly through a shell company).
2. The company targets a developing country (increasingly in South or Central America).
3. The company disputes a resource management or environmental protection measure (typically seeking hundreds of millions of dollars in compensation).
4. The company does not win (or has not yet won) an award or favourable settlement.

Not all cases fit this mould, but a surprising and growing proportion do: 29 cases (53%) meet at least three of these criteria, including 19 of the past 21 cases initiated by Canadian investors, and 19 cases (34%) meet all four criteria, including 15 of the 19 most recent cases. This pattern does not support the Canadian government's position that ISDS is necessary for protecting Canadian investors abroad; it consequently weakens the government's justification for the aggressive pursuit of new treaties containing ISDS.

Of course, this pattern may not hold. It is certainly possible that Canadian investors, primarily in the resource sector, will start to win more or even most of these cases moving forward, especially as corporate lawyers become more adept at navigating the global ISDS architecture. Too much

emphasis on macro-level, quantitative analysis also obscures the important social, environmental, and political consequences of expanding the ISDS regime through new IIAs.

In the next section, two case studies help to elucidate the threats of treaty-based investment arbitration to democratic governance and to illustrate the potential of non-treaty-based mechanisms for more effectively protecting Canadian investment abroad than signing ever-more FIPAs and FTAs.

Case Studies of Investor–State Disputes Involving Canadian Investors

TWO ISDS CASES involving Canadian resource companies are investigated in this section. The first case, *Pac Rim v. El Salvador*, exemplifies the common narrative of a resource company challenging environmental protections in a developing country. The second case, *Khan Resources v. Mongolia*, demonstrates as a counterpoint the utility of contract-based international arbitration to address investment disputes in countries with problematic domestic legal systems.

Pac Rim Cayman LLC v. Republic of El Salvador

El Salvador is a small Central American nation of 6.3 million people bordering Guatemala and Honduras to the north and the Pacific Ocean to the south. Its dense population and historically deregulated resource sector have placed significant strains on the country's natural environment. Only 13% of the country remains forested, compared to well over 80% in the 1960s, and 90% of El Salvador's surface water is contaminated.[26] Water stress is a

severe and growing humanitarian issue for the country, which already has high rates of poverty and inequality. El Salvador is also considered to be one of the most vulnerable countries in the world to climate change due to the prevalence of extreme weather events in the country, including both heavy rainstorms and droughts.

Despite its size, El Salvador is home to significant gold and silver reserves, which have attracted extensive investment from foreign mining companies. However, those mining projects are also draining and contaminating the country's scarce water resources. Poisoning and disease is frequently reported in communities downstream from large mines, and the public is increasingly opposed to mining in the country. In 2007, an academic study suggested that 62.5% of Salvadorans opposed metal mining.[27] In more recent plebiscites conducted at the community level, 98% of residents polled have voiced their opposition to these projects.[28] In response to public pressure, the government of El Salvador has acknowledged the necessity of addressing environmental degradation and climate change. Significantly, the government has, since 2008, imposed a de facto moratorium on new mining activity. It is in this context that a Canadian mining company launched an international arbitration claim against El Salvador.

The El Dorado gold mine in the Cabañas region of central El Salvador is a major deposit of high-quality gold ore. The government of El Salvador had initially granted exploration rights to the site in 1993, well before it was willing or able to acknowledge the potential humanitarian and environmental consequences of mining in the area. In 2002, those rights were acquired by Pacific Rim Mining Corporation, a Canadian company headquartered in Vancouver, British Columbia.

Pacific Rim began to drill exploratory wells and otherwise invest in the El Dorado project in 2003. In 2004, the company transferred legal ownership of the project to Pac Rim Cayman LLC, a shell company incorporated in the Cayman Islands. It continued to develop the mine for several years as it awaited government approval to begin full operations. Public opposition grew during this time—violence broke out between miners and local communities at several points. As a result of public pressure, the government indicated as early as 2006 that it was hesitant to grant an exploitation permit. In 2007, Pac Rim Cayman changed its legal residence from the Cayman Islands to the U.S. state of Nevada. In March 2008, then-president Antonio Saca announced that no new mining permits would be granted, provoking the company to launch an ICSID arbitration case against El Salvador in April 2009.

Canada does not have an international investment agreement with El Salvador, so Pacific Rim used its U.S.-registered shell company, Pac Rim Cayman LLC, to bring the claim. The company invoked the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA), to which both El Salvador and the United States are party. In its notice of arbitration, the company alleged that El Salvador had violated DR-CAFTA Articles 10.3 (national treatment), 10.4 (most-favoured nation), 10.5 (minimum standard of treatment), and 10.7 (expropriation and compensation). Pacific Rim also alleged violations of El Salvador's domestic investment law, which includes protections for foreign investors. The company initially claimed a minimum of US$77 million in compensation.[29]

After several years of hearings, the tribunal ruled in 2012 that Pacific Rim did not have jurisdiction under DR-CAFTA to bring the claim against El Salvador. The tribunal did not dispute Pac Rim Cayman's opportunistic legal migration from the Cayman Islands to the United States, which El Salvador had alleged was an "abuse of process," but it concluded that the shell company did not have "substantial business activities" in the United States and was therefore not covered by the agreement. However, the tribunal accepted the allegations brought under El Salvador's domestic investment law and decided to proceed with the case regardless of its tenuous legal foundation.[30]

Pacific Rim was brought to the brink of bankruptcy during the lengthy arbitration process. In 2013, the company was acquired by Canadian-Australian mining company OceanaGold, which inherited the ISDS case. OceanaGold subsequently increased the compensation claim to US$301 million before reportedly reducing it to US$284 million.[31] The tribunal process continues with a final decision expected in the next year.

Although an outcome is still pending, *Pac Rim Cayman v. El Salvador* illustrates a number of issues common to Canadian investors' use of ISDS. Two in particular are worth highlighting.

First, the dispute stemmed not from the arbitrary actions of a corrupt government, but rather from a citizen-led drive to preserve a poor country's dwindling natural environment. The El Dorado gold mine was and remains deeply unpopular in El Salvador and the government's de facto moratorium on new mining projects was a reasonable and democratically legitimate response to this public pressure. As a 2011 *amicus curiae* brief in the arbitration proceedings explained:

> The real opposition to Pac Rim's mining plans was *not* generated at the level of government ministries, but rather at the level of the local, potentially af-

> fected communities. Local communities and NGOs...in a legitimate exercise of the democratic process in the post-Civil War political environment, refused to accept Pac Rim's plans to dig mines under their own lawfully owned land, build dangerous waste ponds, and otherwise threaten the continuity of their environment, livelihoods, and way of life.[32]

In other words, this case demonstrates very clearly how the ISDS process can be used to directly challenge government actions taken in the public interest.

Second, the consequences of losing an ISDS case are far more severe for a state than they are for an investor. Conversely, an investor has far more to gain from winning. The US$284 million claimed by Pac Rim (OceanaGold) is more than the country receives in foreign aid every year.[33] An award of this magnitude would be devastating for the country.

Moreover, if El Salvador cannot afford to pay compensation then the government may be forced to grant Pac Rim (now OceanaGold) a mining permit for the El Dorado project after all. Even if it does win, the case has been extremely expensive for El Salvador. As of June 2012, the government's legal costs had exceeded US$4 million and that figure has reportedly increased to US$12 million since.[34] That does not include the social costs of years of legal uncertainty or the potential chilling effect on future resource management policy in the country.

OceanaGold, on the other hand, has almost nothing to lose by rolling the dice through investor-state arbitration. The Canadian-Australian company's revenues in 2014 were US$563 million with profits of US$112 million. A favourable decision in this case would nearly quadruple its profits for the year. Alternatively, the company may be granted a lucrative concession to the El Dorado gold mine. If Pac Rim loses the case it will only cost OceanaGold the US$10.2 million it paid to acquire the failing company, plus lawyers' and arbitrators' fees. At worst, the company may also be on the hook for El Salvador's legal costs, which it could easily absorb.

The highly uneven stakes in this case are indicative of the lopsided nature of ISDS more broadly. Powerful foreign investors have every incentive to launch an ISDS claim; the only downside is the cost of arbitration. For governments, every case is a direct threat to their sovereignty and the source of potentially devastating payouts. Put another way, governments can never truly "win" an ISDS case — at best, they can only hope to not lose.[35]

Khan Resources Inc. et al. v. Mongolia[36]

Not all ISDS cases are based on international investment treaty rights. In some cases, such as *Khan Resources v. Mongolia*, recourse to ISDS is built into the investor's contract with a foreign government. This is the preferred option for Chinese companies when they invest in developing countries, but Canadian investors have also employed it under certain circumstances. There are still issues with this approach, since foreign investors retain the ability to sidestep the domestic court system if they feel they would be more favourably treated by an investment arbitration panel. However, there are occasionally situations where local courts are compromised, and contract-based arbitration is a somewhat more palatable alternative to treaty-based ISDS for resolving investment disputes—i.e., there are fewer negative consequences for democratic choice.

Mongolia is a vast, sparsely populated country located in the steppes between China and Russia. A third of its three million inhabitants live below the poverty line. Besides agriculture, the Mongolian economy is highly dependent on the extraction of its significant mineral deposits. Foreign direct investment makes up half the country's GDP, which includes extensive investment in mining projects.[37] The government has enacted extremely liberal investment legislation in the hope of attracting FDI. Mongolia is also party to a number of major multilateral trade treaties.

The Dornod region in northeast Mongolia is home to a major uranium deposit. A Russian state-owned mining company operated an open pit mine in Dornod from 1988 until the mine was abandoned in 1995. Rights to the project changed hands several times in the following decade before Toronto-based Khan Resources took effective ownership in 2005, although legal ownership was technically shared between Khan's subsidiaries and partner firms registered in several jurisdictions.

Khan began exploratory drilling in 2006 and was preparing to begin construction in 2009 when it became embroiled in legal disputes with the government. Mongolia alleged breaches of domestic investment law; specifically, the government claimed that Khan was deliberately delaying the project while it tried to sell the rights at a profit. In July 2009, the government temporarily suspended Khan's license to the Dornod mine and in April 2010 it permanently invalidated Khan's mining rights.

However, Mongolia's motivations in 2009 and 2010 are questionable in light of other actions taken by the government during this time. Specifically, Mongolia initiated a joint venture between Russian and Mongolian

state-owned enterprises to begin mining for uranium in the Dornod region in 2009. Suspiciously, the announcement came only one week after Khan confirmed the economic feasibility of the mine. Furthermore, Mongolia had apparently reached a deal with Russia *before* the government had investigated Khan. The tenuous allegations made against the company as a result of those investigations, which were the legal basis for invalidating Khan's licences, appear especially dubious in this context. The domestic courts ruled in 2010 that the government's actions against Khan were "clearly invalid" and "clearly not lawful." When the government refused to comply with the domestic courts, Khan initiated a UNCITRAL arbitration case in January 2011.

Technically, the arbitration was jointly brought by three companies — Khan Resources Inc. (Canada), Khan Resources B.V. (Netherlands), and the Central Asian Uranium Company Holding Company (British Virgin Islands). The claimants alleged dozens of violations of three different sets of legal obligations to which Mongolia was bound — the companies' mining contract with the government, Mongolian investment law, and the Energy Charter Treaty. Effectively, Canadian-based Khan Resources was using every possible legal avenue available to it and its affiliates and subsidiaries to sue the government of Mongolia for expropriating its investment in the Dornod project and for ignoring the domestic court decisions. The company claimed US$80 million in compensation.

In March 2015, after four years of proceedings, the tribunal ruled unanimously in favour of Khan. It found that the invalidation of the company's exploration and mining licenses was a violation of domestic and international law and it awarded US$80 million plus interest and legal costs amounting to US$104 million in compensation. The tribunal noted that the government's motivations were clearly suspect in light of the proposed joint venture with Russia. The government disputes the ruling and has not yet paid the award, so it remains to be seen how the decision will be enforced.

The *Khan Resources v. Mongolia* dispute is superficially similar to *Pac Rim v. El Salvador*. In both cases, a Canadian resource company legally acquired and began developing a mining project in a developing country. In both cases, the government changed its mind between the exploration and exploitation stages of the project and effectively expropriated the company's right to mine. Finally, in both cases, the company pursued international arbitration under the terms of any and all legal agreements that were available to it and/or its subsidiaries, including international treaties, domestic laws, and government contracts. However, as an exemplar of Canadian in-

vestors using ISDS abroad, the Khan case breaks the mould in at least four very important ways.

First, judging from the tribunal award, Mongolia's legal and moral basis for invalidating Khan's licenses was tenuous and opportunistic. Public opinion and the public interest were never driving factors for the government. Instead, it appears that Mongolia tried to remove Khan from the project so that it could launch a lucrative new partnership with a Russian state-owned enterprise. Environmental concerns surrounding the project (and of uranium mining more generally) are certainly valid, but the government did not invoke those concerns. Indeed, its willingness to open the mine under different ownership belies any concern for potential environmental or humanitarian harm.

Second, Khan first attempted — with some success — to resolve the dispute through the domestic legal system before it turned to any ISDS mechanism, whereas Pacific Rim ignored the domestic legal system entirely and went straight to arbitration.

Third, with the exception of the multilateral Energy Charter Treaty, which was ancillary to the main claim, Khan's case against the government of Mongolia was brought entirely through domestic instruments. The company invoked the arbitration clause in a contract that the government had signed specifically for the Dornod project, as well as a piece of Mongolian investment legislation.

Unlike Pacific Rim, which used the DR-CAFTA as an entry point to ICSID arbitration, Khan did not need an IIA to initiate its UNCITRAL claim. This is important because international investment agreements, especially bilateral or regional deals like the DR-CAFTA, are binding in perpetuity and cannot be altered unilaterally. In contrast, Mongolia retains direct control over its domestic law, which it may change in response to this ruling, as well as any future contracts that it negotiates with foreign investors.

Fourth, unlike the vast majority of ISDS cases initiated by Canadian investors, Khan's challenge was successful. As detailed in the preceding section, Canadian investors have only won or favourably settled four out of 55 known ISDS cases. Of the two cases where a tribunal reached a decision in favour of the investor, the Khan case is the only one where the investor could be said to be based in Canada (the other was a U.S. company using a Canadian shell company).

Conclusion

IT MAY BE tempting for ISDS proponents to cite *Khan Resources v. Mongolia* as proof of the ISDS regime's utility for foreign investors operating in uncertain legal environments, but the case is an outlier in a number of respects. Importantly, the dispute was resolved outside of any international investment agreement. *Pac Rim v. El Salvador* better illustrates the prevailing use of ISDS by Canadian investors.

In that ongoing case, a large resource company exploited legal loopholes in an investment agreement to claim significant monetary compensation from a developing country acting in the public interest. In Latin America in particular, public mobilization against mining projects has been the source of half a dozen recent disputes between states and Canadian investors. Environmental and humanitarian concerns are simply not considered when investors decide to initiate arbitration or when tribunals decide whether or not to hear an ISDS case.

Canada's experience at home demonstrates quite clearly the damage ISDS can cause when companies are given the right to challenge government actions taken in the public interest outside the normal court system. As a result of NAFTA's ISDS mechanism, Canada has reversed regulations and/or paid compensation to half a dozen companies for, among other things, imposing regulations on toxic waste management, adding local economic development requirements to energy projects, and attempting to ban trade in gasoline containing a suspected neurotoxin. ISDS in Canada has also dis-

couraged some governments from introducing new social programs (e.g., public driving insurance) or taking regulatory actions.[38]

While investment treaties have compromised Canadian democracy and the democratic policy space of Canada's trading partners, this study has shown that, historically and in aggregate, these complex agreements have also not created a "transparent and predictable" investment environment abroad. Even in the resource and energy industries, where investors have won a few cases, the success rate is still close to zero. Yet with so little to lose and so much to gain from launching claims, these companies continue to do so with little regard for the consequences for respondent states.

Due to cases like these, global criticism of ISDS is loud and growing. In a recent report, the United Nations Conference on Trade and Development (UNCTAD) concluded that ISDS is a proven threat to governments' right to regulate and therefore to achieving sustainable development goals.[39] According to UNCTAD, fundamental reform of the global ISDS architecture is necessary. More than 50 countries around the world — from Germany to India to Brazil to Norway — are currently reviewing their approach to ISDS because of its failings. Some countries, like Bolivia, Ecuador, and Venezuela, are even cancelling their investment treaties, pulling out of the ICSID Convention, and proposing alternative systems for resolving investment disputes.

Canada is not among them. In fact, Canada continues to press ahead with one of the most aggressive investor protection agendas in the world. Canada concluded twice as many new IIAs as any other country in 2014. Announcing the conclusion of the Canada–Guinea FIPA in May 2015, Trade Minister Ed Fast reiterated the government's commitment to "ensuring that Canadian investments are protected in global markets."[40]

Despite the government's posturing, this study has shown that Canada's ISDS regime does not work as its proponents suggest it should. Instead of facilitating restitution where domestic legal systems have failed, Canada's promotion of ISDS abroad has resulted too often in investors abusing the process to claim compensation from governments acting in the public interest. Taken together, the evidence simply does not support Canada's promotion of ISDS at home and abroad. For Canada, ISDS is a failed policy and a losing proposition for the future.

Notes

1 Scott Mills and Gregory N. Hicks. (2015). *Investor–State Dispute Settlement: A Reality Check*, Center for Strategic & International Studies, January, http://csis.org/files/publication/150116_Miller_InvestorStateDispute_Web.pdf.

2 The recent ruling in Clayton/Bilcon v. Canada is the latest in a series of troubling ISDS defeats for the Canadian government. The dissenting arbitrator in the split decision called the ruling a "remarkable step backwards" for environmental protection in Canada. The Canadian government, which rarely criticizes the ISDS system, admitted it was "disappointed" by the decision. For reporting on the case, see Shawn McCarthy. (2015). "NAFTA ruling in Nova Scotia quarry case sparks fears for future settlements," *Globe and Mail*, March 24. http://www.theglobeandmail.com/report-on-business/nafta-ruling-against-canada-sparks-fears-over-future-dispute-settlements/article23603613/.

3 Foreign Affairs, Trade and Development Canada. (2014). "Canada's FIPA Program: Its Purpose, Objective and Content," last modified May 27. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-purpose.aspx?lang=en.

4 Ibid.

5 Scott Sinclair. (2015). *NAFTA Chapter 11 Investor-State Disputes to January 1, 2015*, Canadian Centre for Policy Alternatives, January 14, 2015. https://www.policyalternatives.ca/publications/reports/nafta-chapter-11-investor-state-disputes-january-1-2015.

6 A rich literature exists on investor-dispute settlement in Canada, which the present research draws on and hopes to inform. In particular, Canadian researchers in academia and civil society have written extensively on those ISDS cases brought against Canada under NAFTA. Significant academic and activist work has also been done on specific cases of Canadian investors using ISDS abroad. However, to date and to the best of this author's knowledge, there are no recent, macro-level quantitative analyses of all the ISDS cases involving Canadian investors in other countries.

7 Several of these databases are cited as sources in the Appendix.

8 Shell companies are registered corporations with a legal residence but no substantive business activities (offices, employees, etc.) in one jurisdiction that are controlled by a legitimate busi-

ness in another jurisdiction. Companies in Canada or other developed countries will often funnel their earnings or assets through shell companies in other countries to gain access to more favorable taxation or investment protection policies.

9 Sinclair. *NAFTA Chapter 11*... (2015).

10 The ICSID Convention includes an annulment procedure, which allows parties to challenge a ruling within the ICSID framework (there is no external appeals process). Grounds for annulment are specific and narrow, but the process has been invoked by both states and investors in a handful of cases (although never by Canada or a Canadian investor) to varying degrees of success. For a more detailed discussion, see Lise Johnson. (2010). *Annulment of ICSID Awards: Recent developments*, IV Annual Forum for Developing Country Investment Negotiators — Background Papers, October 27–29. https://www.iisd.org/sites/default/files/pdf//2011/dci_2010_annulment_icsid_awards.pdf.

11 Foreign Affairs, Trade and Development Canada. (2015). "Foreign Investment Promotion and Protection (FIPAS)," last modified May 27. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.

12 Foreign Affairs, Trade and Development Canada. (2015). "Canada's Free Trade Agreements," last modified June 29. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng.

13 For a brief analysis of some of the potential consequences of the TPP for Canada, see Scott Sinclair and Stuart Trew. (2015). *Fact Sheet: The TPP and Canada*, Canadian Centre for Policy Alternatives, May 22. https://www.policyalternatives.ca/publications/reports/tpp-and-canada.

14 The most notable exception is the FTA between Canada and the European Free Trade Association, which covers Iceland, Liechtenstein, Norway, and Switzerland.

15 Author's calculations (2014 figures). Statistics Canada. (2015). "CANSIM 376-0051: International investment position, Canadian direct investment abroad and foreign direct investment in Canada, by country," last modified April 23.

16 See, for example, differences in protections for Canadian versus Chinese investors under the new Canada-China BIT in Gus van Harten. (2015). *Sold Down the Yangtze: Canada's Lopsided Investment Deal with China*, IIAPP.

17 Author's calculations (as above).

18 The future of the CETA is uncertain given serious opposition in some European Member States, particularly with regard to the ISDS mechanism. See Scott Harris. (2014). *Growing Opposition in Europe Could Still Derail CETA*, Council of Canadians, Autumn. http://canadians.org/sites/default/files/publications/ceta_1.pdf.

19 Axel Berger. (2015). "Financing Global Development: Can Foreign Direct Investments be Increased through International Investment Agreements?" German Development Institute. http://www.die-gdi.de/uploads/media/BP_9.2015.pdf.

20 Scott Sinclair and Stuart Trew. (2015). "What trade agreements have achieved," in *Canada After Harper*, ed. Ed Finn, Toronto: Lorimer.

21 United Nations Conference on Trade and Development. (2015). "Investor State Dispute Settlement: Review of Developments in 2014," *IIA Issue Note* No. 2, May.

22 Only 42 new cases were recorded for 2014, but that number is likely to rise as more cases from the past year are publicized. The secretive nature of tribunals makes it difficult to get up-to-date figures.

23 "Claimant's notice of arbitration" in *South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*. (April 30, 2013). Accessible from the Permanent Court of Arbitration at http://www.pca-cpa.org/showpage.asp?pag_id=1586.

24 Preliminary 2014 figures from Statistics Canada. (2015). "CANSIM 376-0052: International investment position, Canadian direct investment abroad and foreign direct investment in Canada, by North American Industry Classification System (NAICS) and region," last modified April 23.

25 According to an article from *American Lawyer* magazine, which is quoted in the report, "Bringing a billion-dollar claim is no longer enough to stand out in a survey of international arbitration. Nor is it enough to win a measly US$100 million. Attention, arbitration lawyers: What it takes to distinguish yourself these days is a US$350 million award, minimum." Pia Eberhardt and Cecilia Olivet. (2012). *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory and the Transnational Institute, November. http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

26 Yanira Cortez Estévez, Human Rights Ombudsman's Office of El Salvador. (2015). Presentation in Ottawa, May 12.

27 Instituto Universitario de Opinión Pública. (2009). "Conocimientos y percepciones hacia la minería en zonas afectadas por la incursión minera," Universidad Centroamericana José Simeón Cañas, October 7.

28 Marcos Gálvez, Association for the Development of El Salvador (CRIPDES). (2015). Presentation in Ottawa, May 12.

29 "Claimant's notice of arbitration" in *Pac Rim Cayman LLC v. The Republic of El Salvador*. (April 30, 2009). Accessible from ITA Law at http://www.italaw.com/cases/783.

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Appendix

TABLE 8 Investor–State Dispute Settlement Cases Involving Canadian Investors
(Figures are in nominal Canadian dollars unless otherwise indicated)

Case Details	Parties	Issue	Status
Date Initiated October 30, 1998 *Notice of arbitration* **Treaty Invoked** NAFTA **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/98/3*	**Claimants** Loewen Group Inc. *Burnaby, BC, Canada* Raymond L. Loewen *Burnaby, BC, Canada* **Industry** Death care **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Administration of justice **Amount Claimed** US$725 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated May 6, 1999 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/99/2*	**Claimant** Mondev International Ltd. *Westmount, QC, Canada* **Industry** Real estate **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Administration of justice **Amount Claimed** US$50 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated June 15, 1999 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** Methanex Corp. *Vancouver, BC, Canada* **Industry** Chemicals **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Environmental protection **Amount Claimed** US$970 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed

Case Details	Parties	Issue	Status
Date Initiated July 22, 1999 *Request for arbitration* **Treaty Invoked** United States-Sri Lanka BIT **Arbitration Rules** ICSID — Convention *Case no. ARB/00/2*	**Claimant** Mihaly International Canada Ltd. *Oakville, ON, Canada* **via** Mihaly International Corp. *California, United States* **Industry** Energy **Respondent** Sri Lanka *Asia & Oceania*	In February 1993, Mihaly International, a Canadian financial services company, won the temporary exclusive right to develop a proposal for a thermal power station in Sri Lanka. Mihaly began development of the project immediately, although a contract for construction, ownership and operation of the power station was never signed. When Sri Lanka ultimately decided not to contract Mihaly for the project, the company brought a claim against the government through its American subsidiary under the US-Sri Lanka BIT. It sought reimbursement for its expenditures on the proposal and for lost future profits. **Type of Measure Challenged** Resource management **Amount Claimed** Unknown	On March 15, 2002, the tribunal ruled that Mihaly's Canadian ownership did not disqualify its American subsidiary from filing a claim under the BIT, despite Sri Lanka's objections. However, the tribunal also decided that the disputed project did not qualify as a protected investment under the BIT due to its provisional nature. Therefore, the tribunal lacked jurisdiction over the claim. **Outcome** Dismissed
Date Initiated February 29, 2000 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/00/1*	**Claimant** ADF Group Inc. *Terrebonne, QC, Canada* **Industry** Construction **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Public contracting **Amount Claimed** US$90 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated November 5, 2001 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** Canfor Corp. *Vancouver, BC, Canada* **Industry** Resources **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Resource management **Amount Claimed** US$250 million	See CCPA's NAFTA ISDS table for description. **Outcome** Withdrawn
Date Initiated January 14, 2002 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** Kenex Ltd. *Chatham, ON, Canada* **Industry** Agriculture **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Resource management **Amount Claimed** US$20 million	See CCPA's NAFTA ISDS table for description. **Outcome** Inactive
Date Initiated March 15, 2002 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** n/a	**Claimant** James Russell Baird *Nanaimo, BC, Canada* **Industry** Private investor **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Environmental protection **Amount Claimed** US$13.58 billion	See CCPA's NAFTA ISDS table for description. **Outcome** Inactive
Date Initiated March 21, 2002 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** International Thunderbird Gaming Corp. *Canada* **Industry** Entertainment **Respondent** Mexico *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Gambling regulations **Amount Claimed** $100 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed

Case Details	Parties	Issue	Status
Date Initiated May 1, 2002 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** n/a	**Claimant** Doman Industries Ltd. *Duncan, BC, Canada* **Industry** Resources **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Trade remedies **Amount Claimed** $513 million	See CCPA's NAFTA ISDS table for description. **Outcome** Inactive
Date Initiated May 3, 2002 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimants** Tembec Inc. *Montreal, QC, Canada* Tembec Investments Inc. *Montreal, QC, Canada* Tembec Industries Inc. *Montreal, QC, Canada* **Industry** Resources **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Resource management **Amount Claimed** US$200 million+	See CCPA's NAFTA ISDS table for description. **Outcome** Withdrawn
Date Initiated May 16, 2002 *Request for arbitration* **Treaty Invoked** Italy-United Arab Emirates BIT **Arbitration Rules** ICSID — Convention *Case no. ARB/02/7*	**Claimant** Hussein Nuaman Soufraki *Canada* **via** Hussein Nuaman Soufraki *Italy* **Industry** Private investor **Respondent** United Arab Emirates *Asia & Oceania*	In October 2000, Hussein Soufraki, a Canadian investor, won a 30-year concession to develop, manage and operate the port of Dubai. The government of the United Arab Emirates subsequently cancelled the concession, provoking Mr. Soufraki to file an arbitration claim for damages of up to US$2.5 billion. Mr. Soufraki brought the claim under the Italy-UAE BIT based on his Italian nationality by birth, even though he legally gave up his Italian citizenship when he acquired Canadian citizenship in 1991. **Type of Measure Challenged** Service concessions **Amount Claimed** US$580 million to US$2.5 billion	On June 5, 2007, the tribunal ruled that the investor did not have Italian nationality and it therefore lacked jurisdiction over the claim. **Outcome** Dismissed
Date Initiated September 9, 2002 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** n/a	**Claimants** Gordon Paget & Philip L. Furtney *Canada* 800438 Ontario Ltd. *Canada* **Industry** Entertainment **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Administration of justice **Amount Claimed** $38 million	See CCPA's NAFTA ISDS table for description. **Outcome** Inactive

Case Details	Parties	Issue	Status
Date Initiated March 14, 2003 *Notice of arbitration* **Treaty Invoked** Canada-Ecuador BIT **Arbitration Rules** UNCITRAL *LCIA Case no. UN 3481*	**Claimant** EnCana Corp. *Calgary, AB, Canada* **Industry** Energy **Respondent** Ecuador *South & Central America*	EnCana, a Canadian energy company, disputed changes to the Ecuadorian tax regime that reduced or denied value-added tax credits and exploration refunds to oil companies. EnCana claimed that credits and refunds owed to its Ecuadorian subsidiaries, AEC Ecuador Ltd. and City Oriente Ltd., both incorporated in Barbados, were effectively expropriated. The company claimed that Ecuador's tax reforms violated several provisions in the Canada-Ecuador BIT, including the fair and equitable treatment, national treatment, and expropriation provisions. **Type of Measure Challenged** Financial regulation & taxation **Amount Claimed** US$80 million	On February 3, 2006, the tribunal dismissed the fair and equitable treatment and national treatment claims on the grounds that tax-related measures were not subject to the BIT (except under circumstances not applicable to the case). The tribunal did consider the expropriation claim on its merits but ruled against EnCana in a split decision. Notably, an American company, Occidental Exploration, brought an analogous claim against Ecuador under the US-Ecuador BIT in 2002. In that case, the tribunal ruled in favour of the investor and awarded US$75 million. **Outcome** State wins
Date Initiated June 12, 2003 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** Terminal Forest Products Ltd. *Richmond, BC, Canada* **Industry** Resources **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Trade remedies **Amount Claimed** US$90 million	See CCPA's NAFTA ISDS table for description. **Outcome** Withdrawn
Date Initiated July 21, 2003 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** Glamis Gold Ltd. *Vancouver, BC, Canada* **Industry** Resources **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Environmental protection **Amount Claimed** US$50 million+	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated September 15, 2003 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimants** Grand River Enterprises Six Nations Ltd. *Ohsweken, ON, Canada* Jerry Montour & Kenneth Hill *Ohsweken, ON, Canada* Arthur Montour *Perrysburg, New York, United States* **Industry** Tobacco **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Administration of justice **Amount Claimed** US$340 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed

Case Details	Parties	Issue	Status
Date Initiated November 13, 2003 *Request for conciliation* **Treaty Invoked** Contract **Arbitration Rules** ICSID — Conciliation *Case no. CONC/03/1*	**Claimant** TG World Energy Corp. *Calgary, AB, Canada* **via** TG World Petroleum Ltd. *Bahamas* **Industry** Energy **Respondent** Niger *Africa*	TG World Energy, a Canadian energy company, owned concessions to the Ténéré Block of oil and gas reserves in Niger through its Bahamian-incorporated subsidiary, TG World Petroleum. In September 2003, the government of Niger terminated the concessions and effectively granted them to a competitor, China National Petroleum Corp. (CNPC) and its affiliates, in November 2003. TG World subsequently brought a claim against Niger to ICSID's little-used conciliation commission, which issues non-binding dispute resolutions. **Type of Measure Challenged** Resource management **Amount Claimed** Unknown	The parties reached an "out-of-court" settlement in December 2004, which saw CNPC assume all costs for the Ténéré Block project while TG World retained a 20% carried interest. **Outcome** Settlement
Date Initiated May 10, 2004 *Request for arbitration* **Treaty Invoked** Canada-Costa Rica BIT **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/07/3*	**Claimant** Alasdair Ross Anderson et al. *Canada* **Industry** Private investor **Respondent** Costa Rica *South & Central America*	Between 1998 and 2002, more than 6,000 investors bought into a currency exchange scheme operated by Costa Rican nationals that promised extremely high interest rates on a minimum initial investment of $10,000. In 2002, the operation was revealed to be a Ponzi scheme. In 2004, 137 Canadian investors who had lost their deposits in the scheme brought "separate and distinct" arbitration claims against the government of Costa Rica, although they were consolidated into a single case for arbitration. The investors claimed compensation for their deposits on the grounds that the government had failed to provide proper vigilance and regulatory supervision. **Type of Measure Challenged** Financial regulation & taxation **Amount Claimed** Unknown	On May 19, 2010, the tribunal decided that the deposits amounted to personal loans, not "investments" as defined in the BIT, and were therefore not subject to protection. The tribunal ruled that it lacked jurisdiction over the claim. **Outcome** Dismissed

Case Details	Parties	Issue	Status
Date Initiated July 9, 2004 *Request for arbitration* **Treaty Invoked** Canada-Venezuela BIT **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/04/6*	**Claimant** Vannessa Ventures Ltd. (now Infinito Gold Ltd.) *Calgary, AB, Canada* **Industry** Resources **Respondent** Venezuela *South & Central America*	Vannessa Ventures, a Canadian mining company, acquired concessions to the Las Cristinas mine in July 2001 in a private sale that the government considered illegal. In November 2001, the mine was seized by a Venezuelan state-owned enterprise and the Venezuelan government subsequently changed the law in order to take legal control of the mine. In 2002, the government granted new concessions to Las Cristinas to Crystallex, a different Canadian mining company. Between 2001 and 2003, Vannessa Ventures launched ten unsuccessful domestic court challenges before finally turning to international arbitration under the Canada-Venezuela BIT in 2004. The company alleged expropriation and a breach of fair and equitable treatment, claiming more than US$1 billion in damages. Vannessa Ventures changed its name to Infinito Gold in May 2008. **Type of Measure Challenged** Resource management **Amount Claimed** US$1.045 billion	On January 16, 2013, the tribunal unanimously rejected Vannessa Ventures' claim on its merits. The tribunal decided that there had been no discriminatory treatment or violation of rights under the BIT. **Outcome** State wins
Date Initiated August 12, 2004 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** The Canadian Cattlemen for Fair Trade *Canada* **Industry** Agriculture **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Agricultural policy **Amount Claimed** US$235 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated 2004 *Notice of arbitration* **Treaty Invoked** Canada-Croatia BIT **Arbitration Rules** UNCITRAL	**Claimant** Nedjeljko Ulemek *Canada* **Industry** Private investor **Respondent** Croatia *Europe*	Nedjeljko Ulemek left behind an investment in Jugoturbina Select, a Croatian office supplies venture, when he left the country for Canada during the Croatian War of Independence in the early 1990s. He claimed that, as a consequence of the war and various state actions, he had suffered discrimination, unfair treatment, and expropriation. **Type of Measure Challenged** Unknown **Amount Claimed** $2.6 million *Reported*	On May 25, 2008, the tribunal reportedly ruled that the actions of the Croatian government had not been in violation of the BIT and it consequently rejected the investor's claim, although no official documents have been released. **Outcome** State wins *Reported*

Case Details	Parties	Issue	Status
Date Initiated April 7, 2005 *Notice of arbitration* **Treaty Invoked** Canada-Argentina BIT **Arbitration Rules** UNCITRAL	**Claimant** Bank of Nova Scotia *Toronto, ON, Canada* **Industry** Finance & banking **Respondent** Argentina *South & Central America*	The Bank of Nova Scotia's Argentine subsidiary, Scotiabank Quilmes, collapsed as a result of actions taken by the Argentine government during the country's banking crisis in 2002. Those actions—specifically the forced conversion of US-dollar deposits into pesos—were later ruled illegal by Argentina's Supreme Court. The Bank of Nova Scotia sought compensation on the grounds of discrimination and expropriation under the Argentina-Canada BIT. **Type of Measure Challenged** Financial regulation & taxation **Amount Claimed** US$600 million *Reported*	In July 2011, the bank reportedly withdrew its claim against Argentina, although no documents or official statements have been released. **Outcome** Withdrawn *Reported*
Date Initiated October 12, 2006 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** n/a	**Claimant** Notre Development Corp. *North Bay, ON, Canada* **via** Vito G. Gallo *Pennsylvania, United States* **Industry** Waste disposal **Respondent** Canada *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Environmental protection **Amount Claimed** CAD$105 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated December 28, 2006 *Notice of intent* **Treaty Invoked** Canada-Costa Rica BIT **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/08/1*	**Claimants** Quadrant Pacific Growth Fund L.P. *Vancouver, BC, Canada* Canasco Holdings Inc. *Vancouver, BC, Canada* **Industry** Agriculture **Respondent** Costa Rica *South & Central America*	Quadrant Pacific Growth Fund and Canasco Holdings, both Canadian companies, owned a citrus plantation in Costa Rica. Beginning in April 2003, one of their citrus farms was occupied by agrarian squatters, who have certain legal protections in Costa Rica. Although eventually the occupation was ruled illegal, local police were unable to remove the trespassers until September 2005. The companies claim that business was significantly disrupted during this time and that the squatters caused significant damage to the property. The companies brought an arbitration claim against the government of Costa Rica on the grounds that the government failed to protect its investment as required by the Canada-Costa Rica BIT. **Type of Measure Challenged** Administration of justice **Amount Claimed** US$20 million+	Proceedings began in 2008 but stumbled in November 2009 when Quadrant Pacific and Canasco failed to pay their share of the ongoing arbitration costs and their legal counsel withdrew. On October 27, 2010, the tribunal decided to discontinue proceedings on the grounds of non-payment by the parties. Quadrant Pacific and Canasco were ordered to pay the entire cost of the proceedings. **Outcome** Dismissed

Case Details	Parties	Issue	Status
Date Initiated 2006 *Notice of arbitration* **Treaty Invoked** Contract **Arbitration Rules** UNCITRAL	**Claimant** World Wide Minerals Ltd. *Toronto, ON, Canada* **Industry** Resources **Respondent** Kazakhstan *Asia & Oceania*	World Wide Minerals (WWM), a Canadian mining company, briefly managed and operated a uranium processing facility under contract with the government of Kazakhstan beginning in 1996. Shortly thereafter, the government imposed a series of new bureaucratic and regulatory measures, which WWM claimed were a breach of contract. WWM's uranium facility subsequently went bankrupt and was confiscated by the state. WWM brought a series of claims against Kazakhstan through the US domestic court system before filing an international arbitration claim under UNCITRAL rules in 2006. **Type of Measure Challenged** Resource management **Amount Claimed** Unknown	On December 22, 2010, the tribunal reportedly ruled that under Kazakh law the investor's claims were time-barred (i.e. WWM waited too long before bringing the case to arbitration), although no official documents have been released. **Outcome** Dismissed *Reported*
Date Initiated April 16, 2007 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** n/a	**Claimant** Domtar Inc. *Montreal, QC, Canada* **Industry** Resources **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Trade remedies **Amount Claimed** US$200 million+	See CCPA's NAFTA ISDS table for description. **Outcome** Inactive
Date Initiated September 21, 2007 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL *Case no. UNCT/10/2*	**Claimant** Apotex Inc. *Weston, ON, Canada* **Industry** Pharmaceuticals **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Health care & pharmaceuticals **Amount Claimed** US$8 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated December 3, 2007 *Notice of arbitration* **Treaty Invoked** Canada-Czech Republic BIT **Arbitration Rules** UNCITRAL	**Claimant** Frontier Petroleum Services Ltd. *Calgary, AB, Canada* **Industry** Manufacturing **Respondent** Czech Republic *Europe*	In 2000, Frontier Petroleum Services (FPS), a Canadian company, invested in a joint venture with Moravan-Aeroplanes (MA), a Czech company, to manufacture aircraft in the Czech Republic. After MA allegedly breached the contract in 2002, FPS initiated criminal proceedings against the company and members of its board of directors. FPS also launched an arbitration case against MA at the Stockholm Chamber of Commerce in 2003. Although it lost the domestic cases, FPS won the arbitration case and was awarded damages. However, MA did not compensate FPS and the Czech court system did not recognize or enforce the award. In 2007, FPS launched an arbitration claim against the Czech government for failing to protect its investment and accord it fair and equitable treatment pursuant to the Canada-Czech Republic BIT. **Type of Measure Challenged** Administration of justice **Amount Claimed** US$20 million	On November 12, 2010, the tribunal ruled that the Czech courts were within their rights to reject the Stockholm award since it was incompatible with domestic bankruptcy rules. All of FPS' claims were rejected on their merits. **Outcome** State wins

Case Details	Parties	Issue	Status
Date Initiated October 1, 2008 *Notice of arbitration* **Treaty Invoked** Canada-Venezuela BIT **Arbitration Rules** UNCITRAL	**Claimant** Nova Scotia Power Inc. *Halifax, NS, Canada* **Industry** Energy **Respondent** Venezuela *South & Central America*	In 1999, Nova Scotia Power Inc. (NSPI), a Canadian energy company, negotiated a long-term coal supply contract with a Venezuelan state-owned enterprise that facilitated regular coal shipments to NSPI at a fixed price. Shipments continued until December 2007, when the contract was abruptly cancelled by a government directive. The company alleged that the breach of contract was illegal and brought an arbitration claim against Venezuela under the Canada-Venezuela BIT. The company opted for UNCITRAL arbitration, even though the BIT requires ICSID arbitration if available. **Type of Measure Challenged** Resource management **Amount Claimed** Unknown	On April 22, 2010, the tribunal ruled that it was inappropriate for NSPI to bring a claim under UNCITRAL rules since ICSID arbitration was available at the time. The tribunal decided that it lacked jurisdiction over the claim. On August 30, 2010, the tribunal ordered NSPI to pay Venezuela's legal costs. **Outcome** Dismissed
Date Initiated April 23, 2009 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** AbitibiBowater Inc. *Montreal, QC, Canada* **via** AbitibiBowater Inc. *Delaware, United States* **Industry** Resources **Respondent** Canada *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Resource management **Amount Claimed** CAD$467.5 million	See CCPA's NAFTA ISDS table for description. **Outcome** Settlement — Canada pays investor CAD$130 million
Date Initiated April 30, 2009 *Notice of arbitration* **Treaties Invoked** Dominican Republic-Central America-FTA Domestic Law **Arbitration Rules** ICSID — Convention *Case no. ARB/09/12*	**Claimant** Pacific Rim Mining Corp. (now OceanaGold Corp.) *Vancouver, BC, Canada* **via** Pac Rim Cayman LLC *Nevada, United States* **Industry** Resources **Respondent** El Salvador *South & Central America*	In 2002, Pacific Rim Mining Corp., a Canadian mining company, received an exploration license for the El Dorado gold mine in El Salvador's Cabañas region. In 2004, the company transferred ownership of the mine to its Cayman-registered subsidiary, Pac Rim Cayman LLC, through which it applied for an exploitation permit to open the mine. In the face of significant public opposition to new mining projects on humanitarian and environmental grounds, the government of El Salvador delayed approval of the El Dorado mine for several years before finally announcing in 2008 that it would grant no new mining concessions. Pacific Rim moved its Cayman-based subsidiary to the United States in 2007. In 2009, it launched an arbitration claim for US$77 million against El Salvador under the Dominican Republic-Central America FTA (DR-CAFTA) to which the US is a party. Pacific Rim also alleged violations of El Salvador's domestic laws covering mining and foreign investment. **Type of Measure Challenged** Environmental protection **Amount Claimed** US$284 million *Reported*	On June 1, 2012, the tribunal rejected most of El Salvador's jurisdictional objections, including that Pacific Rim's change of nationality for the purpose of initiating arbitration constituted an "abuse of process". However, the tribunal agreed that Pacific Rim's American shell company did not qualify as a protected investor under DR-CAFTA. The tribunal consequently ruled that it lacked jurisdiction over all claims related to the FTA. Nevertheless, the tribunal affirmed its jurisdiction over the claims made under Salvadoran domestic law and decided to proceed with the case. In 2013, OceanaGold, an Australia-Canadian mining company, bought Pacific Rim, which was on the brink of bankruptcy, and inherited the dispute. OceanaGold subsequently increased the compensation claim to US$301 million before reportedly reducing it to US$284 million. The tribunal process continues. **Outcome** Pending

Case Details	Parties	Issue	Status
Date Initiated June 4, 2009 *Notice of arbitration* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** Apotex Inc. *Weston, ON, Canada* **Industry** Pharmaceuticals **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Health care & pharmaceuticals **Amount Claimed** US$8 million	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated October 21, 2009 *Request for arbitration* **Treaty Invoked** Canada-Venezuela BIT **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/09/1*	**Claimant** Gold Reserve Corp. *Washington, United States* **via** Gold Reserve Inc. *Yukon Territory, Canada* **Industry** Resources **Respondent** Venezuela *South & Central America*	In 1992, Gold Reserve, an American mining company based in the state of Washington, acquired a concession for the Brisas gold and copper mine in central Venezuela. In 1999, Gold Reserve transferred ownership of the mine to a shell company incorporated in Canada. Between 1997 and 2009, Gold Reserve worked to develop the project, although its applications for permits to open the mine were repeatedly denied on environmental grounds. Relations between Gold Reserve and the government of Venezuela deteriorated until, in March 2009, the state revoked the concession and subsequently took control of the project. The government claimed that uncontrolled mining was causing serious environmental deterioration to rivers and biodiversity in the region. Later that year, Gold Reserve brought an arbitration case against Venezuela through its Canadian shell company under the Canada-Venezuela BIT. It alleged violations of the provisions on fair and equitable treatment, full protection and security, most favoured nation, and expropriation. Gold Reserve initially sought up to US$5 billion in compensation for lost future profits, but later reduced its claim to just over US$1.7 billion. **Type of Measure Challenged** Environmental protection **Amount Claimed** US$1.735 billion	The tribunal dismissed Venezuela's jurisdictional objection that Gold Reserve was effectively an American company and therefore not protected by the Canada-Venezuela BIT. The tribunal noted that the Canadian government had provided diplomatic assistance to Gold Reserve, implicitly endorsing its Canadian nationality. On September 22, 2014, the tribunal rejected several of Gold Reserve's claims but agreed that Venezuela had failed to accord fair and equitable treatment to the investor. The tribunal awarded Gold Reserve US$713 million plus interest and legal costs. **Outcome** Investor wins — awarded US$740.3 million
Date Initiated September 8, 2009 *Notice of intent* **Treaty Invoked** Canada-Barbados BIT **Arbitration Rules** UNCITRAL *PCA Case No. 2012-06*	**Claimant** Peter A. Allard *Canada* **Industry** Private investor **Respondent** Barbados *North America*	Peter Allard, a Canadian investor, acquired 34 acres of wetlands in Barbados in 1994, which he developed into an eco-tourism project over the next 15 years. Mr. Allard alleges that the government of Barbados, by failing to prevent environmental degradation of the wetlands as required by both international and domestic law, caused extensive damage to his investment. In 2009, he brought an arbitration claim against Barbados under the Canada-Barbados BIT. **Type of Measure Challenged** Land use planning **Amount Claimed** US$35 million	The tribunal process continues. **Outcome** Pending

Case Details	Parties	Issue	Status
Date Initiated April 1, 2010 *Request for arbitration* **Treaty Invoked** Contract **Arbitration Rules** ICSID — Convention *Case no. ARB/10/11*	**Claimant** Niko Resources Ltd. *Calgary, AB, Canada* **via** Niko Resources (Bangladesh) Ltd. *Barbados* **Industry** Energy **Respondents** Bangladesh *Asia & Oceania*	In 2003, Niko Resources, a Canadian energy company, entered into a joint venture agreement (JVA) with two Bangladeshi state-owned enterprises, Petrobangla and BAPEX, to develop the Feni natural gas field in Bangladesh. Niko began producing gas at the Feni site in 2004, but two disastrous gas blowouts in 2005, for which Niko was found legally responsible, resulted in a Supreme Court injunction against any payments to the company. Niko was also investigated for corruption in both Bangladesh and Canada during this time. Niko denied both the corruption charges and liability for the blowouts and continued to operate the Feni project. In 2006, Niko completed a gas purchase and sale agreement (GPSA) with Petrobangla and BAPEX, but both state-owned enterprises withheld payments as required by the injunction. In 2010, Niko brought an ICSID arbitration claim against Petrobangla, BAPEX and the government of Bangladesh through its Barbadian subsidiary. The company sought to resolve liability for the blowouts under the JVA. Niko also claimed payment from Petrobangla under the GPSA. **Type of Measure Challenged** Administration of justice **Amount Claimed** US$35.71 million	On August 19, 2013, the tribunal dismissed the respondents' jurisdictional objection that Niko was actually a Canadian company, which is not a member of ICSID. However, the tribunal did find that Bangladesh never consented to ICSID arbitration since the government was not explicitly party to either the JVA or GPSA. The tribunal consequently ruled that it lacked jurisdiction over the claim made against the state. Niko's arbitration case against Petrobangla and BAPEX continues at ICSID. **Outcome** Dismissed
Date Initiated November 2, 2010 *Request for arbitration* **Treaty Invoked** Canada-Venezuela BIT **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/11/1*	**Claimant** Nova Scotia Power Inc. *Halifax, NS, Canada* **Industry** Energy **Respondent** Venezuela *South & Central America*	After its earlier claim was dismissed on jurisdictional grounds (see above), Nova Scotia Power Inc. (NSPI) brought a new claim against Venezuela through the Canada-Venezuela BIT in 2010. This time the company opted for ICSID arbitration in accordance with the BIT. **Type of Measure Challenged** Resource management **Amount Claimed** US$180 million	On April 30, 2014, the tribunal ruled that NSPI's contract with the Venezuelan supplier did not constitute an "investment" as defined in the BIT and therefore did not qualify for protection. The tribunal consequently rejected the claim on jurisdictional grounds. **Outcome** Dismissed

Case Details	Parties	Issue	Status
Date Initiated 2010 *Request for arbitration* **Treaty Invoked** Contract **Arbitration Rules** International Chamber of Commerce	**Claimants** First Quantum Minerals Ltd. *Vancouver, BC, Canada* Industrial Development Corp. *South Africa* International Finance Corp. *District of Columbia, United States* **Industry** Resources **Respondent** Democratic Republic of the Congo *Africa*	First Quantum, a Canadian mining company, acquired the Kolwezi tailings project in the Democratic Republic of the Congo (DRC) in 2006. With several partners, including the World Bank's International Finance Corporation, First Quantum committed to a significant investment in the mine, although it never actually began production. In August 2009, the DRC requested the voluntary cancellation of the project. When First Quantum and its partners refused, the government seized the mine. The government then issued a new permit for the Kolwezi project to a subsidiary of the Kazakhstan-based Eurasian Natural Resources Corp. (ENRC). First Quantum challenged ENRC and the DRC through every available channel, including an arbitration claim lodged against the DRC at the International Chamber of Commerce in 2010. **Type of Measure Challenged** Resource management **Amount Claimed** US$2 billion	On January 5, 2012, First Quantum announced a surprise settlement with ENRC, who agreed to pay US$1.25 billion for First Quantum's assets in—and legal claims to—the Kolwezi project. As a condition of the settlement, First Quantum agreed to drop its litigation against ENRC and its arbitration case against the DRC. No documents from either case have yet been made public. **Outcome** Withdrawn
Date Initiated January 10, 2011 *Notice of arbitration* **Treaties Invoked** Contract Domestic Law Energy Charter Treaty **Arbitration Rules** UNCITRAL	**Claimants** Khan Resources Inc. *Toronto, ON, Canada* Khan Resources B.V. *Netherlands* Central Asian Uranium Company (CAUC) Holding Company Ltd. *British Virgin Islands (United Kingdom)* **Industry** Resources **Respondent** Mongolia *Asia & Oceania*	Between 2003 and 2005, Khan Resources, a Canadian mining company, acquired rights to the Dornod uranium project in eastern Mongolia. Khan invested in the development of the project between 2005 and 2009 with construction of an open pit mine scheduled to begin later that year. In August 2009, Mongolia announced an intergovernmental joint venture with Russia to develop the Dornod project. In April 2010, the government of Mongolia invalidated Khan's licenses. Khan successfully challenged the move in the domestic courts, but the government ignored the rulings. Khan and its affiliates brought an international arbitration case against Mongolia in 2011 claiming expropriation under the terms of their contract with the government as well as Mongolia's investment law. Khan's Dutch-registered sister company also alleged violations of the Energy Charter Treaty to which both Mongolia and the Netherlands are party. **Type of Measure Challenged** Administration of justice **Amount Claimed** US$200 million+	In March 2015, the tribunal ruled in Khan's favour. It upheld jurisdiction over all claims and awarded US$80 million in compensation for the expropriated project plus interest and legal costs. The government disputes the award and has suggested it will not pay compensation, which may provoke further litigation or arbitration. **Outcome** Investor wins — awarded US$104 million

Case Details	Parties	Issue	Status
Date Initiated January 2011 *Notice of arbitration* **Treaty Invoked** Canada-Ecuador BIT **Arbitration Rules** Unknown	**Claimant** Copper Mesa Mining Corp. *Vancouver, BC, Canada* **Industry** Resources **Respondent** Ecuador *South & Central America*	Copper Mesa, a Canadian mining company, began operating in Ecuador in 2004 and acquired concessions to a number of areas, including the massive Junín region in western Ecuador. Public opposition to the Junín project was fierce and led to protests, clashes with police, and legal challenges against the company. In 2008, the government of Ecuador nullified Copper Mesa's claim to the Junín concession for failing to provide an environmental impact study. In 2011, Copper Mesa brought an arbitration claim against Ecuador under the Canada-Ecuador BIT. The company alleges expropriation of two of its mining concessions. No documents related to the case have yet been made public. **Type of Measure Challenged** Environmental protection **Amount Claimed** Unknown	Proceedings reportedly closed in March 2014 and the parties are waiting for a ruling from the tribunal. **Outcome** Pending
Date Initiated February 16, 2011 *Request for arbitration* **Treaty Invoked** Canada-Venezuela BIT **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/11/2*	**Claimant** Crystallex International Corp. *Toronto, ON, Canada* **Industry** Resources **Respondent** Venezuela *South & Central America*	Crystallex, a Canadian mining company, acquired rights to the Las Cristinas mine in 2002. The government of Venezuela had seized the mine a year earlier from another Canadian mining company (see Vannessa Ventures case above). A dispute arose between Crystallex and the government as early as 2008, when the company first signalled its willingness to arbitrate. After Venezuela terminated Crystallex's mine operation contract (MOC) in 2011, the company followed through on its threat and registered an ICSID arbitration claim under the Canada-Venezuela BIT. Crystallex claims nearly US$4 billion in compensation for violations of the BIT's provisions on expropriation, fair and equitable treatment, and discrimination. **Type of Measure Challenged** Resource management **Amount Claimed** US$3.8 billion *Reported*	The tribunal process continues. **Outcome** Pending
Date Initiated July 2011 *Notice of arbitration* **Treaty Invoked** Canada-Ecuador BIT **Arbitration Rules** UNCITRAL	**Claimant** Zamora Gold Corp. *Ecuador* **via** Zamora Gold Corp. *Whitehorse, YT, Canada* **Industry** Resources **Respondent** Ecuador *South & Central America*	Zamora Gold, an Ecuadorian mining company incorporated in Canada, alleges that seven of its mining sites were expropriated by the government of Ecuador in April 2010. In 2011, the company brought an arbitration claim against Ecuador under the Canada-Ecuador BIT through its Canadian-registered shell company. No documents related to the case have yet been made public. **Type of Measure Challenged** Resource management **Amount Claimed** Unknown	The tribunal process continues. **Outcome** Pending

Case Details	Parties	Issue	Status
Date Initiated November 23, 2011 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** ICSID — Additional Facility *Case no. ARB(AF)/12/1*	**Claimants** Apotex Holdings Inc. *Toronto, ON, Canada* Apotex Inc. *Toronto, ON, Canada* **Industry** Pharmaceuticals **Respondent** United States *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Health care & pharmaceuticals **Amount Claimed** US$520 million+	See CCPA's NAFTA ISDS table for description. **Outcome** Dismissed
Date Initiated July 17, 2012 *Request for arbitration* **Treaty Invoked** Canada-Venezuela BIT **Arbitration Rules** ICSID — Additional Facility *Case no. No. ARB(AF)/12/5*	**Claimant** Rusoro Mining Ltd. *Russia* **via** Rusoro Mining Ltd. *Vancouver, BC, Canada* **Industry** Resources **Respondent** Venezuela *South & Central America*	Rusoro, a Russian mining company incorporated in Canada, owned several gold mining concessions in Venezuela. The company alleges that a series of changes to the country's legal regime for gold marketing led to the effective nationalization of its concessions. In 2012, Rusoro brought a claim against Venezuela for just over US$3 billion under the Canada-Venezuela BIT. No documents related to the case have yet been made public. **Type of Measure Challenged** Resource management **Amount Claimed** US$3.03 billion	The tribunal process continues. **Outcome** Pending
Date Initiated November 8, 2012 *Notice of intent* **Treaty Invoked** NAFTA **Arbitration Rules** UNCITRAL	**Claimant** Lone Pine Resources Inc. *Calgary, AB, Canada* **via** Lone Pine Resources *Canada Ltd.* Delaware, United States **Industry** Energy **Respondent** Canada *North America*	See CCPA's NAFTA ISDS table for description. **Type of Measure Challenged** Environmental protection **Amount Claimed** CAD$250 million	See CCPA's NAFTA ISDS table for description. **Outcome** Pending
Date Initiated April 30, 2013 *Notice of arbitration* **Treaty Invoked** UK-Bolivia BIT **Arbitration Rules** UNCITRAL	**Claimant** South American Silver Corp. (now TriMetals Mining Inc.) *Vancouver, BC, Canada* **via** South American Silver Ltd. *Bermuda (United Kingdom)* **Industry** Resources **Respondent** Bolivia *South & Central America*	In 2006, South American Silver (SAS), a Canadian mining company, acquired the Malku Khota silver mine in central Bolivia through its Bermudan shell company. SAS began exploration and development activities in the region but relations with local indigenous groups quickly deteriorated. Violence between the company and local communities broke out, including a death and hostage taking, which provoked massive public protests in Le Paz, the Bolivian capital, in May 2012. Responding to this public pressure, the government of Bolivia ended SAS' mining concession by Supreme Decree in August 2012. Bolivia's assessment of the value of the project was US$19 million, which it was prepared to pay in compensation, but SAS claimed a much higher valuation. In 2013, the company brought an arbitration claim for US$386 million against Bolivia through its Bermudan shell company under the UK-Bolivia BIT. SAS alleges expropriation and violations of the fair and equitable treatment and national treatment provisions. South American Silver changed its name to TriMetals Mining in 2014. **Type of Measure Challenged** Resource management **Amount Claimed** US$385.7 million	The tribunal process continues. **Outcome** Pending

Case Details	Parties	Issue	Status
Date Initiated October 30, 2013 *Request for arbitration* **Treaty Invoked** Moscow Convention on the Protection of the Rights of Investors **Arbitration Rules** Moscow Chamber of Commerce	**Claimant** Stans Energy Corp. *Toronto, ON, Canada* **Industry** Resources **Respondent** Kyrgyzstan *Asia & Oceania*	In 2009, Stans, a Canadian mining company, acquired a license to the Kutessay II rare earths project in northern Kyrgyzstan. Government prosecutors challenged the licensing process and in April 2013 won an injunction against Stans in the domestic courts, which brought work on the project to a standstill. In October 2013, Stans brought an arbitration claim for US$118 million to the Moscow Chamber of Commerce. The company alleged "expropriatory and unlawful treatment" under the Moscow Convention on the Protection of the Rights of Investors, an obscure investment treaty to which Kyrgyzstan is bound as a member of the Commonwealth of Independent States (CIS). **Type of Measure Challenged** Resource management **Amount Claimed** US$117.8 million	In July 2014, Stans announced that the tribunal had ruled in favour of the investor and awarded compensation of US$117.7 million plus legal fees. However, the government of Kyrgyzstan rejected the tribunal's ruling on jurisdiction under the obscure treaty. The government refused to pay the award and sought to annul the decision in the Moscow courts. After its initial appeals were dismissed, Kyrgyzstan won its case at the Moscow Circuit Court. Stans is appealing that decision and has brought a separate challenge against Kyrgyzstan to the Ontario Court of Justice. The legal battle continues. **Outcome** Pending
Date Initiated December 16, 2013 *Notice of arbitration* **Treaty Invoked** Canada-USSR BIT **Arbitration Rules** UNCITRAL	**Claimants** World Wide Minerals Ltd. *Toronto, ON, Canada* Paul A. Carroll *Canada* **Industry** Resources **Respondent** Kazakhstan *Asia & Oceania*	World Wide Minerals (WWM), a Canadian mining company, operated a uranium processing facility in Kazakhstan in the mid-1990s before it went bankrupt and was confiscated by the state. After its initial arbitration claim was dismissed in 2010 (see above), WWM brought a new case against the government of Kazakhstan in 2013. This time, the company invoked the USSR-Canada BIT on the grounds that Kazakhstan, as a former Soviet state, is bound by its provisions. **Type of Measure Challenged** Resource management **Amount Claimed** Unknown	The tribunal process continues. **Outcome** Pending

Case Details	Parties	Issue	Status
Date Initiated February 10, 2014 *Request for arbitration* **Treaty Invoked** Canada-Costa Rica BIT **Arbitration Rules** ICSID — Convention *Case no. ARB/14/5*	**Claimant** Infinito Gold Ltd. *Calgary, AB, Canada* **Industry** Resources **Respondent** Costa Rica *South & Central America*	Starting in 1993, Infinito Gold, a Canadian mining company, acquired a series of concessions to develop a gold mine in the Crucitas region of northern Costa Rica. The project provoked significant public opposition, which culminated in a nationwide ban on open pit mining in 2010. Activists also brought a series of lawsuits against the company for humanitarian and environmental violations. In 2010, two public interest lawsuits that had been brought against Infinito Gold reached contradictory conclusions. One dismissed all objections to the Crucitas mine while the other required an injunction against the project, leaving Infinito Gold in a legal limbo. In 2014, the company brought an arbitration claim against the government of Costa Rica under the Canada-Costa Rica BIT. Infinito Gold claims compensation for expropriation and the violation of fair and equitable treatment under the BIT. **Type of Measure Challenged** Environmental protection **Amount Claimed** US$94 million *Reported*	The tribunal process continues. **Outcome** Pending
Date Initiated June 25, 2014 *Request for arbitration* **Treaty Invoked** Canada-Slovakia BIT **Arbitration Rules** ICSID – Convention *Case no. ARB/14/14*	**Claimants** Belmont Resources Inc. *Vancouver, BC, Canada* EuroGas Inc. *Utah, United States* **Industry** Resources **Respondent** Slovakia *Europe*	Belmont Resources, a Canadian mining company, and EuroGas, an American resource company, jointly controlled the Gemerská Poloma talc deposit in Slovakia. In 2005, the government of Slovakia revoked the companies' rights to the mine and granted them to a Slovak competitor. The Supreme Court of Slovakia subsequently ruled the government's actions to be illegal. In 2010, EuroGas threatened arbitration against Slovakia. In 2014, Belmont joined EuroGas in bringing a joint claim for several billion dollars in damages under the Canada-Slovakia BIT and US-Slovakia BIT, respectively. **Type of Measure Challenged** Resource management **Amount Claimed** US$1.65 billion to US$3.2 billion *Reported*	The tribunal process continues. **Outcome** Pending

Case Details	Parties	Issue	Status
Date Initiated August 11, 2014 *Request for arbitration* **Treaty Invoked** Canada-Peru FTA **Arbitration Rules** ICSID – Convention *Case no. ARB/14/21*	**Claimant** Bear Creek Mining Corp. *Vancouver, BC, Canada* **Industry** Resources **Respondent** Peru *South & Central America*	Bear Creek, a Canadian mining company, owned rights to the Santa Ana silver deposit in southern Peru. In early 2011, the proposed mine became the target of increasingly violent protests and in June 2011 the government of Peru revoked Bear Creek's concession by Supreme Decree. Opponents say the mine risks contaminating nearby Lake Titicaca, but Bear Creek denies any environmental risk. In 2014, the company successfully challenged the Decree in the domestic courts. Settlement talks with the government are ongoing. In August of the same year, Bear Creek brought a parallel arbitration case against Peru under the Canada-Peru FTA as insurance against settlement talks breaking down. **Type of Measure Challenged** Environmental protection **Amount Claimed** Unknown	The tribunal process continues. **Outcome** Pending
Date Initiated October 2014 *Notice of arbitration* **Treaty Invoked** Contract **Arbitration Rules** UNCITRAL	**Claimant** Vanoil Energy Ltd. *Vancouver, BC, Canada* **Industry** Energy **Respondent** Kenya *Africa*	Vanoil, a Canadian oil and gas company, acquired exploration rights to large areas of the Anza Basin in southeastern Kenya through a production sharing contract (PSC) negotiated with the government in 2007. In 2013, public opposition and local unrest significantly disrupted the project and the government refused to extend the PSC. Vanoil alleges that the government failed to adequately protect the site in accordance with the contract. In 2014, Vanoil brought an arbitration claim against the government of Kenya under the terms of the PSC. The company says it is seeking more than US$150 million in compensation, although no official documents have yet been released. **Type of Measure Challenged** Resource management **Amount Claimed** US$150 million+ *Reported*	The tribunal process continues. **Outcome** Pending
Date Initiated February 23, 2015 *Date registered* **Treaty Invoked** Contract **Arbitration Rules** ICSID – Convention *Case no. ARB/15/7*	**Claimant** WalAm Energy Inc. *Calgary, AB, Canada* **Industry** Energy **Respondent** Kenya *Africa*	In 2007, WalAm Energy, a Canadian renewable energy company, acquired concessions to the Suswa geothermal field in central Kenya. In 2012, the government of Kenya cancelled the license and seized the field on the grounds that the company had failed to carry out a required environmental assessment. In 2015, the company brought an ICSID arbitration claim against the government. No official documents have yet been released. **Type of Measure Challenged** Environmental protection **Amount Claimed** Unknown	The tribunal process continues. **Outcome** Pending

Case Details	Parties	Issue	Status
Date Initiated June 18, 2015 *Request for arbitration* **Treaty Invoked** UK-Kenya BIT **Arbitration Rules** ICSID – Convention	**Claimants** Pacific Wildcat Resources Corp. *West Kelowna, BC, Canada* **via** Cortec Pty Ltd. *United Kingdom* Stirling Capital Ltd. *United Kingdom* **Industry** Resources **Respondent** Kenya *Africa*	In 2010, Pacific Wildcat, a Canadian mining company, acquired rights to the Mrima Hills rare earth minerals project in the Kwale region of southern Kenya through two UK-registered subsidiaries. The company valued the site at more than US$60 billion and in March 2013 secured a license extension of 21 years. However, in August of that year, shortly following the Kenyan general election, the government revoked Pacific Wildcat's claim to the project as part of a nationwide re-evaluation of mining licenses. The company challenged the government measure in the domestic courts but ultimately lost the case. In 2015, Pacific Wildcat used its UK-registered subsidiaries to bring an ICSID arbitration claim against the government through the UK-Kenya BIT. The company alleges expropriation and a breach of fair and equitable treatment under the BIT. No official documents have yet been released. **Type of Measure Challenged** Resource management **Amount Claimed** Unknown	The tribunal process continues. **Outcome** Pending
Date Initiated July 21, 2015 *Request for arbitration* **Treaties Invoked** Canada-Romania BIT UK-Romania BIT **Arbitration Rules** ICSID – Convention	**Claimants** Gabriel Resources Ltd. *Toronto, ON, Canada* Gabriel Resources (Jersey) Ltd. *Channel Islands (United Kingdom)* **Industry** Resources **Respondent** Romania *Europe*	In 2000, Gabriel Resources, a Canadian mining company, acquired a license to the Roșia Montană gold and silver mine in western Romania. The project would be the largest open-pit mine in Europe, although the company has so far been unable to secure all the necessary permits to begin operations. The project is deeply unpopular in Romania. Starting in 2013, protestors organized daily demonstrations in dozens of Romanian cities for 18 straight months. The proposed mine has also been the subject of extensive, contentious legal and legislative disputes. So far, the government has been unable to pass a new law that would allow the project to proceed. In 2015, the company and its UK-registered affiliate brought an ICSID arbitration claim against the government under the terms of the Canada-Romania BIT and the UK-Romania BIT. No official documents have yet been released. **Type of Measure Challenged** Environmental protection **Amount Claimed** Unknown	The tribunal process continues. **Outcome** Pending

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