

# International Investment Arbitration in Asia: Year in Review 2015

---

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

---

Economic activity in Asia continued to slow in 2015 following its 2014 downturn. China, Asia's largest economy, saw its GDP fall from a high of 7.5 percent in the first half of 2014 to 7.2 percent by mid-2015 and 6.8 percent by year end. China's central bank stepped in and cut interest rates, but that failed to produce the desired effects. As reported by the Asian Development Bank, the downturn in China had "larger than expected" spillovers into the rest of the region, as regional exports fell short of global growth. India, Asia's second largest economy, experienced similar downward movement from 2014 through 2015. Japan performed strongly in the first quarter of 2015, before slumping in the second and settling into a recession by the end of the year, with growth at 0.5 percent. The member countries of the Association of Southeast Asian Nations (ASEAN) similarly experienced a slowdown, likely due to decreased exports. The average of "emerging Asia" (the ASEAN members plus China and India) rounded out to 6.5 percent by the end of 2015. The International Monetary Fund predicted moderate growth in Asia as a whole, at 5.4 percent across 2015 and into 2016.

The number of new investment arbitrations in Asia in 2015 held steady with previous years at around 3-5 new cases initiated each year, notwithstanding 2013, in which only one new case was initiated. Although oil, gas and mining has traditionally been the dominant sector in arbitrations in Asia, 2015 saw a disproportionate increase in the number of disputes in the electric power and other energy sector. Three arbitrations were initiated in this sector in 2015, to oil, gas and mining's one. This is perhaps a sign of industrial diversification in Asia, as 2014's biggest sector for new arbitrations was construction.

Countries in the region have concluded at least 1,284 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions). More than 13 percent of the region's investment treaties are intraregional (i.e., concluded between only Asian countries), as are almost 15 percent of the region's investment disputes.

For purposes of this review, continental Asia includes those countries grouped as Eastern Asia, Southern Asia and South-Eastern Asia, as defined by the United Nations Conference on Trade and Development (UNCTAD). It does not include Central or Western Asian countries, some of which are represented in our reviews of investment arbitration in other regions.

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

**Authors:**

**Emma Lindsay**

Counsel, New York

+1 212 541 2121

emma.lindsay@bryancave.com

**Bieta Andemariam**

Associate, New York

+1 212 541 1109

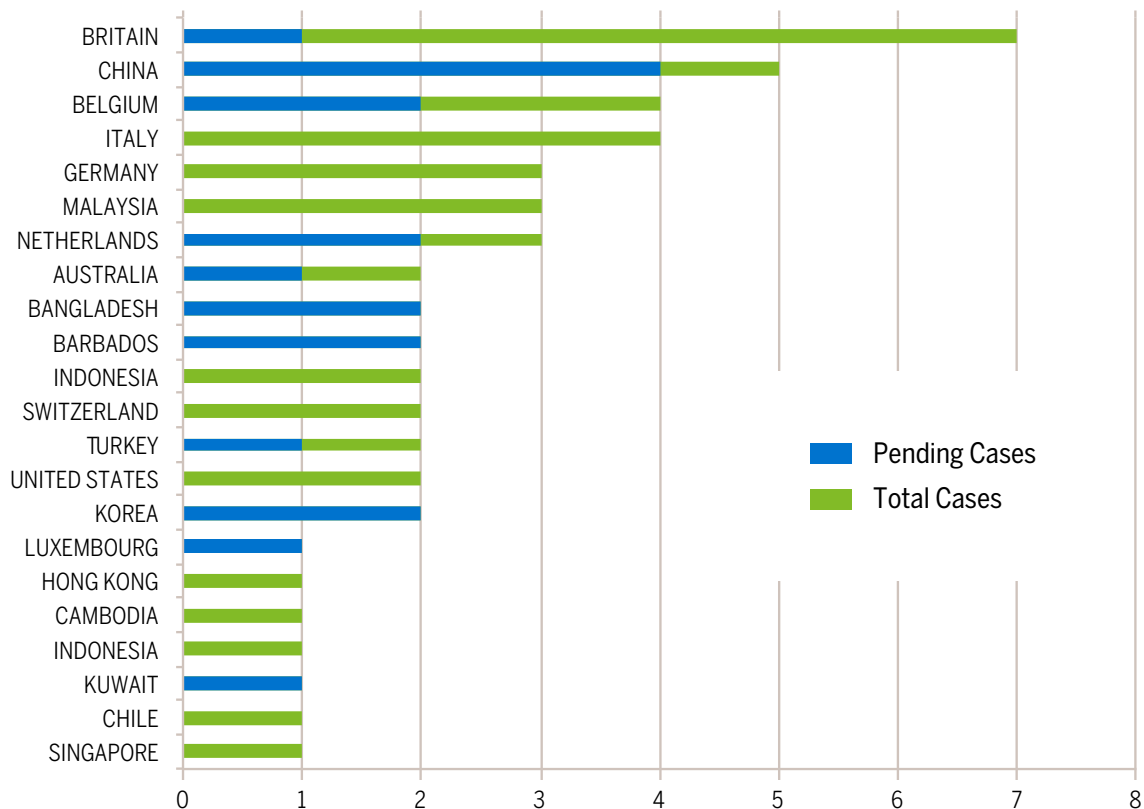
bieta.andemariam@bryancave.com

### Investment Arbitration in the Region<sup>1</sup>

A total of 47 ICSID cases have involved Asian parties as either claimant investors, respondent States or both, with five of those cases being brought in 2015. The first arbitration brought against an Asian country – by a British/Indonesian investor against Indonesia – was filed in 1981, and the first arbitration brought by a sole Asian investor – by a Singaporean investor against Indonesia – was filed in 2004. Of those 47 cases, 17 cases were pending as of the end of 2015. Two cases that were pending in 2014, against Belgium by a Chinese claimant and against Peru also by a Chinese claimant, were resolved in 2015. In the former, an award was rendered dismissing the case against the State for lack of jurisdiction, and in the latter, an annulment proceeding initiated by the State was dismissed.

Claims against Asian countries have historically been made most frequently by investors from Britain, with Belgium, China and Italy tying for second. In 2015, the three new cases registered against Asian countries were brought by claimants from the Netherlands, the Seychelles and Korea. Of the investment arbitrations against Asian countries pending in 2014, Chinese investors brought the greatest number. In 2015, no claims were brought against Asian countries by a Chinese investor.

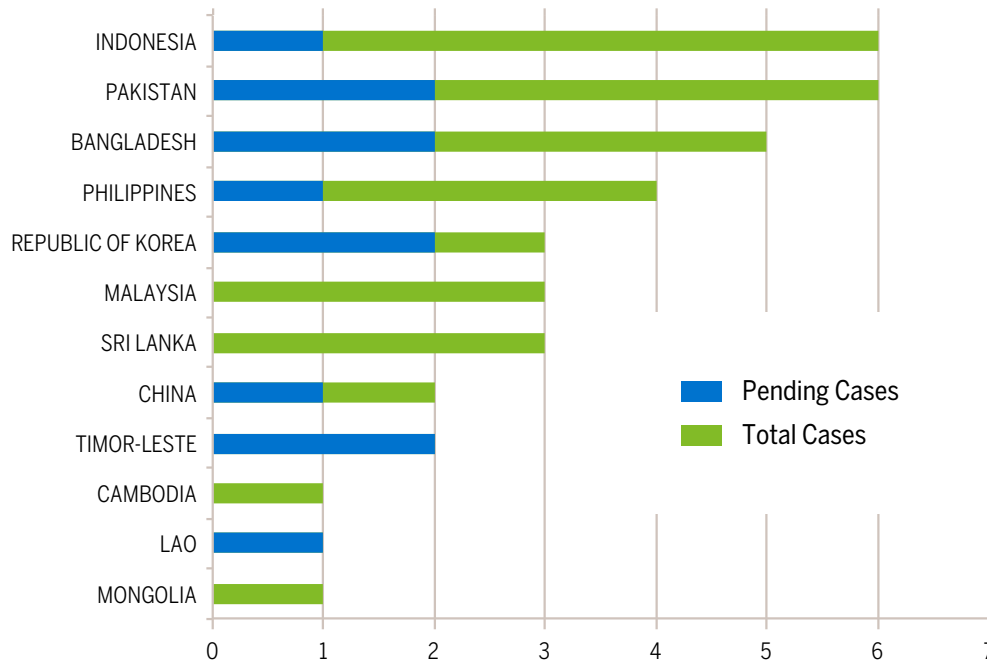
**Top Nationalities of Investors with ICSID Arbitrations in Asia**



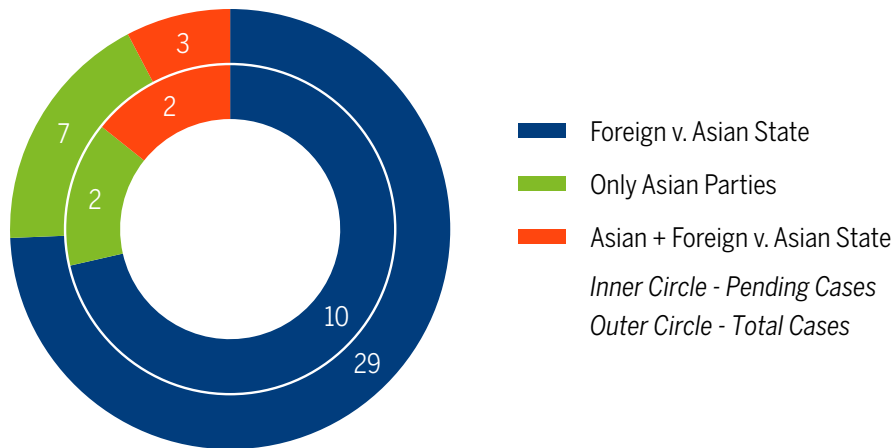
<sup>1</sup> This publication considers only investment arbitrations brought under the auspices of ICSID, which are the significant majority of investment arbitrations in the region.

Historically, the countries in the region that have faced the most investment claims are Indonesia, Pakistan and Bangladesh. In 2015, the two new claims brought against Asian countries were against South Korea and Timor-Leste.

### Asian Countries Facing Investment Claims

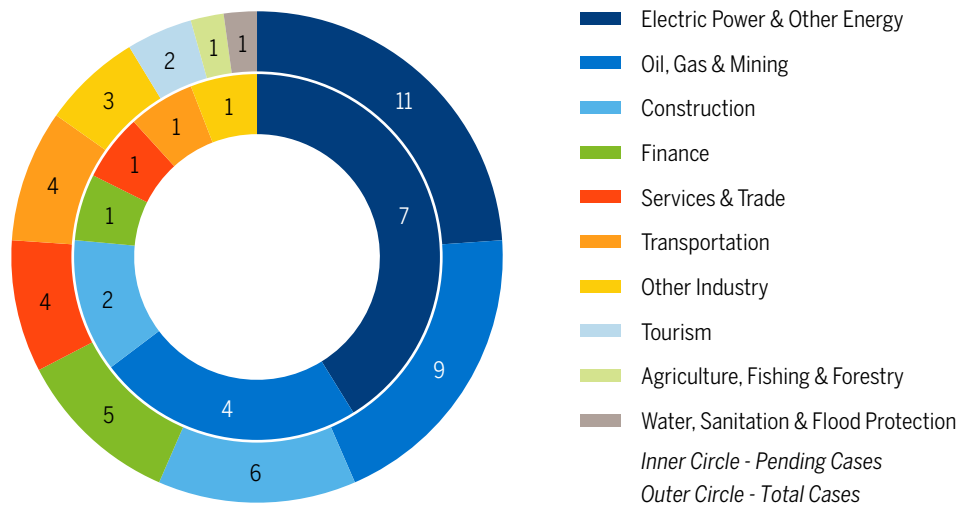


The vast majority of investment arbitrations against Asian countries have been brought by investors from other regions. However, almost 15 percent of investment arbitrations in the region have involved only Asian parties. In previous years, Cambodian investors instituted an action against Cambodia, and China saw disputes from Korean and Malaysian investors.



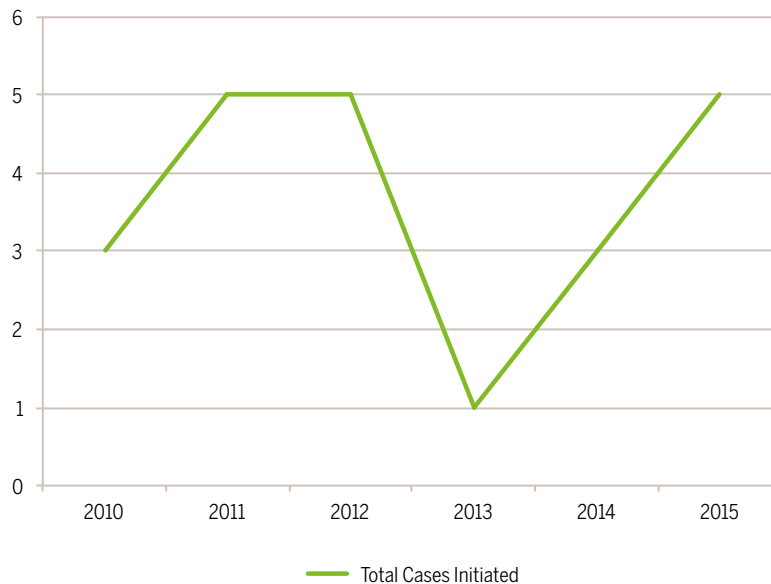
Investment disputes in the region have historically arisen most frequently in the oil, gas and mining industry. However, only one of the five disputes instituted in 2015 involved this industry, which is nevertheless in line with the proportion of cases (18 percent) that have historically involved oil, gas and mining. Three of the five new disputes concerned the electric power and other energy sector, overtaking oil, gas and mining as the most common industry for ICSID arbitration.

### Investment Cases by Industry



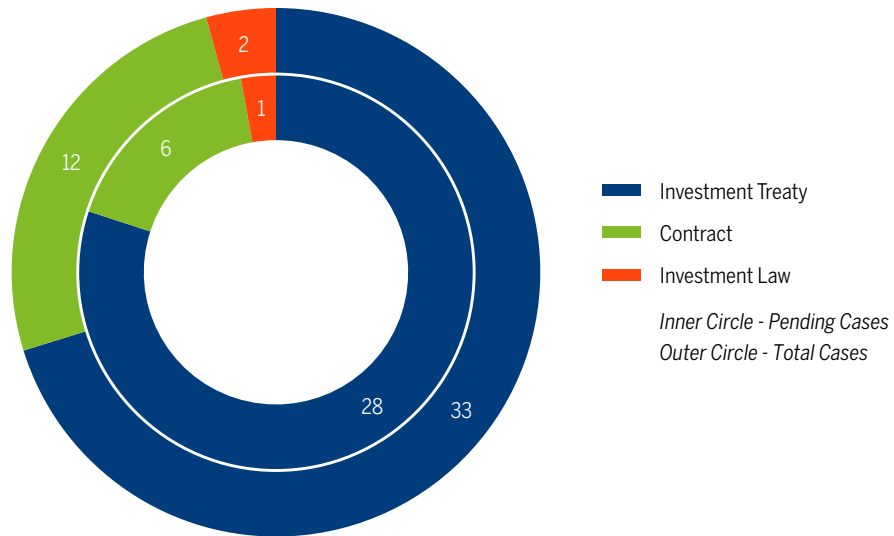
The number of investment arbitrations initiated in 2015 increased over that in 2014, reaching the peak numbers of 2011 and 2012.

### Cases Initiated Per Year



The basis for arbitral jurisdiction in most cases has been an investment treaty (typically a bilateral investment treaty), although claims also have been made pursuant to contracts and, less frequently, national investment laws. Of the five cases initiated by or against Asian parties in 2015, three were brought pursuant to a treaty (two of which were bilateral investment treaties, and one a multilateral treaty) and two pursuant to a contract.

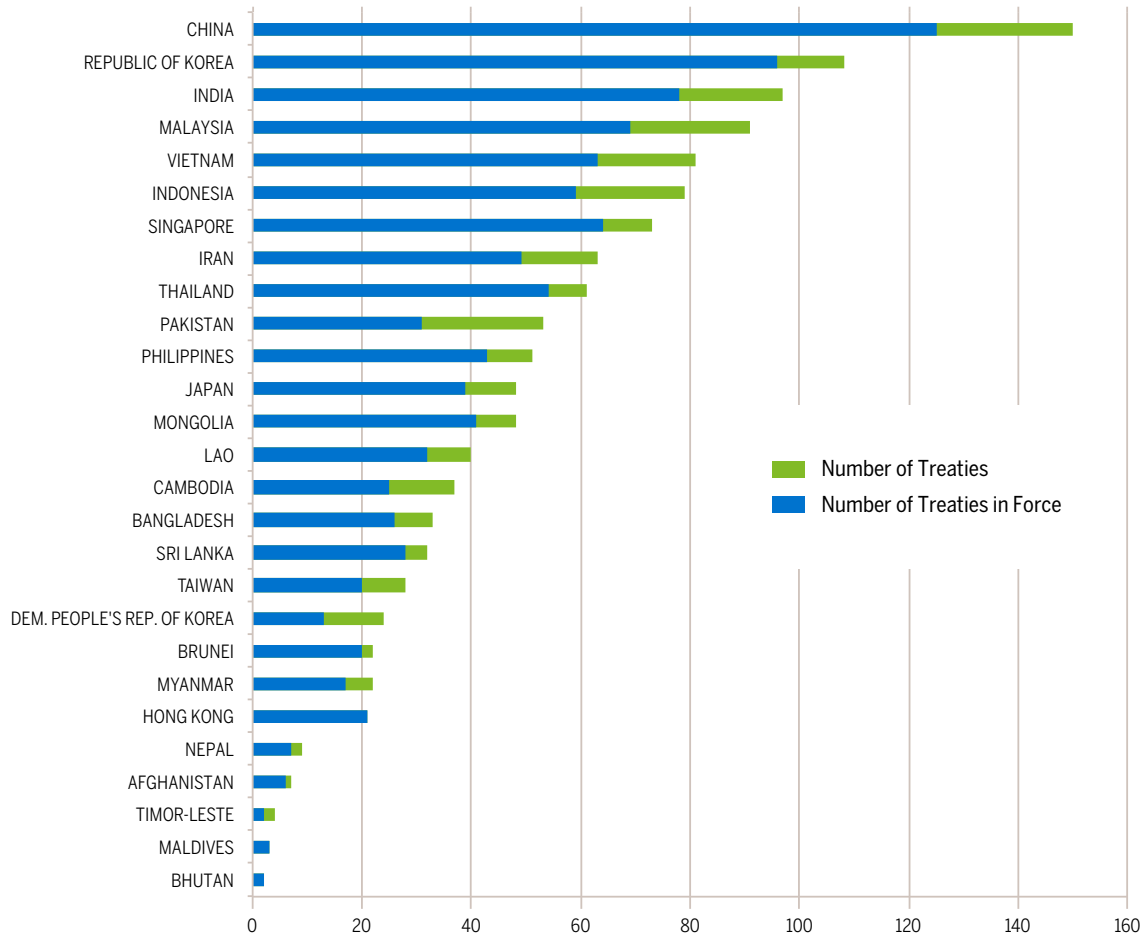
### Instrument Invoked to Establish ICSID Jurisdiction



Of the 29 concluded arbitrations, eight cases (27.5 percent) have involved further proceedings seeking to annul the arbitral award. Applications for annulment were successful in at least two cases and rejected in at least one. In 2015, a decision was issued on one annulment proceeding which had been initiated in 2011. That decision rejected the Republic of Peru’s application for annulment of an award in favor of a Chinese fishing company (*Tza Yap Shum v. Republic of Peru*, ARB/07/06).

## Investment Treaties Involving Asian Countries

More than a third of the just over 3,500 investment treaties currently in existence involve Asian signatories. China has concluded the most investment treaties, followed by South Korea and India. In 2015, China added three more treaties to its roster, signing bilateral investment treaties with Turkey and Australia, and a free trade agreement with Korea.



Of the 1,284 investment treaties signed by Asian countries, 177 are treaties signed between or among only Asian States. The United States has signed 19 investment treaties with Asian countries, but signed no new treaties in 2015.

In both 2014 and 2015, Japan signed the most treaties of any Asian nation, with four in each year. In 2015, Japan signed treaties with Oman, Mongolia, Ukraine and Uruguay. In total, 11 treaties were signed by Asian countries in 2015, across seven countries (Singapore, China, Japan, Korea, Vietnam, Cambodia, Mongolia). Four agreements were concluded within the region, involving only Asian States.

## Other Developments in 2015

- ▶ Five Asian States – Brunei, Japan, Malaysia, Singapore and Vietnam – continued through 2015 to negotiate with seven other Pacific Rim countries – Australia, Canada, Chile, Mexico, New Zealand, Peru and the United States – towards joining the proposed Trans Pacific Partnership (TPP), which would establish a regional trade and investment treaty regime. Following five years of negotiation, the TPP was signed in Auckland on February 4, 2016. The TPP will now undergo a two-year ratification period in which at least six countries that account for 85 percent of the combined gross domestic production of the 12 TPP nations must approve the final text for the treaty to enter into force. Given their size, both the United States and Japan would need to ratify the treaty.
- ▶ India and the United States have been negotiating a new bilateral investment treaty. The two countries concluded the U.S.-India Trade Policy Forum in October 2015 with India sharing a draft of its model bilateral investment treaty with a view to speeding up the negotiating process as it continues into 2016.
- ▶ China also continued negotiations to conclude a separate bilateral investment treaty with the United States. Although these negotiations have been somewhat overshadowed by the negotiation of the TPP (discussed above), a U.S.-China bilateral investment treaty could have a significant impact. The two economic powerhouses had bilateral trade flows totaling nearly \$600 billion in 2015.

## Critical Times to Consult Counsel

### INVESTORS:

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

### STATES:

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

## About Our Team

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

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

This Review is published for the clients and friends of Bryan Cave LLP for informational purposes only and to provide a general understanding of the laws in different jurisdictions. The statements made in this publication are for general educational purposes only. Information contained herein is not to be considered as legal advice. You are urged to seek the advice of your legal counsel if you have any specific questions as to the application of the law. The receipt of this publication does not create any attorney-client relationship between you and Bryan Cave LLP. Bryan Cave is not necessarily licensed to practice in the jurisdiction or jurisdictions referred to in the Review. However, Bryan Cave works regularly with local counsel in relevant jurisdictions to arrange advice for clients on specific issues. A list of jurisdictions in which Bryan Cave has offices are as follows: America: Atlanta, Boulder, Charlotte, Chicago, Colorado Springs, Dallas, Denver, Irvine, Jefferson City, Kansas City, Los Angeles, Miami, New York, Phoenix, San Francisco, St. Louis, Washington, D.C. Europe: Frankfurt, Hamburg, London, Paris, Milan (Affiliated Firm). Asia: Hong Kong, Shanghai, Singapore. Under the ethics rules of certain bar associations, this review may be construed as an advertisement or solicitation. © 2016 Bryan Cave LLP. All Rights Reserved.

## Authors

### Emma Lindsay

Counsel, New York  
+1 212 541 2121  
emma.lindsay@bryancave.com

### Bieta Andemariam

Associate, New York  
+1 212 541 1109  
bieta.andemariam@bryancave.com

---

## Additional Contacts

### Pedro J. Martinez-Fraga

Partner, Miami  
+1 786 322 7373  
pedro.martinezfraga@bryancave.com  
*Co-Leader of the International Arbitration Team*

### Mathew Rea

Partner, London  
+44 (0)20 3207 1203  
mathew.rea@bryancave.com  
*Co-Leader of the International Arbitration Team*

### Constantin Achillas

Partner, Paris  
+33 (0) 1 44 17 77 34  
constantin.achillas@bryancave.com

### Nigel Binnersley

Partner, Hong Kong  
+852 3588 9110  
nigel.binnersley@bryancave.com

### Rodney Page

Partner, Washington, D.C.  
+1 202 508 6002  
rodney.page@bryancave.com