INTERNATIONAL ARBITRATION TEAM

International Investment Arbitration in Latin America: 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 Latin America 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.

In 2015, the ongoing recessions in Brazil and Argentina and the economic and political upheaval in Venezuela exacerbated the stagnant economic growth in Latin America, and also dragged down some of this decade's better performing regional economies, including Colombia and Chile. The ongoing low commodity prices for precious metals and raw materials and the downward trend of crude oil prices that started in July 2014 have had a similar effect on capital received from foreign direct investment. Despite these continuing economic challenges, the region may bounce back in light of political changes which have seen the ouster of some left-leaning governments and their anti-privatization policies and the pursuit by newer, right-leaning administrations of more public/private ventures in an effort to increase foreign direct investment during this economic slowdown.

The number of new ICSID investment arbitrations in Latin America in 2015 dropped from the previous year with only four newly registered disputes for the calendar year, down from seven in 2014 and matching the 2013 total, a far cry from the annual double digit levels registered from 2010-2012. This represents the lowest number of new disputes registered in Latin America over a two year period since the turn of the century, when only four ICSID claims were filed in 2000 and six in 2001.

Further underscoring the region-wide reduction in new claims, two of last year's four new ICSID arbitrations relate to the same Argentinean highway system construction project. The two claimants, hailing from Spain and Italy, have filed separate claims under each of their home countries' bilateral investment treaties with Argentina. The oil, gas, and mining industry disputes that dominated last year's tally have dropped off entirely, from five requests for arbitration in 2014 to zero in 2015.

Reflecting trade and investment patterns, countries in the region have concluded at least 644 investment treaties (including bilateral investment treaties, free trade agreements. and other treaties containing investment-related provisions). Notably, 21 percent of the region's investment treaties are intraregional (i.e., concluded between only Latin American countries).

For purposes of this review, Latin America includes the Spanish and Portuguese-speaking countries of the Americas, as well as Caribbean countries.

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

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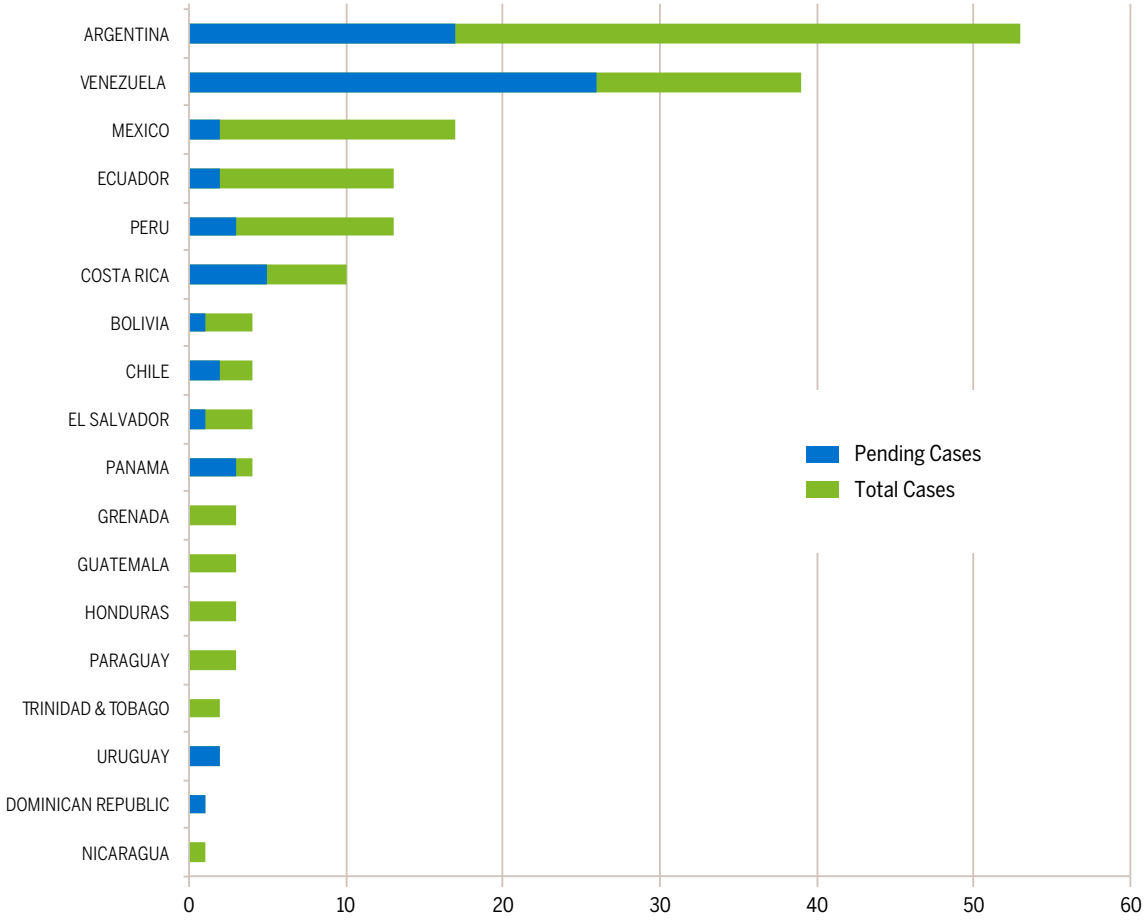
Investment Arbitration in the Region[1]

Just as the number of newly registered disputes has dropped in recent years, there has been a corresponding reduction in pending ICSID proceedings, as cases filed during the early part of the decade conclude their proceedings either by settlement or award. Guatemala and Honduras each saw their sole remaining pending dispute (in the form of annulment proceedings) end in 2015. A number of other respondent States (Bolivia, Dominican Republic, and El Salvador) currently have only one pending dispute.

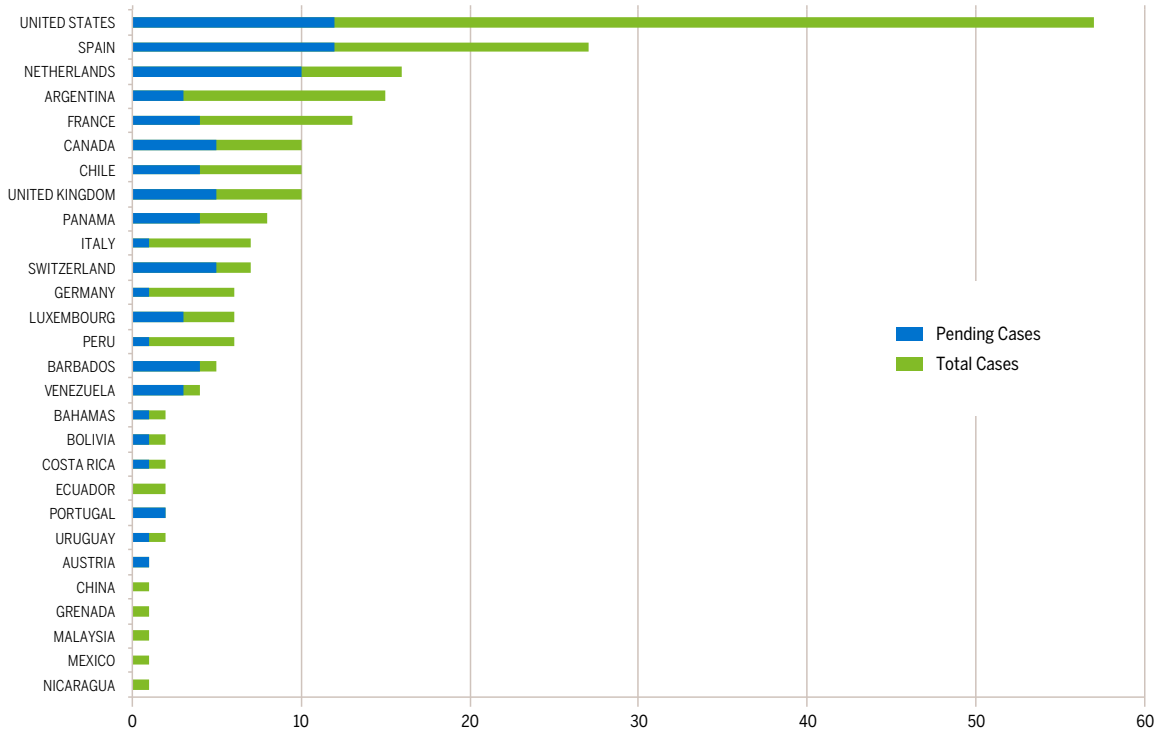
Latin American Countries Facing Investment Claims



[1] This publication considers only investment arbitrations brought under the auspices of ICSID (a member of the World Bank Group), which are the significant majority of investment arbitrations in the region. Aside from its availability as an arbitral forum in investment treaties among the 152 Contracting States that are signatories to the Convention (as of November 2015), claimants tend to choose ICSID arbitrations for reasons related to finality and enforceability of the award and the institutional support of the Centre. But parties can, and do, engage in non-ICSID investment arbitrations, and because many investment treaties allow for fully confidential arbitration, the actual number of non-ICSID cases is difficult to determine.

Investors from the United States have historically filed the most claims against Latin American countries, although nationals from Spain and the Netherlands have emerged in recent years as regular ICSID claimants in this region, with 12 and 10 pending disputes respectively.

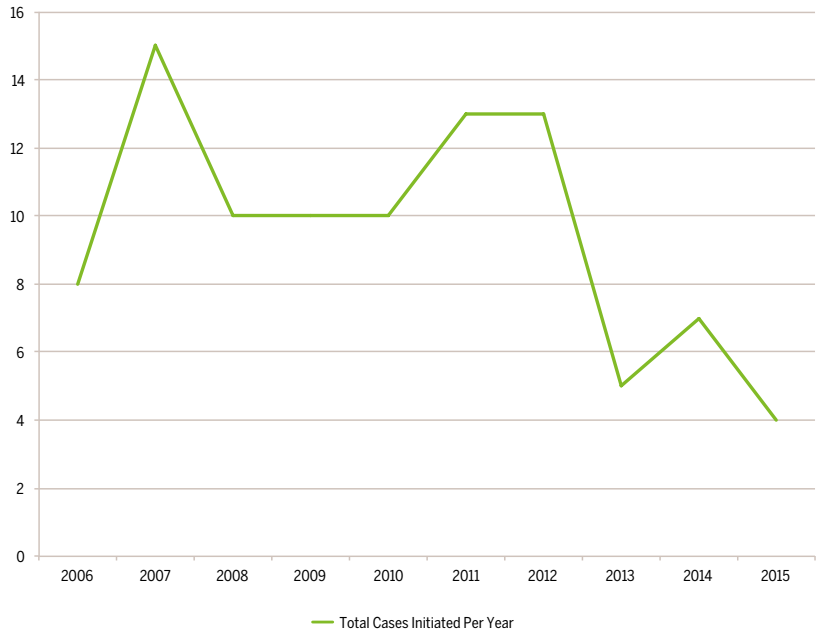
Top Nationalities of Investors with ICSID Arbitrations in Latin America



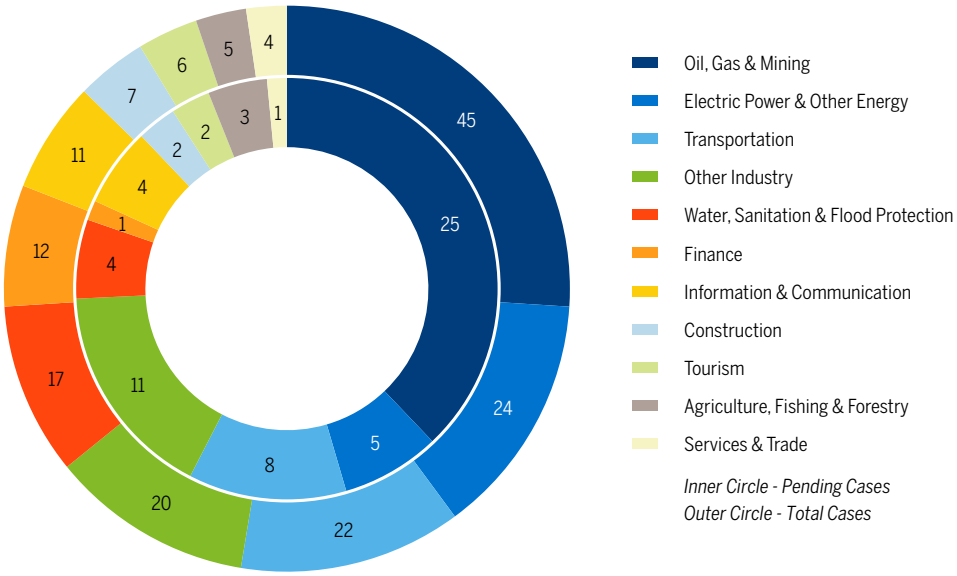
The ongoing slump in new disputes in 2015, after the slight uptick in 2014, could signal ICSID's declining influence in Latin America, especially when considered in light of the denunciations of the ICSID Convention by Bolivia, Ecuador, and Venezuela, and the possible emergence of UNASUR as an alternative dispute resolution regime.

Of the four cases registered in 2015 against Latin American respondents, two were disputes in the transportation industry, one in construction, and one in the tourism industry. The oil, gas, and mining industry maintains its position as the leading industry in Latin American investment disputes, accounting for nearly 38 percent of all pending ICSID claims.

Total Cases Initiated Per Year

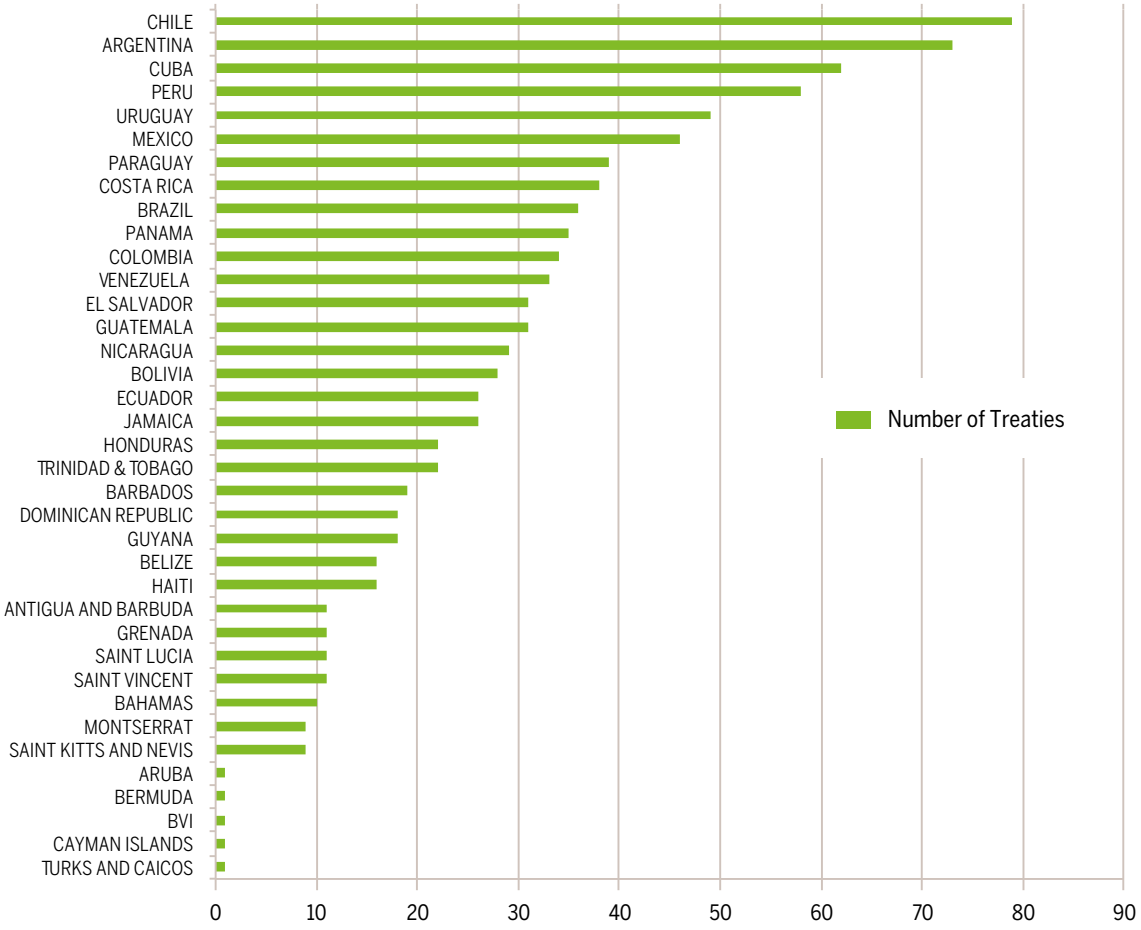


Investment Disputes by Industry



Investment Treaties Involving Latin American Countries

Almost 20 percent of the just over 3,500 investment treaties currently in existence involve Latin American signatories. Chile has signed the most investment treaties, followed by Argentina and Peru.



Of the 653 investment treaties signed by Latin American countries, 143 are treaties signed between or among only Latin American countries. The United States has signed 22 investment treaties with Latin American countries, 12 of which are bilateral investment treaties that permit investor-State arbitration (the treaties signed by the United States with each of Argentina, Bolivia, Ecuador, El Salvador, Grenada, Haiti, Honduras, Jamaica, Nicaragua, Panama, Trinidad and Tobago, and Uruguay). Bolivia terminated its treaty with the United States in June 2012, and the U.S. treaties with El Salvador, Haiti, and Nicaragua are pending domestic ratification or exchange of instruments of ratification by one or both parties.

Treaty-making activity in the region in 2015 was led by Brazil. As Latin America's largest economy, Brazil has long resisted participation in the current investment treaty framework, relying instead on the attractiveness of its rich and diverse markets to attract foreign investment while avoiding consent to investor-State arbitration. Until 2015, it had been nearly 16 years since Brazil last signed a bilateral investment treaty, with Belgium-Luxembourg (which was never ratified). In 2015, however, Brazil signed six bilateral agreements, styled as Cooperation and Facilitation Investment Agreements (CFIAs). These treaties include guidelines on transparency and protection against expropriation, but do not contain investor-State dispute settlement provisions.

Investment Treaties Signed by Latin American Countries in 2015

Countries	Type of Treaty	Date Signed
Japan-Uruguay	Bilateral Investment Treaty	January 26, 2015
Brazil-Mozambique	Cooperation and Facilitation Investment Agreement	March 30, 2015
Brazil-Angola	Cooperation and Facilitation Investment Agreement	April 1, 2015
Haiti-Mexico	Bilateral Investment Treaty	May 7, 2015
Brazil-Mexico	Cooperation and Facilitation Investment Agreement	May 26, 2015
Honduras-Peru	Free Trade Agreement	May 29, 2015
Brazil-Malawi	Cooperation and Facilitation Investment Agreement	June 25, 2015
Brazil-Colombia	Cooperation and Facilitation Investment Agreement	October 9, 2015
Brazil-Chile	Cooperation and Facilitation Investment Agreement	November 24, 2015

Other Developments in 2015

- The United States continued through 2015 to negotiate with some Latin American countries – Chile, Mexico, and Peru – towards joining the proposed Trans-Pacific Partnership (TPP) to establish a regional trade and investment treaty regime with eight other countries scattered throughout the Asia-Pacific region (Australia, Brunei, Canada, Japan, Malaysia, New Zealand, Singapore, and Vietnam). Included among its provisions is the availability of investor-State arbitration under ICSID, UNCITRAL, or any other arbitral institution agreed by the parties, if a claimant investor and a respondent TPP host State cannot resolve their dispute within a six-month consultation/negotiation period. 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.

- Criticism and dissatisfaction of the current ICSID framework has led a handful of Latin American countries (including former ICSID Contracting States Bolivia, Ecuador, and Venezuela) to continue to discuss the establishment of a Latin American-centered dispute resolution system as an alternative to ICSID, under the auspices of the 12-member South American intergovernmental group UNASUR. Early leaks of the draft document suggest a significant departure from the current procedural and substantive regime, including increased respect for States' sovereign privileges and a possible appellate procedure, along with a system of precedent. The establishment of a UNASUR arbitration center could further diminish ICSID's influence in the region, although claimants could still be expected to opt for ICSID proceedings so long as treaties granting consent to ICSID jurisdiction remain in force.
- The gradual thawing in 2015 of the diplomatic and trade restrictions between the United States and Cuba has led to increased interest in possible investment flows between the two countries. Despite the opening of embassies, the loosening of export restrictions on the supply of telecommunications, agricultural, and construction equipment, and the re-establishment of regular commercial flights between the two countries, major obstacles remain before Cuba can begin to challenge the Dominican Republic's supremacy in the Caribbean in attracting foreign direct investment from the United States. Chief among these concerns is Cuba's lack of meaningful procedural protections for foreign investors – while Cuba has signed investment treaties with other nations, these treaties tend to forgo investor-State dispute settlement provisions in favor of State-to-State proceedings. Moreover, the outstanding claims (totaling 5,913) for property expropriated by the Cuban Government and certified by the U.S. Foreign Claims Settlement Commission likely would need to be settled before the two nations could work towards a potential bilateral investment treaty or free trade agreement.

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.

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