International Investment Arbitration in Latin America: Year in Review 2016

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 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.

The economic challenges affecting Latin America continued unabated in 2016. The region’s economic activity contracted by an estimated 0.7% in 2016 alone, caused by various factors including (i) ongoing falling or stagnant commodities prices in agriculture, metals, and fossil fuels, (ii) less inbound foreign direct investment in light of the decreased demand for raw materials, (iii) fluctuations in currency rates and monetary policies, implemented in part to ameliorate deepening trade imbalances, and (iv) recessions experienced by Latin America’s traditional economic powerhouses (Argentina, Brazil, and Venezuela), which further hamper recovery efforts for the region as a whole.

In spite of, or perhaps because of, the worsening economic climate, new investor-State arbitration filings spiked to a four-year high in 2016. Twelve requests for arbitration were filed against Latin American host States, snapping a three-year streak of single digit cases filed from 2013-2015.

The new arbitration claims concern at least half a dozen industrial sectors, and were filed against both new and familiar host States. Colombia became an ICSID respondent host State for the first time in 2016, facing three ICSID claims filed by Colombian, Canadian and Swiss claimants involving mining concessions and a telecommunications initiative. Venezuela, the country facing the most pending investment claims in the region, also saw three new ICSID claims, pertaining to the agriculture and transportation industries and involving Barbadian and Spanish investors. This was despite Venezuela having recently observed the four-year anniversary of its July 2012 denunciation of the ICSID Convention, a move that was intended to avoid subsequent foreign investor claims by withdrawing as an ICSID member State.

Reflecting trade and investment patterns, countries in the region have concluded at least 663 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions). Notably, over 22% 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.
Investment Arbitration in the Region

As part of this year’s spike in investor-State arbitration claims, Colombia has become a respondent host State for the first time, with three newly registered ICSID disputes in 2016, matched only by Venezuela, a longtime investor-State arbitration respondent, and Panama, whose three new disputes in 2016 nearly doubled its historical total. At the other end of the spectrum, the Dominican Republic’s sole pending ICSID claim was concluded in 2016, though it also litigated at least one other investor-State dispute outside of the ICSID framework.

<table>
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<th>Latin American Countries Facing Investment Claims</th>
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<td>Argentina</td>
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<td>Venezuela</td>
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<td>Mexico</td>
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<td>Peru</td>
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<td>Ecuador</td>
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<td>Costa Rica</td>
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<td>Panama</td>
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<td>Bolivia</td>
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<td>El Salvador</td>
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<td>Chile</td>
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<td>Colombia</td>
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<td>Grenada</td>
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<td>Guatemala</td>
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<td>Honduras</td>
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<td>Paraguay</td>
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<td>Trinidad &amp; Tobago</td>
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<td>Uruguay</td>
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<td>Dominican Republic</td>
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<td>Nicaragua</td>
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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 153 Contracting States that are signatories to the Convention (as of December 2016), 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.
Although historically investors from the United States have filed the most ICSID claims against Latin American countries, accounting for more total claims than the next three countries combined, the number of pending claims by Spanish nationals now edges ahead of that of U.S. claimants.

**Top Nationalities of Investors with ICSID Arbitrations in Latin America**

- United States
- Spain
- Netherlands
- France
- Canada
- Argentina
- United Kingdom
- Chile
- Peru
- Panama
- Switzerland
- Italy
- Barbados
- Germany
- Luxembourg
- Venezuela
- Bahamas
- Bolivia
- Costa Rica
- Ecuador
- Portugal
- Uruguay
- Austria
- China
- Colombia
- Grenada
- Guatemala
- Malaysia
- Mexico
- Nicaragua

- Pending Cases
- Total Cases
2016 saw a resurgence in the number of new ICSID disputes filed, reaching double digits for the first time since 2012, and surpassing the number of new cases filed in 2014 and 2015 combined. Despite its withdrawal from ICSID in 2012, Venezuela has been confronted by three new ICSID disputes registered in 2016. Colombia, facing three new disputes of its own, marks its debut as an ICSID respondent host State.

Of the 12 cases registered in 2016 against Latin American respondents, three were disputes in the oil, gas and mining industry, two each in transportation and the information and communication industry, one in agriculture and one in construction, with the remaining three classified as “Other Industry”. The oil, gas, and mining industry maintains its position as the leading industry in Latin American investment disputes, accounting for over 40 percent of all pending ICSID claims involving the region.
Almost 20 percent of the approximately 3,500 investment treaties currently in existence involve Latin American signatories. Chile has signed the most investment treaties, followed by Argentina, Cuba, and Peru.
Of the 663 investment treaties signed by Latin American countries, 147 are treaties signed between or among only Latin American countries. The United States has signed 25 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, Uruguay). The most recent instrument signed by the United States in the region is the trade and investment framework agreement with Argentina in March 2016, which provides a mechanism to resolve State-to-State trade disputes and further deepens the ties established by the 1994 bilateral investment treaty between the two countries.

Treaty-making activity in the region in 2016 was dominated by the signing of the Trans-Pacific Partnership (“TPP”) by 12 countries, including Chile, Mexico, and Peru. While their continental neighbors have focused on intra-regional treaties in recent years, as evidenced by the further development of the Union of South American Nations (UNASUR), Chile and Peru have each increasingly attracted foreign direct investment from Asia in recent years. In light of the stalling of the TPP’s ratification process caused by the policy shift of the United States following its 2016 presidential election, these two countries likely will seek to replace this trade deal by way of bilateral investment treaties with other Pacific Rim countries, much like the Chile-Hong Kong bilateral investment treaty signed in November 2016.

In other news, Brazil continued its practice of resisting participation in the current investment treaty framework, by signing trade deals which purport to protect against expropriations and discriminatory treatment of foreign investments, while avoiding consent to investor-State dispute settlement. In its latest treaty signed in April 2016, Brazil’s agreement with Peru was styled as an Economic and Trade Expansion Agreement (ETEA), which bears some resemblance to its previously signed Cooperation and Facilitation Investment Agreements (CFIAs), in that they also omit any provision for investor-State dispute settlement.

### Investment Treaties Signed by Latin American Countries in 2016

<table>
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<tr>
<th>Countries</th>
<th>Type of Treaty</th>
<th>Date Signed</th>
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<tbody>
<tr>
<td>Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, Vietnam</td>
<td>Free Trade Agreement</td>
<td>February 4, 2016</td>
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<tr>
<td>Brazil-Peru</td>
<td>Economic and Trade Expansion Agreement</td>
<td>April 29, 2016</td>
</tr>
<tr>
<td>Chile-Uruguay</td>
<td>Free Trade Agreement</td>
<td>October 4, 2016</td>
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<tr>
<td>Argentina-Qatar</td>
<td>Bilateral Investment Treaty</td>
<td>November 6, 2016</td>
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<tr>
<td>Chile-Hong Kong</td>
<td>Bilateral Investment Treaty</td>
<td>November 18, 2016</td>
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Other Developments in 2016

- ICSID began the process of reviewing and amending its rules and regulations in an attempt to improve the efficiency of proceedings. A public consultation exercise is expected this coming year.
- It was the best of times and the worst of times for the Trans-Pacific Partnership in 2016, as the long negotiated agreement was signed by the United States, three Latin American countries—Chile, Mexico, and Peru—and eight other countries scattered throughout the Asia-Pacific region (Australia, Brunei, Canada, Japan, Malaysia, New Zealand, Singapore, and Vietnam). The agreement ultimately included among its provisions the availability of investor-State arbitration under ICSID, UNCITRAL, or any other arbitral institution agreed by the parties, if the claimant investor and respondent TPP host State could not resolve their dispute within a six-month consultation/negotiation period. In light of the shifting political climate in the United States with respect to international trade following the November 2016 presidential election, it now appears likely that the TPP will never enter into force. According to the terms of the treaty, at least six countries that account for 85 percent of the combined gross domestic product of the 12 signatory nations must approve the final text for the treaty to enter into force. Even if the other 11 nations ratify the treaty, the United States’s abandonment of the treaty portends its demise.
- The UNASUR Arbitration Centre edges closer to reality as a Latin American centered dispute resolution system created in part to serve as an alternative to ICSID, under the auspices of the twelve-member South American intergovernmental group UNASUR. The Rules promulgated by the Centre, which were released to industry watchers in near-final form in 2016, contain respondent State-friendly provisions, including (i) requirements governing the exhaustion of local remedies, (ii) the freedom of each host State to exclude certain economic and industrial sectors from the Centre’s subject matter jurisdiction, and (iii) an appellate system designed to correct legal errors, but which also will inevitably prolong the final adjudication of claims. It remains to be seen whether claimant investors would be willing to participate in such a framework, particularly in situations where competing arbitral fora offer a greater degree of familiarity and potential procedural advantages.
- The United States and Cuba continue to inch toward normalized trade and diplomatic relations, even as the new U.S. presidential administration has hinted at possible rollbacks. In February 2016, an agreement was signed restoring commercial flights between the two countries, and several U.S. airline and cargo carriers won bids to provide non-stop routes to Havana, Holguin, and other cities. One month later, President Barack Obama was the first sitting U.S. president in 85 years to visit the country, and in July, the two countries re-opened embassies in each other’s capitals. Finally, near the end of his administration, and despite the still-intact trade embargo which can be abrogated only with an act of Congress, Obama signed a directive easing trade restrictions on Cuban rum and cigars, and directed immigration officials to phase out the “wet foot, dry foot” policy providing favorable terms for Cuban migrants to obtain permanent residency if they reached U.S. territory. These milestones are small but necessary steps toward the normalization of trade relations between the two countries, but major challenges remain before Cuba stands to benefit from foreign direct investment from the United States. The parties must still contend with the nearly 6,000 claims for property expropriated by the Cuban Government, which may be settled piecemeal or collectively, before the two nations could contemplate entering into an investment treaty or (more likely) a generalized trade agreement that provides some State-to-State dispute settlement mechanism, but falls short of providing a framework for the resolution of investor-State disputes.

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.