

IISDS

in numbers

Impacts of investment arbitration
against Latin America
and the Caribbean

IMPACTS OF INVESTMENT ARBITRATION AGAINST LATIN AMERICA AND THE CARIBBEAN¹

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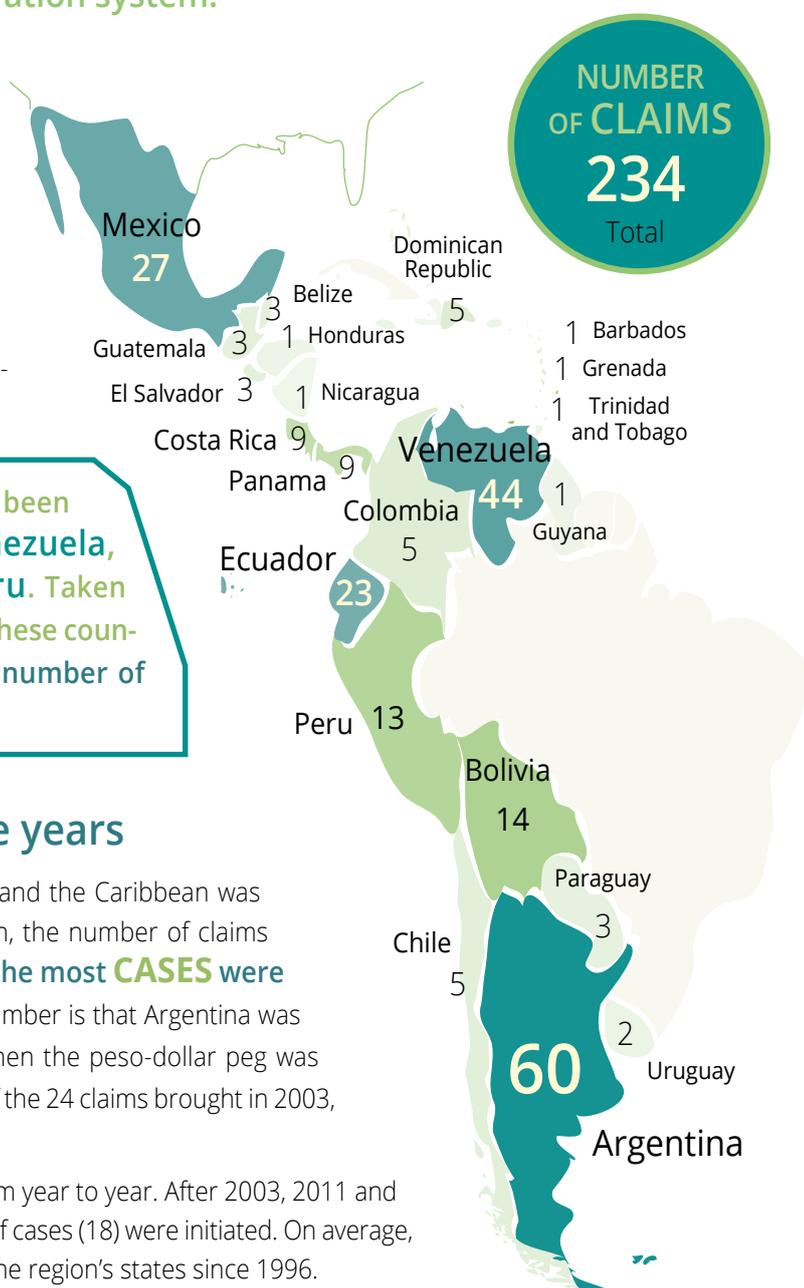
For more information about the impacts of the investment protection regime in Latin America and the Caribbean, visit www.ISDS-AmericaLatina.org

The number of investor-state dispute settlement cases has shot up in the last twenty years, from a total of 6 known treaty-based cases in 1995 to 817 known cases today.² Of this total, 234 claims were brought against countries in South America, Central America and the Caribbean. It amounts to 28,6% of known Investor-state disputes around the world making this region the most affected by the investment arbitration system.

The most sued Latin American and Caribbean countries

Of the 42 countries in Latin America and the Caribbean (LAC),³ 22 – or 52.4% of the region's countries – have now been sued under the international arbitration system.

The countries in the region that have been sued most often are Argentina, Venezuela, Mexico, Ecuador, Bolivia and Peru. Taken together, the number of claims against these countries accounts for 77.3% of the total number of claims against LAC countries.



The rise in lawsuits over the years

The first case against a state in Latin America and the Caribbean was brought in 1996 against Venezuela. Since then, the number of claims has been rising. **2003 was the year when the most CASES were initiated**, and the main reason for the high number is that Argentina was starting to re-emerge from the 2001 crisis, when the peso-dollar peg was abandoned and public spending was frozen.⁴ Of the 24 claims brought in 2003, 20 were filed against Argentina.

Since then, the number of claims has varied from year to year. After 2003, 2011 and 2016 were the years when the highest number of cases (18) were initiated. On average, 11 claims per year have been brought against the region's states since 1996.

AMOUNT OF CLAIMS PER YEAR

2003, 2011 and 2016
the years with the highest number of cases

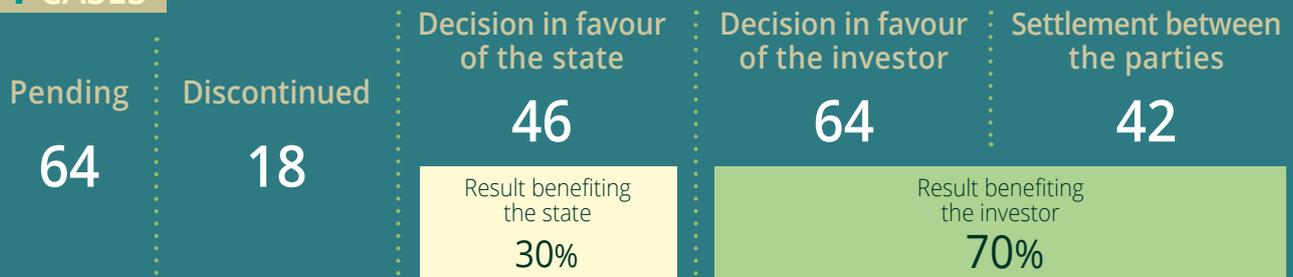


Arbitration winners and losers

States have been the main losers in investment arbitration cases.

64 of the 234 known cases against LAC countries are still pending. Of the 170 cases that have concluded, 18 were discontinued, 42 were settled by an agreement between the parties, and 110 cases ended in a decision by the tribunal.

CURRENT STATUS OF THE 234 CASES



In the 110 cases where the tribunal issued a ruling, 64 were decided in favour of the investor (58%) and 46 in favour of the state (42%).

Considering the 152 cases that ended either in a decision of the Tribunal or a settlement between the parties,⁵ the result benefited the investor in 70% of the cases brought against LAC countries.

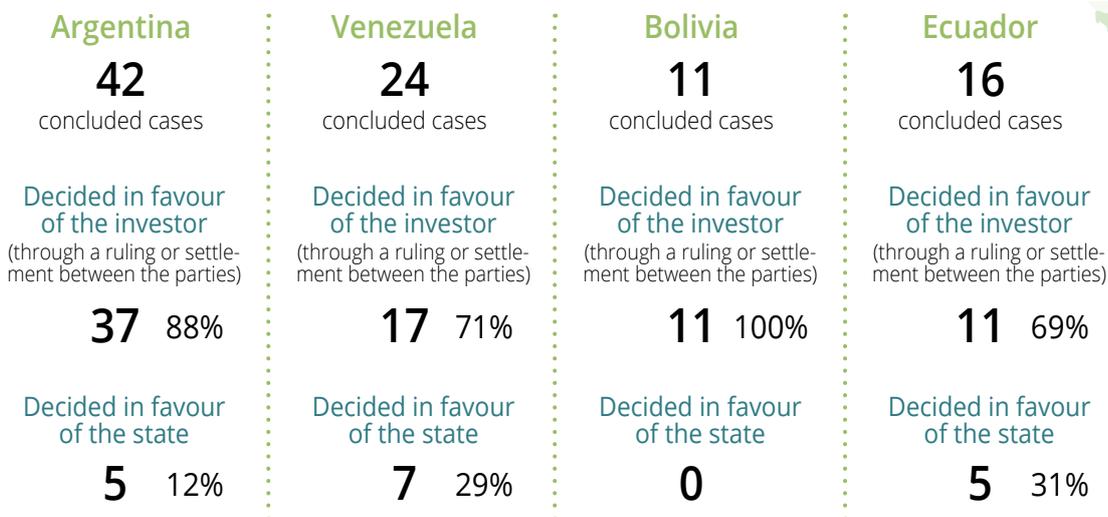
It is also important to bear in mind that states are always the losers in the international arbitration system, because the cases mean that they incur millions of dollars in defence and court costs. Even in cases where the arbitration tribunal's decision does not go against the state, the proceeding itself implies spending vast sums on hiring law firms who may charge up to US\$ 1,000 per hour for their advice. As an example, by 2013 Ecuador had spent 155 million dollars on its defence and arbitration costs.⁶

The countries that lost the most cases

If we assess the results of arbitration rulings by country, **the case of Argentina** stands out, as only 5 of the 28 claims where a decision has been pronounced were decided in favour of the state, whereas 23 were decided in favour of the investor. If we add to these 23 cases the 14 in which a settlement was reached, we find that **88% of the concluded claims against Argentina ended favourably for the investor**.

A significant imbalance in the investor's favour can also be observed in **the case of Venezuela**, the country with the second highest number of claims against it in the region. Of the 24 cases that have concluded, 17 were decided in favour of the investor (5 of the 17 through a settlement between the parties), equivalent to 71% of the concluded cases, and only 7 in favour of the state (29%).

Similar outcomes favourable to the investor can be seen in the cases against Bolivia and Ecuador.

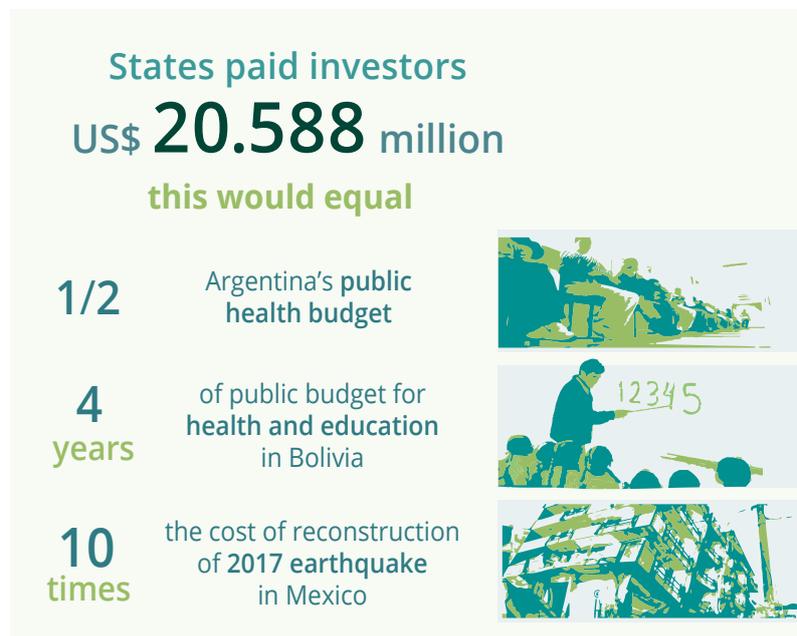


The costs of the claims

As far as the amounts claimed by investors are concerned, **total claims since 1996 add up to US\$ 145,8 billion.**⁷

Based on the cases concluded so far (by either an arbitration decision or a settlement between the parties) where the amounts are known, **the money that states have actually been ordered to pay investors to date adds up to US\$ 20,6 billion.**⁸ That is equivalent to ten times the US\$ 2 billion it is costing Mexico to rebuild after the 2017 earthquakes.⁹ To give other examples, it is equivalent to half of Argentina's public health budget,¹⁰ and could also cover Bolivia's budget for health and education for four whole years.¹¹

The highest amount ever paid by a country as a result of a single claim was the US\$ 5 billion paid by Argentina to the Repsol company in a settlement.





Repsol vs. Argentina

In 2012 the Argentine state seized the shares of the Spanish group Repsol with the aim of bringing the oil company Yacimientos Petrolíferos Fiscales (YPF) under its control. The firm responded by initiating claims in four different courts: Argentina's national justice system, ICSID, and courts in Paris and New York. Finally, in 2015, the country paid **US\$ 5 billion** to settle the case.

The countries most often sued are also those that have had to pay the most so far. Venezuela, the country with the second highest number of claims, has also paid the highest amount of money, although many of the claims against Venezuela were brought following direct expropriations, which usually result in higher amounts of compensation than other cases. The most costly decision, however, was against Ecuador, which lost the claim filed against it in the ICSID by Occidental. The initial ruling ordered it to pay US\$ 2.3 billion, but this amount was reduced to US\$ 1.061 billion following a review of the claim and the partial annulment of the decision.

THE 9 KNOWN CASES THAT HAVE COST COUNTRIES THE MOST

Amount awarded by the arbitration tribunal to the investor



later reduced to
1.061 US\$ billion
Occidental vs. Ecuador

CASE



Mobil et al.
vs. Venezuela



Crystallex
vs. Venezuela



Rusoro Mining
vs. Venezuela



Gold Reserve
vs. Venezuela



Valores Mundiales
vs Venezuela



Vivendi
vs. Argentina



Burlington
vs. Ecuador



OIEG vs.
Venezuela

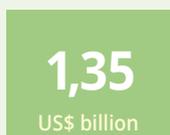
THE 9 LARGEST KNOWN SETTLEMENTS

Settlement amount



Repsol
vs. Argentina

CASE



Abaflat
vs. Argentina



Eni Dación
vs. Venezuela



Holcim
vs. Venezuela



CEMEX
vs. Venezuela



Universal Compression
vs. Venezuela



Williams Company
vs. Venezuela



Pan American
vs. Bolivia



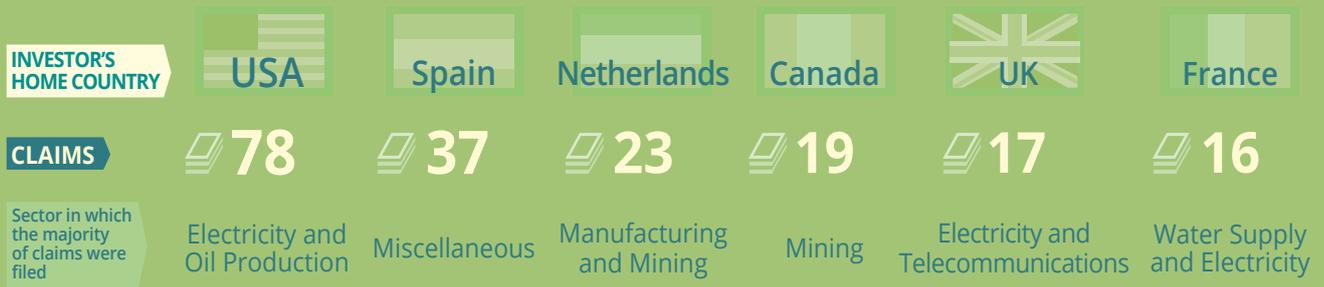
Dunkeld
vs. Belize

The smallest amount ever paid in the history of arbitration

The smallest amount ever paid in the history of arbitration in Latin America and the Caribbean was in the claim filed by Aguas del Tunari (a subsidiary of the US corporation Bechtel) against Bolivia for having terminated its concession to supply water in Cochabamba. After water was privatized in 1999, Bechtel raised the prices it charged consumers by 50%. This led to the outbreak of the “Water War” in 2000, which forced the Andean country to renationalize water in Cochabamba. One year later, Aguas del Tunari, whose registered headquarters were in the Cayman Islands, changed its corporate domicile to Holland so that it could make use of the Bilateral Investment Treaty between the Netherlands and Bolivia and file a claim for US\$ 50 million against the country before the ICSID. The protests against Bechtel by civil society in Bolivia and worldwide were so strong that the corporation decided to abandon the case and agreed to be paid the token amount of 30 US cents by Bolivia in compensation.¹²

Investors nationality

The investors who have filed the most claims against Latin American countries are based in the United States. Investors from the US have taken legal action 78 times in total. They are followed by investors from European countries and Canada.



If we add up all the claims brought by US, Canadian and European investors, we find that they account for 88.8% of the total.

Though few in number, there are also disputes between countries in the region. Among these, Chile stands out with 7 claims against other Latin American and Caribbean states. Another interesting case is Barbados, which is second to Chile with 6 claims, all of them against Venezuela. Only two claims were filed by companies from Argentina, the most sued country in the region, against other states.

ORIGIN OF THE INVESTORS SUING



Treaties invoked

The claims are based on the treaties signed by countries. These may be free trade agreements (FTAs) with a chapter on investment protection, or specific investment protection agreements (bilateral investment treaties or BITs). In the claims filed against Latin American countries, **most investors cited alleged violations of BITs (208 cases), followed by FTAs (39 cases).**

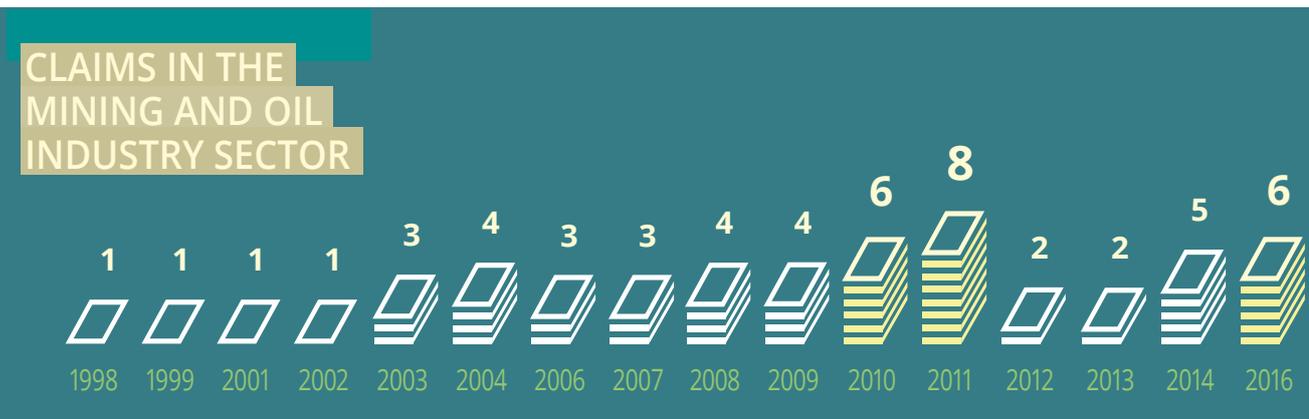
Because the United States is the country where the largest number of claims originate, it is not surprising that the Bilateral Investment Treaties it has signed are the ones most often invoked, together with the FTAs NAFTA and CAFTA.

It is also worth mentioning that a large number of the investors who filed claims against Venezuela invoked that country's BITs with the Netherlands (15 cases) and Spain (8 cases).

Sectors affected by claims

In recent years, most Latin American countries have had a growing number of claims filed against them in the mining and oil industry sector. These challenge government policies that seek to protect the environment and the rights of communities, as well as policies to make companies pay more taxes to the state.

Of the 234 cases filed against Latin American and Caribbean countries, 54 concern the mining, gas and oil sectors, which account for 23% of the claims. Half of these claims were filed after 2011.



The other sectors affected by a significant number of claims are: electricity and gas (37 cases), and manufacturing (29 cases).

THE 10 SECTORS AFFECTED BY THE LARGEST NUMBER OF CLAIMS

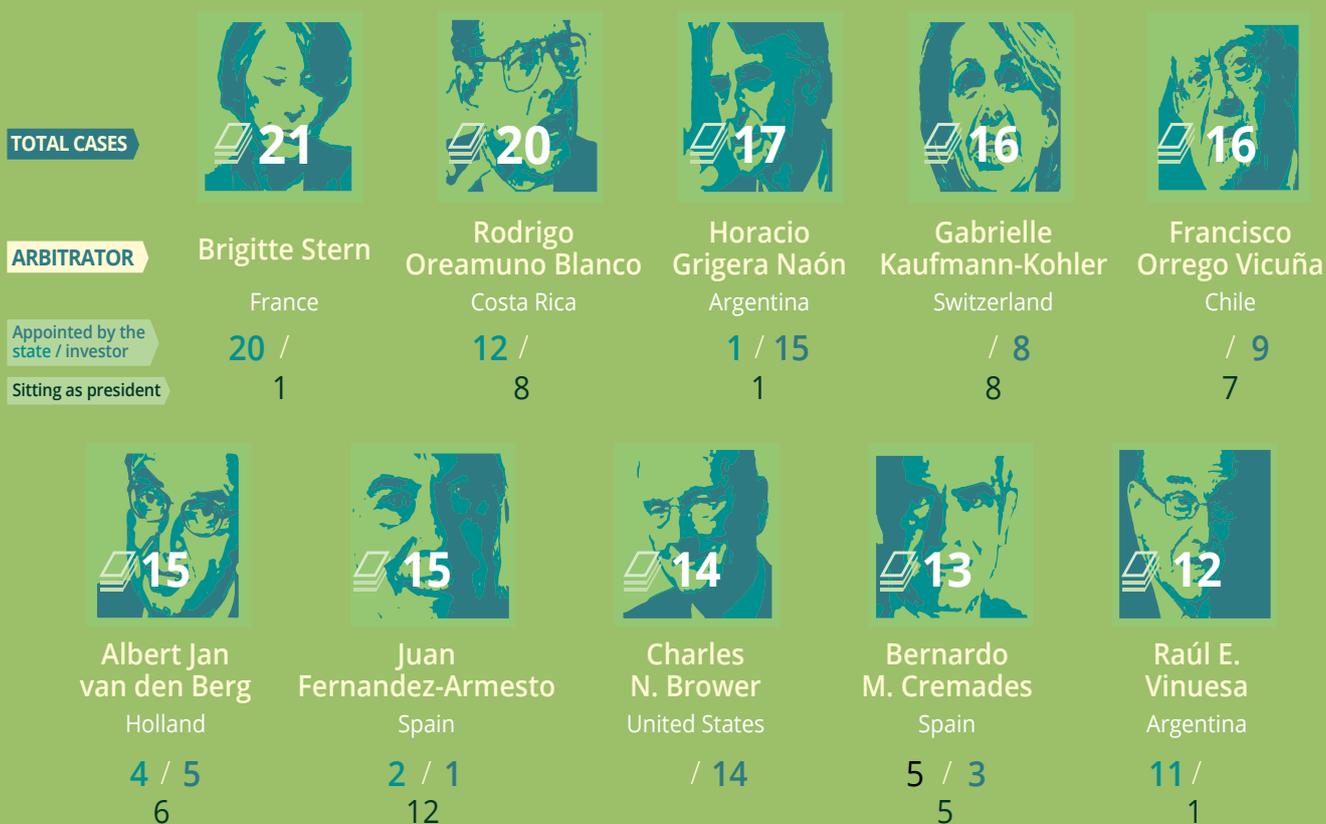


The arbitrators in the cases

The arbitration tribunal is a panel of 3 arbitrators. Usually, one arbitrator is nominated by the investor, one is nominated by the state, and there is a tribunal president appointed by mutual agreement between the parties

Although a total of 208 arbitrators have sat on the tribunals in cases against LAC countries, the vast majority have only participated in a few cases. Thus, there is a small group of arbitrators who have been appointed again and again.

The ten arbitrators most often used in the claims (whether nominated by the parties or appointed as president) are involved in 72% of all the cases in the region for which the tribunal has already been set up. In other words, **nearly 3/4 of the cases brought in Latin America and the Caribbean are decided by the same arbitrators.**



Role rotation among the arbitrators

As the above table shows, the arbitrator who sat as president in one case may be nominated by the investor in the next one, as happened for example with the Chilean arbitrator Francisco Orrego Vicuña, who sat as president 7 times and was nominated by the investor 9 times. The same thing can be seen in the case of the Costa Rican arbitrator Rodrigo Oreamuno Blanco, who was president of the tribunal 8 times and sat as the arbitrator nominated by the state 12 times.

Among the arbitrators, there are some who are favourites with states while others are favourites with investors. The French arbitrator Brigitte Stern is the one who has been nominated the most by states, while Horacio Grigera Naón from Argentina and Charles Brower from the United States are the arbitrators most often nominated by investors.

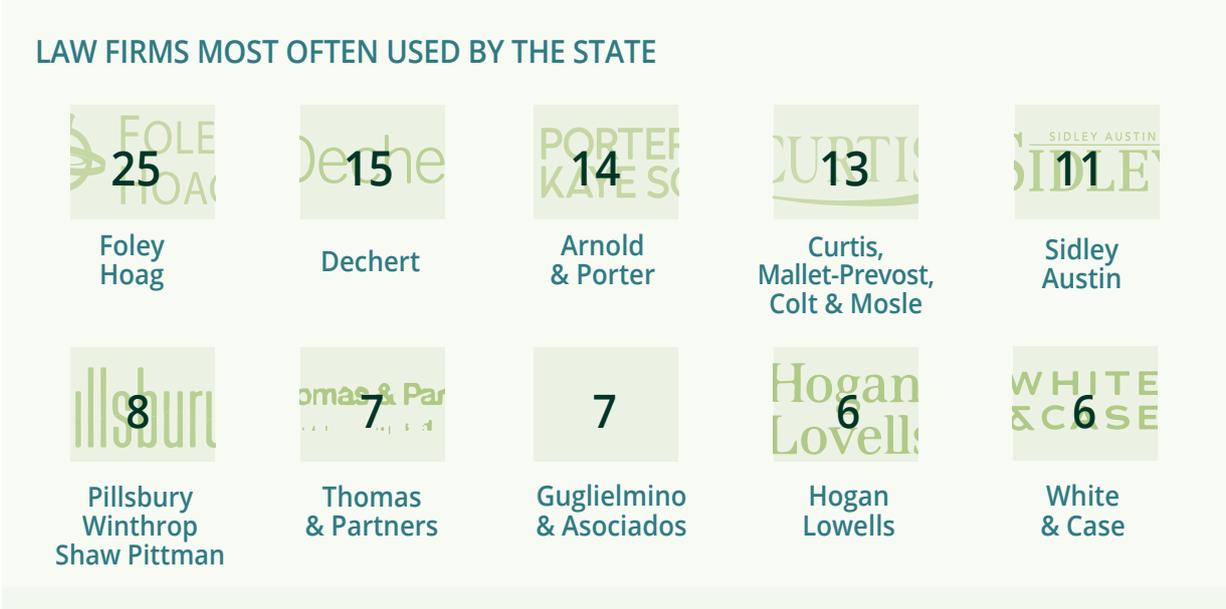
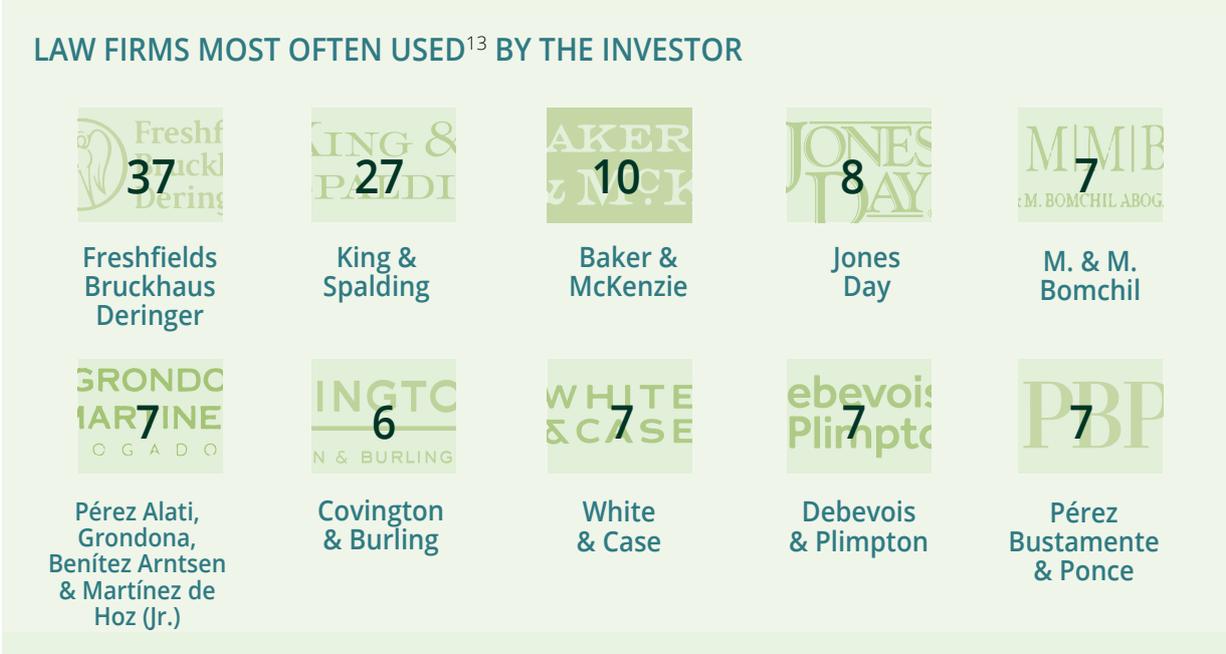
The law firms who defends the investors and states

A small number of law firms have been employed by the parties in the majority of cases.

The law firm most often used by investors is Freshfield Bruckhaus Deringer, which has been involved in 37 cases. It is followed by King & Spalding, with 27 cases, and Baker & McKenzie.

With the exception of a small minority, states also tend to hire international firms of lawyers to defend them. The law firms most often contracted by states are Foley Hoag (25 cases, frequently used by Venezuela and Ecuador), Dechert (16 cases, mainly used by Bolivia), Pillsbury Winthrop Shaw Pittman (14 cases, almost exclusively hired by Mexico), and Arnold & Porter (12 cases, acting for Central American and Caribbean countries, especially Panama and the Dominican Republic).

Argentina conducts its own defence
 In every case it has faced, Argentina has defended itself by only using its own team of lawyers, except in the first case against Vivendi in 1997.



The rules of the game and the institutions that enforce them

There are many arbitration centres around the world where investment-related disputes can be resolved. However, most cases worldwide and most claims against Latin America and the Caribbean are conducted under the auspices of the **World Bank's International Centre for Settlement of Investment Disputes, ICSID** (used 185 times in the region). Specifically, **79% of all claims were brought before this arbitration centre**. Argentina is a good example here, as 54 of its 60 claims were settled in the ICSID.

Other arbitration centres where some disputes have been resolved are the Permanent Court of Arbitration in The Hague in the Netherlands (25 cases) and the London Court of International Arbitration (3 cases).

INSTITUTION SUPERVISING THE CASE		ICSID	PCA	LCIA ¹⁴
Number of cases		185	25	3
ICC ¹⁵	SCC	No information or no supervising institution		Total
2	1	18		234

As well as selecting the arbitration forum, investors have the right to choose the arbitration rules that will govern the case. In the cases against LAC countries, investors chose the ICSID rules in 146 of the 234 claims against the region. Adding in the ICSID Additional Facility (ICSID AF¹⁶), which was used 31 times, it can be concluded that ICSID rules were used to resolve disputes in 76% of the claims against Latin American countries.

Investors also had recourse to the rules of UNCITRAL,¹⁷ part of the United Nations, which were used in the remaining 24% of cases. Investors usually resort to the rules of UNCITRAL and other tribunals when the country concerned has not signed up to the ICSID or has withdrawn from it, as in the case of Bolivia, Ecuador and Venezuela. 9 of the 14 claims against Bolivia and 12 of the 23 claims against Ecuador were decided under UNCITRAL rules. Venezuela only withdrew from the ICSID in 2012, which is why the majority of the claims against it continued to be supervised by the ICSID.

ARBITRATION RULES		ICSID	UNCITRAL	ICSID AF
Number of cases where the arbitration rules were applied		146	55	31
SCC ¹⁸	No information		Total	
1	1			234

Notes

- The data presented in this report is updated until September 2017. The analysis was done using a database of all known investment treaty lawsuits against Latin American countries. This database was compiled by the authors of the report based on public resources (UNCTAD, ICSID, magazines and newspapers) and is available on the website: www.ISDS-AmericaLatina.org
- <http://investmentpolicyhub.unctad.org/ISDS>
- According to LANIC: <http://lanic.utexas.edu/subject/countries/indexesp.html>
- Between 2003 and 2006, 35 claims were filed against Argentina, giving rise to what is known in academic circles as "the Argentinian case" in the ISDS system.
- It should be pointed out that when the case concludes with a settlement between the parties, it is usually because the state has agreed to pay compensation or bow to the investor's demands (e.g. to roll back regulation).
- For more information, see: <http://caitisa.org/>
- This amount is based on the sum of the 182 cases in which the amount claimed by the company is known.
- This amount is based on the sum of the 141 cases in which the amount paid by the state is known.
- <https://lta.reuters.com/article/domesticNews/idLTAKCN1C2345-OU5LD>
- Argentina spends 4.8% of its GDP on health (2014). GDP in 2014 amounted to US\$ 871.6 billion. <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/ar.html>
- Bolivia spends 6.3% of its GDP on health (2014) and 7.3% of GDP on education (2014). <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/bl.html>
GDP in 2014 amounted to 33 billion USD. <http://www.ine.gob.bo/index.php/producto-interno-bruto-departamental/producto-interno-bruto-departamental-5>
- For more information, see: <https://democracyctr.org/archive/the-water-revolt/bechtel-vs-bolivia-details-of-the-case-and-the-campaign/>
- In many cases, both the investor and the state use more than one firm of lawyers, and in some cases as many as 3 different firms. The number given for the law firm therefore corresponds to all the cases in which the firm was used, whether it was the first, second or third firm hired.
- <http://www.Icia.org/>
- <https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration/>
- The ICSID Additional Facility rules are based on the ICSID arbitration rules and those provisions in the Convention that are applicable to an agreement of a contractual nature. They include some provisions taken from the UNCITRAL rules and the International Chamber of Commerce rules.
- United Nations Commission on International Trade Law (UNCITRAL)
- The Arbitration Institute of the Stockholm Chamber of Commerce <http://www.sccinstitute.com/>

