

International Investment Arbitration in Asia: Year in Review 2016

INTERNATIONAL ARBITRATION TEAM

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 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 was stable overall during 2016, if slightly disappointing expectations set at the outset of the year. The region's economic growth grew by approximately 5.6%, 0.1 percentage points lower than predicted at the beginning of the year. Broken down by region, the People's Republic of China saw growth at 6.6%, while East Asia as a whole expanded by 5.8%. The downward trend in the region as a whole can be attributed to India's surprise demonetization of large bank notes, which knocked its growth rate down 0.3 percentage points from the predicted rate to a still healthy 6.6%. Growth was strong in Southeast Asia: with the Philippines and Malaysia surpassing projections, the region expanded by approximately 4.5% in 2016. In Central Asia, low oil and natural gas prices kept growth rates low, at 1.5%. Moderate growth across the board has been predicted for 2017.¹

In February 2016, the Trans-Pacific Partnership, aimed at opening up trade between the United States, Canada and 10 countries around the Pacific Rim (including five in Asia), was finally signed. Notably, this was the only new investment treaty that the United States has inked with any Asian country since 2013. Prior to its ratification by the U.S. Congress, in early 2017, newly-elected President Donald J. Trump withdrew the U.S. from the TPP.

The number of new investment arbitrations in Asia in 2016 held steady with previous years at around 3-5 new cases per year, with the exception of 2013, which saw only one new case. Although oil, gas and mining has traditionally been the dominant sector in arbitrations in Asia, 2016 continued previous years' trend of diversification. Of the four arbitrations initiated in 2016, one was in the oil, gas and mining sector, and the balance were in agriculture, fishing and forestry, tourism, and the gaming industry. This is a reflection of ongoing industrial diversification in Asia—2014's biggest sector for new arbitrations was construction, and 2015 saw the majority in electric power and other energy.

Countries in the region have concluded at least 1,051 treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions). More than 16% of the region's investment treaties are intraregional (i.e., concluded between only Asian countries), as are almost 13% of the region's investment disputes.

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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¹ Asian Development Bank Outlook Supplement, *Asia's Economies Steady Despite Global Uncertainty*, December 2016, available at <https://www.adb.org/publications/ado-supplement-december-2016>.

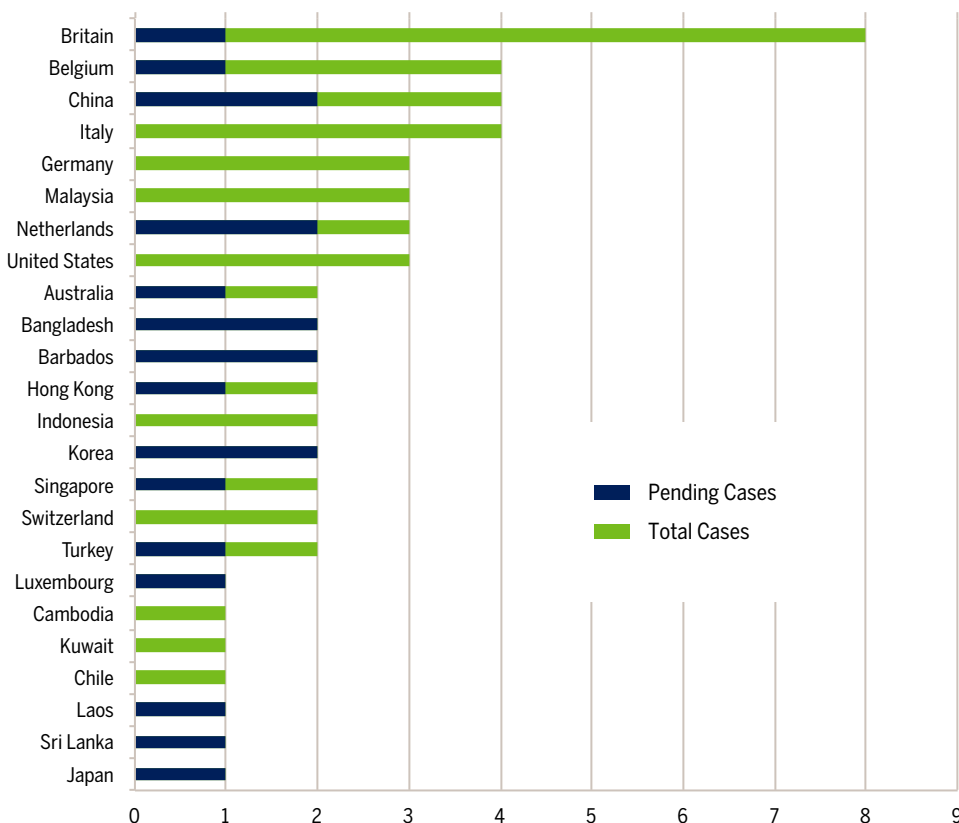
For purposes of this review, continental Asia includes those countries grouped as Eastern Asia, Southern Asia, and South-Eastern Asia, as defined by UNCTAD. It does not include Central or Western Asian countries, some of which may be represented in the Year in Review on Europe.

Investment Arbitration in the Region²

A total of 51 ICSID cases have involved Asian parties as either claimant investors, respondent States or both, with four of those cases being brought in 2016. 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 51 cases, 17 cases were pending in 2016. Three cases that were pending in 2015, one against Pakistan by a Kuwaiti claimant and two against Indonesia by a British and Australian claimant, were resolved in 2016. All were resolved by an arbitral award.

Claims against Asian countries have historically been made most frequently by investors from Britain, with Belgium, China and Italy tying for second. Of the four cases brought in 2016, however, three of the claimants were from Laos, Singapore, and Sri Lanka. For the second year in a row, no claims were brought by Chinese investors against Asian countries—a stark drop from 2014, when Chinese investors brought the most.

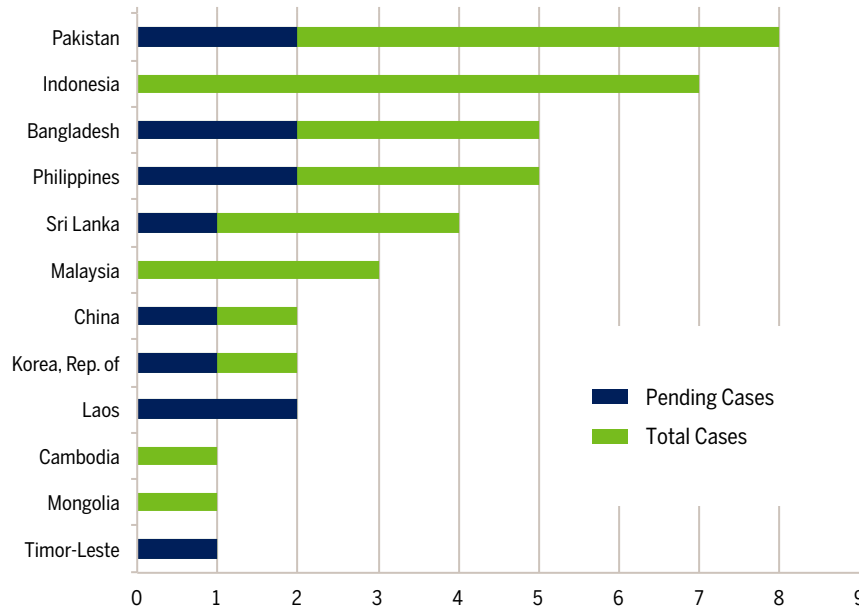
Top Nationalities of Investors with ICSID Arbitrations in Asia



² This publication considers only investment arbitrations brought under the auspices of ICSID, which are the majority of investment arbitrations in the region.

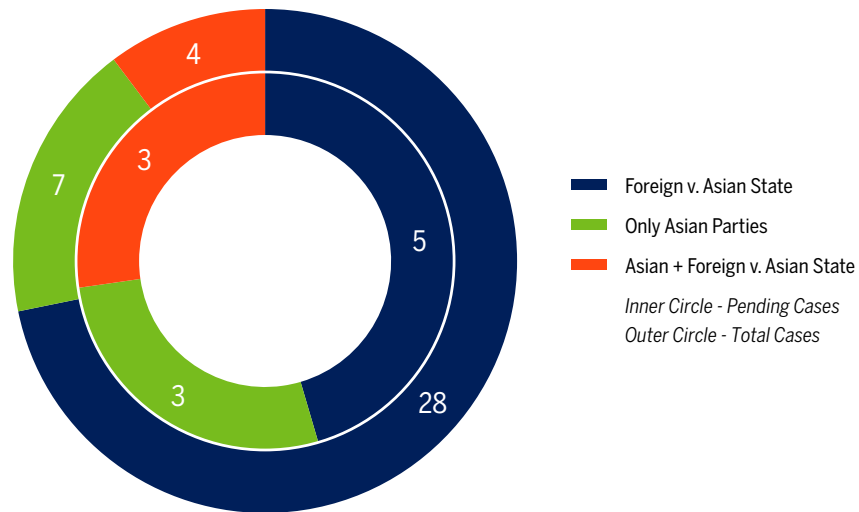
Historically, the countries in the region that have faced the most investment claims are Indonesia, Pakistan, and Bangladesh. None of these countries featured in the lineup of new cases in 2016, when claims were brought against Indonesia, Laos, the Philippines, and Sri Lanka.

Asian Countries Facing Investment Claims



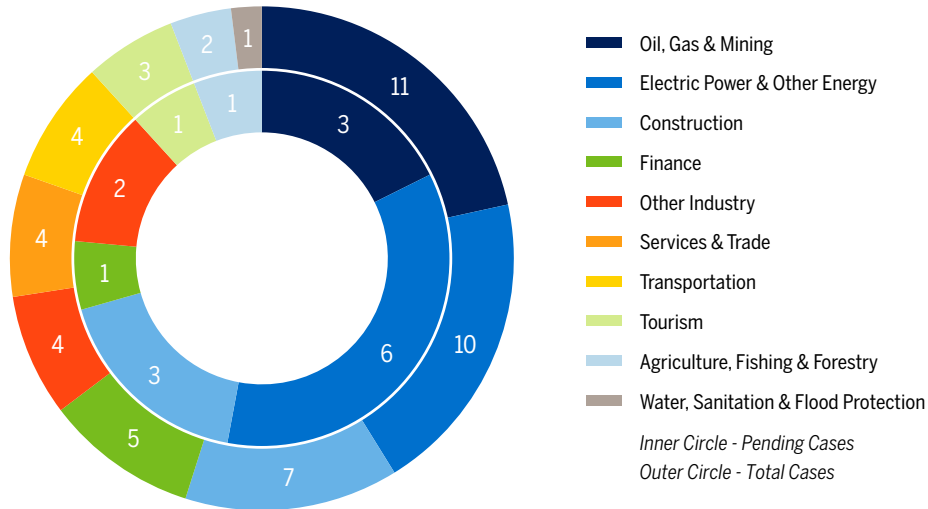
The vast majority of investment arbitrations against Asian countries have been brought by investors from other regions. However, more than 12% of investment arbitrations in the region have involved only Asian parties.

Investment Arbitrations Against Asian Countries



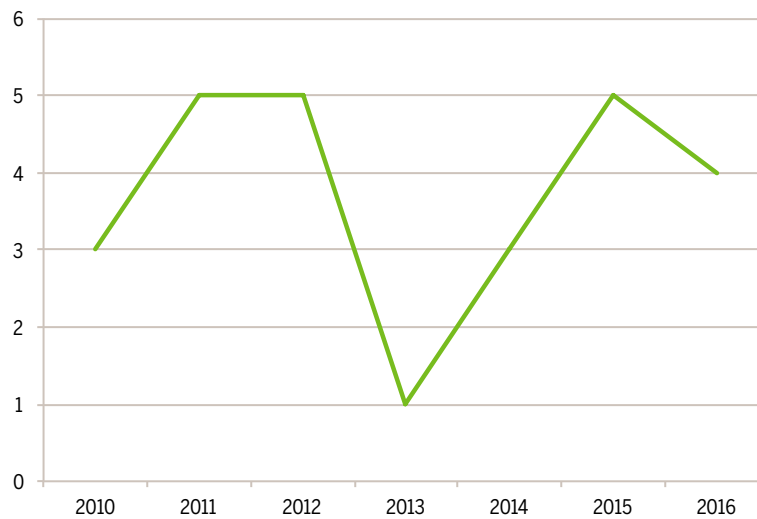
Investment disputes in the region have arisen most frequently in the oil, gas and mining industry. Only one of the disputes instituted in 2016 involved this industry, but that is roughly in line with the proportion of cases that have historically involved oil, gas and mining. The electric power and other energy sector has over recent years been more active for arbitration, falling just behind oil, gas and mining for cases registered.

Investment Cases by Industry



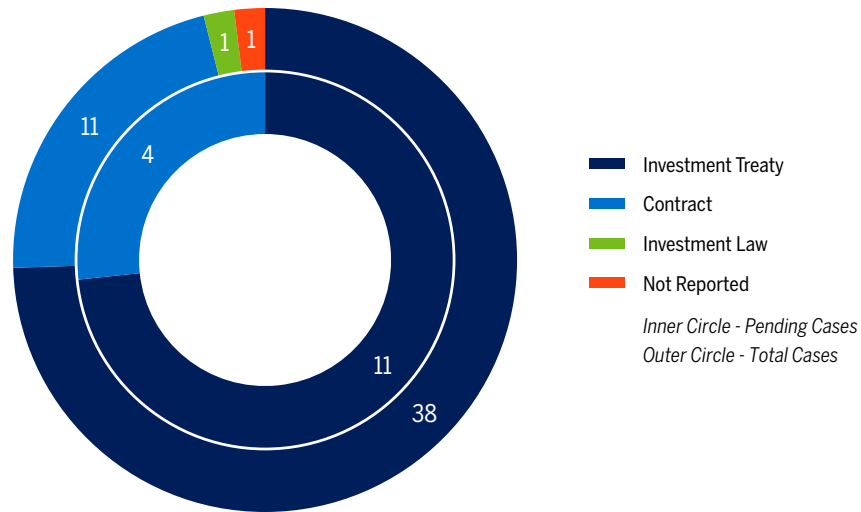
The number of investment arbitrations initiated in 2016 decreased slightly from 2015.

Total Cases Initiated



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 four cases initiated by or against Asian parties in 2016, all were brought pursuant to BITs.

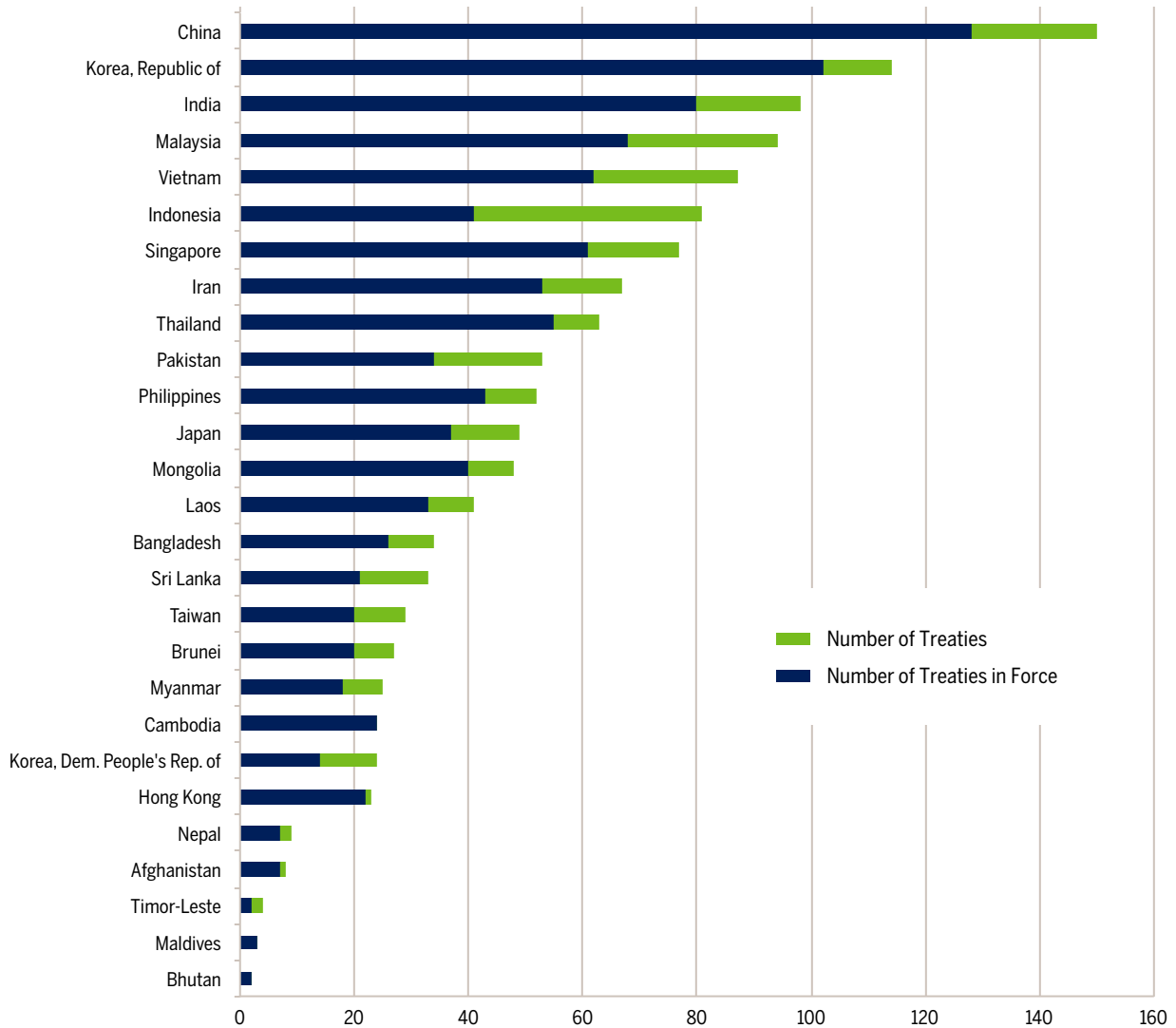
Instrument Invoked to Establish ICSID Jurisdiction



Of the 34 concluded arbitrations, nine cases—26.4% —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 2016, an annulment proceeding, which had been initiated in 2012, was discontinued (*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ARB/09/2).

More than a third (1,051) of the nearly 3,500 investment treaties currently in existence involve Asian signatories. China has concluded the most investment treaties (165), followed by South Korea (123) and India (98).

Investment Treaties Involving Asian Countries



Of the 1,051 investment treaties signed by Asian countries, 175 are treaties signed between or among only Asian states. The United States has signed 20 investment treaties with Asian countries, but signed no new treaties since 2013, except for the Trans-Pacific Partnership, which was signed in early 2016 before the new Administration's withdrawal in early 2017.

For the third year in a row, Japan signed the most treaties of any Asian nation, with four in each of 2014 and 2015, and three in 2016, comprising the TPP and BITs with Kenya and Iran. In total, ten treaties were signed by Asian countries in 2016, across nine countries (Hong Kong/China, Singapore, Mongolia, Japan, Malaysia, Vietnam, Iran, Cambodia, Brunei Darussalam). Two agreements were concluded within the region, involving only Asian states.

Investment Treaties Signed by Asian Countries in 2016

Countries	Type of Treaty	Date Signed
China (Hong Kong) - Chile	BIT	November 18, 2016
Nigeria – Singapore	BIT	November 4, 2016
Canada – Mongolia	BIT	September 8, 2016
Japan – Kenya	BIT	August 28, 2016
Iran – Singapore	BIT	February 26, 2016
Canada – China (Hong Kong)	BIT	February 10, 2016
Iran – Japan	BIT	February 5, 2016
TPP (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America, Vietnam)	Treaty with Investment Provisions	February 4, 2016
Iran – Slovakia	BIT	January 19, 2016
Cambodia – Hungary	BIT	January 14, 2016

Other Developments in 2016

- A notable area of focus in the region in 2016 was the issue of third-party funding in arbitration. In October 2016, the Hong Kong Law Reform Commission released a report recommending the use of third party funding and including a draft set of provisions to amend the Hong Kong Arbitration Ordinance to allow same. The following month, draft legislation was introduced into the Singapore Parliament along with proposed regulations to enact a framework for third-party funding of certain court and arbitral proceedings.
- In late 2015, after years of negotiation, the text of the Trans-Pacific Partnership was finalized. The treaty aims to open up trade between United States and Canada and 10 Pacific Rim countries, and to balance the burgeoning dominance of China in the region. In February 2016, the 12 Pacific Rim countries (including five in Asia) signed the treaty. After the U.S. election and prior to Congress's ratification, however, President Trump declared the withdrawal of the United States from the treaty. Without U.S. participation, it is unclear whether the TPP will move forward, given statements by some heads of state that the TPP could be ineffectual without the United States.
- China continued to negotiate several potential investment treaties throughout 2016, including bilateral investment treaties with the United States and the European Union, a Regional Comprehensive Economic Partnership with 15 Asian countries, a trilateral agreement with Japan and Korea, and a free trade agreement with the Gulf Cooperation Council. The incoming U.S. administration creates uncertainty with respect to the prospects for the China-U.S. BIT, given President Trump's stance on international investment treaties.
- India established the Mumbai Centre for International Arbitration (MCIA), the country's first international arbitration center. The new center was established, in part, to capitalize number of arbitrations involving Indian parties that have been flowing to arbitral seats in Singapore and London. The arbitration center also seeks to attract foreign investment in India with the promise of quick and comprehensive resolutions to 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.

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