

INTERNATIONAL
ARBITRATION
TEAM

International Investment Arbitration in the Commonwealth of Independent States: 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 the Commonwealth of Independent States 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.

The Commonwealth of Independent States (CIS) region fared better economically in 2016 compared with the previous year. Although significant challenges remain, including ongoing recessions in Azerbaijan and Russia, trends in regional growth dynamics in late 2016 and early 2017 point to the start of a recovery in the CIS economies. Against this background, investment arbitration activity in this region saw a slight uptick over 2015.

Five new ICSID cases involving the CIS were filed in 2016, bringing the overall total for the region to 58. With the five new cases, there are 15 pending cases involving the region. One quarter of the currently pending disputes involve the construction industry, down from 2015 when one third of the pending disputes were construction disputes, and from 2014 when almost half were. For the third year in a row, the industry that saw the most new disputes in 2016 was the oil, gas and mining industry, with 40 percent of the new disputes, and one third of all pending disputes. Four cases which were previously pending were concluded in 2016. The top two CIS respondent States remained steady (Ukraine and Kazakhstan) while Georgia dropped out of the top three, having had no new claims filed against it.

Countries in the region have concluded at least 576 investment treaties (including bilateral investment treaties, free trade agreements and other treaties containing investment-related provisions). Just under ten percent of these investment treaties are intra-regional, holding steady with 2015.

Three investment treaties involving the region were signed in 2016, a decrease from the five signed in 2013, and from the eight signed in 2014.

For purposes of this review, the CIS region includes participating, associate and former CIS member States: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

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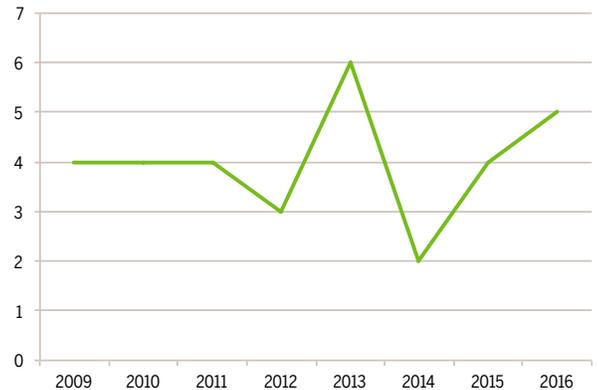
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Investment Arbitration in the Region¹

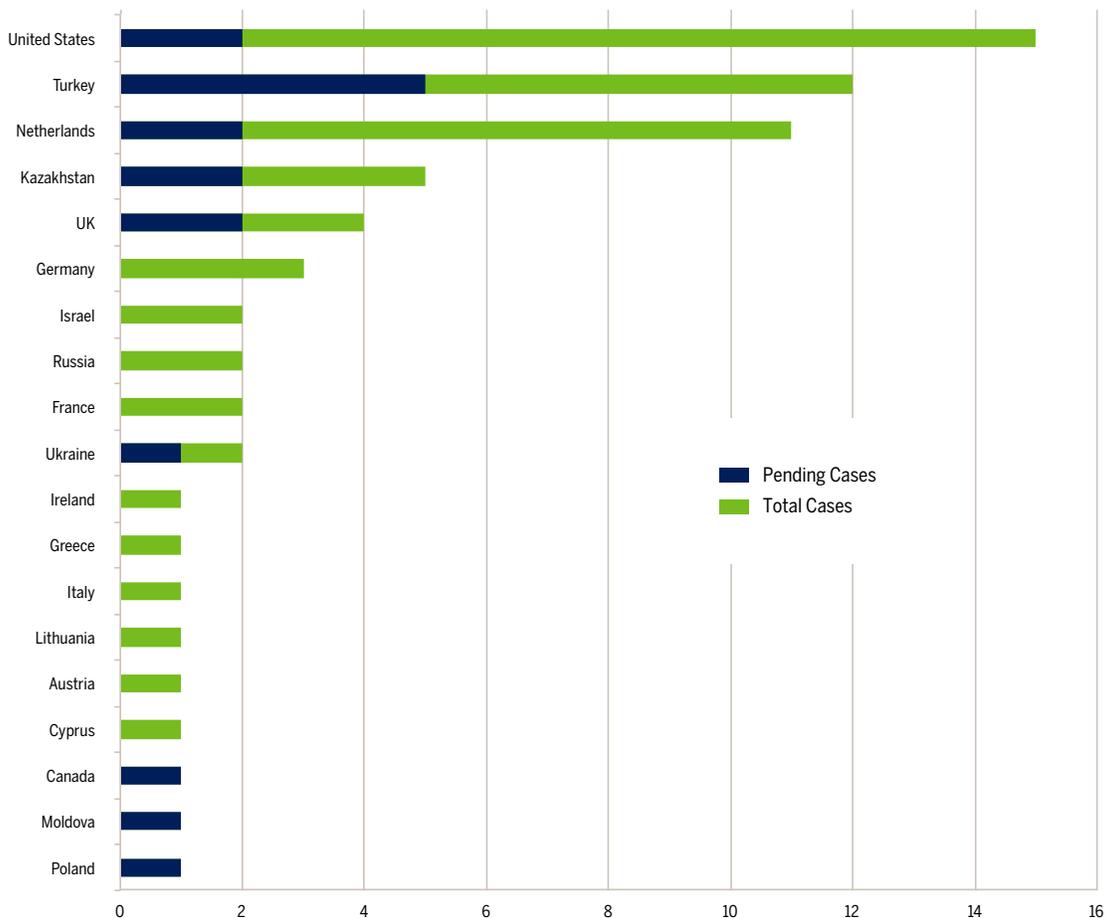
Five new investment arbitrations were brought against CIS States in 2016. Following a drop in new cases in 2012 and 2014 to three and two respectively, the number of new cases filed in 2016 follows on an upward trend begun in 2015 with four new cases. The trend brings the number of new cases into line with levels seen between 2009 and 2011, with 2013 having seen the highest number of new cases in recent years.

Claims against CIS countries have been made most frequently by investors from the United States, with Turkey and the Netherlands in second and third place, at 11 and 12 cases brought by their nationals respectively. Of the five new cases initiated in 2016, one was brought by a Canadian company, one by a Turkish company, one by an Uzbek company, and one by two companies of unknown citizenship; the fifth case was brought by several companies of U.S., Moldovan, and Polish citizenship.

Total Cases Initiated Per Year



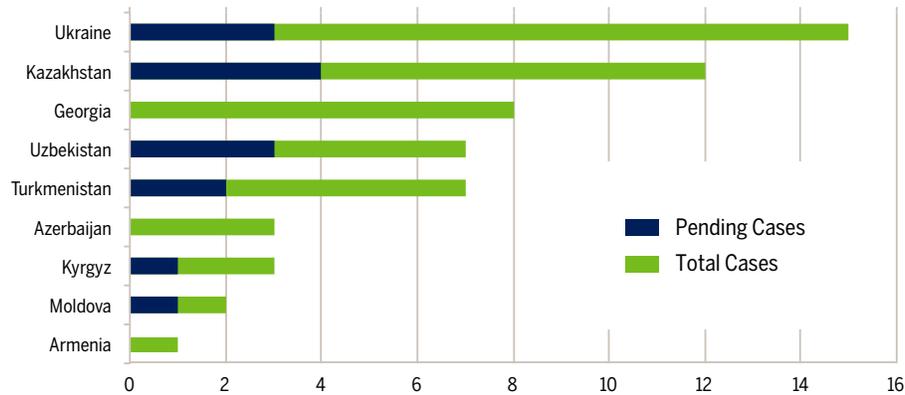
Top Nationalities of Investors with ICSID Arbitrations in CIS Countries



¹ This review considers only investment arbitrations brought under the auspices of ICSID, which constitute the majority of investment arbitrations.

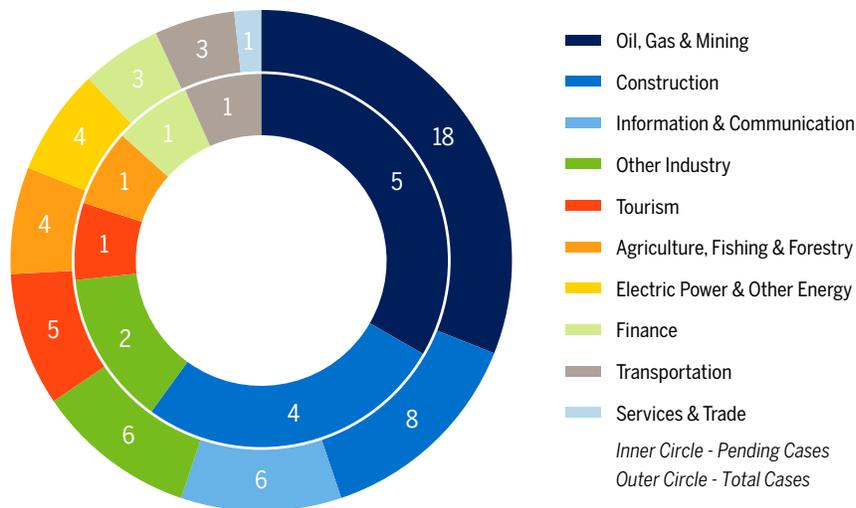
The five new claims brought in 2016 were against five different respondent States: Ukraine, Kazakhstan, Turkmenistan, Kyrgyz Republic, and Moldova. Of the four claims brought in 2015, two were against Ukraine and the other two against Kazakhstan. As in 2014 and 2015, Ukraine and Kazakhstan faced the greatest number of investment claims.

CIS Countries Facing Investment Claims



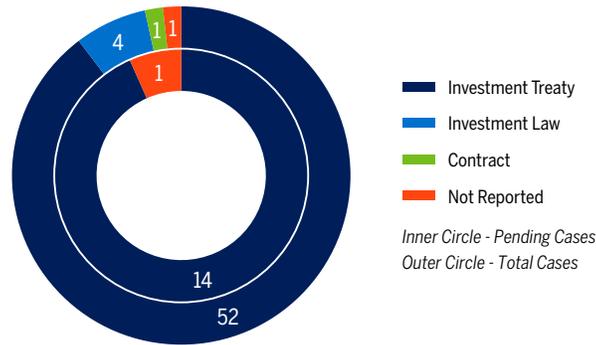
The oil, gas and mining industry continues to be the industry in which investment disputes against CIS countries most frequently arise, followed by the construction industry and the information and communication industry. Of the five cases brought in 2016, two were disputes in the oil, gas and mining industry, and one each in the agriculture, fishing and forestry; construction; and tourism industries.

Investment Cases by Industry



The basis for arbitral jurisdiction in most cases against CIS countries continues to be an investment treaty (the majority of cases are brought pursuant to a bilateral investment treaty). Of the five cases that were brought in 2016, four were brought pursuant to a bilateral investment treaty (the basis for the remaining new case has not been made public).

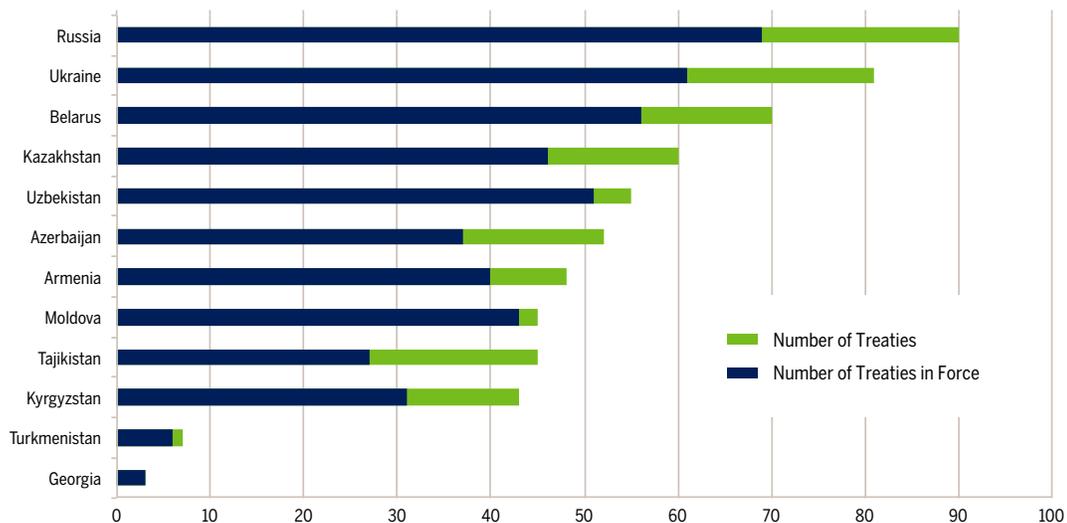
Instrument Invoked to Establish ICSID Jurisdiction



Of the 53 concluded arbitrations involving the CIS region, 11 have involved further proceedings to annul, rectify, or revise the arbitral award. No annulment proceedings were commenced in 2016.

More than 16 percent of the just over 3,500 investment treaties in existence involve CIS countries, a one percent increase from 2015. Russia has signed the most investment treaties. Russia and Ukraine currently have the same number of treaties in force.

Investment Treaties Involving CIS Countries



Of the 576 investment treaties concluded by CIS countries, 56 are intra-regional. To date, three cases in the region have been brought pursuant to an intra-regional investment treaty.

Five investment treaties involving the region were signed in 2016: four were bilateral investment treaties (between Georgia and Turkey, Kyrgyzstan and Austria, Moldova and Turkey, and Russia and Morocco); one was a free trade agreement between Georgia and the European Free Trade Association.

No new investment treaties were signed between the United States and any CIS country in 2016. The number of investment treaties between the United States and CIS countries therefore remains steady at 14. Ten of these investment treaties are bilateral investment treaties that permit investor-State arbitration (the treaties between the United States and each of Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine, and Uzbekistan).

Other Developments in 2016

- UNCTAD reported a doubling of inbound foreign direct investment (FDI) to Kazakhstan (from US\$4 billion to US\$8.1 billion) as well as a 62 percent increase in flows to Russia (from US\$12 billion to an estimated US\$19 billion) in 2016. In Kazakhstan, rising FDI flows were associated with a strong increase in mining exploration activities. In Russia, the increase is principally attributed to investments associated with the privatization of State-owned assets: the government sold a 19.5 percent stake in the State-owned oil company Rosneft in a deal worth around US\$11 billion to a consortium led by Glencore (Switzerland) and the Qatari sovereign wealth fund.
- Following Russia’s petition to the District Court of The Hague in February 2015 to set aside the July 2014 award of the arbitral tribunal sitting in The Hague, under the auspices of the Permanent Court of Arbitration, in the arbitration brought against Russia by the majority shareholders of Yukos Oil Company, The Hague District Court ruled on April 20, 2016 to set aside the arbitral tribunal’s decision against Russia awarding damages in excess of US\$50 billion. The Hague District Court held that there was no valid consent to arbitration by the State and, therefore, the arbitral tribunal lacked jurisdiction over the claims brought against Russia under the Energy Charter Treaty. The decision is currently under appeal.
- In November 2016, ICSID announced that it had begun the process of revising its rules and regulations. The public consultation process will open in 2017. Revisions to ICSID’s rules and regulations were last completed in 2006.

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

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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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