

GAR INVESTMENT TREATY ARBITRATION

United States

Mark Bravin, Tiana Bey, Theresa Bowman,
Albina Gasanbekova and Sofia Castillo
Mitchell Silberberg & Knupp LLP (MSK)

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I Overview

1 What are the key features of the investment treaties to which this country is a party?

BIT contracting party or MIT	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts ¹	Arbitration
1983 US Model Bilateral Investment Treaty (replaced)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
1984 US Model Bilateral Investment Treaty (replaced)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
1987 US Model Bilateral Investment Treaty (replaced)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
1991 US Model Bilateral Investment Treaty (replaced)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
1992 US Model Bilateral Investment Treaty (replaced)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
1994 US Model Bilateral Investment Treaty (replaced)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
1998 US Model Bilateral Investment Treaty (revised from 1994 and replaced)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
2004 US Model Bilateral Investment Treaty (replaced)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
2012 US Model Bilateral Investment Treaty	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Government of the Republic of Albania (4 January 1998)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Argentina (20 October 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Armenia (29 March 1996)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Azerbaijan (2 August 2001)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Bahrain (30 May 2001)	Yes	Yes	Yes	Yes	No	90 days	Yes	Yes
People's Republic of Bangladesh (25 July 1989)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Republic of Bolivia (6 June 2001 – Terminated as of 10 June 2012)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Bulgaria (2 June 1994)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Cameroon (6 April 1989)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Democratic Republic of the Congo (Kinshasa) (28 July 1989)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Republic of Congo (Brazzaville) (13 August 1994)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Croatia (20 June 2001)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Czech Republic (19 December 1992)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Ecuador (11 May 1997 – Terminated as of 18 May 2018)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Egypt (27 June 1992)	Yes	Yes	Yes	Yes	No	6 months	No	Yes



BIT contracting party or MIT	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts ¹	Arbitration
Estonia (16 February 1997)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Georgia (17 August 1997)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Grenada (3 March 1989)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Honduras (11 July 2001)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Jamaica (7 March 1997)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Jordan (13 June 2003)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Kazakhstan (12 January 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Kyrgyzstan (12 January 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Latvia (26 December 1996)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Lithuania (22 November 2001)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Moldova (25 November 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Mongolia (1 January 1997)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Morocco (29 May 1991)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Mozambique (3 March 2005)	Yes	Yes	Yes	Yes	No	90 days	Yes	Yes
Panama (30 May 1991)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Poland (6 August 1994)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Romania (15 January 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Rwanda (1 January 2012)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Senegal (25 October 1990)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Slovakia (19 December)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Sri Lanka (1 May 1993)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Trinidad And Tobago (26 December 1996)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
Tunisia (7 February 1993)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Turkey (18 May 1990)	Yes	Yes	Yes	Yes	Yes	1 year	No	Yes
Ukraine (16 November 1996)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Uruguay (1 November 2006)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Belarus (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
El Salvador (not in force)	Yes	Yes	Yes	Yes	No	90 days	Yes	Yes
Haiti (not in force)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Nicaragua (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Russia (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Uzbekistan (not in force)	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes

FTAs	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Australia Free Trade Agreement (1 January 2005)	Yes	Yes	Yes	Yes	No	No	No	No
Central American/ Dominican Republic Free Trade Agreement [CAFTA-DR] (1 January 2009)	Yes	Yes	Yes	Yes	No	6 months	No	Yes



FTAs	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Chile Free Trade Agreement (1 January 2004)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Colombia Trade Promotion Agreement (15 May 2012)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Korea Free Trade Agreement (15 March 2012, rev. 1 January 2019)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Morocco Free Trade Agreement (1 January 2006)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Oman Free Trade Agreement (1 January 2009)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Panama Trade Promotion Agreement (31 October 2012)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Peru Trade Promotion Agreement (1 February 2009)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Singapore Free Trade Agreement (1 January 2004)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
United States-Mexico-Canada [USMCA] (1 July 2020)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
North American Free Trade Agreement [NAFTA] (Terminated as of 1 July 2020)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Trans-Pacific Partnership [TPP] (not in force)	Yes	Yes	Yes	Yes	No	6 months	No	Yes

II Qualifying Criteria

2 Definition of investor

What are the distinguishing features of the definition of ‘investor’ in this country’s investment treaties?

Issue	Distinguishing features in relation to the definition of ‘investor’
Seat of the investor/ place of business	In all US investment treaties, the seat of the investor is the place in which or under the laws and regulations of which the company or enterprise was incorporated, constituted or duly organised.
Control by a non-national	<p>Each US investment treaty reserves for the parties the right to deny treaty benefits to companies or enterprises owned by nationals of a third state. US BITs based on the 1983 US Model do not specify criteria for denial of benefits and leave it to the discretion of the parties provided that they consult with each other to seek a mutually satisfactory resolution (eg, 1983 US Model BIT, Panama BIT (1991), Senegal BIT (1990) and Turkey BIT (1990).) Treaties based on the 1984 US Model BIT reserve the parties’ right to deny treaty benefits if the denying party does not maintain normal economic relations with that third state or if the company seeking treaty protection has no substantial business activities within the territory where it was incorporated. Subsequent US investment treaties follow that pattern (eg, 1987, 1991, 1992, 1994, and 1998 US Model BITs, Bahrain BIT (2001), Honduras BIT (2001), Mozambique BIT (2005), USMCA (2020)).</p> <p>Some post-2004 treaties expanded the parties’ right to deny benefits if the denying party does not maintain diplomatic relations with the third state or if the denying party ‘adopts or maintains measures against’ that third state or a person of that third state ‘that prohibits transactions with an enterprise or that would be violated or circumvented’ if treaty benefits were accorded to the company seeking treaty protection (eg, 2004 and 2012 US Model BITs, Australia FTA (2005), Colombia FTA (2012)).</p>



Issue	Distinguishing features in relation to the definition of ‘investor’
Dual nationals	The 2004 and 2012 US Model BITs contain a provision that states: ‘a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality’. Thus, claims under treaties that follow the language noted in the 2004 and 2012 Model BITs can be defeated for lack of jurisdiction if brought by dual nationals who have dominant and effective nationality of the host state or of a third state that does not have a relevant investment treaty (eg, Uruguay BIT (2006), Rwanda BIT (2012), Australia FTA (2005) and Peru FTA (2009)). Other US Model BITs do not contain this provision.

3 Definition of investment

What are the distinguishing features of the definition of ‘investment’ in this country’s investment treaties?

Issue	Distinguishing features in relation to the concept of ‘investment’
Eligible Assets	All US BITs contain asset-based definitions of ‘investment’ that provide an illustrative list of eligible assets, including: (i) tangible and intangible property; (ii) a company (or enterprise) or securities and related interests in a company; (iii) a claim to money or a claim to performance having economic value; (iv) intellectual and industrial property rights; and (v) any right conferred by law or contract, and any licences and permits pursuant to law (eg, Panama BIT (1991), Lithuania BIT (2001) and Tunisia BIT (2001)). Investment treaties based on the 2004 and 2012 US Model BITs expand the above categories of assets to include: (i) bonds, debentures, other debt instruments and loans; (ii) futures, options, and other derivatives; and (iii) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts (eg, Rwanda BIT (2012), Colombia FTA (2012) and USMCA (2020)).
Indirect control of assets	All US Model BITs provide a definition of ‘investment’ that expressly includes assets owned or controlled indirectly by an eligible investor (such as through a locally-incorporated company in the host state that is majority-owned by the investor) (eg, Panama BIT (1991), Tunisia BIT (1993), Ukraine BIT (1996), Mozambique BIT (2005), Chile FTA (2004) and Australia FTA (2005)).
Exclusion of certain assets	Investment treaties based on the 2004 and 2012 US Model BITs expressly exclude ‘an order or judgment entered in a judicial or administrative action’ from the definition of ‘investment’ (eg, Uruguay BIT (2006), Rwanda BIT (2012), Australia FTA (2005), and Peru FTA (2009)). Some BITs specifically exclude from a covered ‘investment’ assets that might fall within an eligible category. For example, the Uruguay BIT provides that ‘a bank account that does not have a commercial purpose and is related neither to an investment in the territory in which the bank account is located nor to an attempt to make such an investment’ will likely not have the characteristics of an ‘investment’. Similarly, the Rwanda BIT provides that an ‘enterprise’ is an investment asset, but ‘where an enterprise does not have the characteristics of an investment, that enterprise is not an investment regardless of the form it may take’. And the Peru FTA provides that ‘[l]oans issued by one Party to another Party are not investments’.
Scope of treaty protection	The US Model BITs before 2004 provide that the treaty binds the parties as to ‘investments existing at the time of entry into force as well as to investments made or acquired thereafter’. However, the 2004 and 2012 US Model BITs expressly state that treaty obligations do ‘not bind either Party in relation to any act that took place or any situation that ceased to exist before the date of entry into force of this Treaty’ (eg, Peru FTA (2009) and Korea FTA (2019)).
Special formalities	The 1983, 1984, 1987, 1991, 1992, and 1994 US Model BITs do not preclude the parties from ‘prescribing special formalities in connection with the establishment of investments,’ unless those formalities ‘impair the substance of any of the rights set forth’ in the treaty (eg, Panama BIT (1991), Sri Lanka BIT (1993), Honduras BIT (2001), and Mozambique BIT (2005)). The 2004 and 2012 US Model BITs are more specific about application of special formalities, providing the parties may require an investor or its company to disclose non-confidential information for statistical purposes or information, the disclosure of which is required by law (eg, Chile FTA (2004) and Australia FTA (2005)).



III Substantive Protections

4 Fair and equitable treatment

What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
Scope of 'fair and equitable treatment'	<p>Investment treaties based on the 2004 and 2012 US Model BITs expressly include fair and equitable treatment as part of, rather than in addition to, customary international law. Fair and equitable treatment includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with due process (eg, Australia FTA (2005), Colombia TPA (2012), Rwanda BIT (2012), CAFTA-DR (2009)² and USMCA (2020)³ contain similar language).</p> <p>Investment treaties based on the 1983, 1987, 1991, 1992, 1994 and 1998 US Model BITs do not define 'fair and equitable treatment,' except to indicate that such treatment shall be no less favourable than is required by international law (eg, Argentina BIT (1994), Romania BIT (1994)).</p> <p>Investment treaties based on the 1983 US Model BIT tie the concept of fair and equitable treatment to applicable national laws and prescribe that 'in no case' shall it be less than that required by international law (eg, Egypt BIT (1992)).</p>

5 Expropriation

What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

Issue	Distinguishing features of the 'expropriation' standard
What constitutes an expropriation	<p>Investment treaties based on the 2004 and 2012 US Model BITs provide that an action or a series of actions by a party only constitutes an expropriation if it interferes with a tangible or intangible property right or property interest in an investment (eg, Australia FTA (2005), Colombia TPA (2012)). The Singapore FTA (2004) does not include this definition. CAFTA-DR (2009) and USMCA (2020) contain similar language.</p> <p>Investment treaties based on prior US Model BITs do not have this definition.</p>
Judicial or administrative review	<p>Investment treaties based on US Model BITs for 1983, 1987, 1991 and 1992 enable a national or company to pursue 'prompt review by the appropriate judicial or administrative authorities' to determine whether an expropriation has occurred and whether such expropriation conformed to principles of international law (eg, Grenada BIT (1989), Turkey BIT (1990)).</p>
Permissible expropriation conditions	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on US Model BITs since 1983 provide that direct or indirect expropriations are only permissible if done: (i) for a public purpose; (ii) in a non-discriminatory manner; (iii) on payment of prompt, adequate, and effective compensation; and (iv) in accordance with due process of law and the minimum standard of treatment provision in the treaty (eg, Colombia TPA (2012), Bulgaria BIT (1994)). Investment treaties based on the 1983 US Model BIT require the expropriation not to violate contractual stability or expropriation provisions in an investment agreement between investor and party (eg, Senegal BIT (1990)).</p>
Indirect expropriation requires a case-by-case, fact-based inquiry	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on the 2004 and 2012 US Model BITs provide that determining whether an action or series of actions by a party constitutes an indirect expropriation, requires consideration of factors such as (i) the economic impact of the government action; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action (eg, Australia FTA (2005), Colombia TPA (2012)).</p>
Compensation conditions	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on US Model BITs since 1983 provide that compensation must (i) be paid without delay; (ii) be equivalent to the fair market value of expropriated investment immediately before the expropriation took place; (iii) not reflect any change in value because the intended expropriation had become known earlier; (iv) be fully realisable and freely transferable and (e) include interest, at a commercially reasonable rate (eg, Korea FTA (2012), Mongolia (1997)).</p>
Intellectual property regulations allowed if consistent with TRIPS	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on the 2004 and 2012 US Model BITs provide that the issuance of compulsory licences, renovation, limitation or creation of intellectual property rights, to the extent these acts are consistent with the TRIPS Agreement, are not expropriations (eg, Peru TPA (2009), Singapore FTA (2004)). Investment treaties based on prior US Model BITs do not contain similar provisions.</p>



6 National treatment/most-favoured-nation treatment

What are the distinguishing features of the national treatment/most favoured nation treatment standard in this country's investment treaties?

Issue	Distinguishing features of the 'national treatment' and/or 'most favoured nation' standard
Scope of national treatment and most favoured nation clauses	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on the 2004 and 2012 US Model BITs provide that investors and their 'covered investments' are entitled to be treated as favourably as the host party treats its own investors and their investments, or investors and investments from any third country, in like circumstances. Read together, the national treatment (NT) and most favoured nation (MFN) clauses, afford the better of NT or MFN with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments (eg, Colombia TPA (2012), Rwanda BIT (2012)).</p> <p>Investment treaties based on the 1994 and 1998 US Model BITs provide NT and MFN for the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of 'covered investments' (eg, Bahrain BIT (2001), Jordan BIT (1997), Honduras BIT (2001)).</p> <p>Investment treaties based on the 1983, 1987, 1991 and 1992 US Model BITs provide NT and MFN for investments and 'associated activities' by nationals and companies of the other party (eg, Romania BIT (1994), Turkey BIT (1990)).</p>
Meaning of 'like circumstances'	<p>The USMCA (2020) establishes that 'like circumstances' for NT and MFN, 'depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives'. No international investment treaty based on a US Model BIT since 1983, or CAFTA-DR (2009) define 'like circumstances'.</p>
Scope of MFN and NT regarding measures related to investment losses due to war or armed conflict, revolution, state of national emergency, insurrection, civil disturbance, etc.	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on the 2004 and 2012 US Model BITs establish that parties shall accord 'non-discriminatory treatment' to investors and covered investments over measures related to losses caused by armed conflict (eg, Colombia TPA (2012), Singapore FTA (2004)).</p> <p>Investment treaties based on the US Model BITs from 1983 to 1998 MFN and NT for covered investments when a party implements measures relating to investment losses caused by these types of events (eg, Georgia BIT (1997), Lithuania BIT (2001), Turkey BIT (1990)).</p> <p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on the 1983, 1994, 1998, 2004 and 2012 US Model BITs establish that a party is required to accord restitution or pay adequate compensation if a covered investment is requisitioned or unnecessarily fully or partially destroyed by the party's authorities due to these types of events (eg, Colombia TPA (2012) and Senegal BIT (1990)).</p>
Exceptions for non-conforming measures, etc	<p>Investment treaties based on the 2004 and 2012 US Model BITs establish that NT and MFN do not apply to non-conforming measures, any measures with respect to sectors or activities carved out in an annex, exceptions to obligations under certain TRIPS articles, government procurement, subsidies or grants provided by a party. Various US treaties include some or all of these exceptions.</p> <p>Investment treaties based on US Model BITs from 1983 to 1998 preserve parties' right to carve out sectors or activities from the obligation to provide NT and MFN (eg, Bulgaria BIT (1994) and Grenada BIT (1989)).</p>
Treaty-specific exceptions	<p>Some treaties include express exceptions from MFN and/or NT. For example, the Colombia TPA (2012) and Peru TPA (2009) exclude dispute resolution mechanisms from the MFN provision.</p>
Special formalities allowed	<p>Investment treaties based on the 2004 and 2012 US Model BITs establish that NT does not prevent a party from prescribing special formalities to covered investments if such formalities 'do not materially impair the protections afforded' to investors and covered investments (eg, Chile (2004), Colombia TPA (2012)). CAFTA-DR (2009) and USMCA (2020) include similar language.</p> <p>Investment treaties based on the 1983, 1987, 1991, 1992, 1994 and 1998 US Model BITs contain similar provisions (eg, Grenada BIT (1989), Jordan BIT (2003)).</p>
Information requests allowed	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on the 2004 and 2012 US Model BITs establish that NT and MFN do not prevent a party from requiring an investor or its covered investment to provide information for informational or statistical purposes (eg, Colombia TPA (2012), Rwanda BIT (2012)).</p> <p>Investment treaties based on prior US Model BITs do not contain similar provisions.</p>



7 Protection and security

What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

Issue	Distinguishing features of the 'protection and security' standard
Scope of 'full protection and security'	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on US Model BITs from 2004 and 2012 expressly include 'full protection and security' as part of, customary international law. The obligation to provide 'full protection and security' includes a level of police protection required under customary international law (eg, Chile FTA (2004), Colombia TPA (2012)).</p> <p>Investment treaties based on the US Model BITs from 1987 to 1998 do not define 'full protection and security' and require it to be no less favourable than required by international law (eg, Argentina BIT (1994), Mongolia BIT (1997)).</p> <p>Investment treaties based on the 1983 Model BIT require 'full protection and security' consistent with applicable national laws and no less than required by international law (eg, Bangladesh BIT (1989)).</p>

8 Umbrella clause

What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

Issue	Distinguishing features of any 'umbrella clause'
Limited use of 'umbrella clauses' in US investment treaties	<p>The Umbrella Clause provision was removed in the 1994 Model BIT and has not since re-appeared.</p> <p>In practice, 27 US BITs currently in force contain an umbrella clause, and 6 of these were signed contemporaneous with, or after, the 1994 Model: Lithuania (2004), Jamaica (1997), Estonia (1997), Mongolia (1997), Latvia (1996) and Ukraine (1996).</p> <p>Five of these post-1994 BITs contain an identical umbrella clause: 'Each Party shall observe any obligation it may have entered into with regard to investments.'¹⁴</p>
Interpretation of scope of 'umbrella clauses' in US investment treaties	<p>The ICSID tribunal in <i>Noble Ventures, Inc v Romania, Award</i>, ICSID Case No. ARB/01/11 (2005) analysed this exact language (also found within the 1994 US–Romania BIT) after Romania failed to carry out a contractually promised restructuring of the debts of a state-owned company acquired by claimant. The tribunal (at ¶¶ 51-53) concluded that the clause's wording – that parties 'shall' observe obligations 'with regard to investments' – provides 'substantial support for the interpretation' that the provision is 'a real umbrella clause.' Thus worded, the provision elevates contractual breaches by the state, including municipal law obligations, into 'obligations directly cognizable in international law.'</p>

9 Other substantive protections

What are the other most important substantive rights provided to qualifying investors in this country's investment treaties?

Issue	Other substantive protections
Additional exceptions for non-conforming measures related to international agreements	<p>Investment treaties based on the 1994 and 1998 US Model BITs establish that NT and MFN obligations do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO on the acquisition and maintenance of intellectual property (eg, Jordan BIT (2003), Trinidad and Tobago (1996)).</p> <p>Investment treaties based on the 1992 US Model BIT excuse parties from according MFN treatment when an advantage originates from obligations under GATT (eg, Bulgaria BIT (1994), Mongolia BIT (1997)).</p> <p>Investment treaties based on the 1987 and 1992 US Model BITs exempt parties from providing MFN treatment when an advantage originates from a party's membership in a free trade area (eg, Argentina BIT (1994) and Czech Republic BIT (1992)).</p>
Foreign investors may not be required to sell or dispose of an investment based on their nationality	<p>CAFTA-DR (2009), USMCA (2020) and investment treaties based on the 2004 and 2012 US Model BITs provide that parties may not require an investor, due to its nationality, to 'sell or otherwise dispose of an investment' after a treaty's entry into force (eg, Rwanda BIT (2012) and Uruguay (2006)).</p>



IV Procedural Rights

10 Are there any relevant issues related to procedural rights in this country's investment treaties?

Issue	Procedural rights
Institutional or ad hoc arbitration	Investment treaties based on the 1994, 1998, 2004, and 2012 US Model BITs provide that claimant may submit a claim to (i) ICSID arbitration; (ii) ad hoc arbitration under the UNCITRAL Arbitration Rules; or (iii) any other arbitration institution or under any other arbitration rules, as long as claimant and respondent agree (eg, Armenia BIT (1992), Kazakhstan BIT (1993), Lithuania BIT (1998), Colombia TPA (2006), Republic of Korea FTA (2007), Rwanda BIT (2012)). CAFTA-DR (2009) and USMCA (2020) contain a similar provision.
Time limits	Investment treaties based on the 2004 and 2012 US Model BITs require that a claim be submitted to arbitration within three years of the investor having first acquired knowledge or should have acquired knowledge of the breach of the treaty (eg, Uruguay BIT (2006), Rwanda BIT (2012)). CAFTA-DR (2009) contains a similar three-year limitation provision. USMCA (2020) provides that no claims shall be submitted to arbitration if more than four years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach. Investment treaties based on the 1994 and 1998 US Model BITs are silent on time limits within which a claim may be submitted to arbitration (eg, Honduras BIT (2001) and Mozambique BIT (2005)).
'Cooling-off' period	Most US treaties contain a cooling-off period clause, which is also known as a 'waiting period' and provides that an investor seeking to initiate arbitration proceedings has to hold off for a specified period. Investment treaties based on the US 1994 and 1998 US Model BITs provide for a three-month cooling-off period (eg, Azerbaijan BIT (1997)). Other US treaties (eg, Latvia BIT (1995), Lithuania BIT (1998), CAFTA-DR (2009), and USMCA (2020)) provide for six months of cooling-off time. Investment treaties based on the 2004 and 2012 US Model BITs also provide for six months of cooling-off time (eg, Uruguay BIT (2006), Rwanda BIT (2012)).
'No U-Turn' waiver	Investment treaties based on the 2004 and 2012 US Model BITs provide that no claim may be submitted to arbitration without the prerequisite waiver of a right to bring a claim in another forum (eg, Uruguay BIT (2006), Rwanda BIT (2012), Panama FTA (2008)). CAFTA-DR (2009) and USMCA (2020) contain a similar waiver provision. Investment treaties based on the 1994 and 1998 US Model BITs do not have such a 'waiver' requirement.
Fork-in-the-road	Most US treaties contain a fork-in-the-road clause, according to which investors must choose either to pursue their claim through the local courts and administrative tribunals or through international arbitration. Under such treaties, investors may not use both options (eg, Bahrain BIT (2001), Croatia BIT (1996), Uruguay BIT (2006)). CAFTA-DR (2009) and USMCA (2020) contain a similar fork-in-the-road provision.

11 What is the status of this country's investment treaties?

The United States has signed 48 BITs and FTAs. Forty⁵ of them are currently in force (Albania; Argentina; Armenia; Azerbaijan; Bahrain; Bangladesh, Bulgaria; Cameroon; Democratic Republic of Congo; Republic of the Congo [Brazzaville], Croatia; Czech Republic; Egypt; Estonia; Georgia; Grenada; Honduras; Jamaica; Jordan; Kazakhstan; Kyrgyzstan; Latvia; Lithuania; Moldova, Republic of; Mongolia; Morocco; Mozambique; Panama; Poland; Romania; Rwanda; Senegal; Slovakia; Sri Lanka; Trinidad and Tobago; Tunisia; Turkey; Ukraine; Uruguay). The US BIT with Bolivia was terminated on 10 June 2012, and the US BIT with Ecuador was terminated on 18 May 2018.

The US BITs with Belarus (1994), El Salvador (1999), Haiti (1983), Nicaragua (1995), Russian Federation (1992) and Uzbekistan (1994) were signed by both contracting parties, but one or both of the contracting parties have not ratified the treaty, a prerequisite for a BIT to enter into force.

The United States ratified amendments or protocols to the BITs with Panama (June 2000); Poland (January 2004); Czech Republic (October 2003); Slovakia (September 2003); Romania (October 2003); Bulgaria (September 2003); Estonia (May 2004); Latvia (September 2003); and Lithuania (September 2003).

All 40 US BITs currently in force provide that the treaty shall remain in force for the initial period of 10 years and continue in force indefinitely thereafter. A party may choose to terminate the treaty either at the end of the initial 10-year period or at any time thereafter by giving one year's written notice to the other party. For example, 1982 Panama BIT, 2012 Rwanda BIT. By contrast, the US FTAs can be unilaterally terminated by either party at any time after giving a six-month notice (eg, 2006 Peru FTA and 2003 Singapore FTA).

The United States has not indicated an intent to withdraw from any of its investment treaties. However, the United States renegotiated the North American Free Trade Agreement (NAFTA) with Mexico and Canada in 2018. The renegotiated USMCA entered into force on 1 July 2020.⁶



V Practicalities (Claims)

- 12 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

Government entity to which claim notices are sent	US Trade Agreements and most BITs provide that a claimant should serve a notice of dispute upon the United States by delivery to the US Department of State, c/o the Executive Director of the Office of the Legal Adviser. ⁷ However, any variation within an investment treaty on the above standard practice should be followed instead.
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- 13 Which government department or departments manage investment treaty arbitrations on behalf of this country?

Government department that manages investment treaty arbitrations	The US State Department manages all representation on behalf of the United States in any international dispute (sometimes coordinating with other components of the US government). Within the US State Department, the Office of International Claims and Investment Disputes handles all international arbitrations in which the United States is a party (including investment treaty arbitrations).
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- 14 Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

Internal/External Counsel	The US State Department utilises internal counsel, typically from the Office of International Claims and Investment Disputes. While the State Department does often coordinate and utilise the resources of other US government components, no instances could be found (as of the time of this writing) of the State Department employing external (non-government) counsel in an investment treaty arbitration.
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VI Practicalities (Enforcement)

- 15 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

Washington Convention implementing legislation	The United States ratified the Washington Convention on 10 June 1966, and enacted implementing legislation on 11 August 1966 (United States Code: Settlement of Investment Disputes, 22 USC. § 1650a (1966)).
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- 16 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

New York Convention implementing legislation	Federal Arbitration Act (FAA), 9 USC. § 1, §§ 201-208 (1970)
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- 17 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

Legislation governing non-ICSID arbitrations	The FAA governs arbitrations seated within the United States (see generally Chapter 1), including non-ICSID arbitrations (see generally Chapter 3, implementing the Panama Convention). However, there is currently a disagreement among US federal courts of appeal as to whether FAA Chapter 1 or FAA Chapter 2 (implementing the New York Convention) governs challenges to non-ICSID international arbitration awards rendered in the United States. See, eg, <i>Inversiones y Procesadora Tropical INPROTSA, S.A. v Del Monte Int'l GmbH</i> , 921 F.3d 1291 (11th Cir. 2019), contra <i>Yusuf Ahmed Alghanim & Sons v Toys 'R' Us, Inc.</i> , 126 F.3d 15, 23 (2d Cir. 1997).
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18 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

Compliance with adverse awards	US voluntary compliance is unknown because no adverse investment treaty awards exist against the United States. Only a small number of BIT or CAFTA-DR-related notices of intent have ever been served upon the United States, and only one, <i>Republic of Ecuador v United States of America</i> (PCA Case No. 2012-5), has led to arbitral proceedings. That case was dismissed. There have been 17 US NAFTA proceedings; seven settled or discontinued and 10 decided in favour of the United States. This record reflects a US tendency to settle disputes or otherwise resolve them through political agreements where possible.
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19 Describe the national government's attitude towards investment treaty arbitration.

Attitude of government towards investment treaty arbitration	The US attitude toward investment treaty arbitration is extremely positive, as evinced by continued US participation in 39 BITs in force as well as several multilateral investment and trade agreements. The United States has fully implemented legislation, notably the FAA and 22 USC. § 1650a, that standardise the recognition and enforcement in US courts of any arbitral awards that result from these treaty (or private) agreements. In turn, US courts routinely affirm that the FAA 'reflects an emphatic federal policy in favor of arbitral dispute resolution'.[.] See, eg, <i>Marmet Health Care Ctr., Inc v Brown</i> , 565 US 530, 533 (2012).
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20 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

Attitude of local courts towards investment treaty arbitration	Subject to limited, narrowly construed statutory exceptions, US courts will 'confirm' investment treaty arbitral awards, after which they are treated as domestic US judgments. Foreign Sovereign Immunities Act (FSIA) § 1605(a)(6) authorises courts to confirm awards against 'foreign states'. After an award is confirmed, the arbitral debtor's (or debtor's alter ego's) US-located assets may be attached or garnished. FSIA § 1610(a)(6) authorises attachment of foreign sovereign assets used for commercial activity within the United States ⁸ if not violative of the arbitration agreement.
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VII National Legislation Protecting Inward Investment

21 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

National legislation	Substantive protections			Procedural rights	
	FET	Expropriation	Other	Local courts	Arbitration
The US Constitution	No	Yes	No	Yes	No

The 5th Amendment to the US Constitution protects private property of foreign and domestic investors against expropriation. Article 1 of the Constitution also provides some protection against impairment of contractual obligations, and both the 5th and 14th Amendments ensure procedural protections for, and limit discrimination against, all investors.

Similarly, US participation in investment treaties protects inward foreign investment against adverse governmental action because article 6 of the Constitution provides that treaties will have the force of domestic law. US courts have since clarified that treaties must first be confirmed by the US Senate and implemented through enabling legislation to be enforceable in US courts. However, the Exon-Florio Amendment, 50 App. USC. § 2170, enables the US President to suspend or prohibit a foreign investment in the United States that 'threatens to impair the national security of the United States'. Similarly, the International Emergency Economic Powers Act, 50 USC. ch. 35 § 1701-1702, authorises the President to limit or prohibit foreign investment by designated foreign parties.



VIII National Legislation Protecting Outgoing Foreign Investment

- 22 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

Relevant guarantee scheme	Qualifying criteria, substantive protections provided and practical considerations
US International Development Finance Corporation (DFC) (until 2 January 2020, known as Overseas Private Investment Corporation (OPIC))	A US government agency that offers specialist insurance, finance, and other programmes to US investors overseas to protect against acts of expropriation and other forms of unlawful interference by the host government, breach of contract, the risks of currency inconvertibility and other losses caused by host country governmental acts. Insurance is primarily available for investments in low and lower-middle income countries but may also be available for investments in certain projects in upper-middle income countries as a case-by-case basis. The investment must be medium to long term in nature and respect the environment, worker and human rights, and local communities.
Multilateral Investment Guarantee Agency	The United States has ratified the Convention, establishing the Multilateral Investment Guarantee Agency (MIGA). US nationals and companies are eligible to acquire risk insurance guarantees to protect against losses from, damage to, or disappearance of tangible assets caused by political acts of war or civil disturbance, breach of contract, expropriation or currency transfer. The investment must be financially viable and medium to long term in nature, promote the host country's development goals, and comply with MIGA's policy on social and environmental sustainability and anti-corruption and fraud standards.

IX Awards

- 23 Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties

Awards
<i>ADF Group Inc v United States</i> , ICSID Case No. ARB(AF)/00/1
<i>AES Corporation and Tau Power BV v Republic of Kazakhstan</i> , ICSID Case No. ARB/10/16
<i>African Holding Company of America, Inc and Societe Africaine de Construction au Congo S.A.R.L. v Democratic Republic of the Congo</i> , ICSID Case No. ARB/05/21
<i>Ahmonseto, Inc and others v Arab Republic of Egypt</i> , ICSID Case No. ARB/02/15
<i>AIG Capital Partners, Inc and CJSC Tema Real Estate Company v Republic of Kazakhstan</i> , ICSID Case No. ARB/01/6
<i>Apotex Holdings Inc and Apotex Inc v United States (I-III)</i> , ICSID Case No. UNCT/10/2, ICSID Case No. ARB(AF)/12/1
<i>Al Tamini v Sultanate of Oman</i> , ICSID Case No. ARB/11/33
<i>American Manufacturing & Trading, Inc v Republic of Zaire</i> , ICSID Case No. ARB/93/1
<i>Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc v Mexico</i> , ICSID Case No. ARB(AF)/04/5
<i>Aven, et al v Republic of Costa Rica</i> , ICSID Case No. UNCT/15/3
<i>Awdj, et al v Romania</i> , ICSID Case No. ARB/10/13
<i>Azinian, et al v United Mexican States</i> , ICSID Case No. ARB(AF)/97/2
<i>Azurix Corp v Argentine Republic (I)</i> , ICSID Case No. ARB/01/12
<i>Ballantine v Dominican Republic</i> , PCA Case No. 2016-17
<i>Bayview Irrigation District, et al v United Mexican States</i> , ICSID Case No. ARB(AF)/05/1
<i>Biedermann International, Inc v The Republic of Kazakhstan</i> , SCC Case No. 97/1996
<i>Bosh International, Inc and B&P, LTD Foreign Investments Enterprise v Ukraine</i> , ICSID Case No. ARB/08/11
<i>Burlington Resources, Inc v Republic of Ecuador</i> , ICSID Case No. ARB/08/5
<i>Canadian Cattlemen v USA</i>
<i>Caratube International Oil Company LLP v Republic of Kazakhstan</i> , ICSID Case No. ARB/08/12



Awards

Cargill, Inc v Mexico, ICSID Case No. ARB(AF)/05/2

Cargill, Inc v Poland

CCL v Republic of Kazakhstan, SCC Case No. 122/2001

Champion Trading Company and Ameritrade International, Inc v Arab Republic of Egypt, ICSID Case No. ARB/02/9

Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador (I), PCA Case No. 2007-02/AA277

Clayton/Bilcon v Canada, PCA Case No. 2009-04

CMS Gas Transmission Company v Argentine Republic, ICSID Case No. ARB/01/8

Commerce Group Corp. and San Sebastian Gold Mines, Inc, v Republic of El Salvador, ICSID Case No. ARB/09/17

Continental Casualty Company v Argentine Republic, ICSID Case No. ARB/03/9

Corona Materials, LLC v Dominican Republic, ICSID Case No. ARB(AF)/14/3

Corn Products International, Inc v Mexico, ICSID Case No. ARB(AF)/04/1

Crompton (Chemtura) Corp v Canada

Detroit International Bridge Company v Canada, PCA Case No. 2012-25

Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador, ICSID Case No. ARB/04/19

Eli Lilly and Company v Canada, ICSID Case No. UNCT/14/2

El Paso Energy International Company v Argentine Republic, ICSID Case No. ARB/03/15

Empresa Electrica del Ecuador, Inc (EMELEC) v Republic of Ecuador, ICSID Case No. ARB/05/9

Enron Creditors Recovery Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No. ARB/01/3

EuroGas Inc and Belmont Resources Inc v Slovakia, ICSID Case No. ARB/14/14

Feldman v United Mexican States, ICSID Case No. ARB(AF)/99/1

Fireman's Fund Insurance Company v United Mexican States, ICSID Case No. ARB(AF)/02/1

F-W Oil Interests, Inc v Republic of Trinidad & Tobago, ICSID Case No. ARB/01/14

Gallo v Canada, PCA Case No. 55798

GAMI Investments v Mexico

Generation Ukraine v Ukraine, ICSID Case No. ARB/00/9

Genin, et al v Republic of Estonia, ICSID Case No. ARB/99/2

Glamis Gold Ltd v United States

Global Trading Resources Corp and Globex International, Inc v Ukraine, ICSID Case No. ARB/09/11

Grand River Enterprises Six Nations, Ltd et al v United States

Grot, et al v Moldova, ICSID Case No. ARB/16/8

Guaracachi America, Inc and Rurelec PLC v The Plurinational State of Bolivia, PCA Case No. 2011-17

H&H Enterprises Investments, Inc v Arab Republic of Egypt, ICSID Case No. ARB/09/15

Italba v Uruguay, ICSID Case No. ARB/16/9

KBR v Mexico, ICSID Case No. UNCT/14/1

Lauder v The Czech Republic

Lemire v Ukraine (II), ICSID Case No. ARB/06/18

LG&E Energy Corp, et al v Argentine Republic, ICSID Case No. ARB/02/1

Link-Trading Joint Stock Company v Department of Customs Control of the Republic of Moldova

Loewen Group, Inc and Raymond L. Loewen v United States, ICISD Case No. ARB(AF)/98/3

Manchester Securities v Poland, PCA Case No. 2015-18

M.C.I. Power Group, LC and New Turbine, Inc v Republic of Ecuador, ICSID Case No. ARB/03/6

McKenzie v Vietnam

Mercer International, Inc v Canada, ICSID Case No. ARB(AF)/12/3

Merrill & Ring Forestry v Canada, ICSID Case No. UNCT/07/1

Mesa Power v Canada, PCA Case No. 2012-17

Metalclad Corporation v United Mexican States, ICSID Case No. ARB(AF)/97/1



Awards

Methanex Corp v United States

Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2

Minnotte and Lewis v Republic of Poland, ICSID Case No. ARB(AF)/10/1

Mitchell v Democratic Republic of the Congo, ICSID Case No. ARB/99/7

Mobil Exploration and Development Inc, et al v Argentine Republic, ICSID Case No. ARB/04/16

Mobil Investments Canada Inc and Murphy Oil Corporation v Canada (I), ICSID Case No. ARB(AF)/07/4

Mobil, et al. v Venezuela, ICSID Case No. ARB/07/27

Mondev International Ltd v United States, ICSID Case No. ARB(AF)/99/2

Murphy Exploration and Production Company International v Republic of Ecuador (I), ICSID Case No. ARB/08/4

Murphy Exploration & Production Company – International v The Republic of Ecuador (II), PCA Case No. 2012-16

SD Myers, Inc v Canada

Nations Energy v Panama, ICSID Case No. ARB/06/19

Noble Ventures, Inc v Romania, ICSID Case No. ARB/01/11

Occidental Exploration and Production Company v The Republic of Ecuador (I), LCIA Case No. UN3467

Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (II), ICSID Case No. ARB/06/11

Pac Rim Cayman LLC v Republic of El Salvador, ICSID Case No. ARB/09/12

Pope & Talbot v Canada

PSEG Global Inc and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v Republic of Turkey, ICSID Case No. ARB/02/5

Railroad Development Corporation v Republic of Guatemala, ICSID Case No. ARB/07/23

The Renco Group, Inc v Republic of Peru (I), ICSID Case No. UNCT/13/1

RSM Production Corporation and others v Grenada, ICSID Case No. ARB/10/6

Ryan, et al v Republic of Poland, ICSID Case No. ARB(AF)/11/3

Seo v Korea, HKIAC Case No. 18117

Sempra v Argentina, ICSID Case No. ARB/02/16

TECO Guatemala Holdings, LLC v Republic of Guatemala, ICSID Case No. ARB/10/23

Transglobal Green Energy, LLC and Transglobal Green Panama, SA v Republic of Panama, ICSID Case No. ARB/13/28

TS Investment Corp. v Republic of Armenia, LCIA

Ulysseas, Inc v The Republic of Ecuador, PCA Case No. 2009-19

United Parcel Service of America, Inc (UPS) v Canada, ICSID Case No. UNCT/02/1

Waste Management, Inc v United Mexican States (I), ICSID Case No. ARB(AF)/98/2

Waste Management, Inc v United Mexican States (II), ICSID Case No. ARB(AF)/00/3

Windstream Energy v Canada, PCA Case No. 2013-2

Pending proceedings

AES Corporation v Argentine Republic, ICSID Case No. ARB/02/17

Aggarwal, et al v Bosnia and Herzegovina

Alicia Grace, et al v Mexico, ICSID Case No. UNCT/18/4

Amec Foster Wheeler, et al. v Colombia, ICSID Case No. ARB/19/34

Ampal-American Israel Corporation and others v Arab Republic of Egypt, ICSID Case No. ARB/12/11

APR Energy, et al v Australia

Arin Capital and Khudyan v Armenia, ICSID Case No. ARB/17/36

Bay View and Spalena v Rwanda, ICSID Case No. ARB/18/21

Big Sky Energy v Kazakhstan, ICSID Case No. ARB/17/22

B-Mex, et al v Mexico, ICSID Case No. ARB(AF)/16/3

Borkowski and Rasia FZE v Armenia, ICSID Case No. ARB/18/28

Bridgestone v Panama, ICSID Case No. ARB/16/34

Carrizosa Gelzis v Colombia (I), PCA Case No. 2018-56



Awards

Carrizosa v Colombia (II), ICSID Case No. ARB/18/5

Champion Holding Company and others v Arab Republic of Egypt, ICSID Case No. ARB/16/2

Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador (II), UNCITRAL, PCA Case No. 2009-23

Cosigo Resources, et al v Colombia

Dominion Minerals v Panama, ICSID Case No. ARB/16/13

ELA v Estonia

Elliott v Korea, PCA Case No. 2018-51

Gabourel Family Trust v Honduras

Gramercy v Peru, ICSID Case No. UNCT/18/2

Hourani v Republic of Kazakhstan, ICSID Case No. ARB/15/13

Iconia Capital LLC v Georgia

Invenergy LLC v Poland

Kappes v Guatemala, ICSID Case No. ARB/18/43

Legacy Vulcan v Mexico, ICSID Case No. ARB/19/1

Lone Pine Resources v Canada, ICSID Case No. UNCT/15/2

Mamacocha and Latam Hydro v Peru, ICSID Case No. ARB/19/28

Mason v Korea, PCA Case No. 2018-55

Merck Sharpe & Dohme (I.A.) Corporation v The Republic of Ecuador, PCA Case No. 2012-10

MetLife v Argentina, ICSID Case No. ARB/17/17

Mobil v Canada (II), ICSID Case No. ARB/15/6

Nelson v Mexico, ICSID Case No. UNCT/17/1

Odyssey v Mexico

Omega Engineering and Rivera v Panama, ICSID Case No. ARB/16/42

Orlandini-Agreda and Compania Minera Orlandini v Bolivia, PCA Case No. 2018-39

Renco v Peru (II), PCA Case No. 2019-46

Resolute Forest v Canada, PCA Case No. 2016-13

RSM v Ecuador

Seda, et al v Colombia, ICSID Case No. ARB/19/6

Tennant Energy v Canada, PCA Case No. 2018-54

The Carlyle Group, et al v Morocco, ICSID Case No. ARB/18/29

The Lopez-Goyne Family Trust, et al v Nicaragua, ICSID Case No. ARB/17/44

Unisys Corporation v Argentine Republic, ICSID Case No. ARB/03/27

Vento v Mexico, ICSID Case No. ARB(AF)/17/3

Westmoreland v Canada (II)

Westwater Resources v Turkey, ICSID Case No. ARB/18/46

WorleyParsons v Ecuador



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Kenneth J. Vandeveld, *The First Bilateral Investment Treaties: US Postwar Friendship, Commerce, and Navigation Treaties* (Oxford Univ. Press 2017)

McLachlan, Campbell; Shore, Laurence; Weiniger, Matthew, *International Investment Arbitration: Substantive Principles* (Oxford Univ. Press, 2nd ed., 2015)

Catherine H. Gibson, 'Beyond Self-Judgment: Exceptions Clauses In US BITs,' *Fordham International Law Journal*, January 2015

Vandeveld, Kenneth, 'A Comparison of the 2004 and 1994 US Model BITs,' *Investment Claims*, 2009

Vasani, Baiju Simal, et al. 'Bilateral Investment Treaty Overview – United States,' *Investment Claims*, 2008

Gudgeon, K. Scott, 'United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards,' *Berkeley Journal of International Law*, Vol. 4, Issue 1, 1986.

Notes

- 1 We noted 'Yes' only where the BIT explicitly grants investors the right to choose the host state's domestic courts as an investment dispute resolution mechanism. We noted 'No' where a letter of transmittal to the US Congress or a treaty annex indicates that the United States unilaterally interprets the BIT to give investors that right, but the BIT does not do so explicitly (eg. Congo (Kinshasa)-US BIT and Congo (Brazzaville)-US BIT). We also noted 'No' if the investor's right to access the host state's domestic courts to resolve an investment dispute depends on whether the right is included in a previously agreed investment agreement between the investor and host state. Some BITs include a provision in the Investment Treatment section with the following language (or something substantially similar): '[E]ach Party shall provide all necessary means to nationals or companies of the other Party to permit them to assert their rights with respect to investment agreements, investment authorizations, and properties, in particular the right of access to its courts . . .'. We interpret that provision to grant investors with a right of access to domestic courts, but not the right to obtain a final, binding and enforceable adjudication of the investor's investment dispute. For example, the host state's civil procedure rules might allow the domestic court to hear the case but not finally resolve the investment dispute. The US BITs that provide the conditional right and include the extra 'right of access' provision are: Bangladesh, Cameroon, Congo (Kinshasa), Egypt, Haiti, Panama, Poland, Senegal and Tunisia. The US BITs that provide the conditional right and do not include the 'right of access' provision are: Bulgaria, Congo (Brazzaville), Czech Republic, Grenada, Morocco, Russia, Slovakia, Sri Lanka and Turkey.
- 2 International Trade Administration, Dominican Republic-Central America Free Trade Agreement, available at https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/CentralAmericanFreeTA.asp.
- 3 US Dep't of State, United States-Mexico-Canada Agreement (2018), available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.
- 4 The Lithuania BIT contains some slight variations.
- 5 US Dep't of State, List of US Treaties, available at www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties/.
- 6 US Dep't of State, United States-Mexico-Canada Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.
- 7 See, eg, section B of CAFTA-DR Chapter 10, section B of NAFTA Chapter 11, section B of the US-Chile FTA.
- 8 In *TIG Insurance Company v. Republic of Argentina*, Case No. 19-7087 (D.C. Cir. 28 July 2020), successfully litigated by authors Mark Bravin and Theresa Bowman, the DC Circuit held that the commercial activity required to attach sovereign assets to enforce an international arbitration award must be determined at the time attachment is sought and considering the totality of the circumstances.





Mark Bravin

**Mitchell Silberberg & Knupp
LLP (MSK)**

Mark heads MSK's international dispute resolution practice. He and his team specialise in handling disputes between private parties and sovereign governments in US court litigation and international arbitration. He has a distinctive record of finding effective solutions to intricate, and often cutting-edge, legal problems involving international investments and contracts. Mark has extensive experience with the Foreign Sovereign Immunities Act (FSIA) – which governs all lawsuits against foreign states and state agencies in US federal and state courts. He also has handled a variety of arbitration-related matters under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, including motions to compel arbitration and petitions to enforce arbitral awards.



Tiana Bey

**Mitchell Silberberg & Knupp
LLP (MSK)**

Tiana A Bey's practice includes international arbitration related to bilateral investment treaties, arbitration award enforcement proceedings, international contract disputes and family law implicating international issues. With 20+ years of legal experience overall, her positions as a paralegal and now attorney have given Tiana a unique and advanced perspective on any case that comes her way. Tiana has performed all aspects of litigation from case intake through final disposition at trial. And she has briefed issues related to the United States Foreign Sovereign Immunities Act (FSIA), the Indian Arbitration Act, Malaysian Arbitration Act, Singapore International Arbitration Act, Singapore Sovereign Immunities Act, and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards before The United States Court of Appeals for the Second Circuit, The United States District Courts for the Southern District of New York and the District of Columbia and in arbitration and ad hoc proceedings before ICSID arbitration panels under ICSID and UNCITRAL arbitration rules.



Theresa Bowman

**Mitchell Silberberg & Knupp
LLP (MSK)**

Theresa Bowman has developed her international arbitration and litigation practices in the areas of commercial disputes and obtaining jurisdiction over, and discovery from, foreign sovereigns and transnational corporate entities. Ms Bowman has briefed issues of foreign sovereign immunity before both the United States Court of Appeals for the Second Circuit and the District of Columbia. She has navigated all aspects of complex litigation against many foreign sovereign and multinational entities in a wide variety of subject areas.

With a background in journalism as well as legal, political and investigative reporting for a major broadcast network affiliate, Ms Bowman offers an advanced and unique approach to effective research and case development techniques in complex litigation matters. Ms Bowman has travelled all over the world to meet and work with clients, fact witnesses and expert witnesses. She utilises strong multi-lingual oral communication and writing skills to advocate successfully for clients.

Ms Bowman is also active in the legal community, serving as the current President of the board of directors of the George Washington Law School Alumni Association. In the past she has served as a co-chair of the Litigation Law Forum of the District of Columbia Women's Bar Association, and as the past President of the Student Bar Association of the George Washington Law School. Ms Bowman has also been published in the *National Law Review*, the International Society of Law's *International Legal Materials* as well as the *World Financial Review*.



Albina Gasanbekova

**Mitchell Silberberg & Knupp
LLP (MSK)**

Albina focuses her practice on international arbitration and federal litigation matters involving contract disputes, enforcement of arbitral awards, public international law and jurisdictional issues, including the application of the Foreign Sovereign Immunity Act (FSIA). She is a bilingual (Russian, English), dual-qualified lawyer in both common law and civil law, and can help clients orient and navigate in a wide variety of legal systems and jurisdictions.





Sofia Castillo

Mitchell Silberberg & Knupp
LLP (MSK)

Sofia Castillo is a member of MSK's motion picture, television and music transactions department. Sofia has experience representing trade associations in the book publishing, film, entertainment software and music industries on matters concerning copyright policy. Her work includes representing clients in the context of legislative and regulatory processes, international treaty implementation and submissions of amicus briefs for high-impact litigation. She has extensive experience advocating before federal agencies and the US Congress on the Digital Millennium Copyright Act (DMCA), limitations and exceptions, Copyright Office practices, open licensing, privacy, accessibility and international trade. She is fluent in Spanish.



MSK's international disputes practice gives emphasis to international arbitration, cross-border litigation and international trade matters. We represent private parties and sovereign governments in US courts and before international arbitral tribunals (ICSID, ICC, ICDR, and UNCITRAL) in high-stakes complex matters. Our team of experts also provide advice and counsel in the area of international regulatory compliance and enforcement matters involving customs, export controls and sanctions.

Investor-state arbitration

Representation of both investors and states in arbitration arising out of bilateral investment treaties (BITs), multilateral investment treaties (such as NAFTA, CAFTA-DR and the Energy Charter Treaty), investment agreements and domestic investment laws.

International commercial arbitration

We have successfully represented corporate clients and individuals in a wide array of industries, and involving the substantive laws of numerous jurisdictions.

International litigation

We have extensive experience successfully litigating cross-border disputes in federal court. This includes lawsuits involving sovereign governments under the Foreign Sovereign Immunities Act; actions to confirm and enforce arbitration awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and, in collaboration with foreign counsel, disputes involving failed investments, ruptured transactions and other business disputes arising in foreign jurisdictions.

1818 N Street NW
7th Floor
Washington, DC 20036
United States
Tel: +1 202 355 7900
www.msk.com

Mark Bravin
mnb@msk.com

Tiana Bey
tab@msk.com

Theresa Bowman
tbb@msk.com

Albina Gasanbekova
a1g@msk.com

Sofia Castillo
szc@msk.com

