



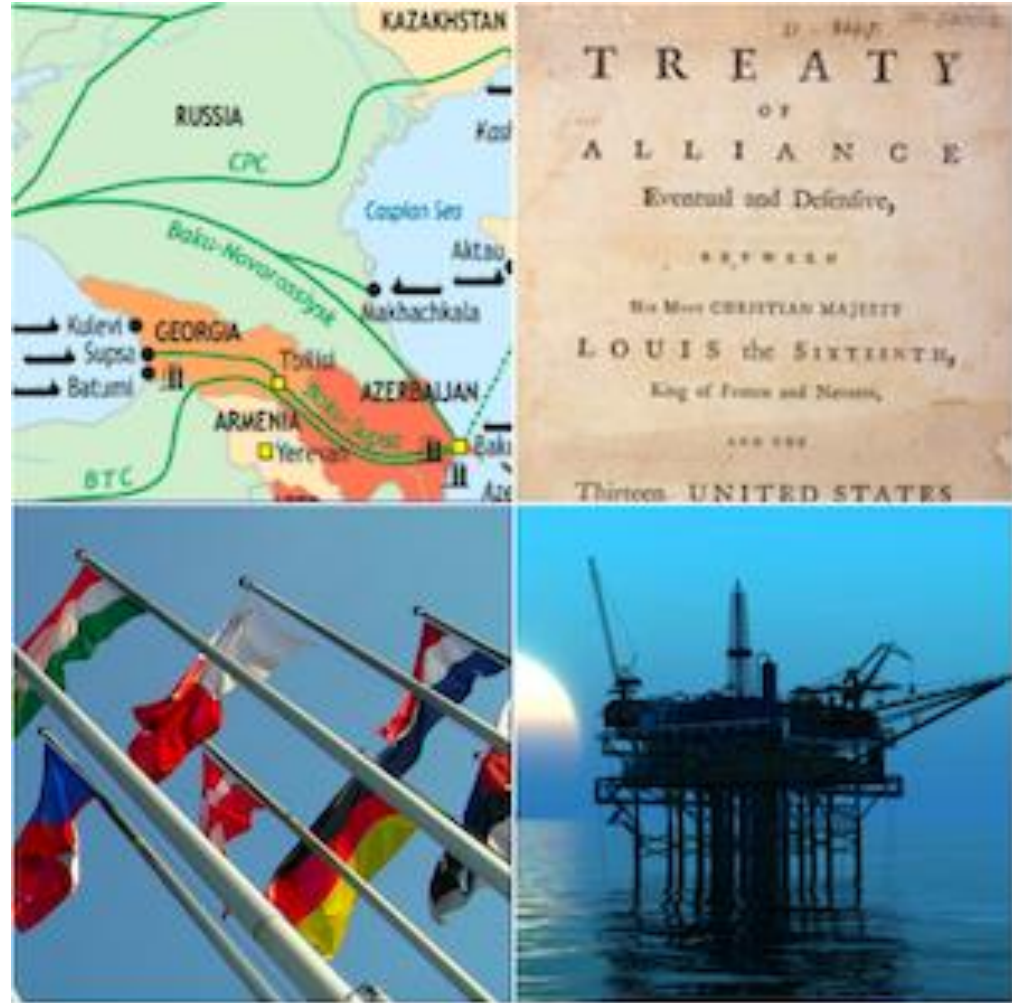
British Institute of
International and
Comparative Law

Public International Law in Practice

International Investment Law

#ITFLaw

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Outline

- Foreign direct investments and protection of investors
- Three pillars: substantive rights, procedural rights and consent
- Not only theory but statistics on BITs and investor-state disputes
- Particular emphasis on BITs and ICSID
- European Union and International Investment Law

Why do States seek foreign direct investment?

“[H]igh rates of foreign direct investment inflows have been associated with rapid economic growth.”

Jeffrey Sachs, *The End of Poverty: How We Can Make It Happen in Our Lifetime* (London 2005), p. 356



Breakout groups

- Benefits of attracting foreign direct investments
- Potential threats of foreign direct investments



Factors in the decision to make foreign direct investments

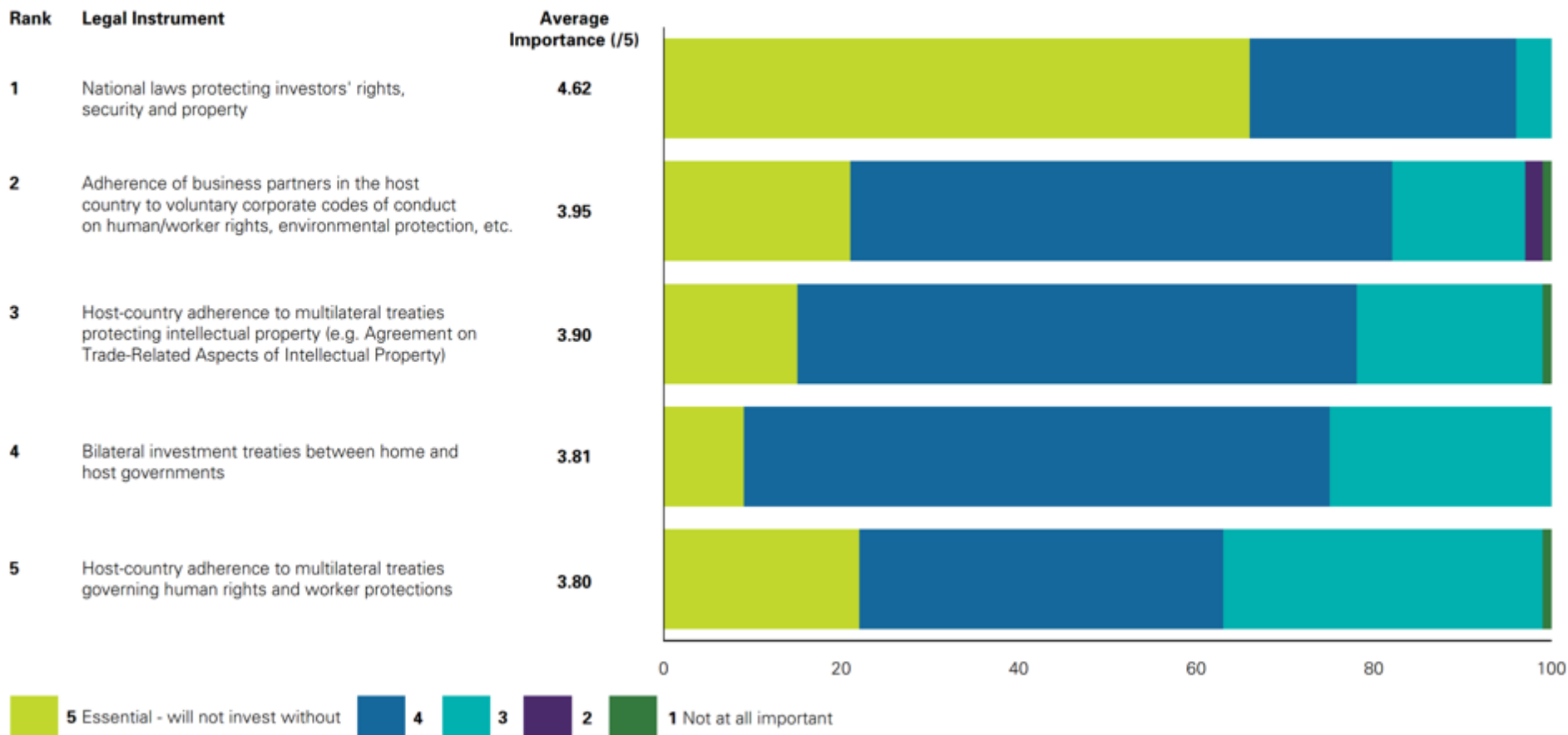
- Commercial factors are most important for investors when considering whether and where to invest abroad.
- Nevertheless, when deciding among potential host states, “legal environment” often plays a key role for foreign investors.
 1. Character of the Legal System: Does the host state present a legal environment that is stable, predictable, transparent and efficient?
 2. Content of the Legal System: Does the substantive content of the host state’s laws support FDI or make that investment more difficult and costly?

Legal infrastructure and FDI flows

States undertake changes to legal infrastructure because when considering legal environment, foreign investors look foremost at the host state's national laws.

On a scale of 1 to 5, indicate the degree of importance to your FDI decisions of each of the following types of legal instruments:

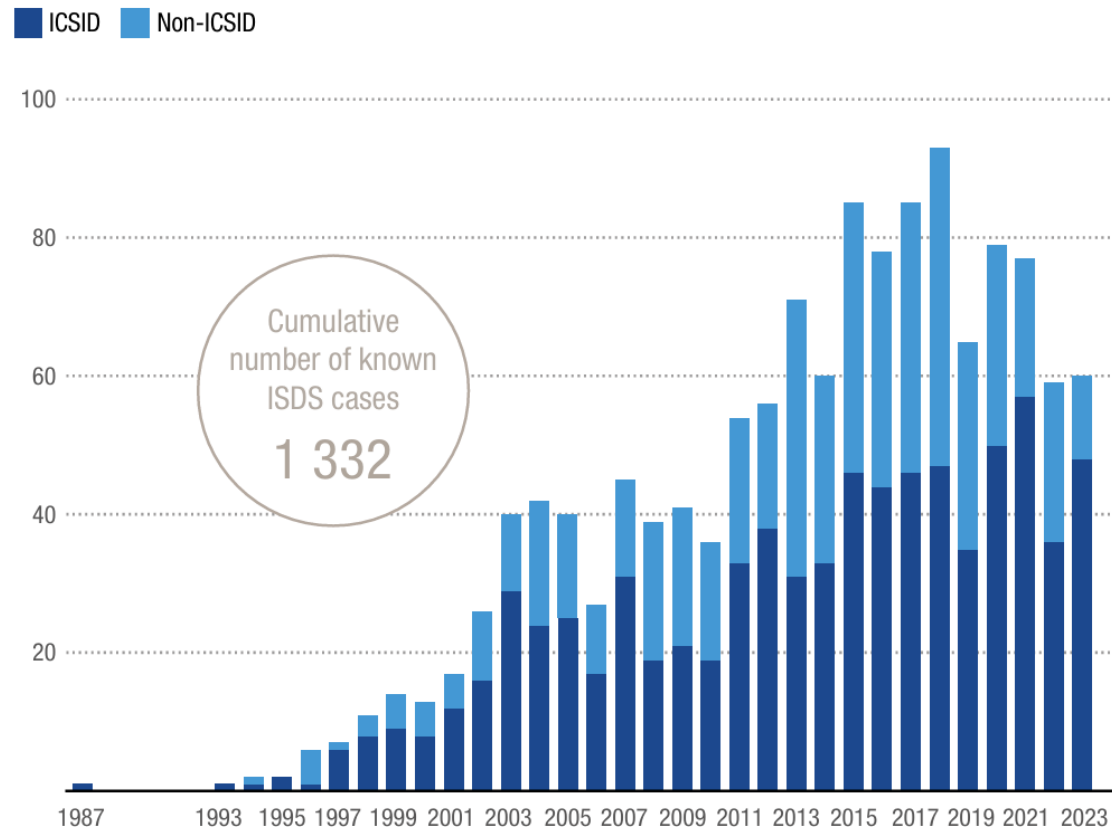
Source: NJ Calamita et al., *Risk and Return: Foreign Direct Investment and the Rule of Law* (2015).



Trends in investor-state dispute settlement

Investor-State dispute settlement cases surpassed 1,300 at the end of 2023

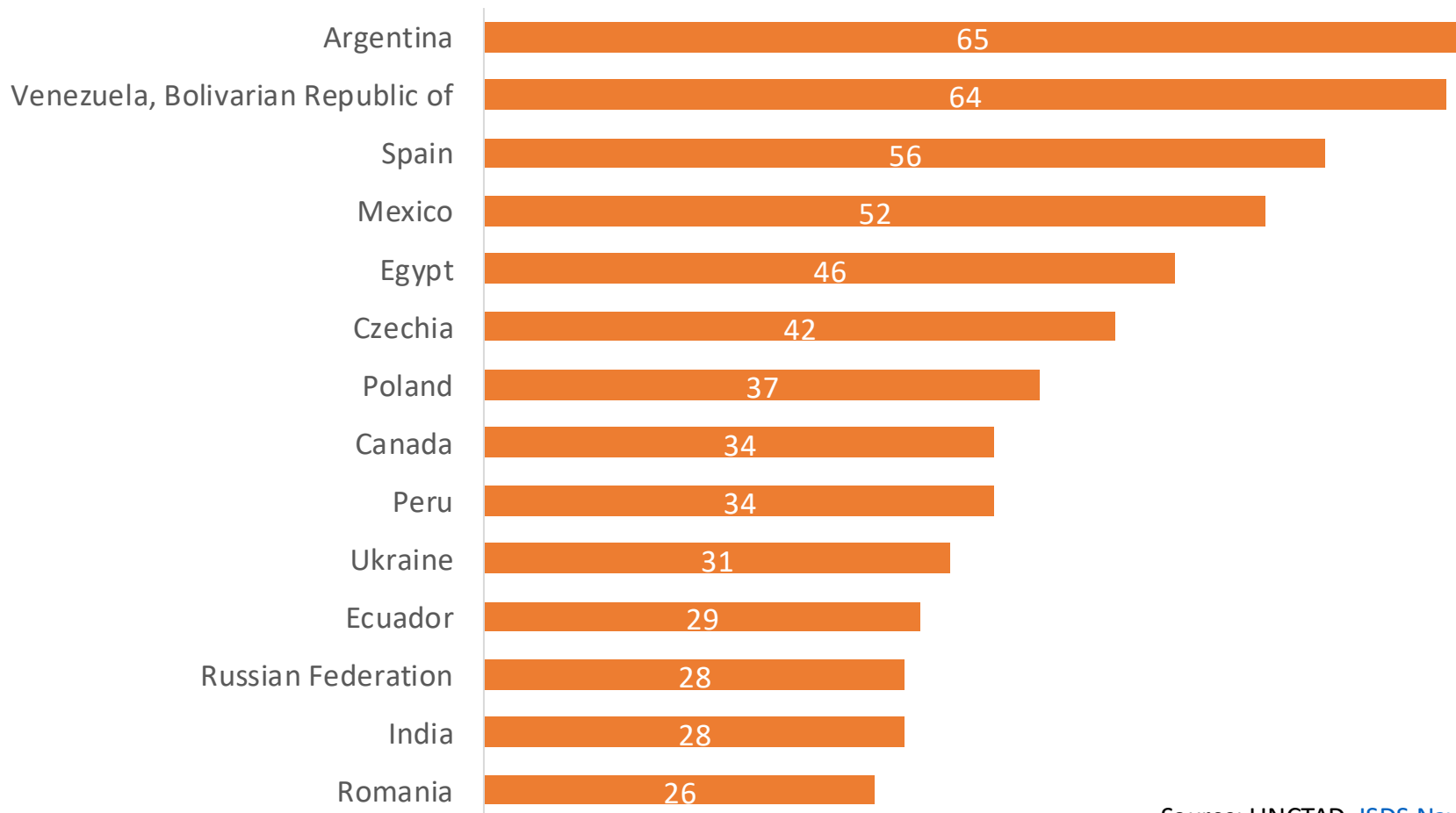
(Annual number of known treaty-based cases)



Source: UNCTAD, ISDS Navigator database, accessed 25 September 2024.

Most frequent respondent States, 1987–2023 (known cases)

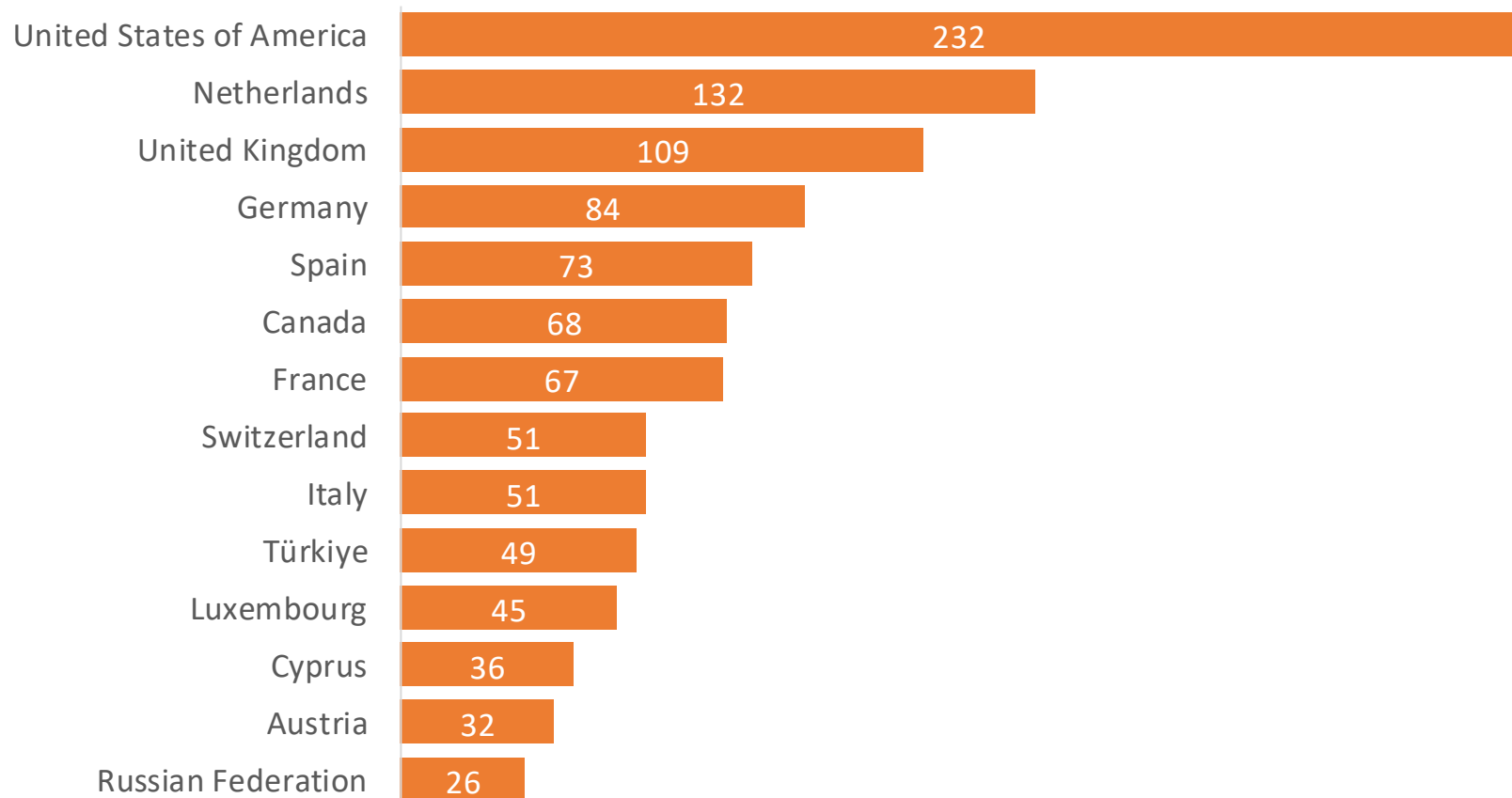
Most frequent respondent States, 1987-2023 (number of known cases)



Source: UNCTAD, [ISDS Navigator](#).

Most frequent home States of claimants, 1987–2023 (Number of known cases)

Most frequent home States of claimants, 1987–2023 (number of known cases)



Source: UNCTAD, [ISDS Navigator](#).

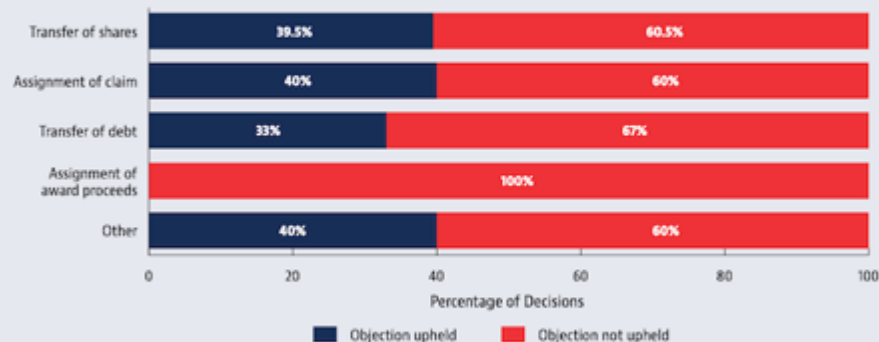
Corporate restructuring and investment treaty protections



Poulton, Ed, Yarik Kryvoi, Ekaterina Finkel, and Janek Bednarz. "Empirical Study: Corporate Restructuring and Investment Treaty Protections." *Ed Poulton, Yarik Kryvoi, Ekaterina Finkel and Janek Bednarz, Corporate Restructuring and Investment Treaty Protections, BIICL/Baker McKenzie, London (2020).*

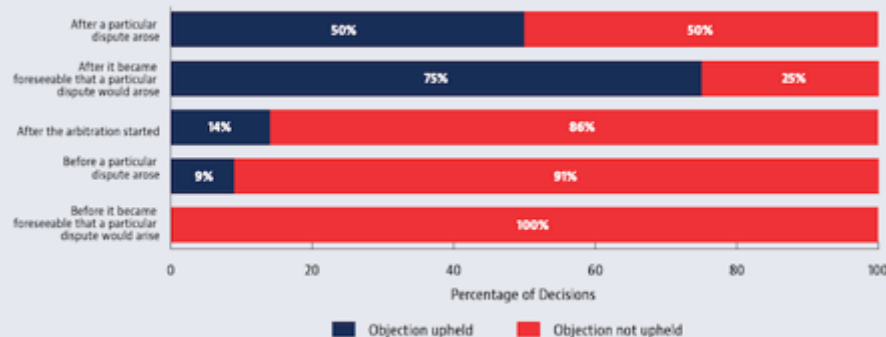
https://www.biicl.org/documents/89_isds-corporate-restructuring.pdf

Chart 21: Method of restructuring – success rate of objection



Based on 51 analysed decisions

Chart 39: Success rate of objections based on the finding of the tribunal on the timing of restructuring



Based on 49 analysed decisions

Industries and economic activities

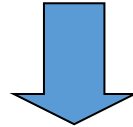
Most frequent economic activities underlying ISDS cases, 1987–2023
(Percentage)



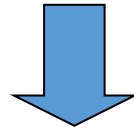
Source: UNCTAD, ISDS Navigator database, accessed 25 September 2024.

Preconditions for investor-State disputes

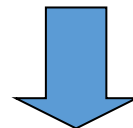
Substantive protections



Procedural Protections



Consent



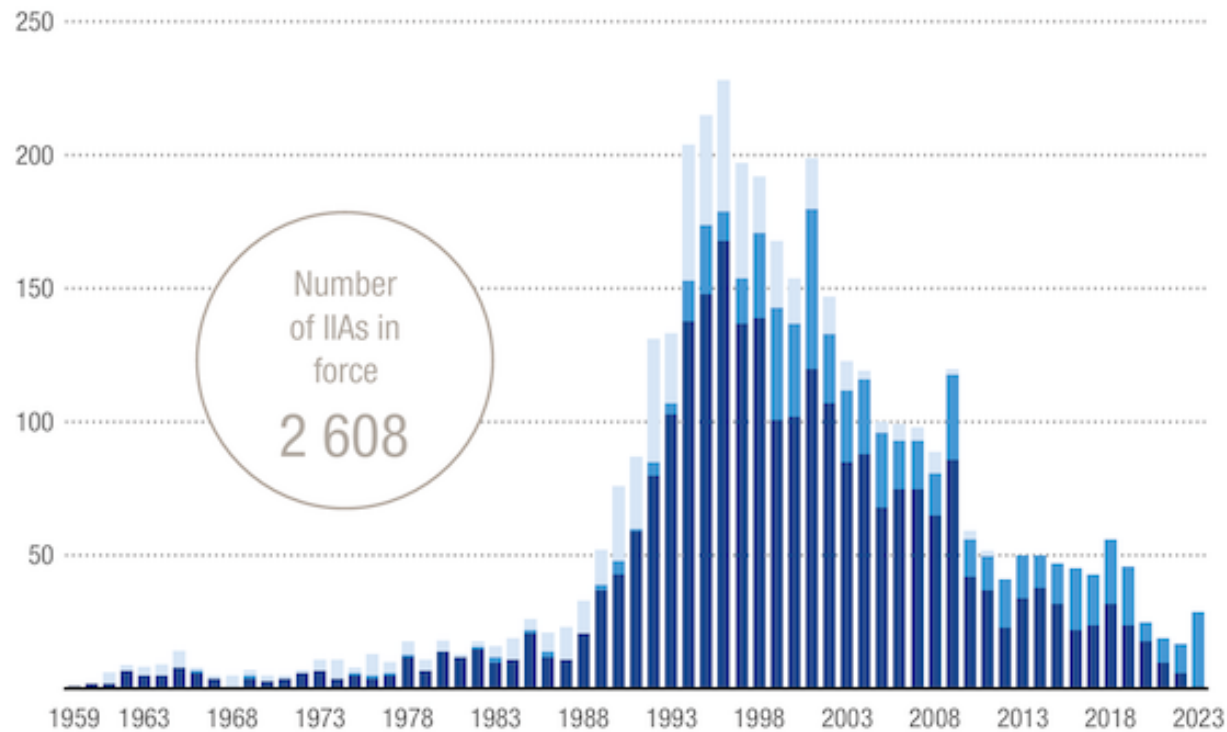
Investor-State Arbitration

Trends in concluded International Investment Agreements

Agreements from the 1990s and 2000s continue to dominate the international investment agreements universe

(Annual number of agreements signed)

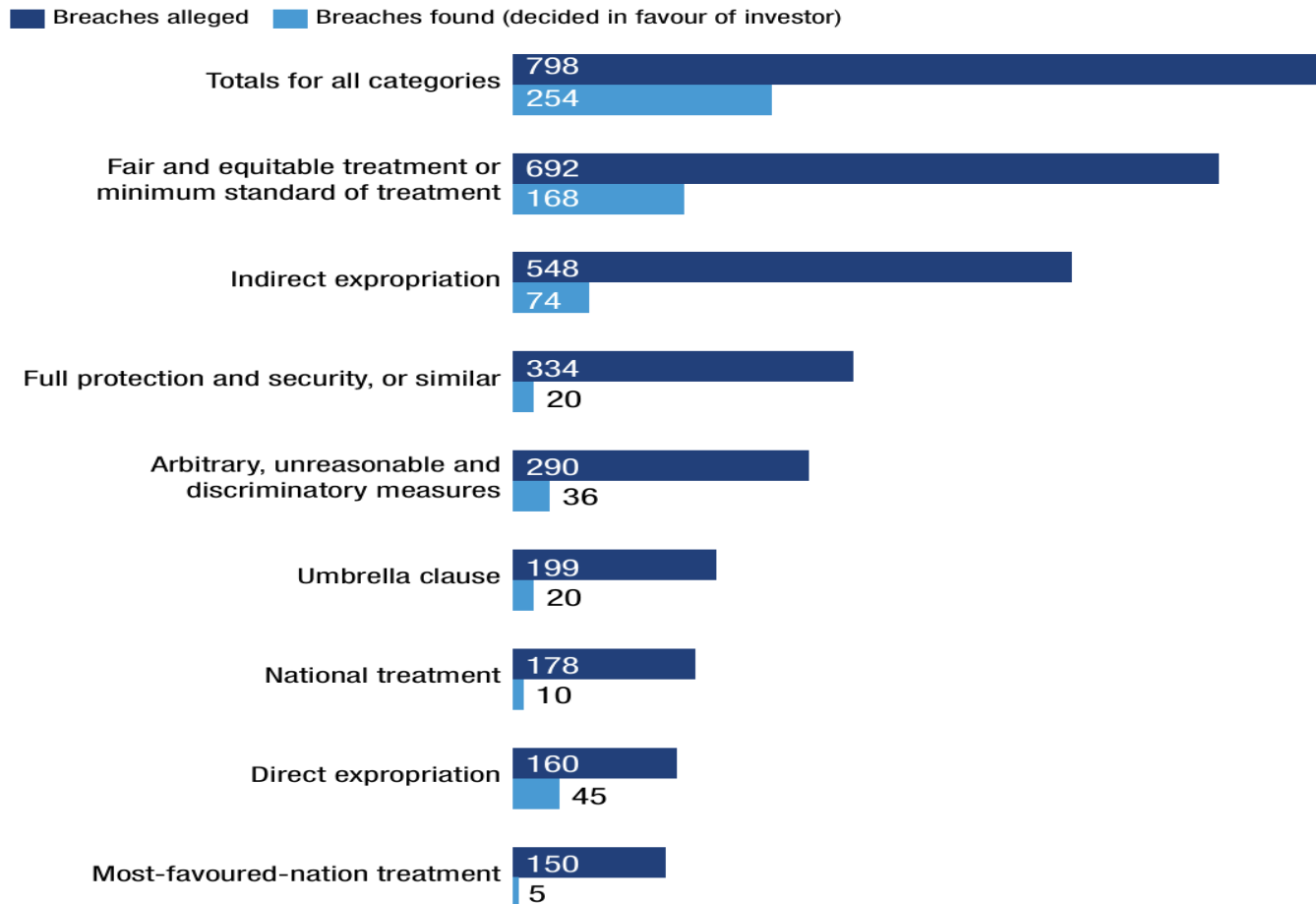
■ IIAs in force ■ IIAs signed, not in force ■ IIAs terminated



Source: UNCTAD, IIA Navigator database, accessed 25 March 2024.

Investment Protection Standards

Breaches most frequently alleged and found, 1987–2023
(Number of known cases)



Source: UNCTAD, ISDS Navigator database, accessed 25 September 2024.

Overview of common treaty provisions

- **IIAs are heterogeneous but most cover at least:**
 - Preamble
 - Definitions (“investment”/“investor”)
 - Admission and establishment of investments(?)
 - Core standards of protection:
 - Fair and equitable treatment
 - Non-discrimination (NT/MFN)
 - Expropriation
 - Transfer of funds
 - Exceptions?
 - Dispute settlement (State-State and investor-State)

Austria/Egypt BIT (2001), Preamble

The Government of the Republic of Austria and the Government of the Arab Republic of Egypt

HEREINAFTER REFERRED to as “Contracting Parties”,

- DESIRING to create favourable conditions for greater economic co-operation between the Contracting Parties;
- RECOGNIZING that the promotion and protection of investments may strengthen the readiness for such investments and hereby make an important contribution to the development of economic relations;

HAVE AGREED AS FOLLOWS:

Admission and establishment

Two approaches to Entry of Investments:

1. Admission model: Entry of investments in accordance with laws and regulations of the host country.
 - No liberalisation of markets
 - Protection under IIA attaches post-establishment
2. Pre-establishment model: Right of establishment for investors.
 - National treatment for foreign investors at the pre-establishment stage
 - Market liberalizing
 - Typical of North American, Japanese and Korean IIAs

Fair and equitable treatment

Most important, highly litigated treaty standard

Found in vast majority of IIAs

Competing FET Interpretations

- Customary international law “minimum standard of treatment”?
- Autonomous standard (embracing the minimum standard of treatment and more)?

Formulations of FET in treaties

Undefined

“(1) Each Contracting Party shall in its territory promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and in any case **accord such investments fair and equitable treatment.**” *Austria/Egypt BIT (2001), Art. 2.*

International Law as a Floor

“Investments shall at all times be accorded **fair and equitable treatment**, shall enjoy full protection and security and shall **in no case be accorded treatment less than that required by international law.**” *United States/Ukraine BIT (1996), Art. II.3 (a).*

Synonymous with International Law

“Each Contracting Party shall accord investments or returns of investors of the other Contracting Party **fair and equitable treatment in accordance with principles of international law.**” *Canada/Egypt BIT (1996), Art. 2(a).*

Arbitral interpretations of FET

1. Synonymous with International Minimum Standard

“[T]he minimum standard of treatment of [FET] is infringed by conduct attributable to the State and harmful to the claimant if . . . **arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety** – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process . . .”

- *Waste Management II v. Mexico, ICSID AF (2004), ¶ 98*

2. Autonomous Standard

“[FET] is an **autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct [] that clearly provides disincentives to foreign investors**. [W]ithout undermining its legitimate right to take measures for the protection of the public interest, [the State] has therefore assumed an obligation to treat a foreign investor’s investment in a way that **does not frustrate the investor’s underlying legitimate and reasonable expectations**. A foreign investor whose interests are protected under the Treaty is entitled to expect that the [State] will **not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions)**.”

- *Saluka v. Czech Republic, UNCITRAL, Partial Award (2006), ¶ 309*

National treatment

- ***A Relative Standard***, Not An Absolute Standard
- A principle whereby a host country extends to foreign investors ***treatment that is no less favorable*** than the treatment that it accords to national investors in like circumstances.
- **Formulations of the NT Standard & Key Issues**
 - Coverage – pre- or post-establishment
 - “In Like Circumstances”
- **Other Key NT Issues**
 - Exceptions
 - “On Account Of Nationality”
 - De Jure/De Facto Discrimination
 - Justifiable Differentiation

Establishing a violation of national treatment

83. The Tribunal notes that there are ***three distinct elements which an investor must establish*** in order to prove that a Party has acted in a manner inconsistent with its obligations under article 1102. These are

- a) The foreign investor must demonstrate that the Party [Canada] ***accorded treatment*** to it [the Claimant or UPS Canada] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
- b) The foreign investor or investment ***must be in like circumstances*** with local investors or investments; and
- c) The NAFTA Party ***must treat the foreign investor or investment less favorably*** than it treats the local investors or investments.”
 - *United Parcel Service v. Canada*, UNICTRAL (2007)

National treatment exceptions

Austria/Egypt BIT (2001), Art. 3.

- (2) The provisions of paragraph 1 shall not be construed as to oblige one Contracting Party to extend to the investors of the other Contracting Party and their investments the present or future benefit of any treatment, preference or privilege resulting from
 - (a) any ***customs union***, common market, **free trade area**, membership in an economic community or multilateral investment agreement;
 - (b) any international agreement, international arrangement or domestic legislation regarding ***taxation***;
 - (c) any ***regulation to facilitate the frontier traffic***.

General treaty exceptions

2012 US Model BIT, Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
2. to preclude a Party ***from applying measures that it considers necessary for*** the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or ***the protection of its own essential security interests.***

Most-favored-nation (MFN) treatment

ARTICLE 4

Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords, in like circumstances, to investments or returns of its own nationals or companies or ***to investments or returns of nationals or companies of any third State.***

Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, ***as regards the management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords, in like circumstances,*** to its own nationals or companies or ***to nationals or companies of any third State.***

- United Kingdom/Mexico BIT (2007)

Expropriation

A sovereign right of States

- But subject to certain conditions:
 - Due process; Non-discrimination; Compensation; Public purpose.
- Types of expropriation:

Direct Expropriation	Indirect Expropriation
<ul style="list-style-type: none">• Formal transfer of title	<ul style="list-style-type: none">• Total or substantial deprivation with an equivalent effect
<ul style="list-style-type: none">• Outright seizure of property	<ul style="list-style-type: none">• No formal transfer of title

What constitutes expropriation?

One of the main issues in international investment law during the last 20 years has been the question of identifying and delimiting compensable expropriation from lesser interferences.

“[...] international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered “permissible” and “commonly accepted” as falling within the police or regulatory power of States and, thus, noncompensable. In other words, it has *yet to draw a bright and easily distinguishable line between noncompensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable* in international law.”

- *Saluka Investments BV v. Czech Republic*, UNCITRAL (2006), ¶263.

ECHR and int'l investment law on expropriation

	A1P1 ECHR	Int'l Investment Law
Concept	interferences with the right to property as a human right	prohibition of direct and indirect expropriations exists as a stand-alone norm in international law
Jurisdiction	compulsory, Council of Europe States, professional judges	consent to arbitration by both parties, ad-hoc arbitrators
Content	A1P1 ECHR	depends on a relevant treaty (e.g. only compensation)
Parties	nationals and non-nationals	only foreign nationals, commercial actors
Enforcement	ECHR mechanism	typically: ICSID Convention, NY Convention

Transfers of funds

- A core element of investment treaties
 - Provides investors a right to transfer funds related to an investment
- Coverage
 - Transfers into the host State
 - Transfers out of the host State
- Absolute obligation?
- Balance of payments exceptions?

Japan-Mexico FTA (2005)

Art. 72 Temporary Safeguard Measures

1. A Party may adopt or maintain measures not conforming with its obligations under Article 58 [National treatment] relating to cross border capital transactions and Article 63 [Transfers]:

(a) in the event of serious **balance-of-payments** and **external financial difficulties** or **imminent threat thereof**; or

(b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause **serious difficulties for macroeconomic management**, in particular, monetary and exchange rate policies.

EU Investment treaty making

- Progressive introduction
- Investment rules in the context of free trade agreements (FTAs with Singapore, Japan, the United States, Egypt, Tunisia, Morocco, Jordan, Malaysia, Vietnam and Thailand)
- Stand-alone investment agreements (China and Myanmar)
- Negotiations with Canada were concluded in 2014 (Comprehensive and Economic Trade Agreement (CETA) but have not been ratified yet)
- EU agreement for the termination of intra-EU bilateral investment treaties (2020)

EU Regulation 1219/2012

- Regulates two aspects of the transitional arrangements: existing and new BITs
- Allows member states to amend an existing BIT or conclude a new one with third countries
- Necessary condition: the terms, conditions and procedures set out in the regulation are respected
- To open negotiations or sign a BIT, member states must obtain authorization from the European Commission.

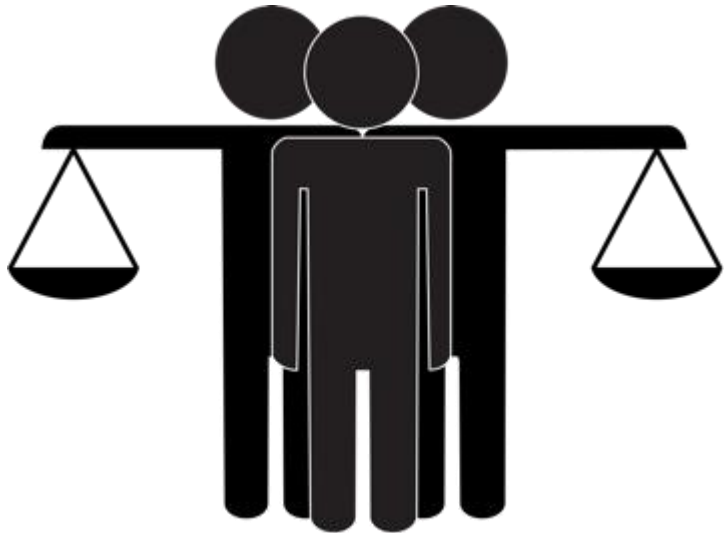
Brexit as a breach of FET? (breakout groups)

The United Kingdom decides to leave the European Union by 2020. Two years before the referendum on EU membership, a South Korean investor invested a significant amount of money into a UK-based business of assembling consumer electronic products and selling them primarily to EU countries.

The investor is considering bringing a claim against the UK in the expectation that they will be unable to maintain tariff-free access to EU Member States.

- What would support this claim?
- What arguments would undermine this claim?

Consent to arbitration



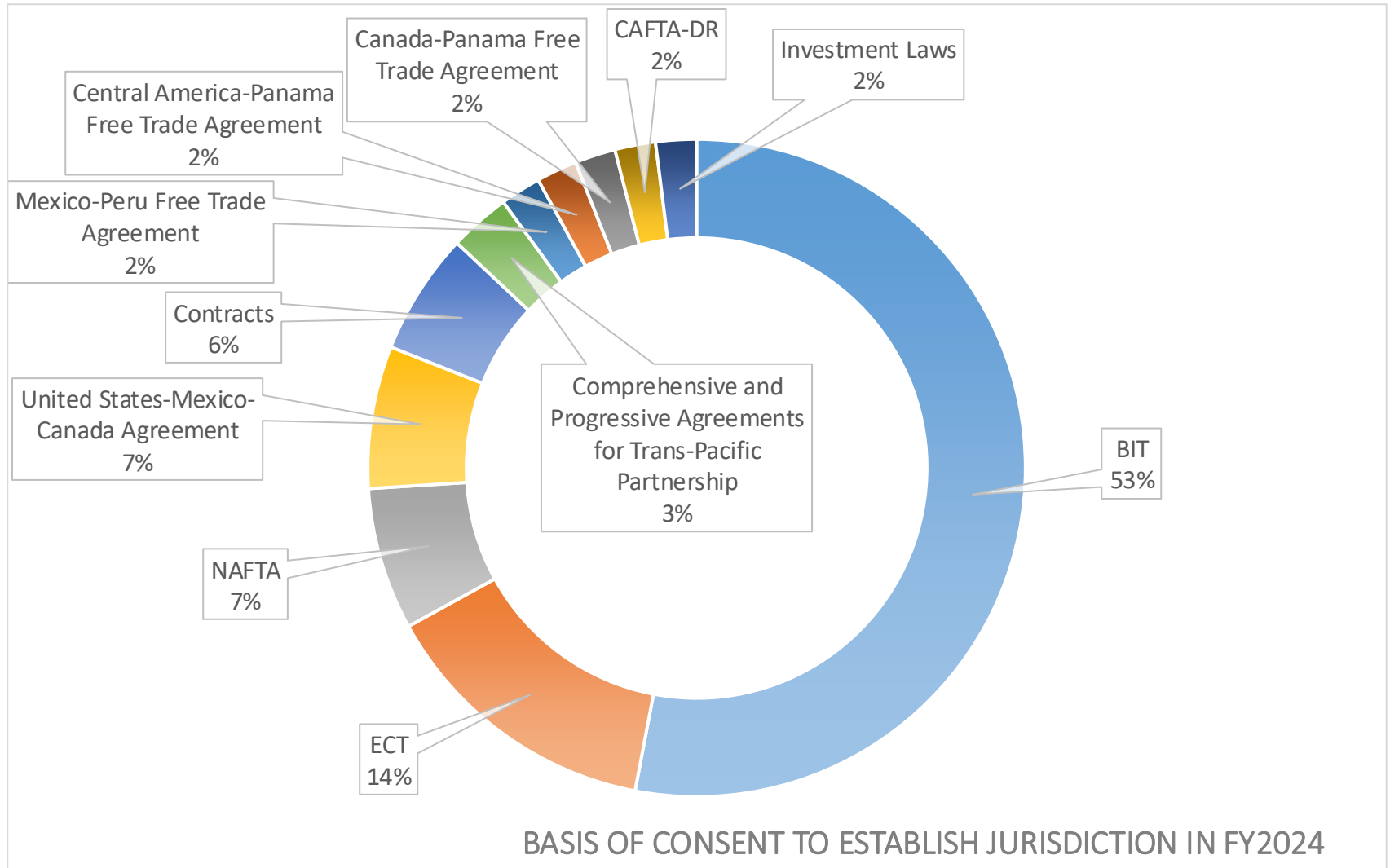
- Given by the State and the foreign investor
- Must be in writing
 - clause included in an investment agreement
 - compromise
 - investment promotion legislation
 - IIAs

BIT procedural protections

Article 9 Netherlands-Kazakhstan BIT

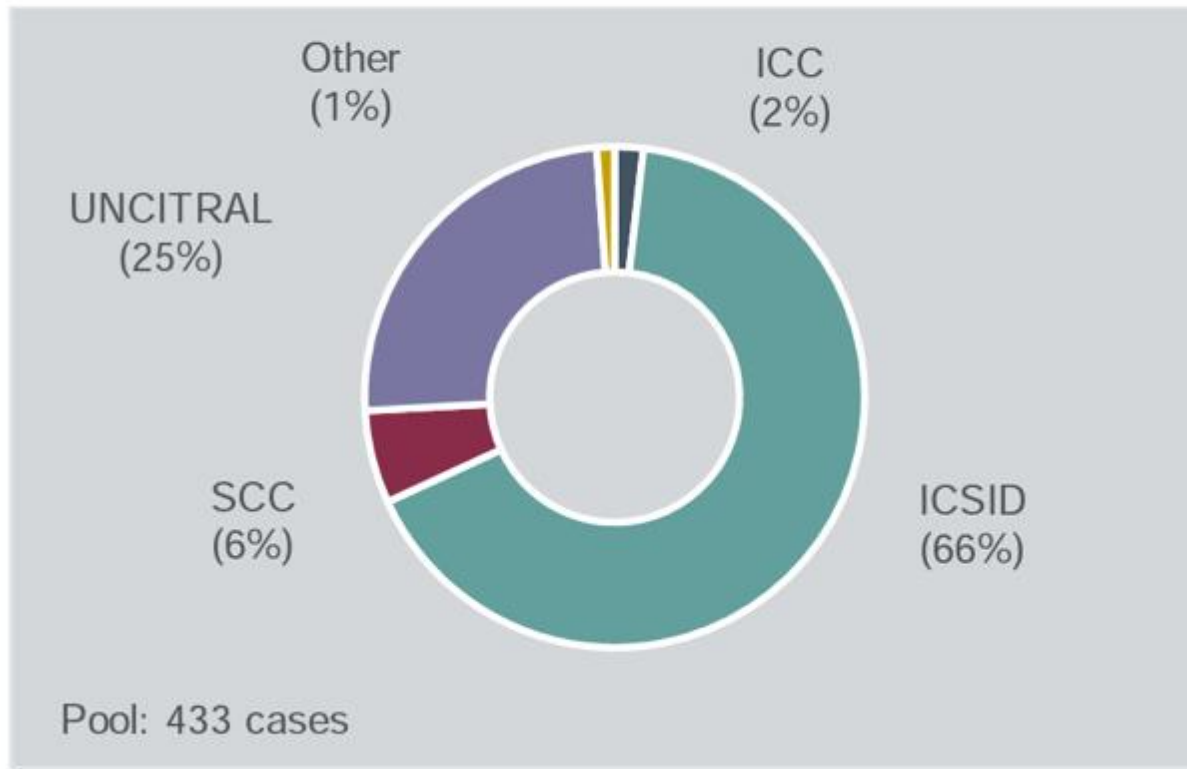
- Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes **for settlement by conciliation or arbitration** under the **Convention on the Settlement of Investment Disputes between States and Nationals of other States**, opened for signature at Washington on 18 March 1965.
- A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention, for the purpose of the Convention be treated as a national of the other Contracting Party.

Form of consent



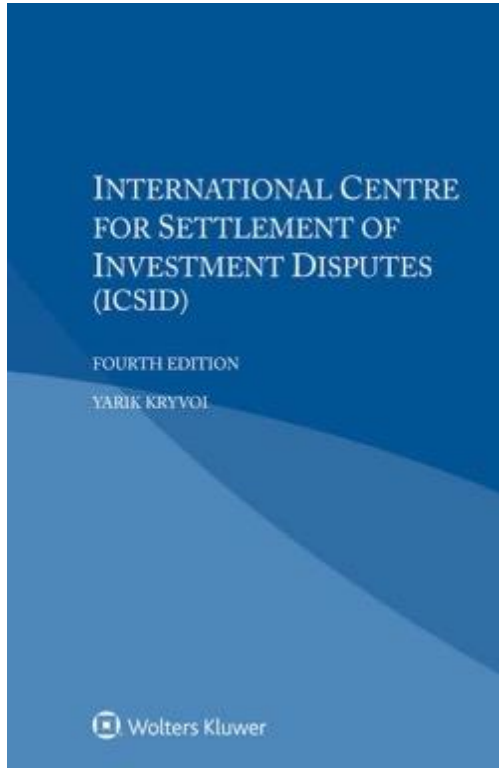
Disputes by arbitration rules

Figure 1: Arbitration rules applied in investor-State arbitrations (up to May 2020)¹⁷



source: [BIICL 2021 Empirical Study](#)

Distinctive features of ICSID



Kryvoi, Yarik, International Centre for Settlement of Investment Disputes (ICSID) (5th edition, 2023). Kluwer. Available [here](#) and on Amazon.

- Firmly establishes the capacity of a private individual to proceed against a state in an international forum
- No need for intervention from the government
- Complete jurisdictional system
- Waiver of sovereign immunity and diplomatic protection

ICSID annulment



Kryvoi, Yarik and Koeppe, Johannes and Biggs, Jack, *Empirical Study: Annulment in ICSID Arbitration*, BIICL & Baker Botts (2021), Available at https://www.biicl.org/documents/141_annulment-in-icsid-arbitration.pdf

Annulment grounds under Article 52(1) of the ICSID Convention:

- The Tribunal was not properly constituted;
- The Tribunal manifestly exceeded its powers
- There was corruption on the part of a member of the Tribunal;
- There was a serious departure from a fundamental rule of procedure; and
- The award failed to state the reasons on which it was based.

Chart 6: Overview Arbitration Proceedings under the ICSID Convention, as of 1 February 2021



Provisional measures in investor-state arbitration

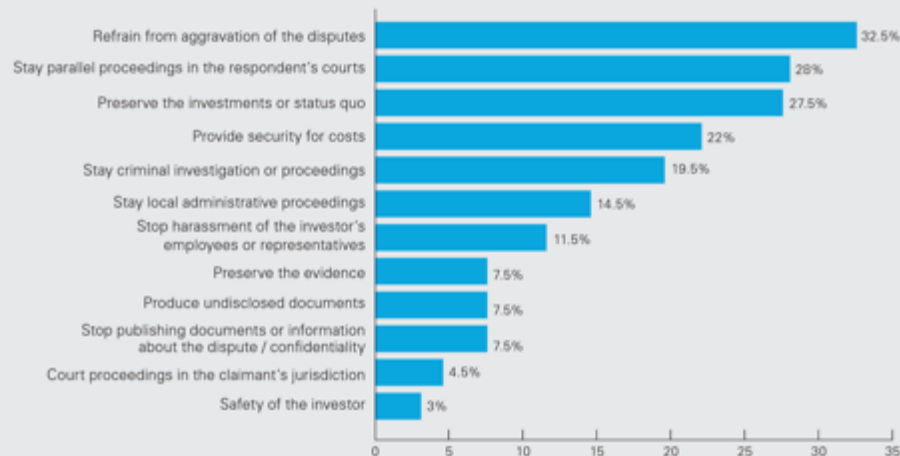
Empirical study: Provisional measures in investor-state arbitration (2023)

David Goldberg, Yarik Kryvoi, Ivan Philippov
January 2023
London

Goldberg, David, Yarik Kryvoi, and Ivan Philippov. "Empirical Study: Provisional Measures in Investor-State Arbitration." *Provisional Measures in Investor-State Arbitration, BIICL/White & Case, London* (2023).

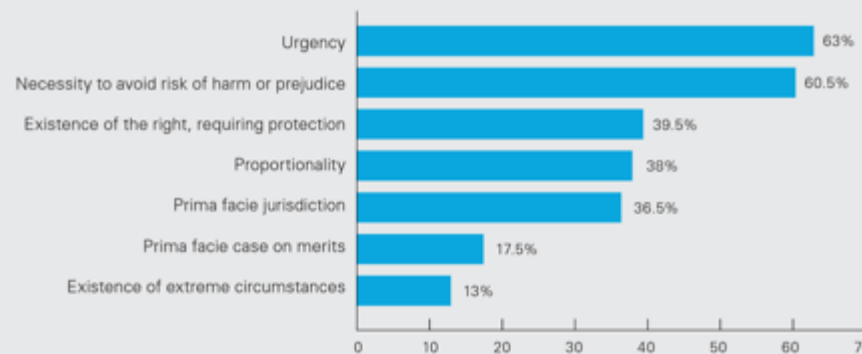
https://www.biicl.org/documents/157_provisional-measures-in-investorstate-arbitration-2023.pdf

Chart 27: Most requested types of the provisional measures



Based on 160 analysed decisions

Chart 31: Most widely used criteria for granting provisional measures

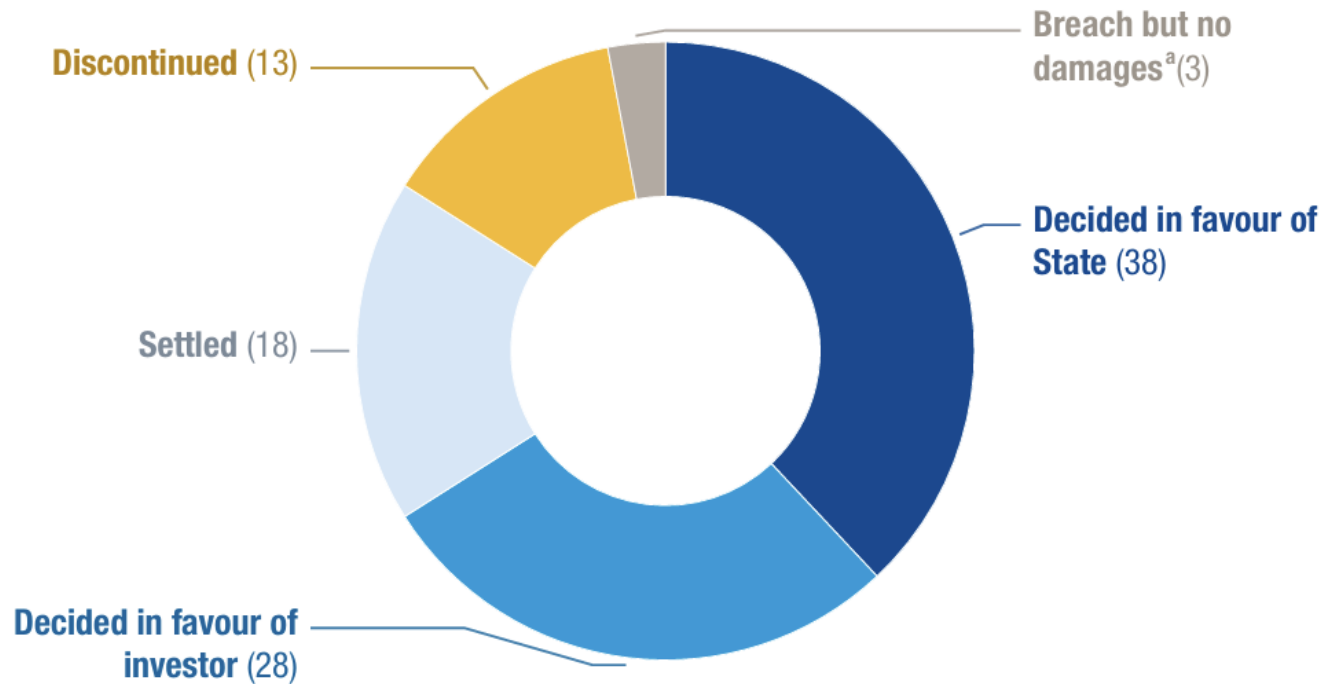


Based on 160 analysed decisions

Outcomes of cases

Almost half of investor–State cases are decided in favour of the investor or settled

Share of concluded cases, 1987–2023
(Percentage)



Source: UNCTAD, ISDS Navigator database, accessed 25 September 2024.

^a Decided in favour of neither party (liability found but no damages awarded).

2021 Empirical Study:

Costs, Damages and Duration in Investor-State Arbitration

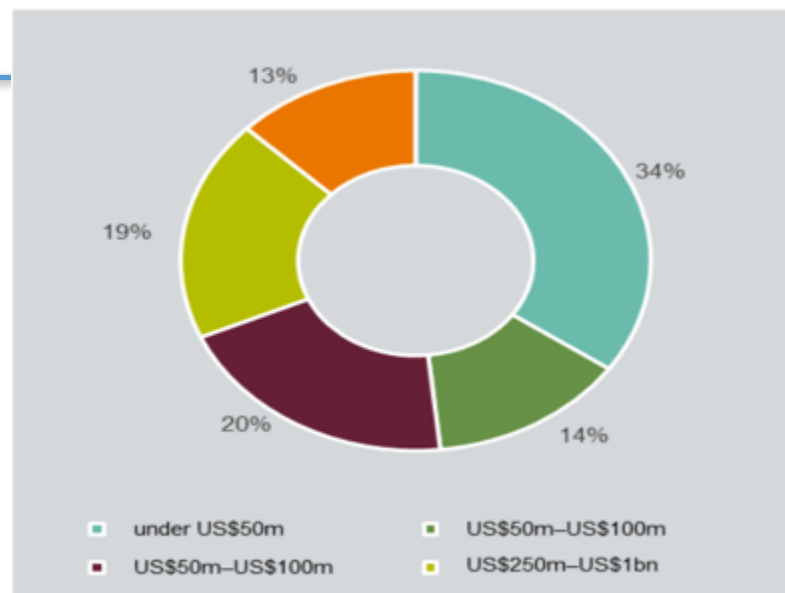


Matthew Hodgson, Yarik Kryvoi, Daniel Hicks
June 2021

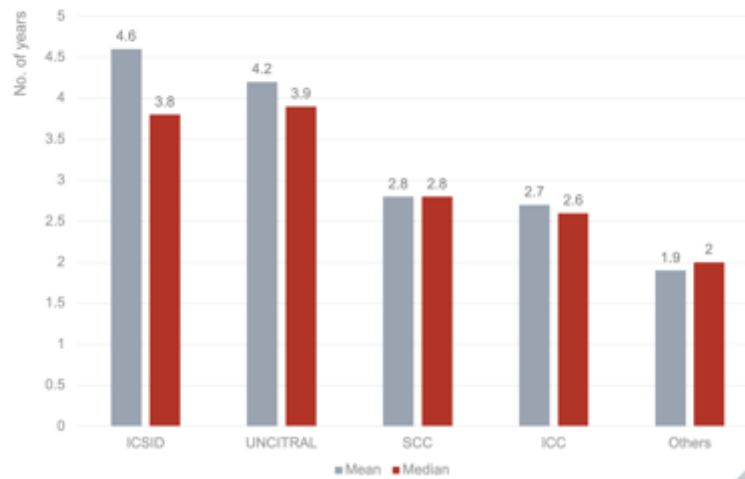
Hodgson, Matthew and Kryvoi, Yarik and Hicks, Daniel, Costs, Damages and Duration in Investor-State Arbitration. BIICL and Allen & Overy, London, 2021, Available at

https://www.biicl.org/documents/136_isds-cost-damages-duration.pdf

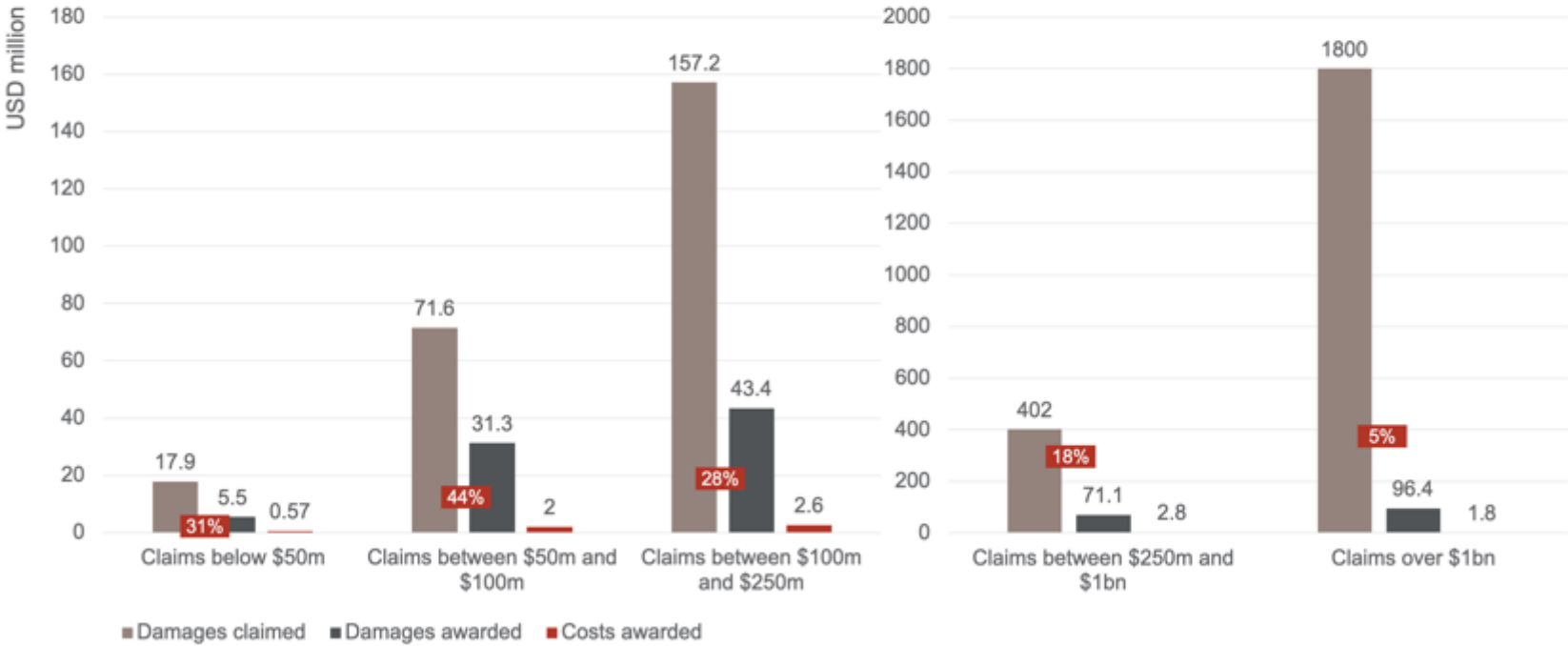
Figure 38: Share of cases by amount in dispute



Key Finding 7: Investor-State arbitration is getting longer. (cont'd)

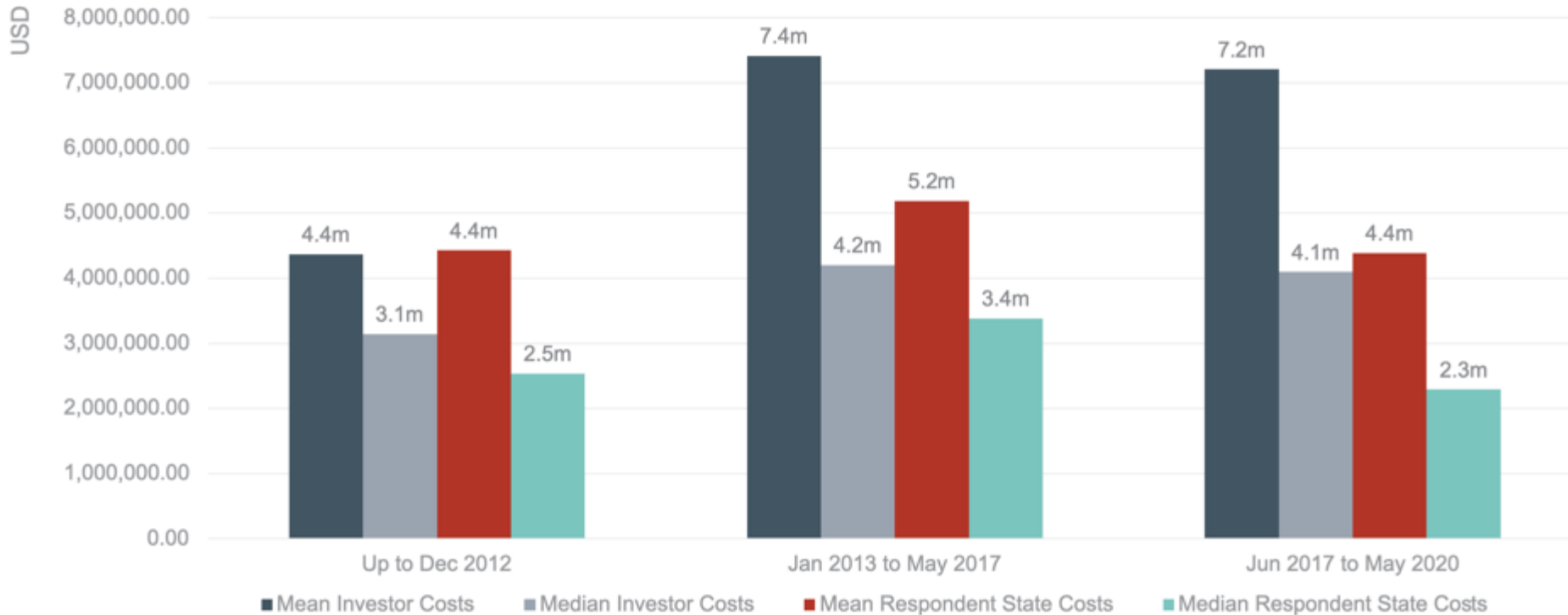


Key Finding 6: Successful investors can expect a significant 'haircut' on the amount they claim. (cont'd)



Median figures are used in this diagram. "Damages claimed" in this diagram take into account cases decided in favour of respondent States.

Key Finding 1: Party costs have decreased over the past three years.



Investment treaty awards: some sizeable outliers

- *Yukos v. Russia* (UNCITRAL), Award (July 18, 2014)
 - **US \$ 50 billion** plus certain costs
- *Occidental Petroleum Corp. v. Ecuador* (ICSID), Award (Oct. 5, 2012)
 - **US \$ 2.3 billion** plus certain costs
- *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya* (Cairo Regional Centre), Award (March 22, 2013)
 - **US \$ 935 million** plus certain costs
- *Gold Reserve Corp. v. Venezuela* (ICSID), Award (Sept. 22, 2014)
 - **US \$ 740.3 million** plus certain costs
- *Hulley Enterprises v. Russia* (UNCITRAL), Award (July 18, 2014)
 - **US \$ 40 billion**
- *Naftogaz and others v. Russia* (UNCITRAL), Final Award (April 12, 2023)
 - **US \$ 4.2 billion**
- *Cairn v. India* (UNCITRAL), Final Award (December 21, 2020)
 - **US \$ 1.2 billion**
- *Agroinsumos Ibero-Americanos and others v. Venezuela* (ICSID), Award (March 23, 2022)
 - **US \$ 1.6 billion**

Costs of defence

- *Yukos v. Russia* (UNCITRAL), Award (July 18, 2014) ¶ 1887
 - **US \$ 60 million** in legal fees to be paid by Russia
 - **Euro € 4.2 million** in arbitration costs to be paid by Russia
- *Plama v. Bulgaria* (ICSID), Award (Aug. 27, 2008) ¶¶ 310-12
 - Claimant's legal costs **US \$11 million**
 - Bulgaria's legal costs **US \$ 13.2 million**
- *Oschadbank v. Russia* (UNCITRAL), Award (Nov. 26, 2018) ¶ 131
 - **US \$ 3.1 million** in legal fees to be paid by Russia
- *Tethyan Copper v. Pakistan* (ICSID), Award (July 12, 2019) ¶¶ 620-21
 - **US \$ 63 million** in arbitration costs and cost incurred by Claimant to be paid by Pakistan

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Case No. <input style="width: 90%;" type="text"/>	Arbitration / Conciliation <input style="width: 90%;" type="text" value="-----Any-----"/>	
Procedural Rules Applied <input style="width: 90%;" type="text" value="-----Any-----"/>	Type of Proceeding Registered <input style="width: 90%;" type="text" value="-----Any-----"/>	
Period Proceeding Registered From <input style="width: 20%;" type="text" value="--Any--"/> To <input style="width: 20%;" type="text" value="--Any--"/>		
Arbitrator, Conciliator, Committee Member <input style="width: 80%;" type="text"/>		
<input type="button" value="Search"/>		<input type="button" value="Reset"/>

Results 1-20 of 273 Show in sets of: [10](#) [20](#) [50](#) [All](#)

Case No.	Claimant		Respondent	Status
ABB/08/13	Atapli Elektrik B.V.	v.	Republic of Turkey	Pending
ABB/08/12	Caratube International Oil Company LLP	v.	Republic of Kazakhstan	Pending
ABB/08/11	Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise	v.	Ukraine	Pending
ABB/08/10	Repsol YPF Ecuador, S.A. and others	v.	Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)	Pending
ABB/08/9	Giordano Alpi and others	v.	Argentine Republic	Pending
ABB/08/8	Inmaris Perestroika Sailing Maritime Services GmbH and others	v.	Ukraine	Pending
ABB/08/7	Itera International Energy LLC and Itera Group NV	v.	Georgia	Pending
ABB/08/6	Perenco Ecuador Limited	v.	Republic of Ecuador and Empresa Estatal Petróleos del Ecuador	Pending

Reforming international investment agreements

- Narrow Definition of Investment
- Clarified Fair and Equitable Treatment (FET)
- Exclusion of Indirect Expropriation
- Inclusion of Sustainable Development Goals (SDGs)
- Obligations on Investors



Reforming international investment agreements

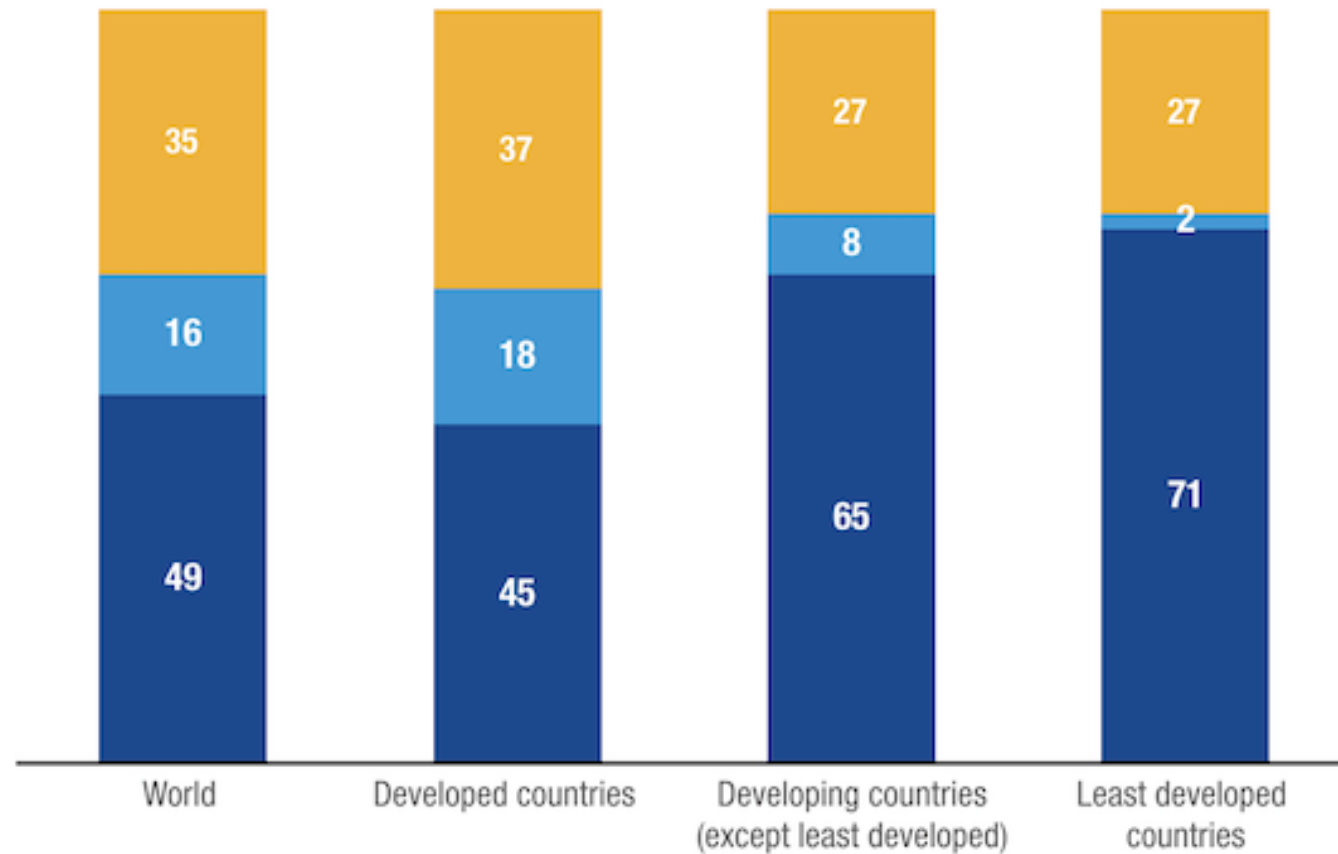
- Right to Regulate Clauses
- Non-Lowering of Standards
- Transparency and Third-Party Participation
- Obligations for Both States and Investors
- Carve-Outs for Sensitive Sectors
- Periodic Review Mechanisms



Old and new generation treaties

(Percentage)

■ Old-generation ■ New-generation ■ Not covered



International Investment Law and Dispute Resolution (Online Course)



<https://www.biicl.org/isds>

More information

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