



British Institute of  
International and  
Comparative Law

# Public International Law in Practice International Investment Law

#ITFLaw

Yarik Kryvoi  
Senior Research Fellow in  
International Economic Law  
[y.kryvoi@biicl.org](mailto:y.kryvoi@biicl.org)  
[www.kryvoi.net](http://www.kryvoi.net)



# 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

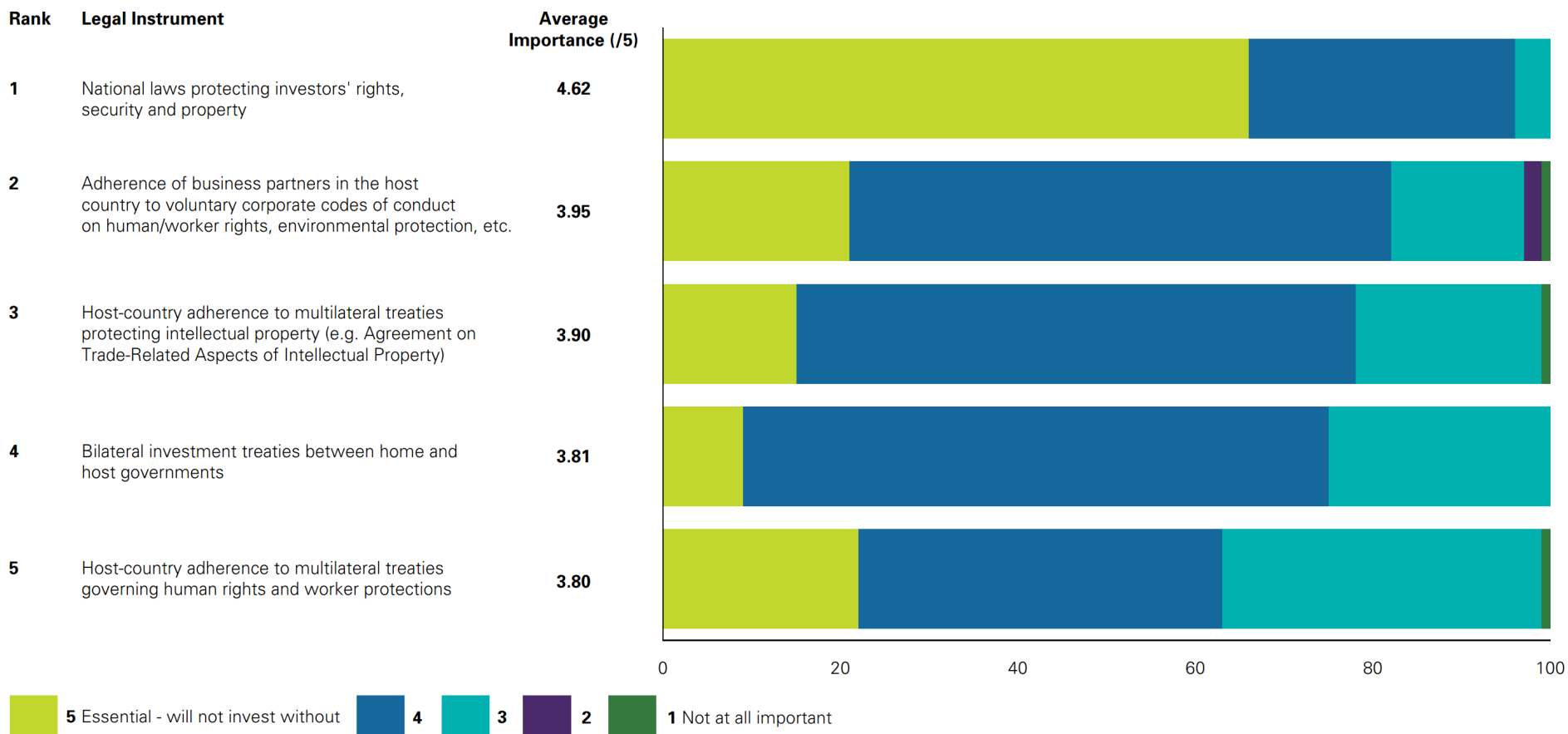
- Commercial factors are most important for investors when considering whether and where to invest abroad.
- Nevertheless, when deciding among potential host states, “legal environment” often plays a key role for foreign investors.
  1. Character of the Legal System: Does the host state present a legal 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.

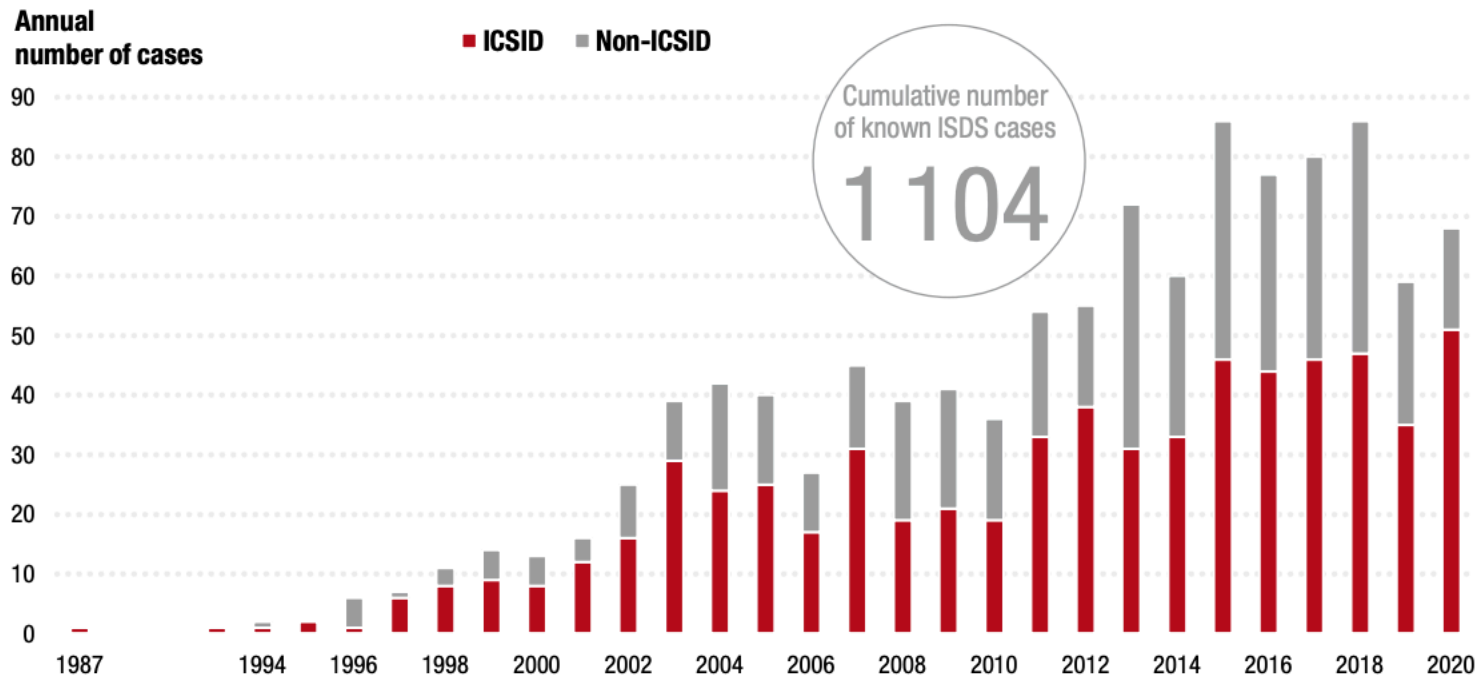
On a scale of 1 to 5, indicate the degree of importance to your FDI decisions of each of the following types of legal instruments:

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



# Trends in treaty-based cases

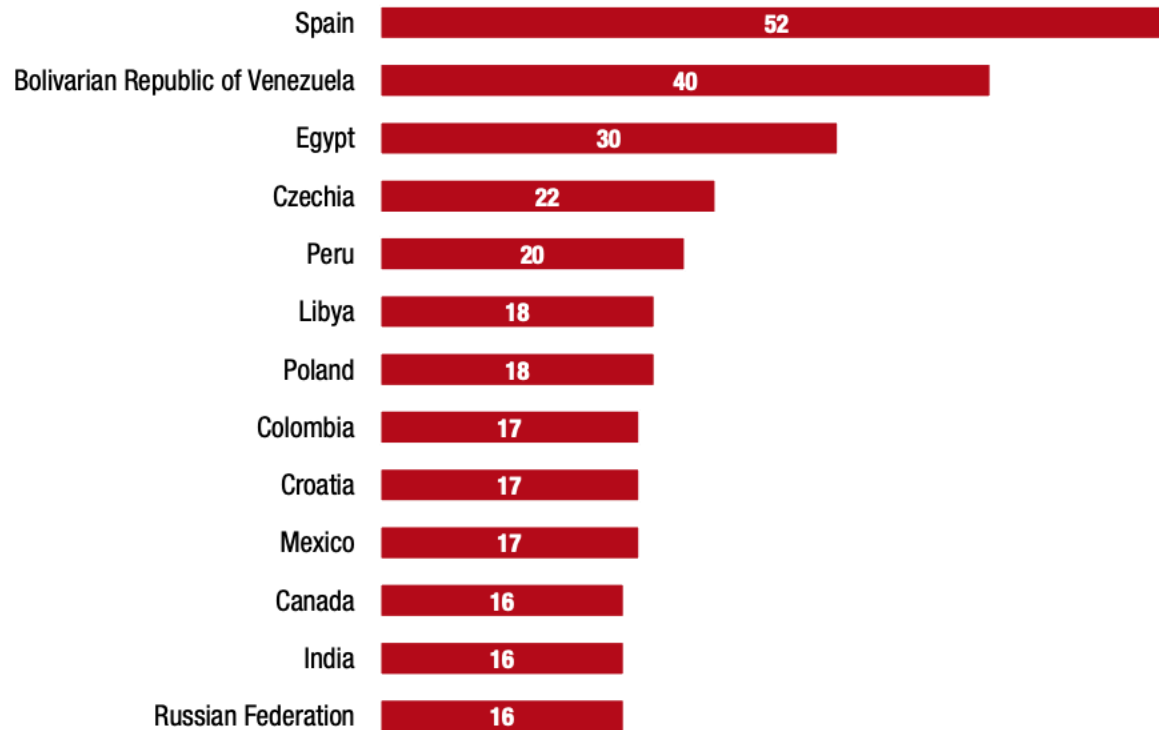
Figure 1. Trends in known treaty-based ISDS cases, 1987–2020



Source: UNCTAD, ISDS Navigator.

# Most frequent respondent States, 1987–2020 (known cases)

**Figure 2. Most frequent respondent States, 2011–2020** (Number of known cases)

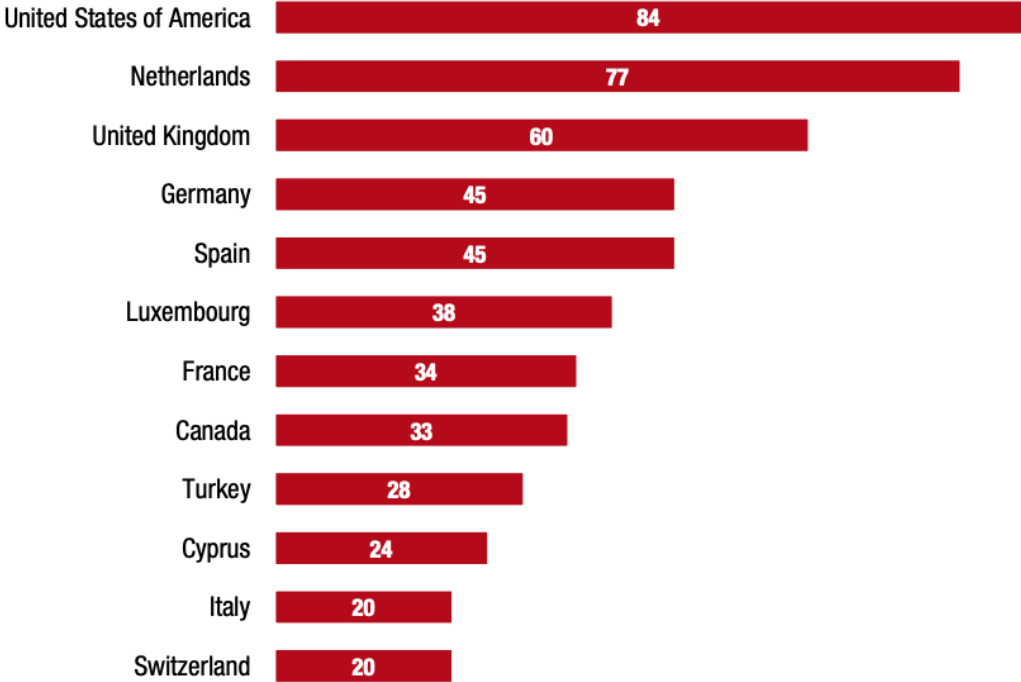


Source: UNCTAD, ISDS Navigator.



# Most frequent home States of claimants, 1987–2020 (Number of known cases)

**Figure 3. Most frequent home States of claimants, 2011–2020** (Number of known cases)



Source: UNCTAD, ISDS Navigator.

# Corporate Restructuring and Investment Treaty Protections

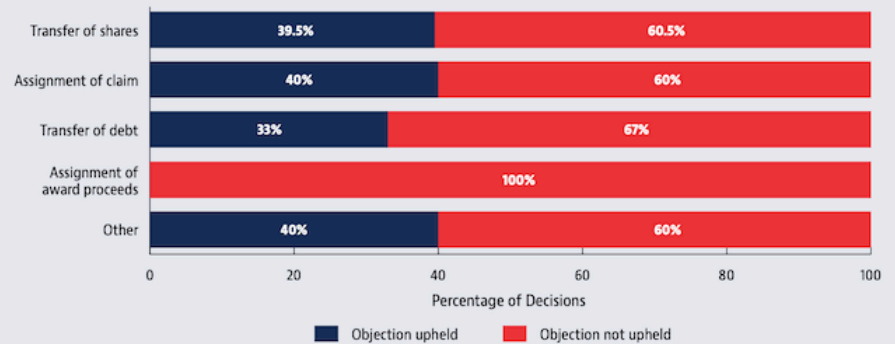
## Empirical Study: Corporate Restructuring and Investment Treaty Protections

Ed Poulton, Yarik Kryvoi, Ekaterina Finkel, Janek Bednarz  
London, 2020

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).*

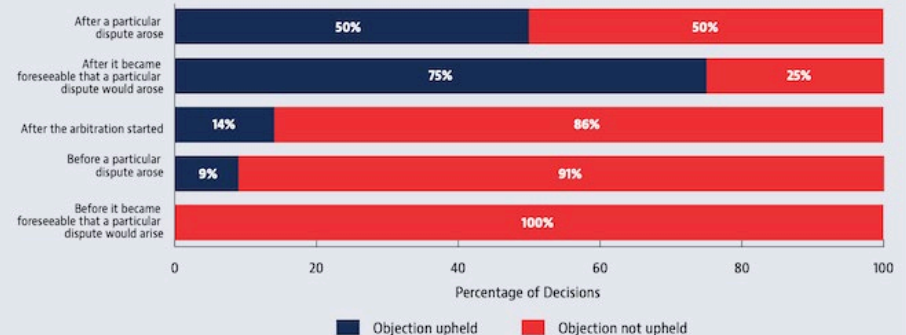
[https://www.biicl.org/documents/89\\_isds-corporate-restructuring.pdf](https://www.biicl.org/documents/89_isds-corporate-restructuring.pdf)

Chart 21: Method of restructuring – success rate of objection



Based on 51 analysed decisions

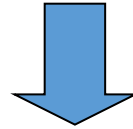
Chart 39: Success rate of objections based on the finding of the tribunal on the timing of restructuring



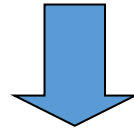
Based on 49 analysed decisions

# Preconditions for Investor-State Disputes

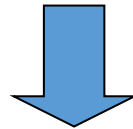
Substantive protections



Procedural Protections



Consent



Investor-State Arbitration

# 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:

# I. 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

## II. “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*

# III. 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)

# NT 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

## 2004 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.***

# IV. MOST-FAVORED-NATION (MFN) CLAUSES

## 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)

# V. 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"><li>• Formal transfer of title</li></ul>	<ul style="list-style-type: none"><li>• Total or substantial deprivation with an equivalent effect</li></ul>
<ul style="list-style-type: none"><li>• Outright seizure of property.</li></ul>	<ul style="list-style-type: none"><li>• No formal transfer of title</li></ul>

# What Constitutes an 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

## VI. 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.

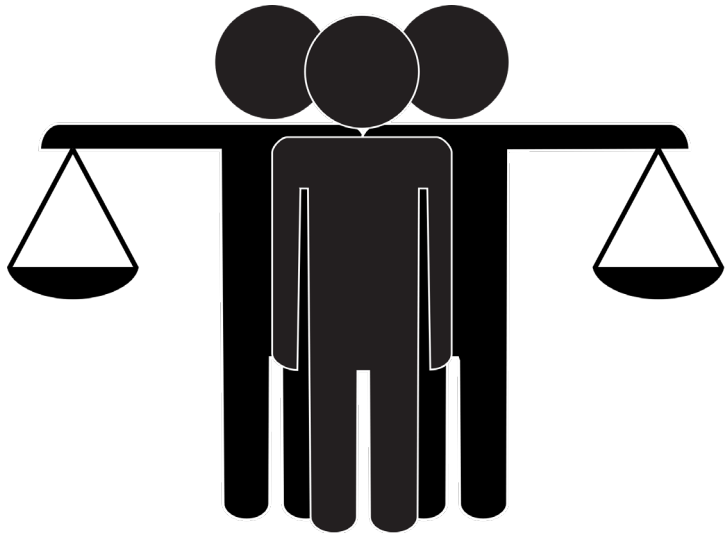
# Brexit as a breach of FET? (breakout groups)

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
  - BIT

# BIT Procedural Protections

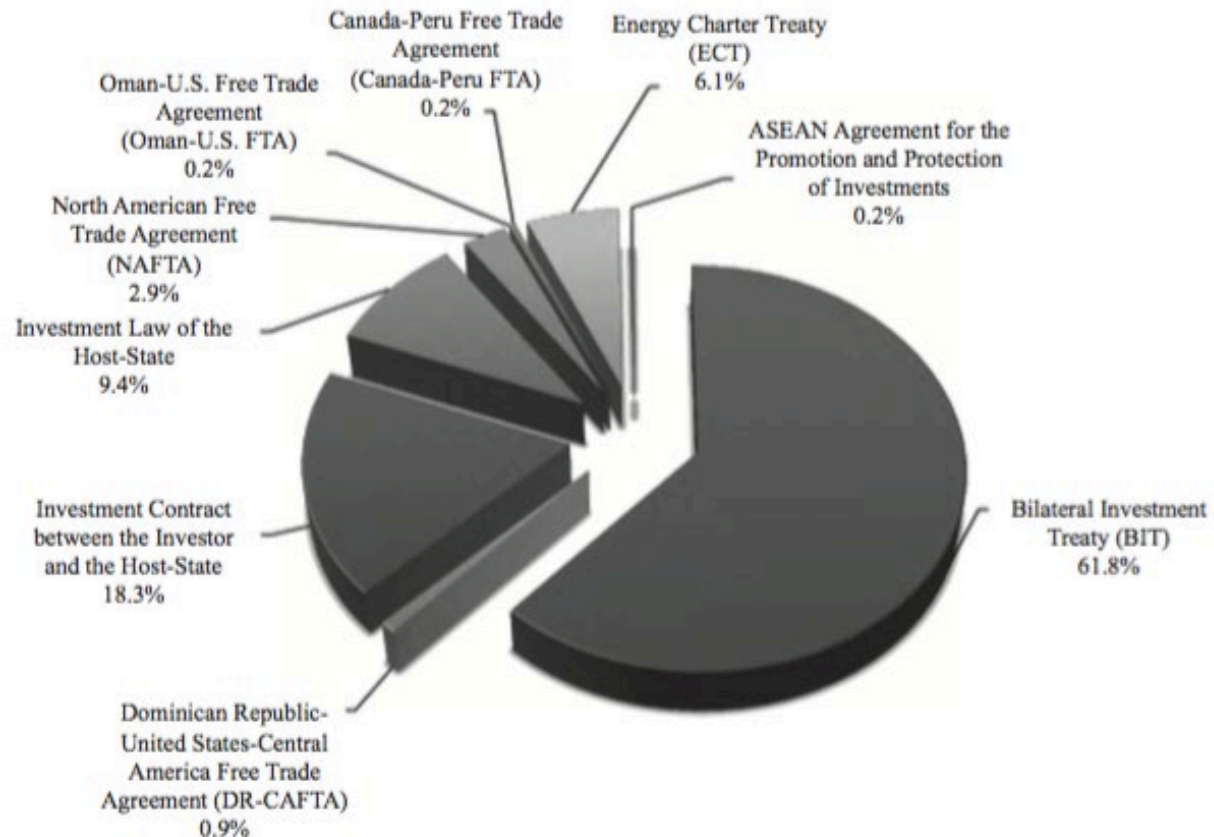
## Article 9 Netherlands-Kazakhstan BIT

- 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

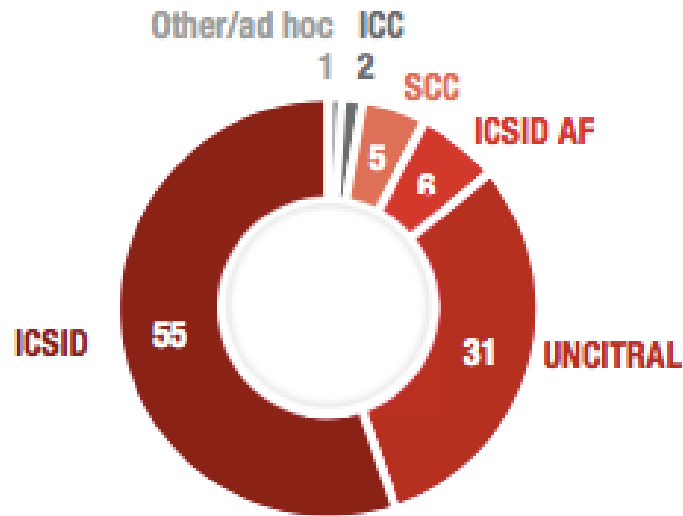
Figure 5 Basis of Consent Invoked to Establish ICSID Jurisdiction in Registered ICSID Cases



Source: ICSID (2015).

# Disputes by Arbitration Rules

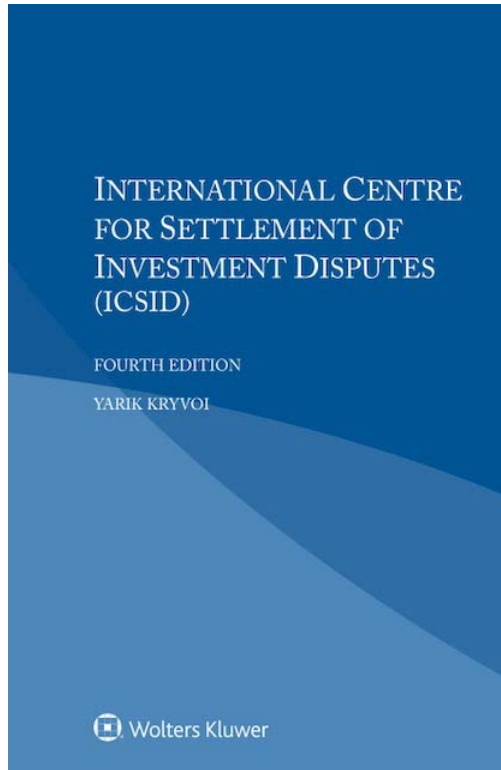
**Figure 7. Known ISDS cases filed by arbitral rules, 1987–31 July 2017 (Per cent)**



Source: ©UNCTAD, ISDS Navigator.

Note: Excluding five cases on which such information was not available.

# Distinctive Features of ICSID

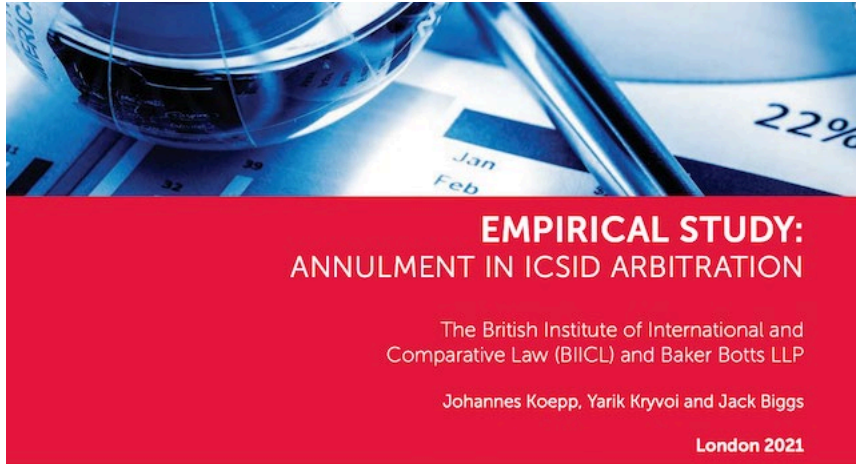


- Firmly establishes the capacity of a private individual to proceed against a state in an international forum
- No need for intervention from the government
- Complete jurisdictional system
- Waiver of sovereign immunity and diplomatic protection

Kryvoi, Yarik, International Centre for Settlement of Investment Disputes (ICSID) (4<sup>th</sup> edition, 2020). Kluwer. Available at:

<https://rus.wolterskluwer.com/store/product/international-centre-for-settlement-of-investment-disputes-icsid-fourth-edition/>

# ICSID Annulment

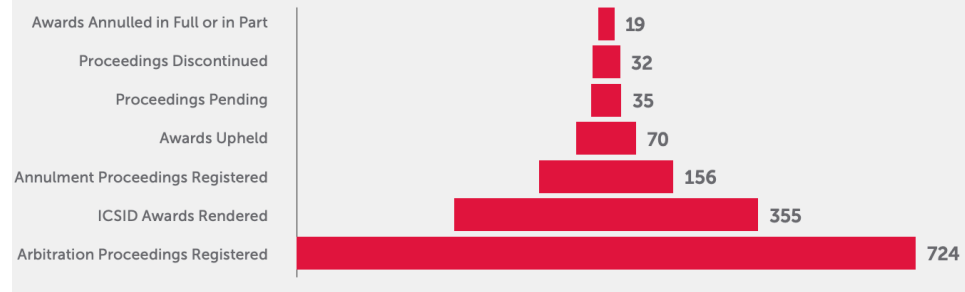


Kryvoi, Yarik and Koepp, Johannes and Biggs, Jack, *Empirical Study: Annulment in ICSID Arbitration*, BIICL & Baker Botts (2021), Available at [https://www.biicl.org/documents/141\\_annulment-in-icsid-arbitration.pdf](https://www.biicl.org/documents/141_annulment-in-icsid-arbitration.pdf)

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

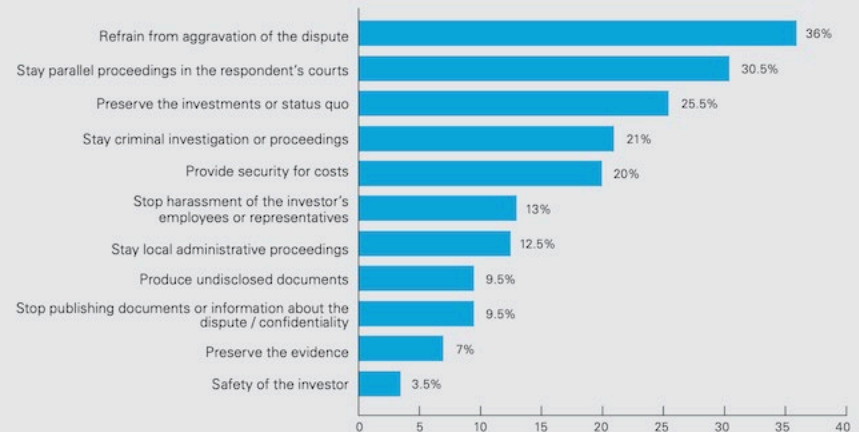
## 2019 Empirical study: Provisional measures in investor-state arbitration

David Goldberg, Yarik Kryvoi, Ivan Philippov  
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 (2019).

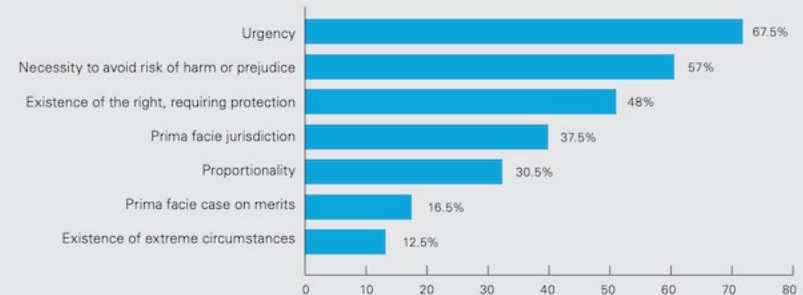
[https://www.biicl.org/documents/78\\_isds-provisional-measures.pdf](https://www.biicl.org/documents/78_isds-provisional-measures.pdf)

Chart 12: Most requested types of the provisional measures



Based on 114 analysed decisions

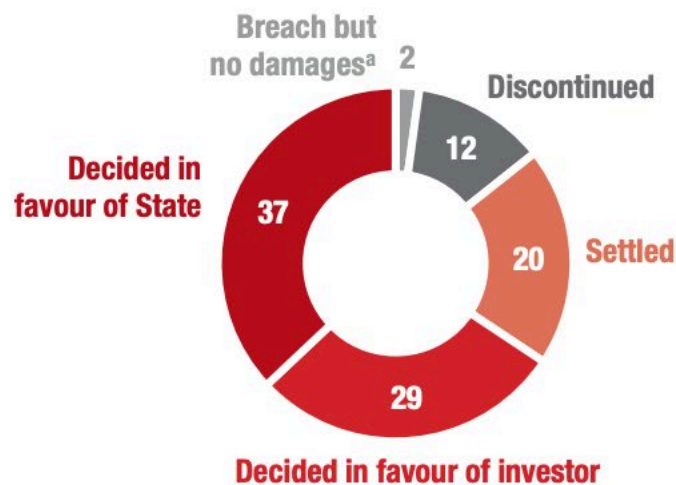
Chart 17: Most widely used criteria for granting provisional measures



Based on 114 analysed decisions

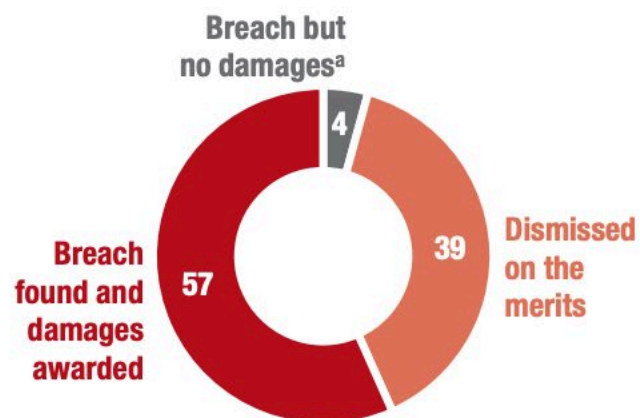
# Outcomes of cases

**Figure 4. Results of concluded cases, 1987–2020 (Per cent)**



Source: UNCTAD, ISDS Navigator.

**Figure 5. Results of decisions on the merits, 1987–2020 (Per cent)**



Source: UNCTAD, ISDS Navigator.



### 2021 Empirical Study:

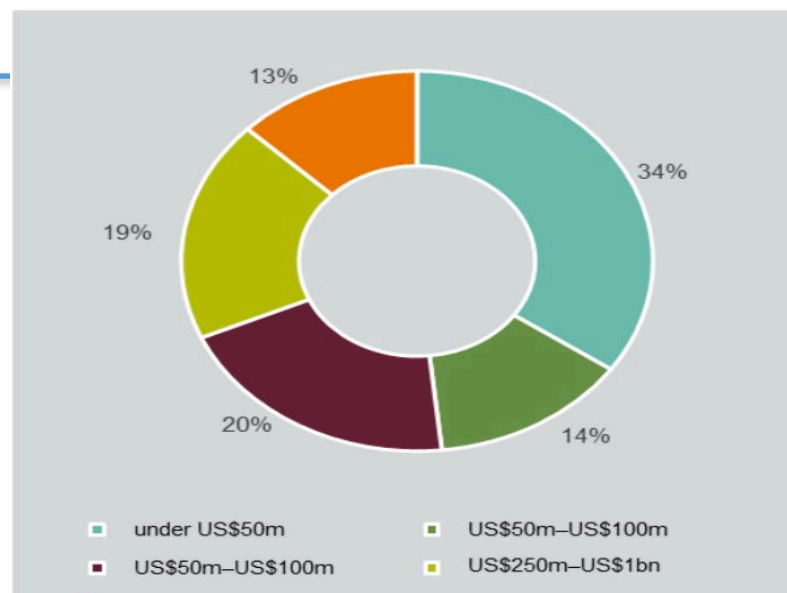
Costs, Damages and Duration in Investor-State Arbitration



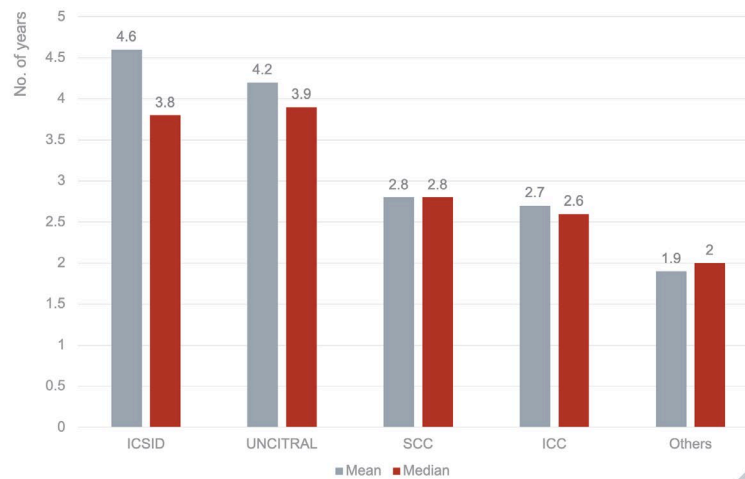
Matthew Hodgson, Yarik Kryvoi, Daniel Hrcak  
June 2021

Hodgson, Matthew and Kryvoi, Yarik and Hrcak Daniel, Costs, Damages and Duration in Invest State Arbitration. BIICL and Allen & Overy, London, 2021, Available at [https://www.biicl.org/documents/136\\_isds-cost-damages-duration.pdf](https://www.biicl.org/documents/136_isds-cost-damages-duration.pdf)

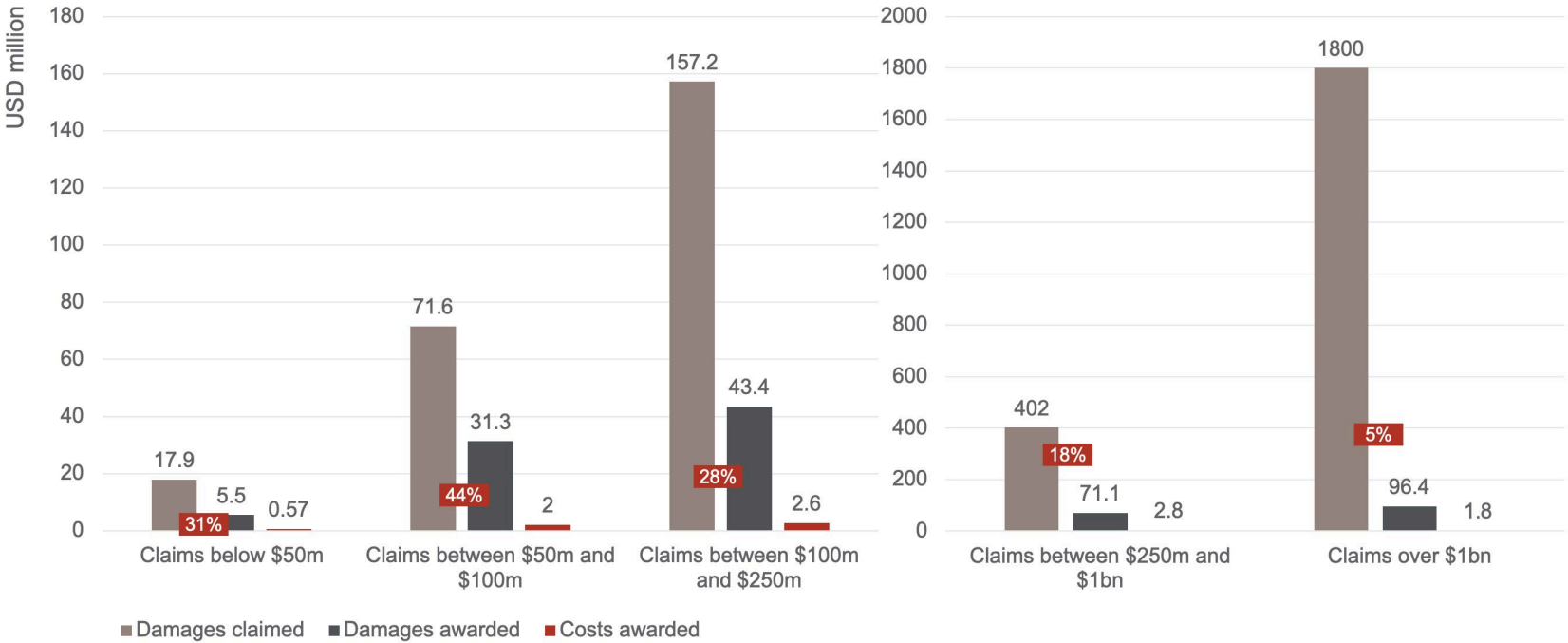
Figure 38: Share of cases by amount in dispute



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



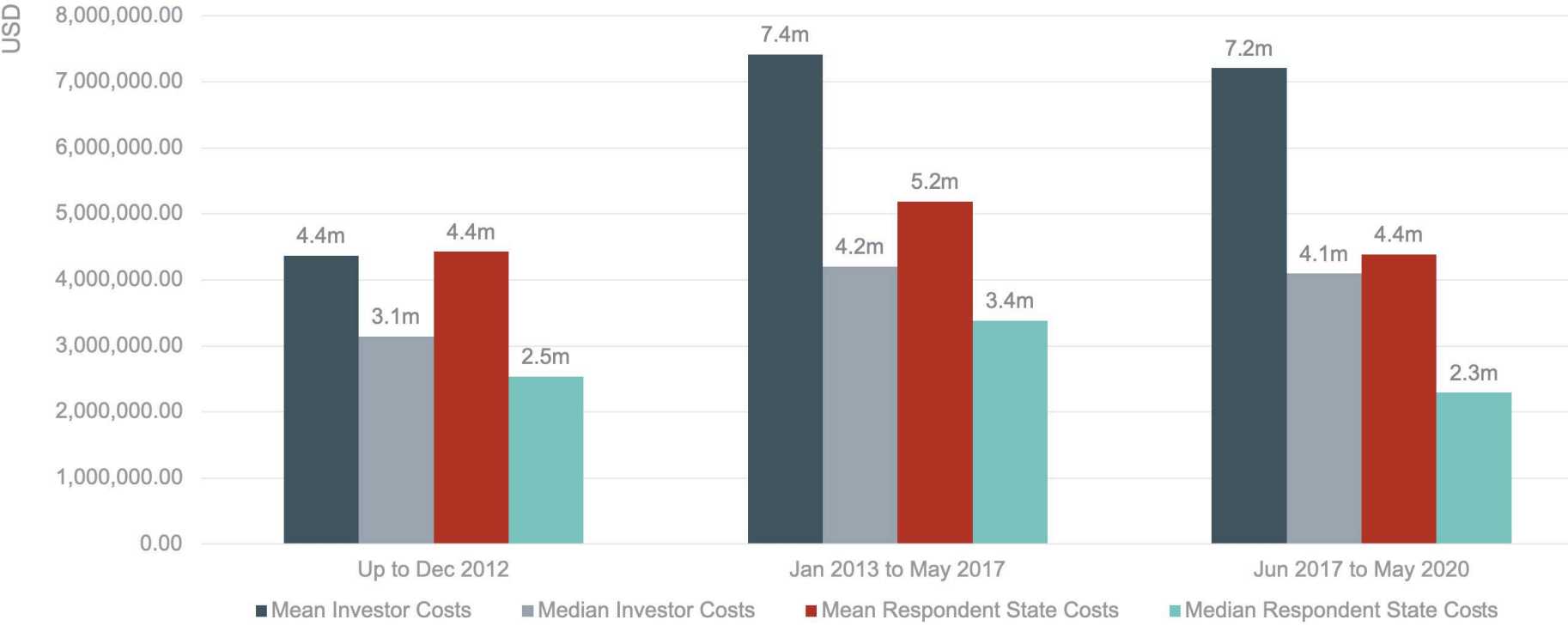
# Key Finding 6: Successful investors can expect a significant 'haircut' on the amount they claim. (cont'd)



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

# 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***

# Research ICSID cases

ICSID

 Search All

International Centre for Settlement of Investment Disputes

Home > Cases > Search ICSID Cases
Print

- About ICSID
- Member States
- Rules
- Cases
- List of Cases
- Search Cases
- Search Online Decisions and Awards
- How to File a Request
- Schedule of Fees
- Documents
- Publications

**Subscribe to:**

Email Alerts

Email Address

## Search ICSID Cases

This database provides access to publicly available information in ICSID cases, including: the names of the parties; the subject matter of the dispute; the date of the constitution of a conciliation commission, an arbitral tribunal or an ad hoc committee including the names of its members; the status of proceedings; and references to published decisions and awards.

View All Cases    
  View Pending Cases    
  View Concluded Cases

**Advanced Search**

Claimant <input style="width: 90%;" type="text"/>	Respondent <input style="width: 90%;" type="text"/>	
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: 90%;" 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 ▼
<a href="#">ARB/08/13</a>	Alapli Elektrik B.V.	v. Republic of Turkey	Pending
<a href="#">ARB/08/12</a>	Caratube International Oil Company LLP	v. Republic of Kazakhstan	Pending
<a href="#">ARB/08/11</a>	Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise	v. Ukraine	Pending
<a href="#">ARB/08/10</a>	Repsol YPF Ecuador, S.A. and others	v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)	Pending
<a href="#">ARB/08/9</a>	Giordano Alpi and others	v. Argentine Republic	Pending
<a href="#">ARB/08/8</a>	Inmaris Perestroika Sailing Maritime Services GmbH and others	v. Ukraine	Pending
<a href="#">ARB/08/7</a>	Itera International Energy LLC and Itera Group NV	v. Georgia	Pending
<a href="#">ARB/08/6</a>	Perenco Ecuador Limited	v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador	Pending

# International Investment Law and Dispute Resolution (Online Course)



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





**PROFESSOR YARIK KRYVOI**  
British Institute of International and Comparative Law



- reform of the Energy Charter Treaty
- UNCITRAL Working Group
- corruption allegations in ISDS
- sanctions and international arbitration



## Annual Investor-State Dispute Settlement Update 2023

### About the instructor

Yarik Kryvoi is Director of the [Investment Treaty Forum](#) at the British Institute of International and Comparative Law and a co-founder of the [Arbitration Lab](#).

Prof Kryvoi practiced with top law firms in Washington, D.C. and London has published on international investment law and dispute resolution and runs [BIICL online course](#) on this topic. The new edition of his [monograph on ICSID](#) will be published by Kluwer in 2023.

The course will feature his insider's perspectives related to the work of the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform and the empirical study on allegations of corruption in ISDS commissioned by the UN on Drugs and Crime.

### What will the course cover?

- An overview of the **Energy Charter Treaty reform process**, its impact on ISDS and why states withdraw from the treaty
- The most important recent developments at the **UNCITRAL Working Group III**, including third party funding, costs and damages, and multilateral instrument on ISDS reform
- Key empirical findings of the yet not public UN study on the impact of **corruption allegations in ISDS**, including relevant treaty provisions, jurisdiction and merits, burden and standard of proof and the red flag analysis methodology
- The impact of **sanctions on investor-state arbitration** (users, institutions, and law firms) with a particular emphasis on EU and UK Russia-related sanctions

# More information

---

- Y. Kryvoi, International Centre for Settlement of Investment Disputes, Kluwer, 2020
- BIICL Investment Treaty Forum
- LinkedIn: [kryvoi](#)
- Email [y.kryvoi@biicl.org](mailto:y.kryvoi@biicl.org)