



Arbitration and Environmental Disputes

16 June 2025, London Arbitration Summer School
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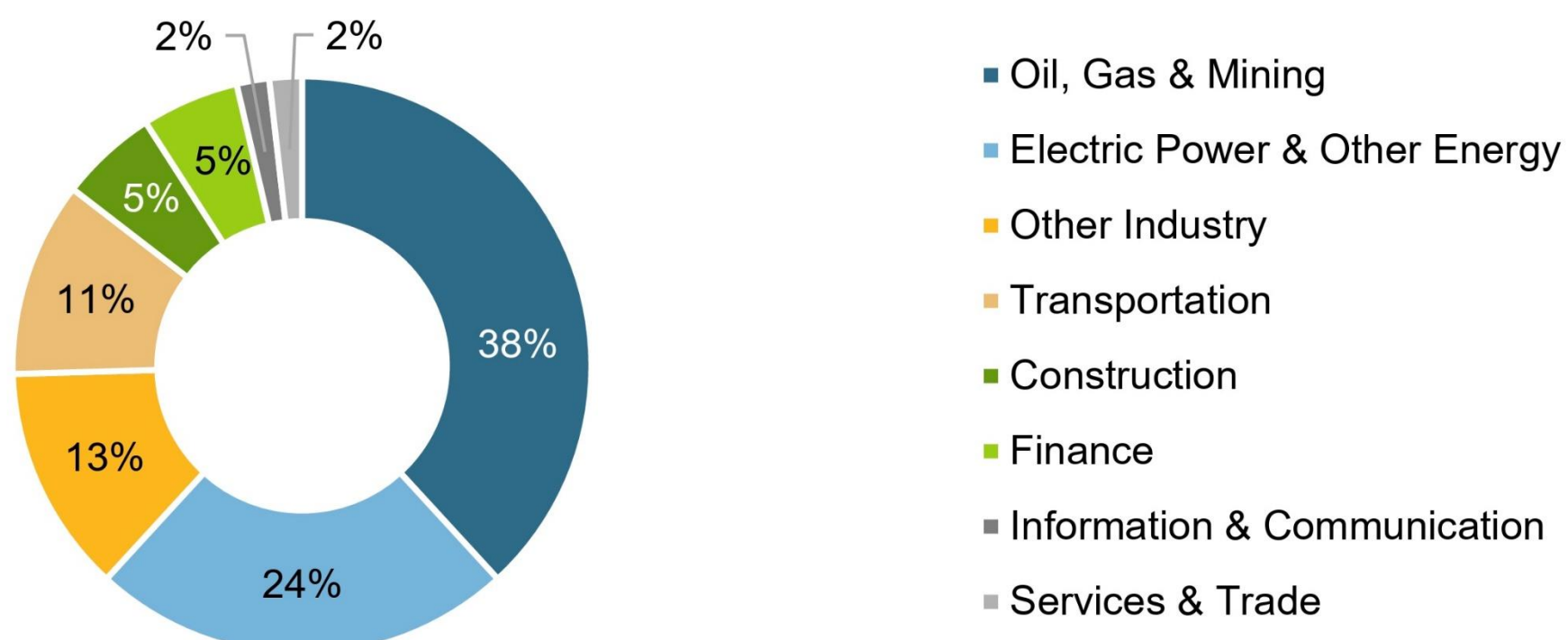
Introduction

Environmental Measures and Investment Arbitration

“ **At least 175 such cases [cases relating to environmental regulations] have been brought against States, amounting to about 15 per cent of all 1,190 known ISDS cases based on IIAs.** ”

UNCTAD Issue Note, Treaty-based Investor–state
Dispute Settlement Cases and Climate Action
(September 2022)

Chart 13: Distribution of ICSID Cases Registered in CY2024, by Economic Sector



The ICSID Caseload— Statistics Issue 2025 - 1

Report of the Special Rapporteur
‘Paying polluters: the catastrophic
consequences of investor-State dispute
settlement for climate and environment
action and human rights’, 13 July 2023,
UN Doc A/78/168:

ISDS is “a daunting obstacle” to
environmental/climate action

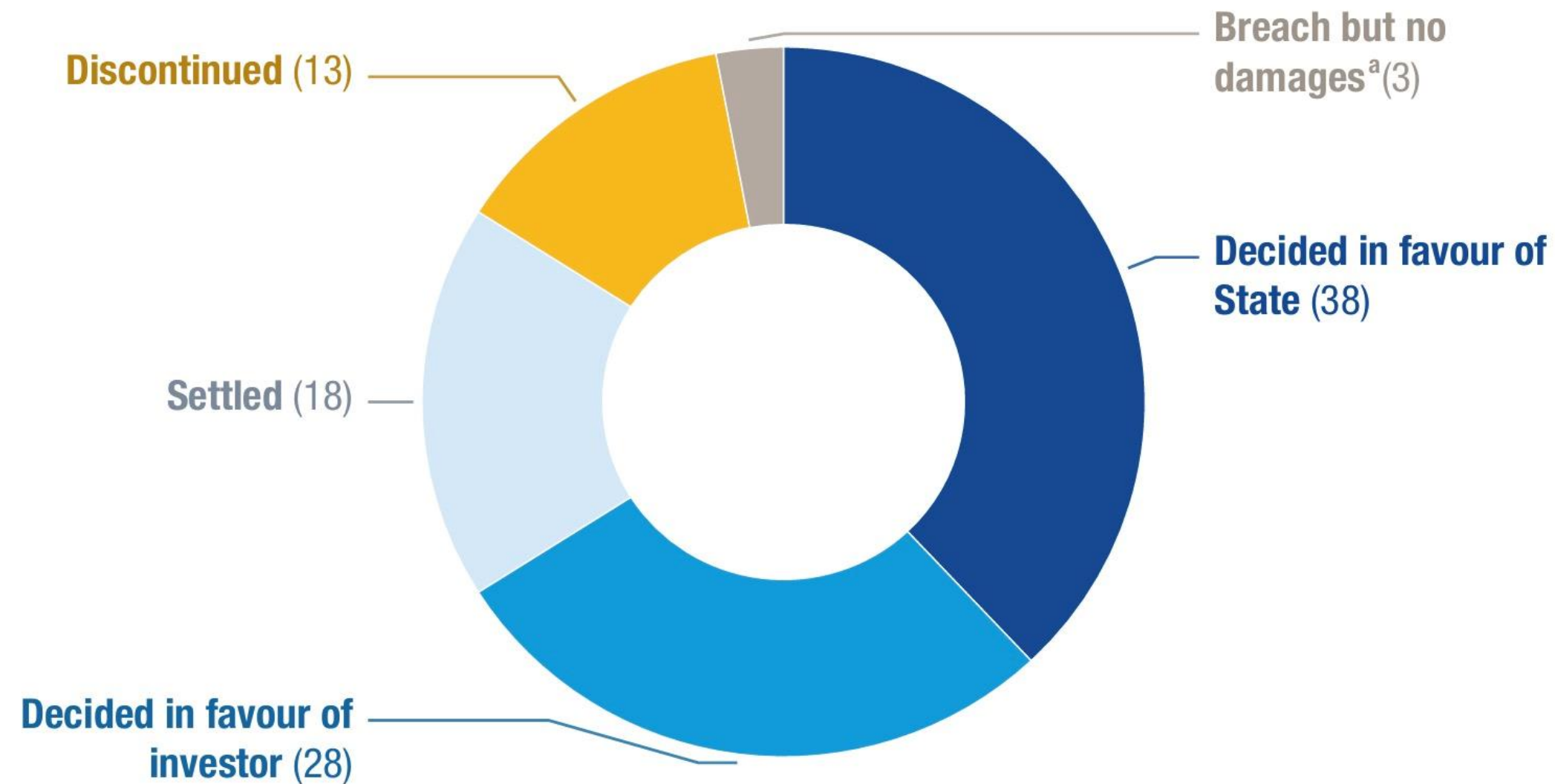
Pro-investor bias?



Figure 3

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

Share of concluded cases, 1987–2023
(Percentage)



UNCTAD, IIA Issues
Note, November 2024,
'Facts and Figures on
Investor–State Dispute
Settlement Cases'

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

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

Pro-investor bias in fossil fuel cases?

Figure 7. The outcome of concluded fossil fuel arbitrations, total number, and percentage

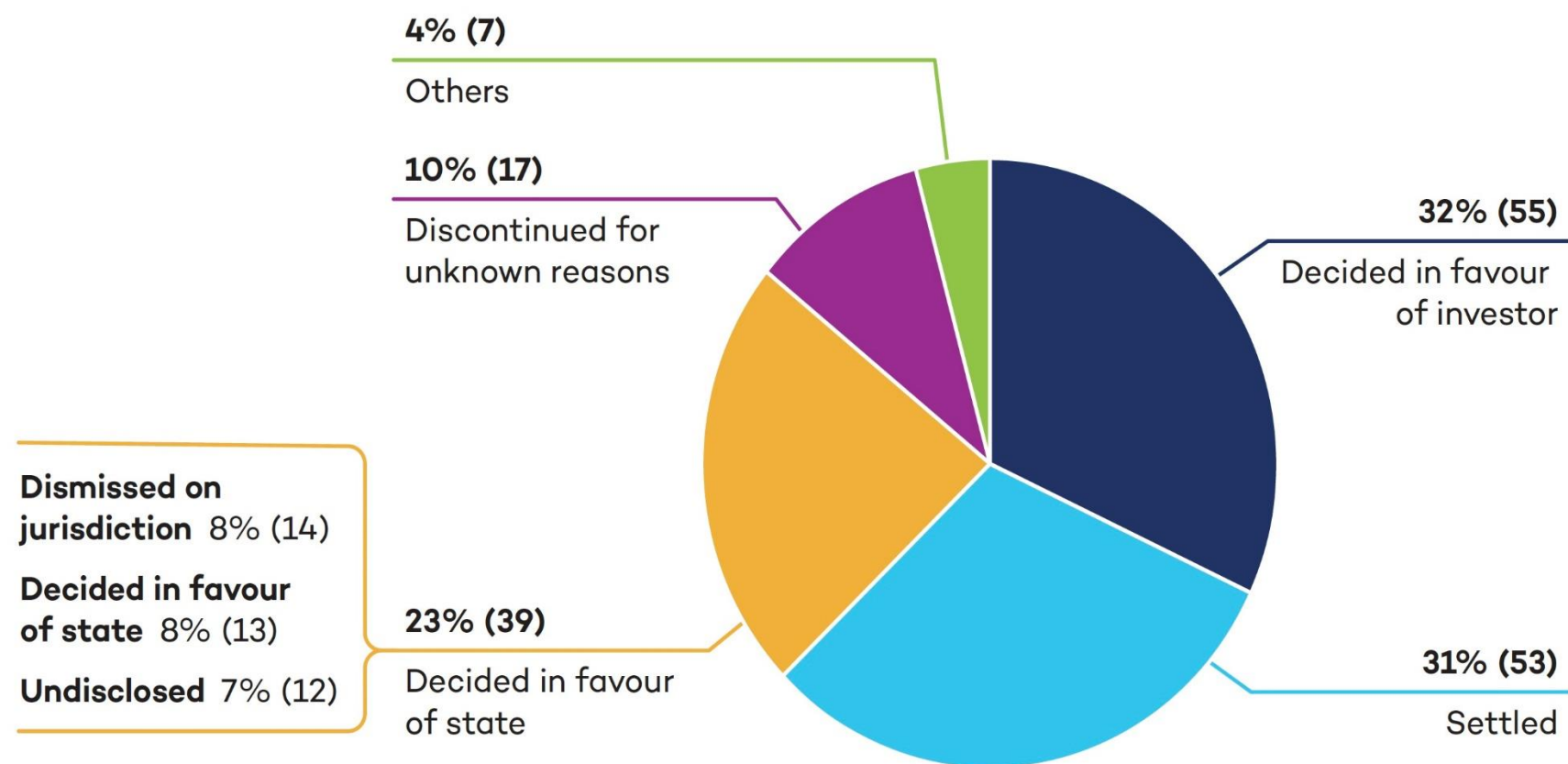
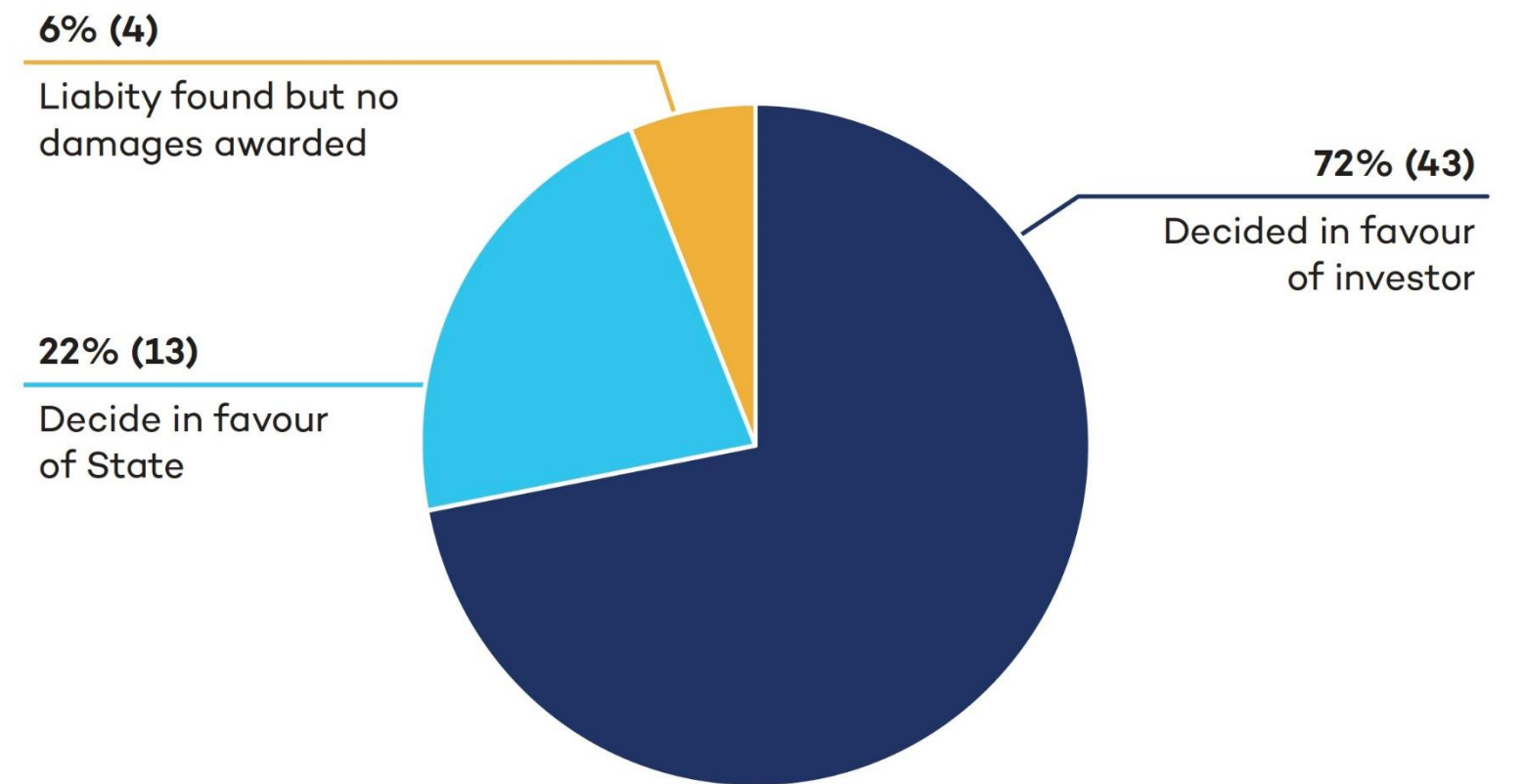


Figure 8. The outcome of disclosed fossil fuel arbitrations decided on the merits (60)



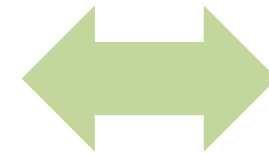
Source: Author diagram.

Source: IISD, Investor–State Disputes in the Fossil Fuel Industry (2021)

ISDS causes a 'regulatory chill'?

"ISDS cases having a 'chilling effect' on implementing the stringent climate regulations required to fulfill a pact to curb global warming."

"U.N. reform needed to stop companies fighting climate rules: Nobel laureate Stiglitz", Reuters, 30 May 2019



"There is no evidence which would support the claim of a regulatory-chill"

Ethyl v. Canada is not a case of regulatory chill because it is due to a decision by the domestic panel under Canada's Agreement on Internal Trade (AIT) that the challenged measure that the MMT Act (prohibition of a commercial importation of and inter-provincial trade of MMT, a gasoline additive) failed to comply with Canada's obligations under the AIT.

Only 9% of ICSID cases actually resulted from legislative acts - the theory that ISDS restricts countries' regulatory branch does not have its basis

'Regulatory chill' in the climate change context?

The Hulot law case

July 2017

M. Nicolas Hulot (then Minister of the Environment) drafted the 'Hulot' law for a phase-out of fossil fuels in the French territory by 2040

September 2017

Revised Hulot law appeared: it allowed the renewal of oil exploitation permits until 2040 and beyond (on certain conditions)

August 2017

Council of State received several lobby letters on the Hulot law including one from a Canadian oil company Vermillion, which produces 75% of oil in France, in which it threatened to sue France under ISDS if it enacts the Hulot law

?

Climate as a public good – the free rider issue?

Tribunals have disregarded the states' legitimate regulatory power?

“

[N]o ISDS tribunal has ever found that a legitimate environmental or health law or regulation of a State breached an investment treaty.

”

Judge Charles N. Brower and Jawad Ahmad, 'Why the "Demolition Derby" that Seeks to Destroy Investor-State Arbitration?' (2018)

Recent cases concerning the refusal of mining or environmental permits, where the claims were dismissed on the merits

- *Discovery Global v. Slovakia*, ICSID Case No. ARB/21/51, Award, 17 January 2025
- *Gabriel Resources v. Romania*, ICSID Case No. ARB/15/31, Award, 8 March 2024 (by the majority)
- *Montauk Metals v. Colombia*, ICSID Case No. ARB/18/13, Award, 7 June 2024
- *Red Eagle Exploration v. Colombia*, ICSID Case No. ARB/18/12, Award, 28 February 2024

Cf.

- *Odyssey Marine Exploration v. Mexico*, ICSID Case No. UNCT/20/1, Award, 17 September 2024
#Arbitrator Sand's dissenting opinion

Fossil phase-out-related investment arbitration cases

Cases		Challenged measures	(Major) developments
<i>Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands</i> , ICSID Case No. ARB/21/22		December 2019 legislation that seeks to phase-out of coal-produced energy by 2030	Uniper has withdrawn from this claim as a condition of a €15 billion bailout from the German government
<i>RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands</i> , ICSID Case No. ARB/21/4		December 2019 legislation that seeks to phase-out of coal-produced energy by 2030	September 2022: the Higher Regional Court of Cologne declared that these claims were inadmissible due to their intra-EU nature January 12, 2024 the Tribunal issued an order on discontinuance
<i>TC Energy Corporation and TransCanada Pipelines Limited v. United States of America</i> , ICSID Case No. ARB/21/63 <i>Alberta Petroleum Marketing Commission v. USA</i> , Case No. UNCT/23/4		Biden administration’s decision to cancel the Keystone XL Pipeline project that aimed at transporting crude oil from Alberta to refineries in the US	TC Energy – dismissed for lack of jurisdiction (majority) Alberta Petroleum - pending
<i>Zeph Investments Pte Ltd v The Commonwealth of Australia</i> , PCA Case No. 2023-67	Refusal of a grant for a coal mine project by the Waratah Coal (Zeph’s subsidiary) by the Queensland Department of Environment and Science The refusal was based on the Queensland Land Court’s recommendation on the evidence of climate change and human rights impacts of the project, including its Scope 3 emissions		Zeph filed a claim based on Chapter 11 of the ASEAN-Australia-New Zealand Free Trade Agreement, claiming damages of AUD 41.3 billion



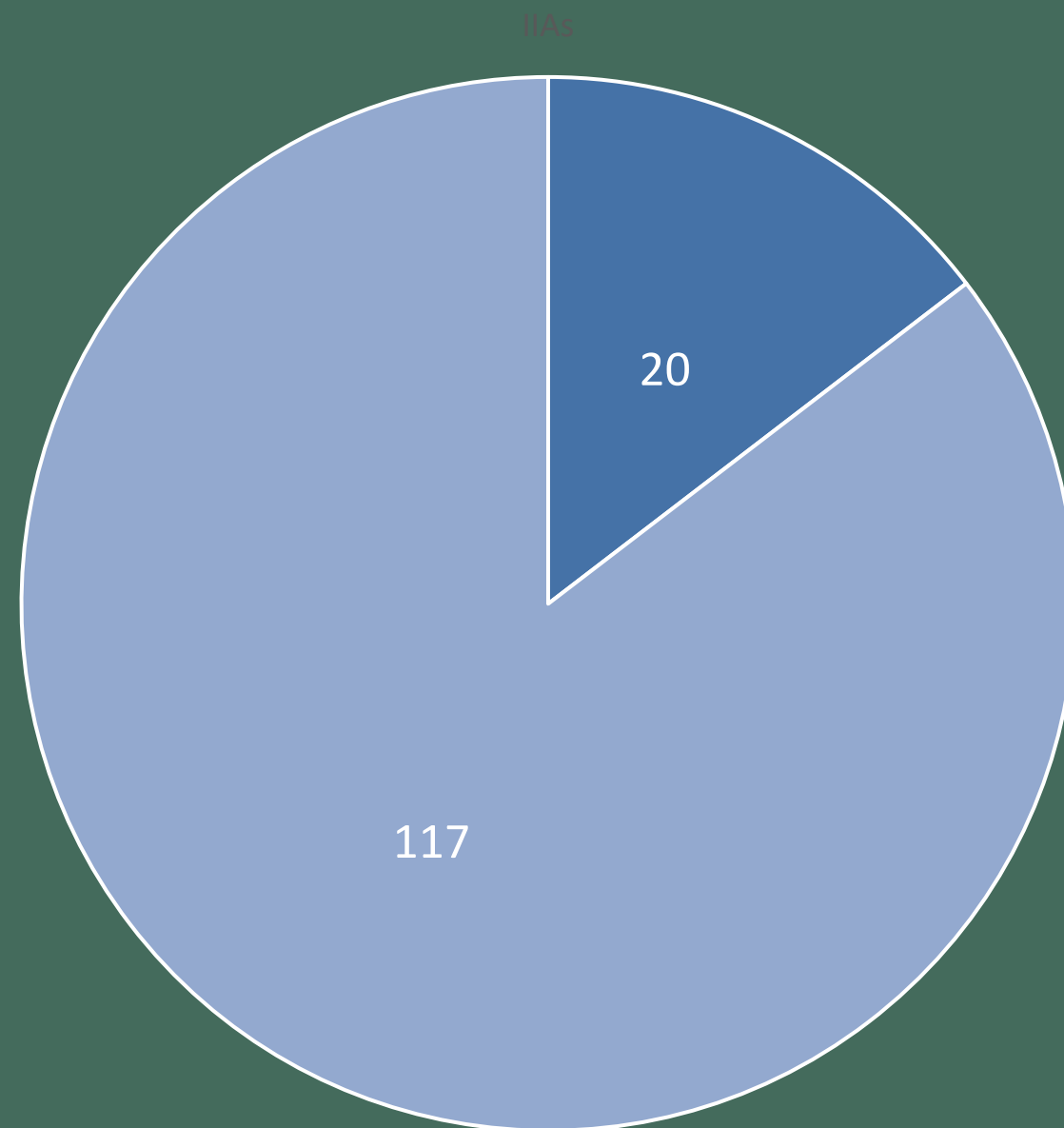
Fossil phase-out-related investment arbitration cases

Cases	Challenged measures	(Major) developments
<i>Ruby River Capital LLC v. Canada</i> , ICSID Case No. ARB/23/5	Rejection of the proposed liquefied natural gas (LNG) facility project in Québec by GNL Québec Inc (GNLQ) The grounds for the rejection included anticipated negative net contributions to global GHG emissions, deceleration of energy transition through foreign LNG imports, and GNLQ’s alleged failure to achieve social acceptability in Québec	GNLQ’s parent company (US) filed a claim based on the NAFTA in February 2023 (four months before the sunset period for NAFTA expires)
<i>Westmoreland Coal Company v. Government of Canada</i> ICSID Case No. UNCT/20/3 ICSID Case No. UNCT/23/2	Canada’s and Alberta’s environmental policy for coal phase-out	Both cases dismissed on jurisdictional grounds
<i>Azienda Elettrica Ticinese v. Federal Republic of Germany</i> , ICSID Case No. ARB/23/47	German 2020 Coal Ban Law that requires shutdown of coal plants constructed in early 2000s, and provides differentiated treatment between coal-fired plants and lignite-fired plants	AET filed its claims before ICSID on 29 September 2023 under the sunset clause of the ECT, arguing that the Coal Ban Law breaches expropriation, FET, FPS obligations

<i>Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic</i> , ICSID Case No. ARB/17/14	Law that barred oil and gas exploration and production activity within 12 nautical miles of the Italian coastline *Measures were driven by ecological concerns, not climate change (see Lone Pine Resources v. Canada) ** June 2025: The Award was annulled by an ICSID Annulment Committee based on Article 52(1)(a) of the ICSID Convention
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Reference to Climate Change – IIAs 2020-2025



- With reference to climate change (UNFCCC, Paris Agreement, etc)
- Without reference to climate change (UNFCCC, Paris Agreement, etc)

Corporate environmental responsibility in ISDS

Criticisms against the one-sidedness of the IIA-based dispute settlement mechanism

Environment/Human Rights-investment conflicts

Backlash against ISDS

Corporate environmental and human rights responsibility

'Paradigm shift' in the IIA regime

II

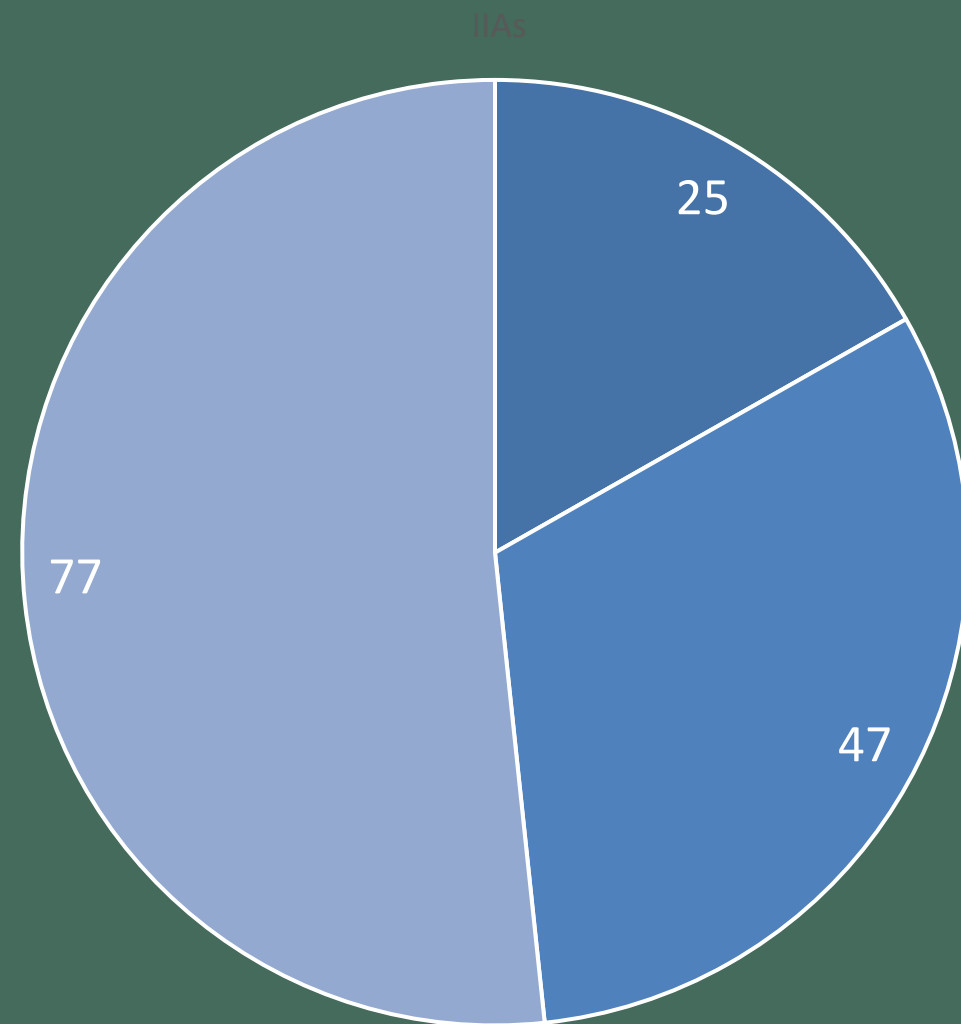
The protection and promotion of foreign investment not as the end itself but as a means to achieve sustainable development

UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa, Note by the Secretariat', 17 July 2019, UN Doc. A/CN.9/WG.III/WP.176

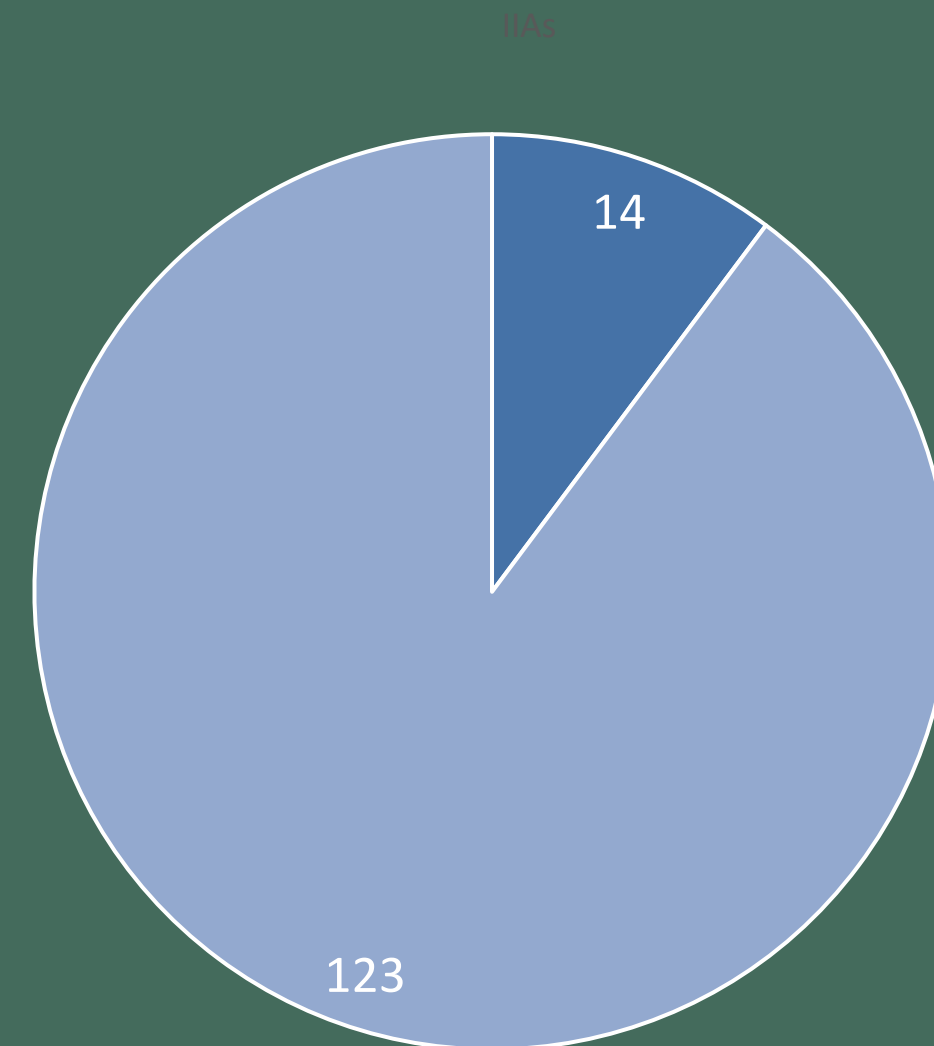
United Nations Resolution 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development', UN Doc. A/RES/70/1, Goal 17, target 10 (trade)

Corporate environmental responsibility in ISDS

CSR provisions in IIAs 2020-2025



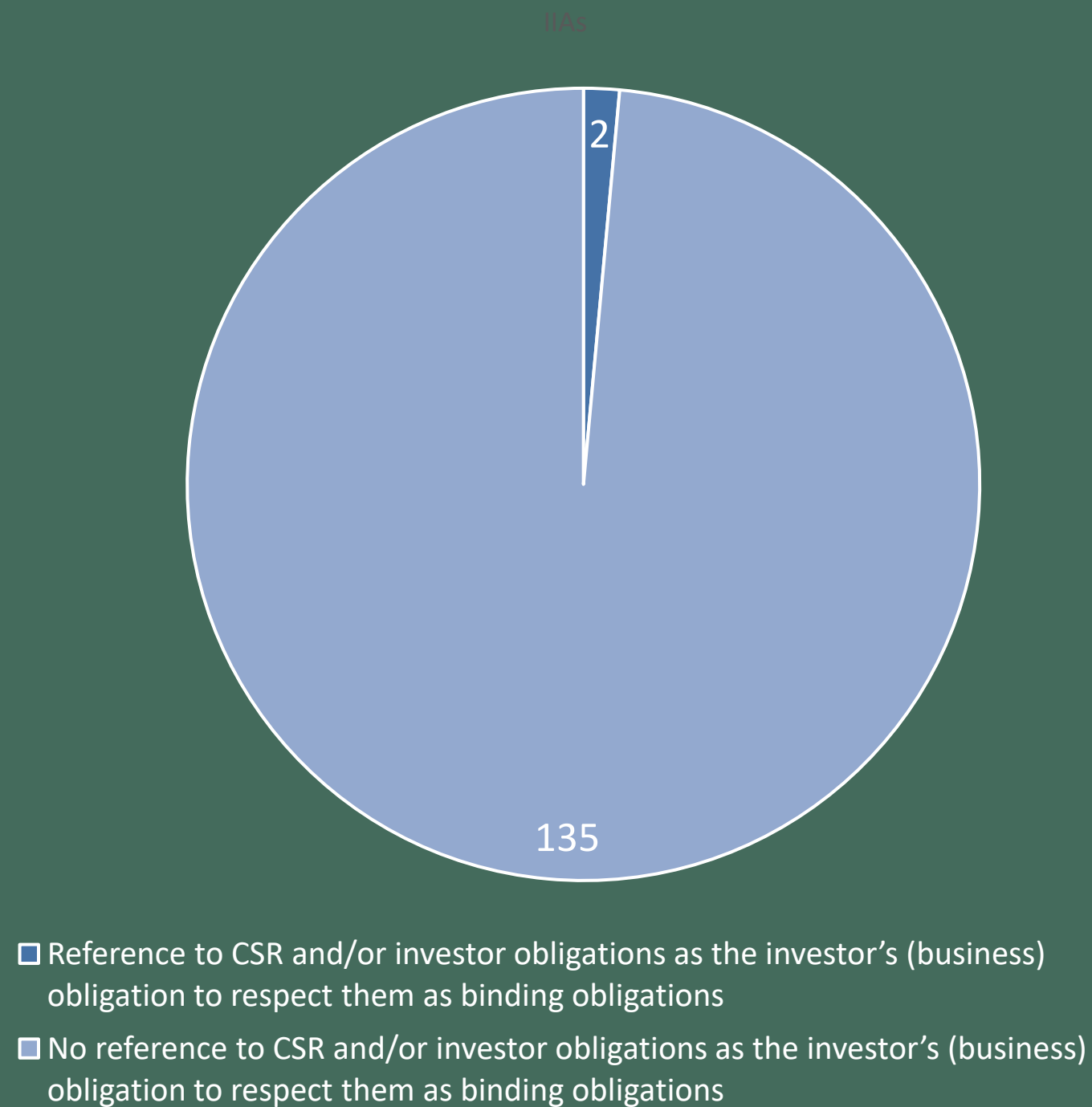
- Reference to business's (investor's) responsibilities/CSR in the preamble
- CSR in main text
- No reference to CSR



- Reference to CSR and/or investor obligations as the investor's (business) obligation to respect them as non-binding obligations
- No reference to CSR and/or investor obligations as the investor's (business) obligation to respect them as non-binding obligations

Corporate environmental responsibility in ISDS

Responsibilities / obligations of investors in IIAs 2020-2025



Corporate environmental responsibility in ISDS

Investor obligations with reference to international standards

2023 AfCFTA Protocol on Investment	Article 33 - Business Ethics, Human Rights and Labour Standards: Investors and their investments shall comply with high standards of business ethics, investment-related human rights and labour standards, and in particular shall: a. support and respect the protection of internationally recognised human rights; b. ensure that they are not complicit in human rights abuses; ...
2016 Morocco-Nigeria Bilateral Investment Treaty (BIT)	Article 19: the adoption of ‘internationally accepted standards in corporate governance’ and establishment and maintenance of ‘local community liaison processes’
CF. Organization of the Islamic Conference (OIC) Agreement (1981)	Article 9: The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

Corporate environmental responsibility in ISDS

Investors' environmental/human rights obligations in investment arbitration

- Counterclaim by the defendant state? Rare success at the merits phase
 - *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award
 - *Urbaser S.A. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award
 - *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award
- Cf. *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims / *Perenco Ecuador Ltd v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/6, Award)
 - Failure to identify 'secondary rules'
- Reform options?