



# Investor-State Arbitration:

The Protections Afforded to Investors by Bilateral Investment Treaties

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# Pursuing Investors' Treaty Rights

- **Usual remedies against adverse Government action and regulation**
  - Lobbying on domestic level, regulatory proceedings, domestic litigation
- **Investment treaty arbitration – powerful tool to challenge the regulation in a more high-profile legal framework**
  - Close to 3'000 BITs in force as well as numerous FTAs and multilateral free trade agreements such as NAFTA, ECT, ASEAN
  - Substantial increase in investment arbitration cases since 1995 (317 treaty-based cases filed through 2009)
  - Examples of investment treaty claims (based on Swiss BITs)
    - ✓ Failure to honour a 1996 contract with SGS Société Générale de Surveillance for pre-shipment inspection services (*SGS v. Paraguay*)
    - ✓ Alleged expropriation of commercial farms, forestry plantations and alleged failure to take adequate action to prevent illegal squatters from invading the forestry (*Border Timbers v. Zimbabwe*)
    - ✓ Alleged expropriation of trademark rights as a result of anti-tobacco legislation (*Philip Morris v. Uruguay*)
  - Strategic advantages of treaty arbitration:
    - ✓ Possibility of “forum shopping” (based on dual nationality or foreign subsidiaries of investors)
    - ✓ Review of regulation according to different, international legal standards
    - ✓ Potential additional advantage to local regulatory proceedings: claim of damages

# “Investment” and Arbitration Clause

- **Is there an investment under the treaty?**
  - Usually broad definition of investment, with a catalogue of examples (including movable and immovable assets, stocks, bonds, IP, goodwill, concessions)
  - Special requirements under ICSID (contribution, duration, expectation of return, assumption of risk)
- **Is there a forum under an investment treaty?**
  - Usually broad arbitration options
  - **Typical BIT arbitration clauses provide several options** (e.g. Article 10 Switzerland-Kenya BIT)

“[...] l'investisseur aura le choix entre:

    - (a) le Centre international pour le règlement des différends relatifs aux investissements (**CIRDI**), institué par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, ouverte à la signature à Washington le 18 mars 1965 (ci-après la “Convention de Washington”); et
    - b) un tribunal arbitral ad hoc qui, à moins que les parties au différend n'en disposent autrement, sera constitué conformément au règlement d'arbitrage de la Commission des Nations Unies pour le droit commercial international (**CNUDCI**). ”

# Investment Arbitration Institutions

- **ICSID**

- Institutional arbitration (institutional framework and experienced administration)
- An established panel of arbitrators (may choose outside the list, fixed arbitrator fees)
- Limited annulment procedure (request submitted to an *ad hoc* committee; limited grounds for review)
- Enhanced enforcement worldwide (award is binding and enforceable in any Member State; reliance on New York Convention not necessary)

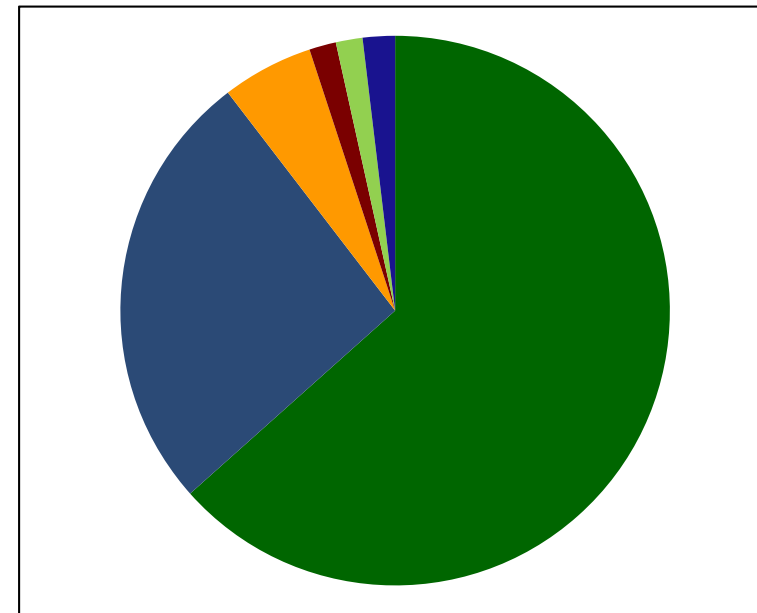
- **UNCITRAL**

- Ad hoc arbitration under well-tested rules of procedure, although resort to a court may be necessary if a party refuses to cooperate in process (e.g., appointment of arbitrators)
- Awards are enforceable under the New York Convention

- **Others**: ICC, SCC, LCIA, special procedures set out in a BIT

# Statistics I

- 317 treaty-based cases filed through 2009
- 77 States have faced claims
- Forums of arbitration
  - ICSID or its additional facility (201)
  - Ad hoc arbitration under UNCITRAL Rules (83)
  - Stockholm Chamber of Commerce (17)
  - ICC (5)
  - Ad hoc arbitration (5)
  - Other (6)



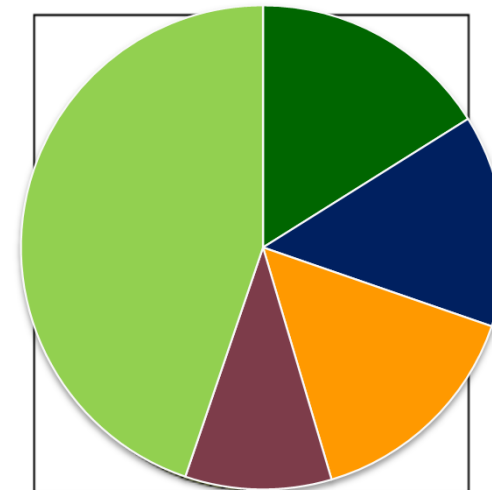
■ ICSID ■ UNCITRAL ■ SCC ■ ICC ■ Ad hoc ■ Other

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# Statistics II

- **The outcomes (through 2009; out of 317 total cases):**

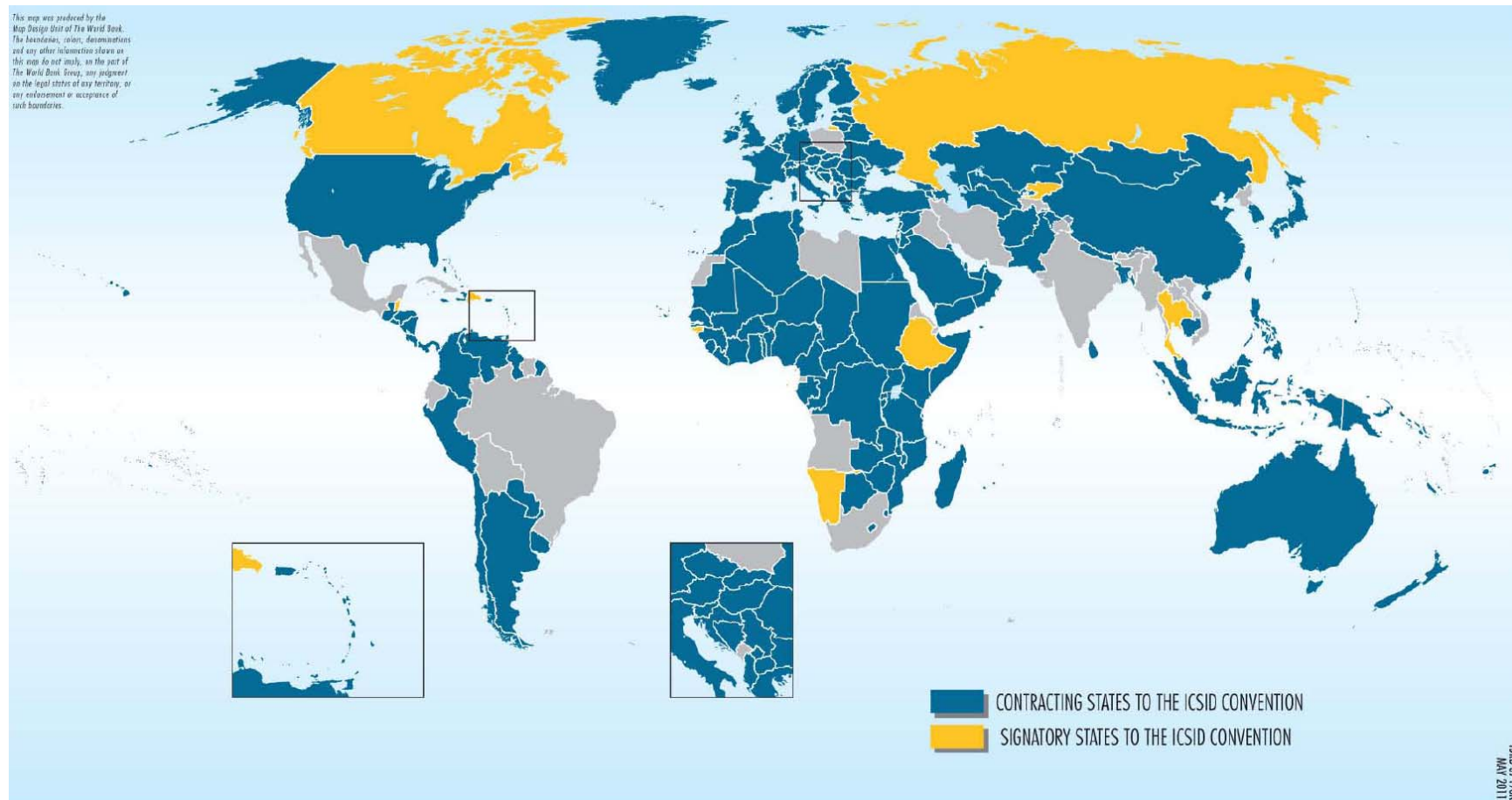
- 51 cases in favor of States (16%)
- 45 cases in favor of investors (14%)
- 48 cases settled amicably (15%)
- 31 cases status unknown (10%)
- 142 pending cases (45%)



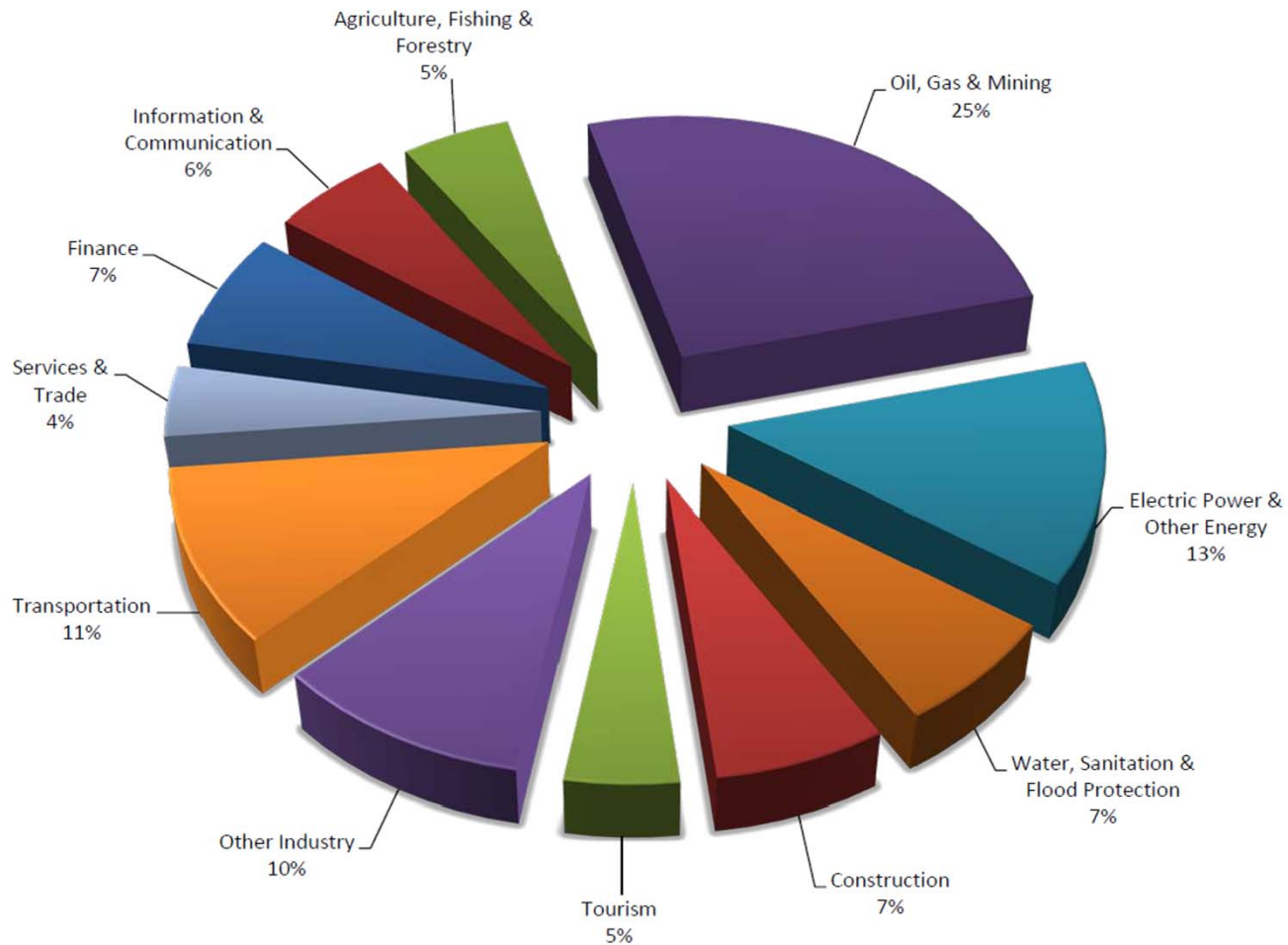
■ States ■ Investors ■ Settled ■ Resolved ■ Pending

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# Statistics III - ICSID Member States



# Statistics IV - ICSID Case Load by Economic Sector





# The Claimant / The Defendant

- **Who is the investor claimant?**

- Individuals as well as legal entities can be investors
- Forum Shopping 1: Multiple nationality of individuals
- Forum Shopping 2: Companies with foreign affiliates

- **Who is the investment treaty defendant?**

- Host State
- Possible limitations of responsibility of host State for acts of an agency

# Standards of Protection

- **Does the adverse measure violate any standard of treatment under the treaty?**
  - No expropriation without just compensation
  - Fair and equitable treatment (FET)
  - Non-impairment (arbitrary, unreasonable or discriminatory measures)
  - Full protection and security
  - National treatment
  - Umbrella clause
- **Most favored nation treatment (MFN)**
  - Possibility to pick from more favorable treatment provisions in other BITs concluded by the host State
  - BIT/MFN-driven organization of assets

# Limitations and Extensions

- **Does the treaty contain any limitations?**
  - Ratione temporis: covers all existing investments or only those made after the entry into force?
  - Admission requirements, e.g. investments must be admitted under domestic foreign investment legislation
  - Industry exceptions, e.g. in NAFTA, ECT
- **Can a claim of breach of an investment contract with a host state be brought under the investment treaty?**
  - Arbitration clause in the contract
  - Umbrella clause

# Duration and Costs

- **Typical choreography of an ICSID arbitration – 3 years plus**
  - Written notice and/or waiting period of 3-6 months
  - Filing of Request for Arbitration: approx. 1-3 months
  - Registration of Request for Arbitration by ICSID Secretariat: 2-3 months
  - Appointment of tribunal: approx. 3-6 months
  - Procedural meeting: 1-2 months
  - Jurisdictional proceeding and decision on jurisdiction: approx. 9-12 months
  - Merits proceeding and Final Award: approx. 10-14 months
- **Costs**
  - Initial costs are minimal
  - Largest cost component by far is outside attorney fees, but then there are also fees of arbitral tribunal, institution and experts
  - Interest can be sought:
    - Pre- and post-award interest can be sought
    - Compound interest can be sought
  - Arbitration costs are often awarded to prevailing party
  - Third party-funding as finance option

# Enforcement – Preliminary Questions

## How often do investors obtain a favorable arbitral award in investment treaty arbitrations?

- **Based on UN review of nearly 200 concluded investment treaty arbitrations:**
  - Award decided in favor of State – approximately 40%
  - Award decided in favor of Investor – approximately 30%
  - Settlement rate – approximately 30%
- **How often is enforcement against a State required?**
  - States reportedly comply with arbitral awards as often as 90% of the time, per 2008 PwC study
  - Settlement by (partial) payment and/or re-negotiation of investment contract
- **Examples of awards that States paid without need for enforcement:**
  - Czech Republic paid over \$270 million
  - Slovak Republic paid over \$867 million
- **Certain States are notorious in resisting compliance with awards:**
  - Argentina, Kazakhstan, Russia, Zimbabwe

# Enforcement – ICSID Convention

## ICSID Convention

- Article 53: awards are binding and must be complied with by the parties to the arbitration
- If a State fails to comply with an ICSID award, investor may seek :
  - Diplomatic protection from its own home state under Article 27, including the filing of an international claim; and
  - Separate recognition and enforcement action in any other Member State under Article 54.
- Article 54 (1): recognition of award as binding and enforcement of “pecuniary” obligations as if the award were a final municipal judgment
  - No grounds for a Member State to refuse recognition
  - Only “pecuniary” obligations; all injunctive relief reduced to monetary damages
  - Imposes an obligation on all Contracting States to recognize and enforce an ICSID award
- Article 54(3): execution is governed by municipal enforcement laws
  - Possible challenges at municipal level
  - Municipal laws and treaties on sovereign immunity apply
  - However host States usually comply voluntarily with ICSID awards

# Enforcement – New York Convention

## New York Convention

- For treaty arbitrations under UNCITRAL, ICC, SCC etc.
- 150 signatories to the New York Convention
- Article V: very limited grounds for resisting recognition and enforcement
- Article V(1): party defences against recognition and enforcement:
  - Invalid arbitration agreement
  - Violation of due process
  - Tribunal ruled upon an issue not within the scope of the arbitration agreement
  - Improper constitution of the arbitral tribunal
- Article V(2): discretion of court refuse recognition and enforcement:
  - Non-arbitrability
  - Violation of public policy of enforcement State
- State immunity still applies

# State Immunity – General Principles

- Prevailing law in many jurisdictions is that States enjoy limited immunity as opposed to absolute immunity
- State assets that are immune from execution include those used for **sovereign purposes**, such as military property, embassy property, and accounts of foreign central banks
- Assets of losing State that are used for **commercial purposes** are not subject to immunity in many states
- Mere consent to arbitration is not considered a waiver of immunity against enforcement, so investors have to find assets used for commercial purposes



# Planning Ahead: Effective „Treaty Planning“

- **Ensure there is a “qualifying investor“ with a “qualifying investment“**
  - Locate the investor/holding company in a country with a favorable BIT with the host country
  - Make sure there is an investment (capital contribution, if not incorporation of the business)
  - Ensure that the relevant BIT is in force at the time the investment is made
  - Check the precise wording of the BIT on which you wish to rely (e.g. BITs may require the “investor“ to have legal personality – exclude certain kinds of trusts or foundations)
- **Anticipate consequences of investment failure by including, for example, a liquidated damages clause**
- **Document the host State is aware of your anticipated revenues and profits from the investment**
- **Keep records of State’s communications relating to investment**
- **Keep detailed records of all project-related expenditures and costs, as well as funds invested**
- **Check whether BIT contains “fork-in-the-road“ or waiver clauses and avoid triggering them by participating in local proceedings dealing with the same dispute**

# Contact Information

**Thank You!**

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