



# INVESTMENT ARBITRATION Part I

*Columbia Law School's  
Global Law and Business  
Seminar*

Patricia Saiz  
Arbitrator  
Member of the ICC Court  
Professor at ESADE Law School

# What lies at the core of investment arbitration?

**Foreign Direct Investment:** medium and short-term infusions of cash, equipment, expertise, into either an ongoing enterprise or new companies created for the purpose of carrying some business (v. foreign indirect investment or portfolio investment)

Why is cross border investment so important to States?

# What is the purpose of investment arbitration?

**Purpose:** reduce investor insecurity, especially in cross border context, increase investment by reducing the cost of capital and eliminating/softening political risk



# What have States done to try to increase inflow of FDI?

- Agreeing to a **set of obligations** vis a vis the investor of the other contracting party
- Submitting to **arbitration-enforced** discipline

# IA as a new field of international law

PUBLIC INTERNATIONAL  
LAW

BORROWS IN TERMS OF PROCEDURE  
FROM INT. COM. ARBITRATION

States agree on a set of obligations in their behavior vis a vis the investor OR agree that a tribunal may vindicate the investor's expectations if state disregards its commitments – standards of liability and compensation derive not from parties' agreement but from language of treaties and CIL

IA

States submit to processes of arbitration-enforced discipline: "two parties in disagreement agree to submit their dispute to a private party which will decide on the issues at stake by issuing an award that will be binding and enforceable if the debtor chooses not to comply"

# Original Divide vs. Current Divide

**North vs. South**

**Developed vs. Developing**

**Exporters vs. Importers (expertise & capital vs. labor and natural resources)**

# What are the core provisions of this law?

- **Qualifying** investment and qualifying investor
- **Substantive** protections
- **Direct access** to arbitration against host state: appearance of “diagonal” clauses in BITS
  - Eliminates diplomatic and political barriers



# Modern ISDS Clause: Israel – Japan BIT (2017)

4. Provided that six months have elapsed since the claimant requested in writing the respondent for consultation and negotiation, the claimant may submit a claim referred to in paragraph 2 to the arbitration:

- (a) under the ICSID Convention, provided that both Contracting Parties are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either Contracting Party, but not both, is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules; or
- (d) if the disputing parties agree, under any other arbitration institution or arbitration rules.

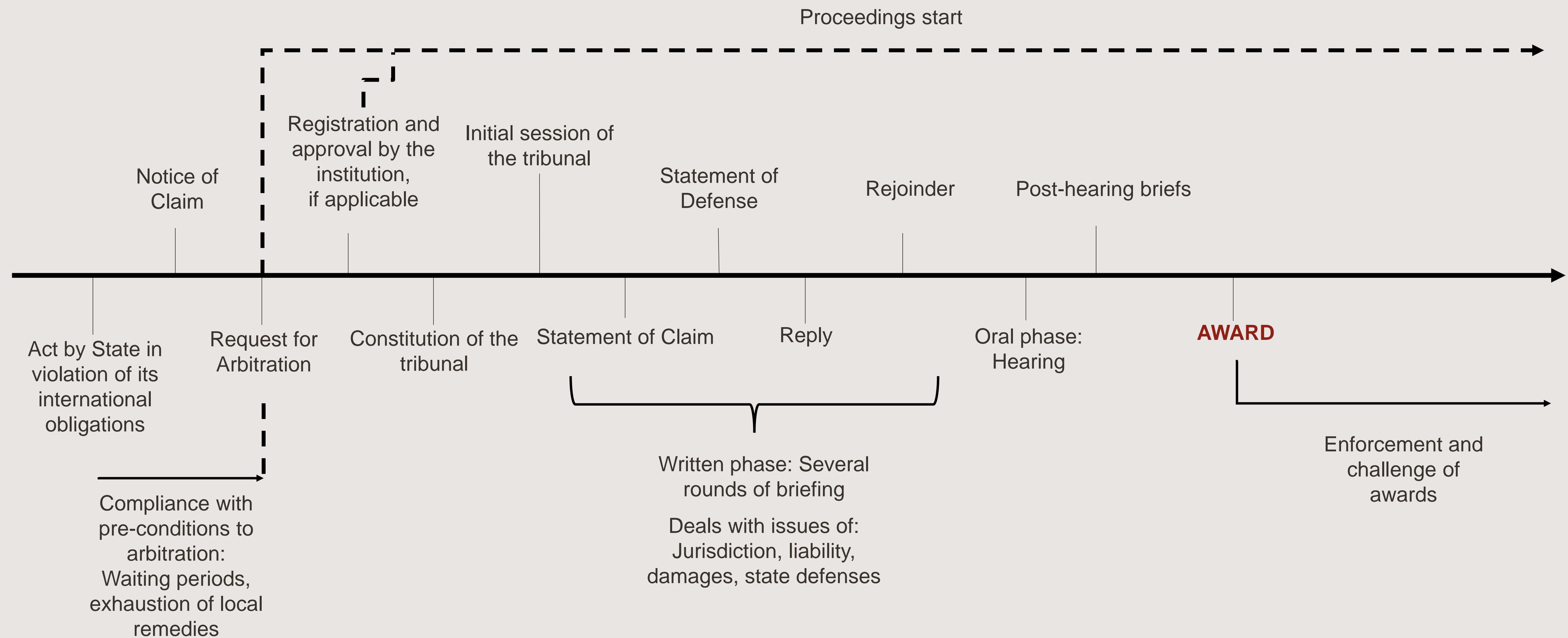
# The hybrid public/private nature of investment treaty arbitration

“[F]or all the passing similarity with the deliberation room in commercial arbitration, this setting [in international investment arbitration] is totally different. [There is a] tribunal in place because of inter-State consent as well as investor consent, but your very existence depends upon two or more states having agreed to you being there. Your mandate unlike commercial arbitration is to review the exercise of discretion by a sovereign by way of its executive, its legislative even its judiciary. You are tasked in this exercise with applying extremely broadly worded standards. They do not give you much guidance. They are skeletal. They are skeletal because [of] the dynamics...of inter-State negotiations...and so you are faced with a very concrete problem. You are supposed to rule upon the interest of an individual investor and yet in doing so, you may well impact upon a whole community. If you are going to rule that a carbons emission quota system is contrary to a [IIA], in order to safeguard the interest of a particular coal-fires power plant in a country, then, you may well be impacting upon the whole environment policy of an entire nation. If you are going to rule upon the rights of an investor in the water system of Tanzania, you may well be affecting 350[, ]000 water users in Dar Es Salaam. If you are going to question and rule upon South Africa’s policy in favour of black economic empowerment, in order to safeguard the interest of the individual mining interest before you the wider impact is obvious. And you do so with the ability to impose damages unlike many public law municipal systems and those damages may be significant. You have the power to affect the most extraordinary allocation of public funds.”

Toby Landau KC. (2010). *Flaws and Presumptions: Rethinking Arbitration Law and Practice in a New Arbitral Seat* (Papers from the joint conference of the Government of Mauritius UNCITRAL, PCA, ICSID, ICC, ICCA and LCIA held in Mauritius on 13 and 14 December 2010). The International Bureau of the Permanent Court of Arbitration. Pages 367-368.

What does an investment arbitration  
look like procedurally?

# Timeline of an investment arbitration





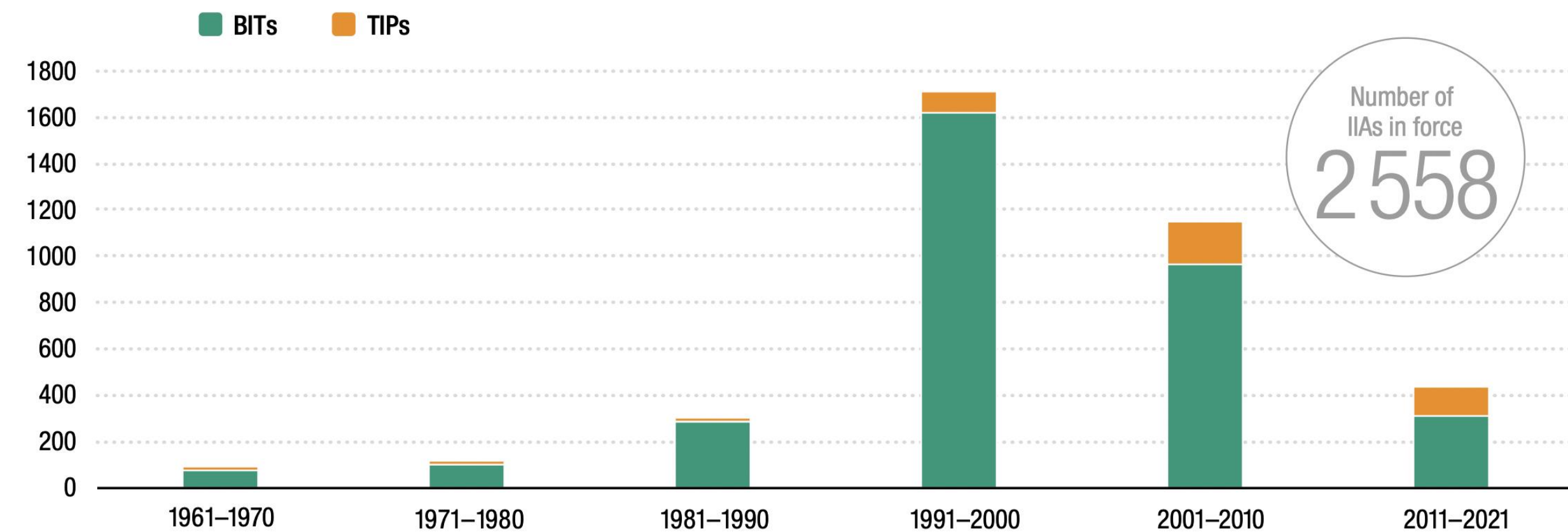
# Relevant Data



# BIT signing

- From the 1950 onwards
- First BIT with a diagonal clause subscribed in 1959 (Germany – Pakistan)
- Sporadic use until 1980s, boom after 1987, saturation after 2002 with slower growth
- More than 2,500 BITS/IAs

Figure II.4. | Number of IIAs signed, by decade, 1961–2021

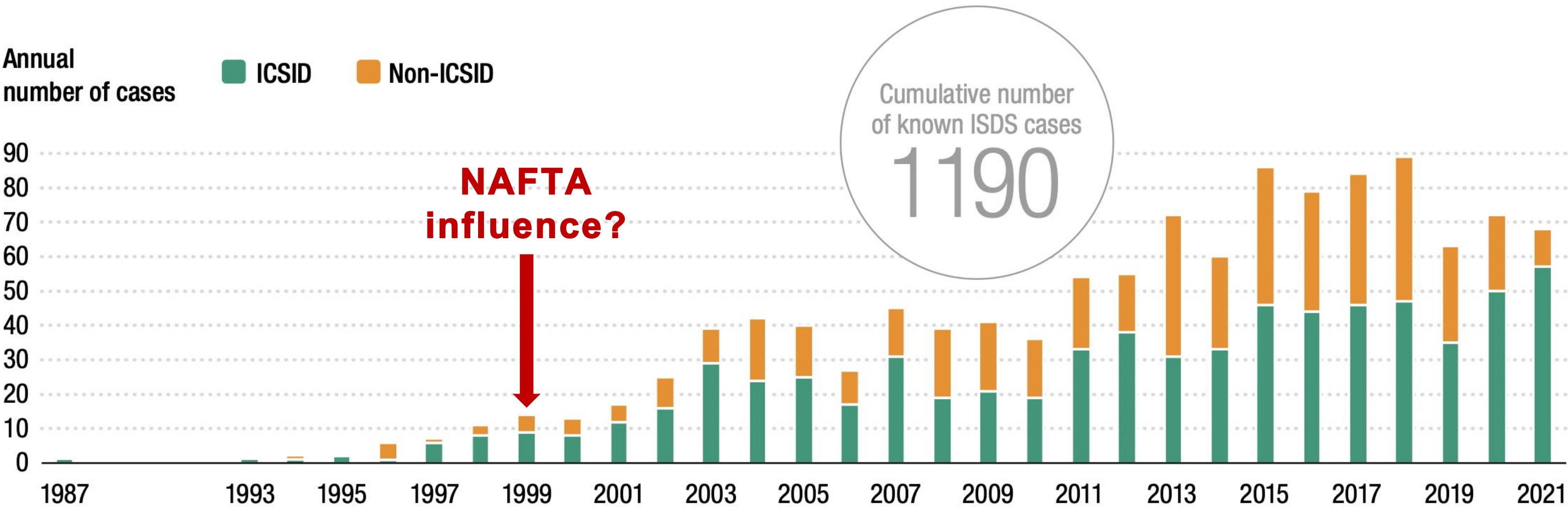


Source: UNCTAD, IIA Navigator.

UNCTAD. *World Investment Report 2022. International Tax Reforms and Sustainable Investment*. Page. 65.

# Known ISDS cases as of end of 2021

Figure II.6. Trends in known treaty-based ISDS cases, 1987–2021



Source: UNCTAD, ISDS Navigator.


Note: Information has been compiled from public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continually adjusted as a result of verification processes and may not match exactly case numbers reported in previous years.

# Many developed States as respondents

NO.	NAME	CASES AS RESPONDENT STATE	CASES AS HOME STATE OF CLAIMANT
1	Argentina	62	5
2	Venezuela, Bolivarian Republic of	59	3
3	Spain	56	68
4	Egypt	46	7
5	Czechia	42	7
6	Mexico	41	5
7	Poland	36	8
8	Peru	33	5
9	Canada	32	65
10	Ukraine	31	16
11	India	29	11
12	Ecuador	28	0

UNCTAD. Investment Dispute Settlement Navigator





# The case of Spain: investor-state cases brought against Spain arising from reforms made in the renewable energy sector post-2010



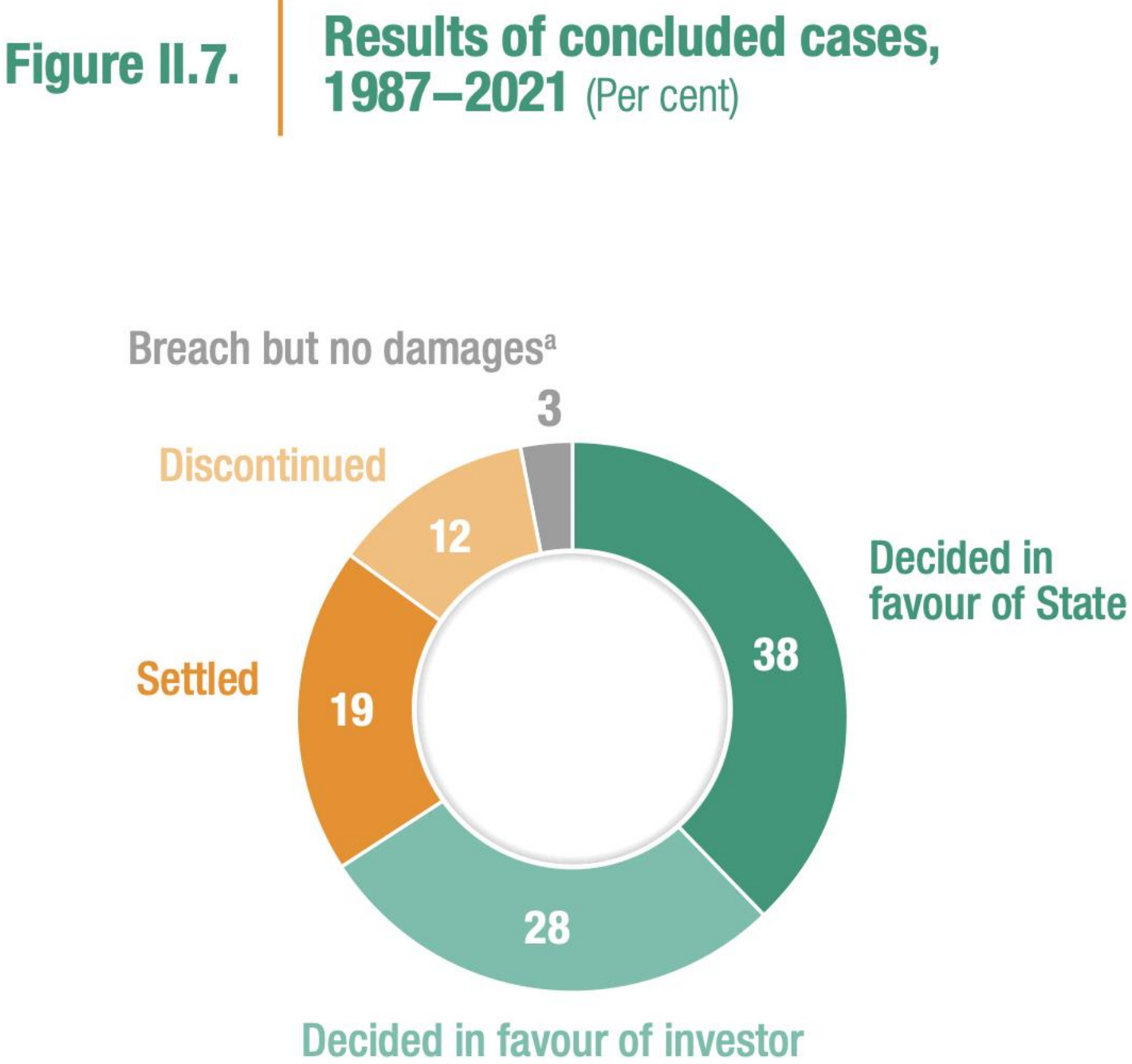
# Most frequent home State of claimants

NO.	NAME ▲	CASES AS RESPONDENT STATE ▲	CASES AS HOME STATE OF CLAIMANT ▼
1	United States of America	23	214
2	Netherlands	2	130
3	United Kingdom	1	101
4	Germany	5	80
5	Spain	56	68
6	Canada	32	65
7	France	3	64
8	Italy	13	48
9	Türkiye	18	48
10	Switzerland	1	45
11	Luxembourg	0	45
12	Cyprus	5	36

UNCTAD. Investment Dispute Settlement Navigator



# Results of concluded cases



Source: UNCTAD, ISDS Navigator.  
<sup>a</sup> Decided in favour of neither party (liability found but no damages awarded).

UNCTAD. *World Investment Report 2022. International Tax Reforms and Sustainable Investment*. Page. 75.

Before IA, what options did investors have when a state committed a wrong against their investment?

# It addresses a need that was not covered (unless investor and State entered into a contract with an arbitration clause)

## Barriers in **host** country

- Local bias
- Inefficient local courts
- State immunity
- Municipal law
- Enforcement
- Calvo Doctrine (national courts and national laws)

## Barriers in **home** country

- Jurisdiction (over material events and entities located in host country)
- Foreign Sovereign Immunity
- Choice of Law (that of country where transaction and dispute are centered)
- Enforcement
- Act of State Doctrine (precludes courts from inquiring into public acts a foreign sovereign committed within its territory)

How about redress under  
international law?

# Remedies available historically

- **Gunboat diplomacy** (today, use of military force is prohibited except for self defense, etc.)
- **Diplomatic protection** (diplomatic correspondence) and diplomatic espousal. Problems:
  - Need to activate diplomatic channels
  - Political / diplomatic agendas
  - Nationality
  - Exhaustion of local remedies under CIL (purpose and complications)
  - High threshold for liability under CIL
- **Early investment protection regime**
  - *Ad hoc* State to State arbitration
  - Binational Claims Commissions (with jurisdiction over broad categories of disputes, ex US Mexico General Claims Commission)
  - Friendship commerce and navigation treaties (equal status of trading partners, greater sovereignty, access to goods)
  - Others



# Remedies available historically

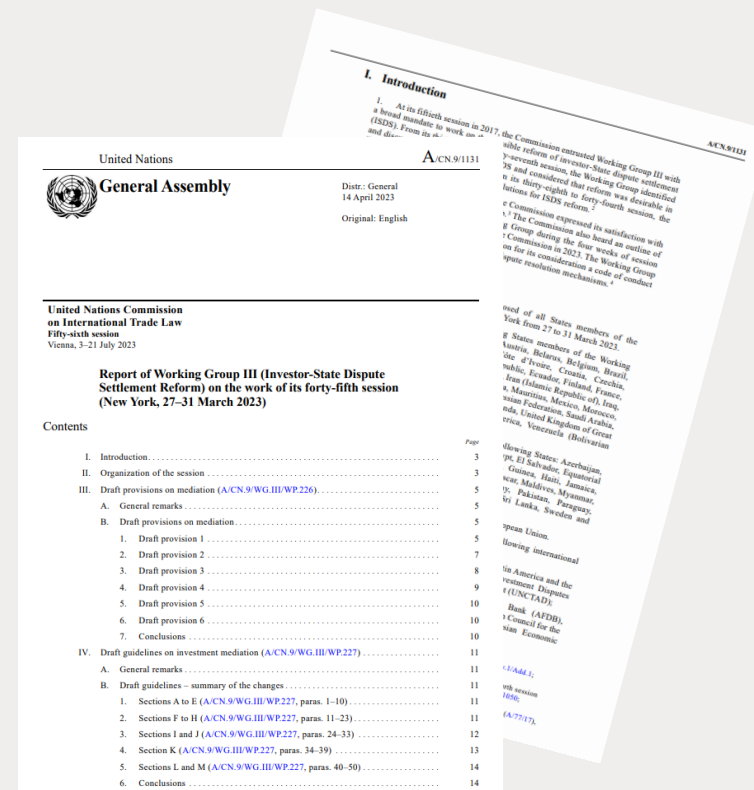
- During second half of 20<sup>th</sup> Century, widespread recognition for shortcomings of national and international remedies
  - Countries started to negotiate BITs
  - In 1961 UN Secretary General prepared a questionnaire to be circulated among member states on their views on foreign investment, results of inquiry:
    - Machinery for resolution of disputes should be **international**
    - **Investment tribunal** or arbitral body
    - **Direct access** of investor to arbitral body
    - Establishment of new **arbitration facilities**
  - Led to Convention on the Settlement of Investment Disputes between States and Nationals of other States, September 14, 1966 (forum, no substantive obligations)
  - Widespread adoption of BITs, rapid growth until 2002 then saturation

# The current debate: ISDS concerns

- Lack of consistency, coherence, predictability and correctness of decisions by ISDS tribunals
  - Divergent interpretations of substantive standards, jurisdiction/admissibility, procedural inconsistency
  - Lack of framework to address multiple proceedings
  - Limitations in current mechanisms to address inconsistency and incorrectness of decisions
- Arbitrators and decision-makers
  - Lack or apparent lack of independence and impartiality
  - Limitations in existing challenge mechanisms
  - Lack of diversity of decision makers
  - Qualifications of decision makers
- Cost and duration of ISDS cases
  - Lengthy and costly ISDS proceedings and lack of mechanism to address frivolous or unmeritorious claims
  - Allocation of costs in ISDS
  - Concerns regarding the availability of security for costs in ISDS
  - Concerns regarding third-party funding

# UNCITRAL Working Group III: Investor-State Dispute Settlement Reform

# 45<sup>th</sup> Session of the WG III (ISDS) | March 2023



- **Legislative guide** on investment dispute prevention and mitigation
- Provisions on **investment mediation**
- **Codes of conduct: arbitrators** and judges



**Still to be approved** at the 56th Session → Vienna, 3<sup>rd</sup>-21<sup>st</sup> July 2023



What will investment arbitration look  
like in the future?

# The Multilateral Investment Court

- First instance tribunal PLUS appeal tribunal
- Tenured, highly qualified judges, obliged to adhere to the strictest ethical standards and a dedicated secretariat.
- Permanent body
- Work transparently
- Rule on disputes arising under future and existing investment treaties
- Only apply where an investment treaty already explicitly allows an investor to bring a dispute against a State
- Would not create new possibilities for an investor to bring a dispute against a state
- Prevent disputing parties from choosing which judges ruled on their case
- Provide for effective enforcement of its decisions
- Be open to all interested countries to join

See link: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>

Foreseen in the EU-Canada Comprehensive Economic Trade Agreement and the EU-Vietnam Free Trade Agreement; the EU now includes similar provisions in all of its negotiations involving investment.



patricia.saiz@esade.edu



Patricia Saiz



www.saizarbitration.com



THANK YOU!