



WEBINAR

# Protecting your Company Overseas: Investor-State Arbitration during Pandemic, Global Conflict, and Political Shifts.

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SHOOK  
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# About me

1. I represent both investors and States in investment treaty arbitrations
2. Board-Certified Specialist in International Arbitration and Litigation (Florida Bar)
3. Registered international arbitrator
4. CIArb Fellow



# Poll

**Have you ever heard about investor-State arbitration?**

*(AKA: investor-State dispute settlement or ISDS)*

# Overview

- 01** | Introduction to ISDS
- 02** | Frequently Asked Questions
- 03** | Latest trends in ISDS
- 04** | Questions & Answers



# 1

# Introduction

ABCs of Investor-State Arbitration

# Basic Terminology in Investor-State Arbitration



## Your Company (the “Investor”)

- National of Country A
- Owner of the “Investment”



## The “Investment”

- Tangible (physical) assets
- Intangible assets
- Shares
- In the territory of Country B
- What doesn’t count?



## Country B (the “State”)

- Host State, recipient of the Investment
- Includes agencies and officials acting in duties



## **Poll No. 2**

**Does your company have  
“investments” situated  
overseas?**

# Trouble Ahead: Unfair Treatment by the State



**NO PAY ON  
CONTRACTS**



**UNFAIR CHANGES  
IN LAWS**



**REFUSAL TO  
ISSUE PERMITS  
OR LICENSES**

**ALSO:**

1. Unlawful Expropriation (“Direct” or “Indirect”)
2. Foreign Investors or Directors “Persecuted.”



# Protection: Investment Treaties

1. Unfair treatment prohibited (“Fair and Equitable Treatment” obligation)
2. Access to international tribunals and not only local courts.
3. Examples

**Goal:** To Promote and Protect Foreign Investment Flow





# Sample Violations Covered by Investment Treaties

1. **Expropriation** without fair compensation
2. **Temporary seizures** of property
3. **Arbitrary or discriminatory** regulatory schemes
4. **Failure to pay** contractual obligations
5. Unfair cancellation or failure to issue **licenses and permits**
6. Failure to provide basic **police protection**
7. Arbitrary **finances and penalties**
8. Arbitrary **detention of business owners** or employees

*...and many other acts or failures to act that negatively impair a business*

# Other Instruments



1. Investment Contracts
2. Foreign Investment Laws or Statutes
3. Human Rights Conventions

# Remedies

1. Fair Market Value
2. Moral or Reputational Damages
3. Attorney's Fees and Costs

**Guiding Principle:** Restore Investor as if no violation



# 2

## **Frequently Asked Questions on ISDS**



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## Q: Are Awards Against States Enforceable?

A: Yes! Enforcement possible virtually worldwide

1. New York Convention
  - (170 contracting States)
2. ICSID Convention
  - (157 contracting States)



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## **Q: What if States Refuse to Pay?**





## Q: What if States Refuse to Pay?

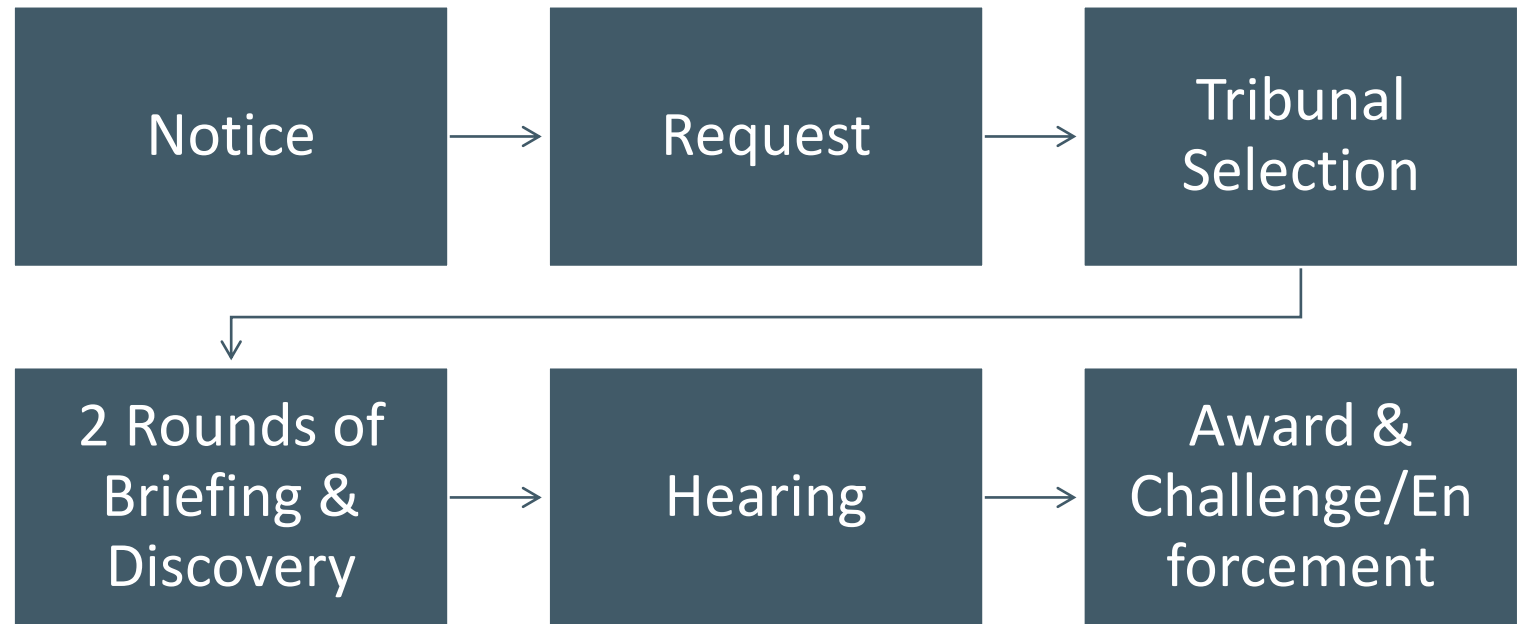
1. **Attach assets** in any of the NY/ICSID Convention signatories
2. **Removal of preferential treatment** in international trade
3. **Removal of voting rights** in multilateral organizations



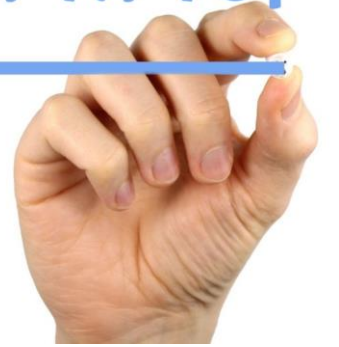
**A: 3 to 4 years** from date of filing

- Typical procedure:

**Q: How long do proceedings take?**



# PLANNING



**Q: My home State has not signed a treaty with the host State**

1. Pre-dispute planning
  - Use of a third State
  - Treaty language is key
2. Post-dispute options:
  - Investment Contract?
  - Foreign Investment Statute?
  - Human Rights Convention?



## **Q: Which State organs are covered?**

- Key concept is “attribution”
  - Executive, Legislative, and Judicial Organs
  - Local governments
  - Non-State organs empowered by State (e.g., contractors)
  - Officials acting in apparent official capacity

# EXPIRATION

DATE \_\_\_\_\_

**Q: Are there prescription periods or expiration dates?**

**A: Depends on the treaty**

1. NAFTA, USMCA, and CAFTA-DR: three years
2. Mexican treaties: 3-4 years
3. Key date typically is when investor “should have known” of damage

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**Q: Should I  
seek remedies  
in national  
courts too?**



1. “Fork in the road clauses”:  
Language of treaty is key
2. Goal is to avoid **inadvertent  
waiver** of treaty rights



**Q: Do I need to exhaust local remedies first?**



**A: Most often no.** Depends on the treaty.

- For “denial of justice” allegations, typically yes, unless it would be futile.

# Q: How do I file a treaty or ISDS claim?



1. States usually consent to arbitration under the following rules:
  - ICSID
  - UNCITRAL (“ad hoc”)
2. Others sometimes available:
  - SCC Rules
  - LCIA Rules



## **Q: How is the arbitral tribunal selected?**

1. Parties typically appoint one arbitrator each
2. Chair is usually selected by Parties jointly
  - If no agreement, appointing authority used





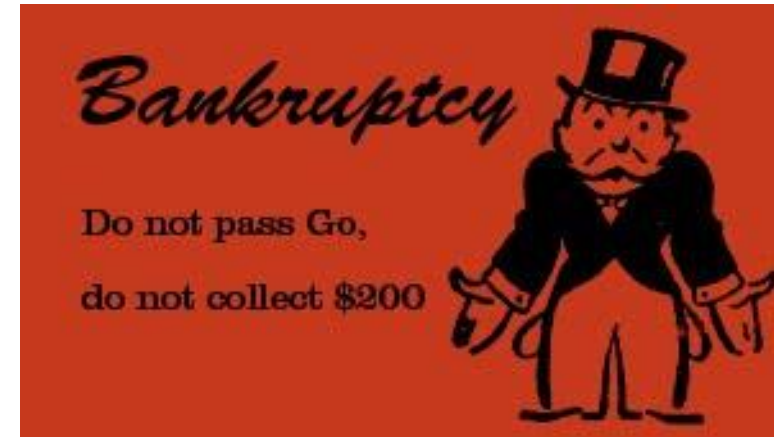
**Q: Is the arbitral award final?**

**A: Yes**

- NY Convention: Limited grounds for challenge
- ICSID: Award treated as a “final judgment of a court in that State.” Limited grounds for challenge.

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**Q: My company lacks funds to proceed. What can it do?**



- Alternative fee arrangements
- Third-party funding



**Q: Are  
proceedings  
confidential?**

A: Depends on language of treaty

- Parties can make certain agreements on confidentiality



## **Q: What can my company obtain in discovery?**

- Key: possession, custody, or control
- Non-compliance: can ask tribunal to make appropriate evidentiary inferences
- Each party presents its own witnesses



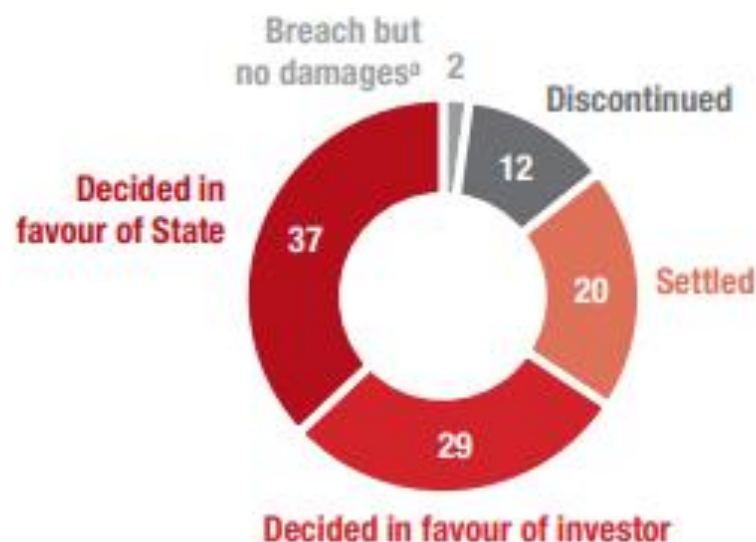
**Q: Can I ask my home State for support?**

A: States typically protect their own interests

- Idea: States agree to consent to arbitrate (no “espousal” or “gun boat” diplomacy)

# Q: How many cases settle?

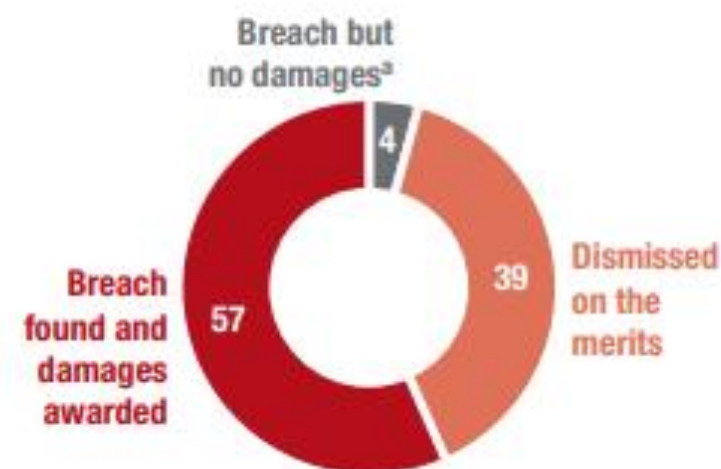
**Figure 4. Results of concluded cases, 1987–2020 (Per cent)**



Source: UNCTAD, ISDS Navigator.

<sup>a</sup> Decided in favour of neither party (liability found but no damages awarded).


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



Source: UNCTAD, ISDS Navigator.


<sup>a</sup> Decided in favour of neither party (liability found but no damages awarded).

Note: Excludes cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons).



**Q: Are  
emergency,  
interim, or  
provisional  
measures  
available?**

- Yes, depending on treaty and rules selected
- Both ICSID and UNCITRAL have comparable rules
- Typically requires imminent and irreparable harm, among other requirements



**Q: Will I be able to do business in the host State again?**

A: Many claimants continue operating or return after some time

- Key is in advocacy





## **Q: What if the State retaliates against my company?**

- Can seek provisional or interim measures
- Can result in a greater damages award

3

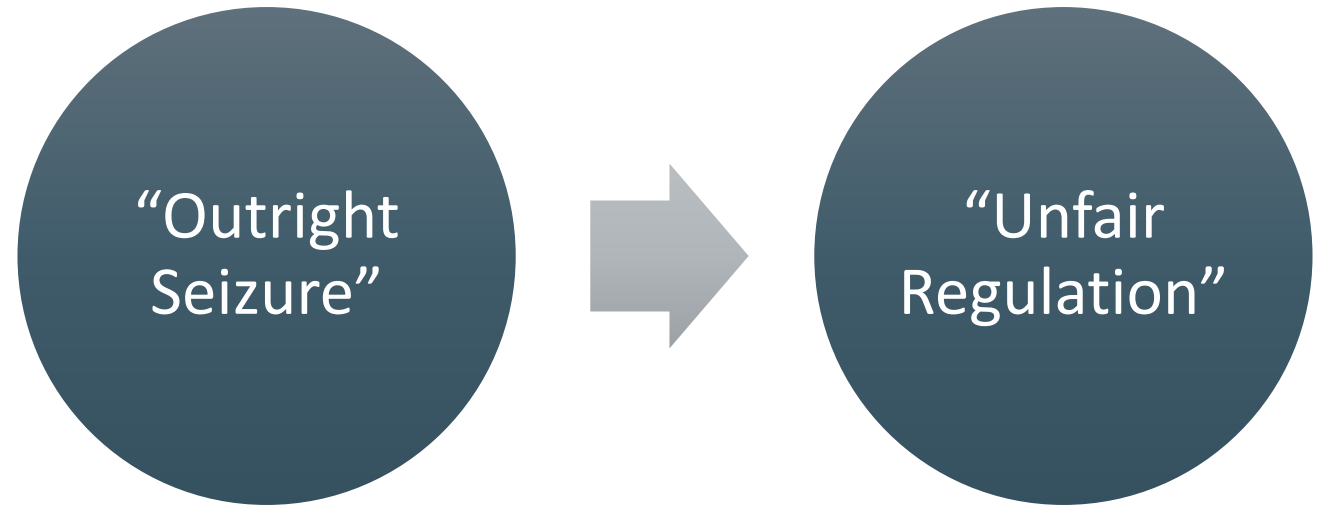
# Latest trends in ISDS

LATEST TRENDS

# Political Changes in Latin America

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# The old days vs. the new





# Recent disputes

1. Nationalization
  - Mining (Mexico)
2. Preferential treatment of national companies
  - Public utilities (Mexico CFE and Iberdrola)
  - Airlines (Flybondi in Argentina)
3. Denial of Justice
  - Fraud in court proceedings
4. Asset forfeiture laws (Seda v. Colombia)
5. Kickback requests and retaliation

LATEST TRENDS

# COVID-19 Pandemic



# Impact of Pandemic on ISDS

1. “Necessity” and *force majeure*
2. Expectation vs. reality
  - Onslaught of cases not yet seen
  - Limited examples: Airport Concession in Chile. State allegedly refused to renegotiate (ADP International and Vinci Airports v. Chile)
3. Impact mostly procedural

LATEST TRENDS

# Russia-Ukraine Conflict



# Major trends

## Disputes brought against Russia

- ExxonMobil
- Crimean arbitrations

## Disputes brought by Russian investors against Ukraine

- ECT Denial of Benefits
- AMIC Energy (Austria, seizure of assets allegedly linked to Russian interests)

## Disputes brought by Russian investors against other States

- Nord Stream 2 v. EU
- Severgroup v. France (mining)

# Hypothetical



1. Your company had a subsidiary in Crimea.
2. Subsidiary is Ukrainian national
3. The subsidiary is destroyed during Russian takeover.
4. Can subsidiary file against Russia under Ukraine-Russia BIT?
5. What if Russia had not annexed Crimea?



## Crimea arbitrations: meaning of “territory”

- Several Ukrainian investors brought claims against Russia under Ukraine-Russia BIT, leading to several awards
- Treaty: “investments within the territory of the State”
  - Russia: “territory” means sovereign territory, not *de facto* control
  - Investors: territory includes “entire territory” over which State exercises jurisdiction
  - Dutch set-aside Court agreed with investors, focusing on VCLT Art. 29.

LATEST TRENDS

# ICSID Rules Amendments 2022

# ICSID 2022 Amendments: Key Changes



1. In general, reduced time limits (for faster proceedings)
2. Expedited arbitration (optional)
3. Third-party funding disclosures
4. Codification of already-existing practices
5. For a full list and breakdown, contact me

# Recap

1. Business overseas? (or plan to)
2. Before you go (investment treaty planning)
3. If you run into trouble with local government
  - **You do not necessarily have to go to national courts**
  - Investment Treaty protection is broad (“fairness”)
  - Other instruments
4. Arbitral awards are binding and enforceable practically worldwide

# 4

## Questions and Answers



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# SHOOK

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