

EFFECTIVE MANAGEMENT OF INVESTMENT DISPUTES

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OUTLINE

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III. REASONS FOR EFFECTIVE MANAGEMENT OF ISDS

IV. MANAGEMENT TECHNIQUES

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INTRODUCTION

INTRODUCTION - IIAs

- ▶ 2950 Bilateral Investment Treaties (“BITs”), 2360 in force
- ▶ 372 Treaties with investment provisions, 307 in force
- ▶ 2573 IIAs “mapped” for content

ISDS – GENERAL OVERVIEW

- ▶ Investment Arbitration
 - Investors enforce treaty rights directly against host States

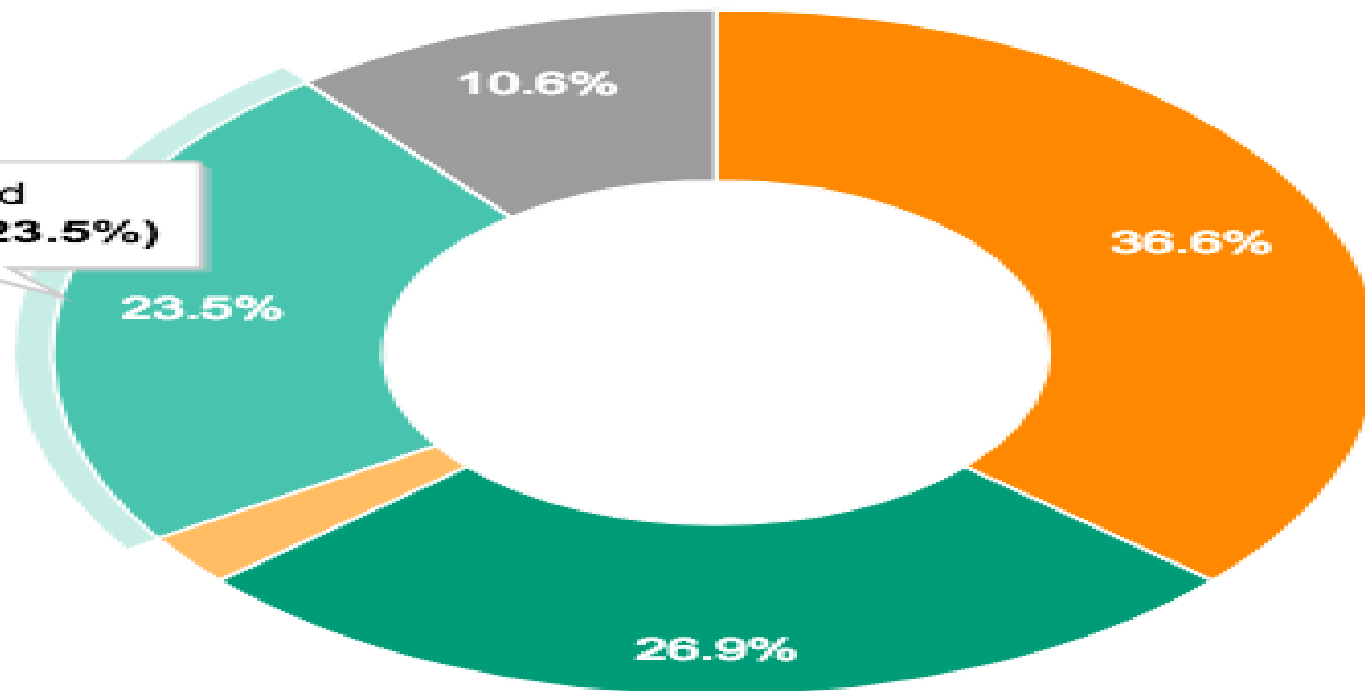
- ▶ Different Procedural Rules
 - ICSID Arbitration rules
 - Most popular, but limited to signatories

 - UNCITRAL Rules
 - 2nd most popular, only option available for some States

INTRODUCTION – ISDS

- ▶ 817 known IIA-based investor state arbitrations, 289 pending
- ▶ 528 arbitrations concluded, 36.6% decided in favour of States
- ▶ In cases decided in favour of the investor:
 - Average amount claimed: \$1.4 billion
 - Average amount awarded: \$545 million

Concluded original arbitration proceedings



Settled
124 (23.5%)

- Decided in favour of State
- Decided in favour of investor
- Decided in favour of neither party (liability found but no damages awarded)
- Settled
- Discontinued

ISDS IN ASIA

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- ▶ Over 20% disputes involve Asia
 - 180 with Asian Respondents
 - 112 with Asian Claimants
- ▶ Sectors: oil, gas, and now electricity and other energy sources
- ▶ Asian states have won 55% of the time
- ▶ More disputes predicted

ISDS IN ASIA – PROMINENT CASES

- ▶ *AAPL v. Sri Lanka*
 - First IIA ISDS case: Asian (HK) investor v. Asian state
- ▶ *Walter Bau v. Thailand*
 - First ISDS case against Thailand, damages of €30 million
- ▶ *White Industries v. India*
 - Effective means standard; watershed in India IIA framework
- ▶ *Al Warraq v. Indonesia*
 - OIC Agreement; first successful counterclaim under IIA

IMPORTANCE OF EFFECTIVE MANAGEMENT

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▶ Nature of ISDS

- Governed by public international law
- Implicate important public policies
- Disputes are public and attract scrutiny
- Substantial amounts in dispute

▶ Limitations on states

- Restricted scope of arguments advanced
- External counsel to understand state's policies and objectives
- Obligations to be fulfilled; politicization to be avoided

IMPORTANCE OF EFFECTIVE MANAGEMENT

- ▶ Limitations on states (contd.)
 - Limited time to respond to claims;
 - Several departments involved; document tracing difficult

- ▶ Costs of ISDS
 - Major part of total arbitration costs
 - Increasing over time
 - No “costs follow the event” rule in ISDS



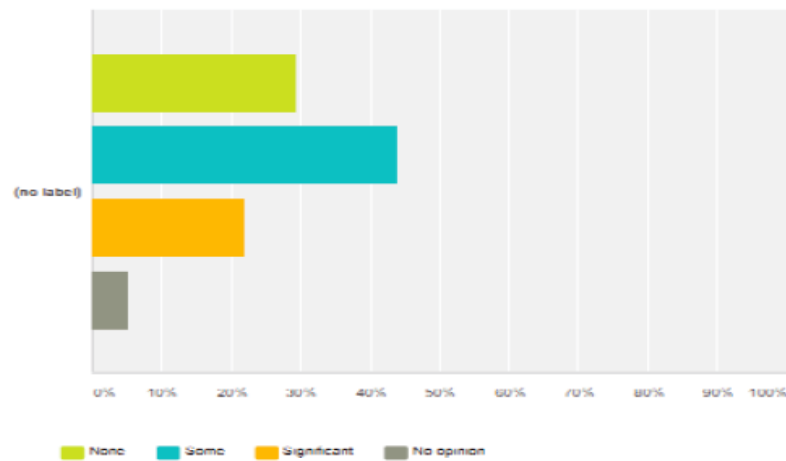
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IBA Subcommittee on Investment Treaty Arbitration

Report on the

**Q43 To what extent do you think that
arbitrator fees are an issue of concern in
investment treaty arbitration?**

Answered: 96 Skipped: 13



**Q42 To what extent do you think that expert
fees are an issue of concern in investment
treaty arbitration?**

Answered: 96 Skipped: 13

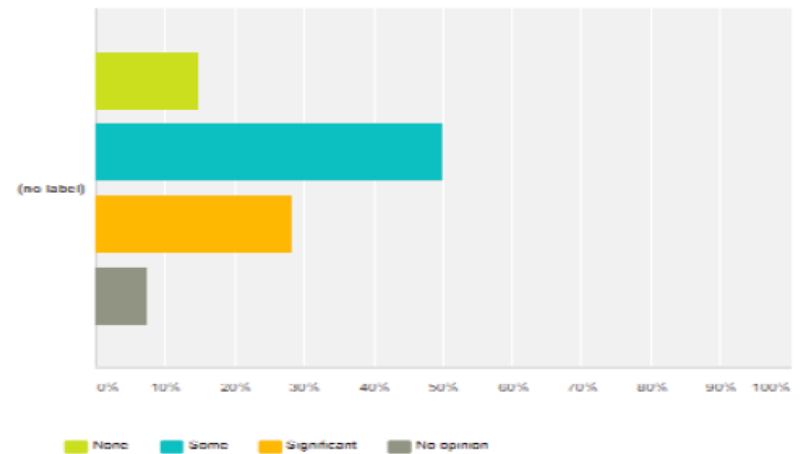
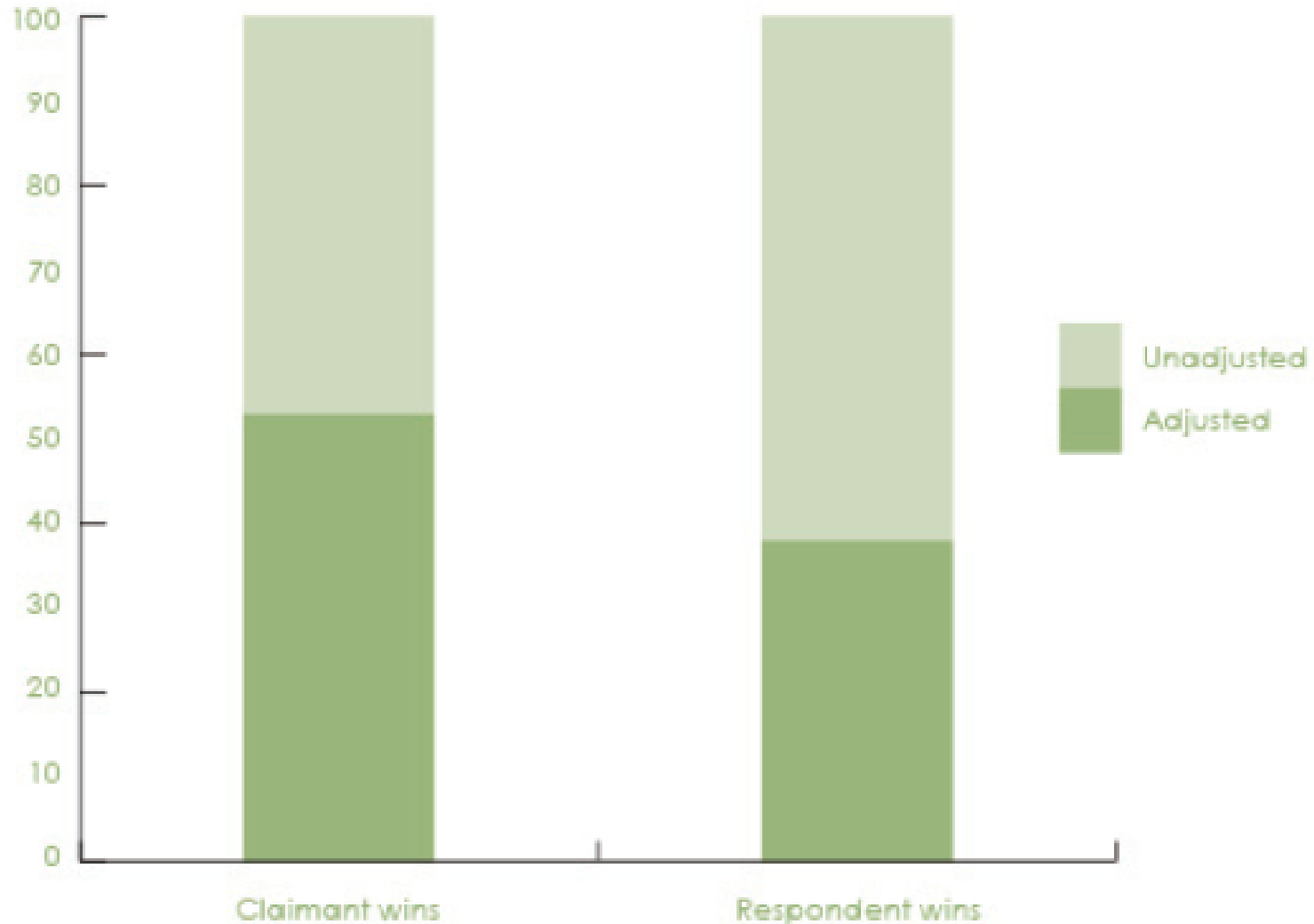


Table 1: Party costs – substantial discrepancies

Name of case	Respondent's party costs (US\$)	Claimant's party costs (US\$)	Discrepancy (US\$)
Jan Oostergetel and Theodora Laurentius v Slovakia	16,330,000	2,231,000	14,099,000
Libananco v Turkey	35,702,000	24,382,000	11,320,000
EDF v Romania	18,575,000	8,198,000	10,377,000

Chart 4: Adjustment of costs according to successful party



MANAGEMENT TOOLS

MANAGEMENT TOOLS

- ▶ Intra-governmental lead agency
- ▶ External counsel
- ▶ External advisors
- ▶ Focus on relevant issues
- ▶ Funding
- ▶ Other tools

INTRA-GOVERNMENTAL LEAD AGENCY

▶ Reason

- More than one ministry/department involved at central/regional/provincial
- Usually no authority to obtain information, documents

▶ Timing

- Permanent: U.S. (Office of Legal Adviser); Canada (Trade Law Bureau)
- Ad hoc: India

▶ Process

- Manage investment disputes when they arise
- Ensure intra-departmental cooperation
- Responsible for day-to-day supervision of the dispute
- Specific contact person

Minutes of the 1st Inter-Ministerial Group (IMG) meeting on arbitration under BIPA by RAKIA, UAE held on 5.1.2017 at Shastri Bhawan, New Delhi under the chairmanship of Secretary (Mines), Shri Balvinder Kumar

[Total 3 pages: Minutes 2 pages & Annexure 1 page]

The 1st IMG meeting was held on 5.1.2017 under the chairmanship of Secretary(Mines) in his chamber, Shastri Bhawan, New Delhi. The list of participants is enclosed on A

2. At the the IMG setu Indian Govern Emirates (UA Agreements

2. At the outset, Secretary (Mines) welcomed the participants to the 1st meeting of the IMG setup to handle the matters in regard to the notice for arbitration served to the Indian Government by Ras-AI-Khaimah Investment Authority (RAKIA), United Arab Emirates (UAE) under the India-UAE, Bilateral Investment Promotion and Protection Agreements (BIPA) to the Indian Government.

3. Secret Hon'ble Print of Mines (M Forests & Cli

article 10(5)(b) of India-UAE BIPA & Article 3 of United Nations Commission on International Trade Law (UNCITRAL) Rules, against the Indian Government vide their notice of arbitration dated 8.12.2016. They have mentioned that the trigger notice has been already served for dispute settlement on 29.04.2016.

[Action: All member Ministries & GoAP]

4. The representative of Government of Andhra Pradesh (GoAP), MD APMDC, informed that GoAP had entered into a memorandum of understanding dated 14th

February 200 to constructi ("MOU"). U Development ("ANRAK"), Aluminium E has arisen pri served an int supply banu investment o

representative of MEA stated that it appears from the notice that the last date for conveying the appointment of an arbitrator by India is 8 February, 2017. He further stated that these cases under international investment treaties require counsel team which have experience in the field of investment treaty cases and international law and the counsel team should ideally consist of an India law firm and a team of foreign counsels. In light of the urgency in the instant case the counsel team representing the Government side may be engaged most immediately. Following this a suitable arbitrator may be appointed in consultation with the counsel.

5. It was the areas whi agreement by by GoAP. He of AP by AN the internatio

DESIGNATE EXTERNAL COUNSEL

▶ Reasons

- Investment arbitration specialized field
- Knowledge of processes may make all the difference e.g. appointment

▶ Timing

- Soon after claim has been filed

▶ Process

- Direct appointment: Lebanon
- Bid: China, Lithuania
- Limited bid: Costa Rica
- Invoke exceptions to tender rules when needed: Czech Republic

DESIGNATE EXTERNAL ADVISORS

▶ Reasons

- Urgency
- Tender process tedious

▶ Timing

- Soon after issue arises

▶ Process

- External advisors, need not be law firms
- Review and critique strategy, submissions, conduct mock hearings
- *Chemtura v. Canada* (NAFTA)

FOCUS ON RELEVANT ISSUES

▶ Reasons

- Ensure that state objectives are not compromised

▶ Timing

- Before/During arbitration

▶ Process

- Tribunal fees: ICSID rates in non-ICSID disputes; fee caps
- Detailed Procedural Calendar (e.g. longer duration for states)
- Use flexibility in institutional rules (e.g. SIAC expedited procedures)
- Use of suitable technology (*Mesa v. Canada*)
- Dual-language proceedings

FUNDING

▶ Reasons

- Resources available to quickly address procedural complexities
- Relevant for recurring respondent states

▶ Timing

- Before/During arbitration

▶ Process

- Permanent fund: U.S.
- Hiring external counsel, experts, interviews of representatives

§2710. Expenses relating to participation in arbitrations of certain disputes

(a) International agreements

The Secretary of State may use funds available to the Secretary for the expenses of United States participation in arbitrations and other proceedings for the peaceful resolution of disputes under treaties or other international agreements.

(b) Contracts abroad

The Secretary of State may use funds available to the Secretary for the expenses of United States participation in arbitrations arising under contracts authorized by law for the performance of services or acquisition of property, real or personal, abroad.

(d) International Litigation Fund

(1) Establishment

In order to provide the Department of State with a dependable, flexible, and adequate source of funding for the expenses of the Department related to preparing or prosecuting a proceeding before an international tribunal, or a claim by or against a foreign government or other foreign entity, there is established an International Litigation Fund (hereafter in this subsection referred to as the "ILF"). The ILF may be available without fiscal year limitation. Funds otherwise available to the Department for the purposes of this paragraph may be credited to the ILF.

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(2) Reprogramming procedures

Funds credited to the ILF shall be treated as a reprogramming of funds under section 2706 of this title and shall not be available for obligation or expenditure except in compliance with the procedures applicable to such reprogrammings. This paragraph shall not apply to the transfer of funds under paragraph (3).

(3) Transfers of funds

Funds received by the Department of State from another agency of the United States Government or pursuant to the Department of State Appropriations Act of 1937 (49 Stat. 1321, 22 U.S.C. 2661) to meet costs of preparing or prosecuting a proceeding before an international tribunal, or a claim by or against a foreign government or other foreign entity, shall be credited to the ILF.

(4) Use of funds

Funds deposited in the ILF shall be available only for the purposes of paragraph (1).

CLAIM LEGAL COSTS

▶ Reasons

- Major part of total arbitration costs

▶ Timing

- At the end of arbitration

▶ Process

- Detailed costs statement, indicating costs for each phase/application

OTHER MANAGEMENT TOOLS

- ▶ Build domestic capacity: Argentina, Spain
- ▶ Approach institutions (ICSID, PCA etc.)

CONCLUSION

- ▶ Costs and complexity of ISDS are increasing
- ▶ Numerous tools to manage ISDS
- ▶ Tools should be deployed at the onset of a claim

LKK

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THANK YOU!

Questions?

