

# Specific types of arbitration: international investment arbitration

International Commercial Arbitration and International Sales Law

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# Different types of arbitration

- international
- domestic
- investment
- corporate
- multiparty
- multicontract
- state-to-state
- ...

## **International investment arbitration**

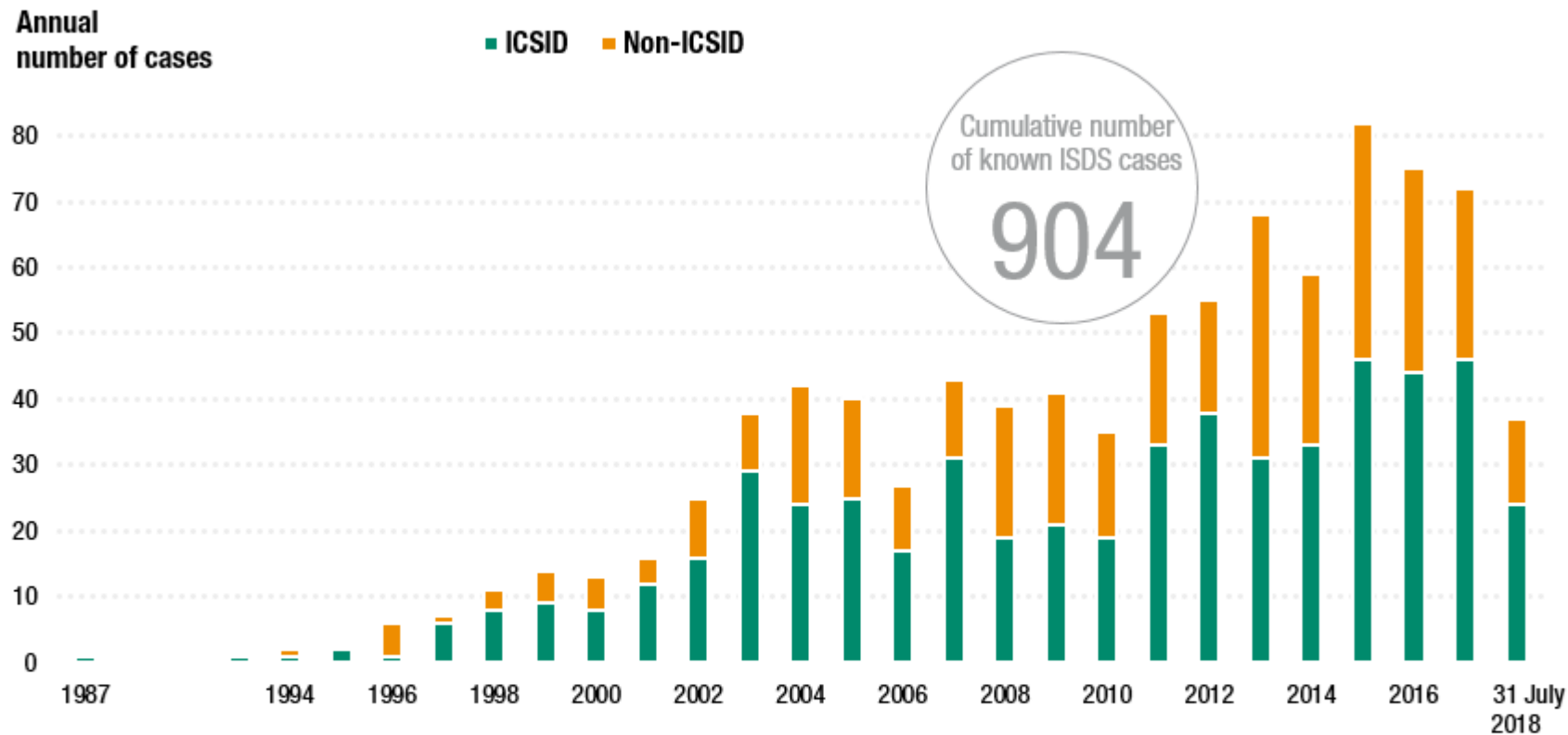
Peculiarities:

- Legal sources
- Subject-matter
- Arbitration agreement
- Applicable law
- R&E of arbitral awards

# Legal ways to protect foreign investment

- Diplomatic protection
- Interstate dispute e.g. Barcelona Traction
- Recourse to the courts of the host State/home State
- International investment tribunals

Figure 1. Trends in known treaty-based ISDS cases, 1987–31 July 2018



Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of 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 continuously adjusted as a result of verification processes and may not match case numbers reported in previous years.

# Legal sources

## international level

1958 New York Convention

bi- and multilateral investment treaties (IIAs): geographical and temporal scope

e.g. Energy Charter Treaty

1965 ICSID (Washington) Convention

## European level

1961 European Convention

bi- and multilateral investment treaties between Member States

**Achmea**



# ICSID

## International Centre for Settlement of Investment Disputes

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### News

January 10, 2019

[Schedule of Fees Effective January 1, 2019](#)

December 28, 2018

[ICSID Secretariat offices closed on December 31, 2018 and January 1&2, 2019](#)

December 21, 2018

[ICSID Secretariat offices closed on December 24, 25 & 26, 2018](#)

December 14, 2018

[Reminder: Deadline for Submitting Comments on the Proposed Amendments to the ICSID Rules](#)

December 13, 2018

[Rule Amendment Video Series Part Nine: Conciliation](#)

### Convention and Rules



### Featured



### Upcoming events

January 24, 2019 - January 25, 2019 (Houston)

[6th ITA-IEL-ICC Joint Conference on International Energy Arbitration](#)

February 25, 2019 (Tel-Aviv)

[Tel-Aviv Arbitration Day](#)

March 27, 2019 (Washington D.C.)

[16th ITA-ASIL Conference](#)

April 03, 2019 - April 04, 2019 (Kigali)

[AfAA 1st Annual International Arbitration Conference](#)

June 03, 2019 - June 21, 2019 (London)

[Association of Young Arbitrators Africa Arbitration Academy](#)

# Contents of the IIAs

(Substantive) standards of treatment

-national treatment

-most-favoured-nation treatment

exception: procedural issues

-fair and equitable treatment

vs. minimum standard of treatment

-full protection and security

-prohibition of arbitrary and discriminatory measures

-prohibition of unlawful expropriation

Procedural rules

investor-to-state arbitration is in  
the 2441 IIAs (UNCTAD)

-consent of the State

-fora

# Legal sources

## national level

mandatory provisions of the seat  
*as ordre public*

national law is usually applicable  
to the merits of the dispute

mandatory provisions have no  
relevance when arbitration is  
under the ICSID Convention

often the parties exclude or limit  
application of national law



# Subject-matter of investment arbitration

disputes arising out of  
**“investments”**

asset-based vs. enterprise-based;  
open vs. closed list

typical exemptions:

- taxation,
- government procurement,
- subsidies,
- grants

Under the ICSID Convention  
(*Salini test*):

- substantial contribution
- certain duration,
- risk,
- significance for the host State’s development

# Subject-matter of investment arbitration

-brought by “investors”

criteria:

- incorporation,
- ownership,
- control;
- company seat and
- real economic activities in the home country

„nationality planning“

denial of benefits clauses

-against a (host) **State**

States, federal units or municipalities

State-owned companies (attribution)

# Arbitration Agreement

**Consent of a host State** (an „offer“) based on

- a treaty between a host State and a home State
- a contract between a host State and an investor
- host State legislation

Limitations, e.g.:

- amount of compensation in case of expropriation
- future disputes

An **acceptance of an investor** by filing a claim by an investor

# Applicable law

Procedural law:

## **IAs:**

preclusion of jurisdiction by

-cooling-off period

-fork-in-the-road clause

-waiver clause

## **Arbitration Rules:**

2014 UNCITRAL Rules on  
Transparency in Treaty-based  
Investor-State Arbitration

Substantive law:

## **ICSID Convention:**

choice of the parties

when no choice – host State law and  
applicable rules of international law

## **Energy Charter Treaty:**

international law

## **investment contracts:**

stabilization clauses

# R&E

## **Under any other arbitration rules:**

New York Convention governs  
awards can be set aside at the  
seat of arbitration

## **ICSID:**

### **delocalization**

enforceable in all States Parties  
like final judgments of courts of  
these States

no set aside, but can be annulled  
by ICSID