

Investor-State Dispute Settlement and the Legitimacy Debate: Is a Global Investment Court the Solution?

Carolyn B. Lamm

October 15, 2015
Columbia Center on Sustainable Development, New York

“Legitimacy” Concerns in Investor-State Dispute Settlement (ISDS)

“Online Consultation on Investment Protection and ISDS in the TTIP” by the European Commission (Jan. 13, 2015); “The Trans-Pacific Partnership Clause Everyone Should Oppose,” by [Senator Elizabeth Warren](#), Washington Post (Feb. 25, 2015); Jeff Zients, ISDS, Q&A Feb. 15, 2015; Doak Bishop Keynote Speech, Danish Institute of Arbitration; Copenhagen (Sept. 1, 2014)

- Tribunals are not sufficiently accountable and transparent

- International Tribunals are Regulating Public Policy

- ISDS does not assure independent, qualified and objective arbitrators; question arbitrator conduct

Defense of ISDS

Judge Stephen Schwebel, *In Defense of Bilateral Investment Treaties*, Keynote Address ICCA, April 2014

□ Judge Schwebel:

- ICSID/BITs guarantee international legal protection for State's treatment of foreign investors and their property
- Bridge the substantial divide between capital exporting and capital importing nations designed to protect and enhance foreign investment
- Permit individual investors to bring claims against States
- Assure enforcement regime

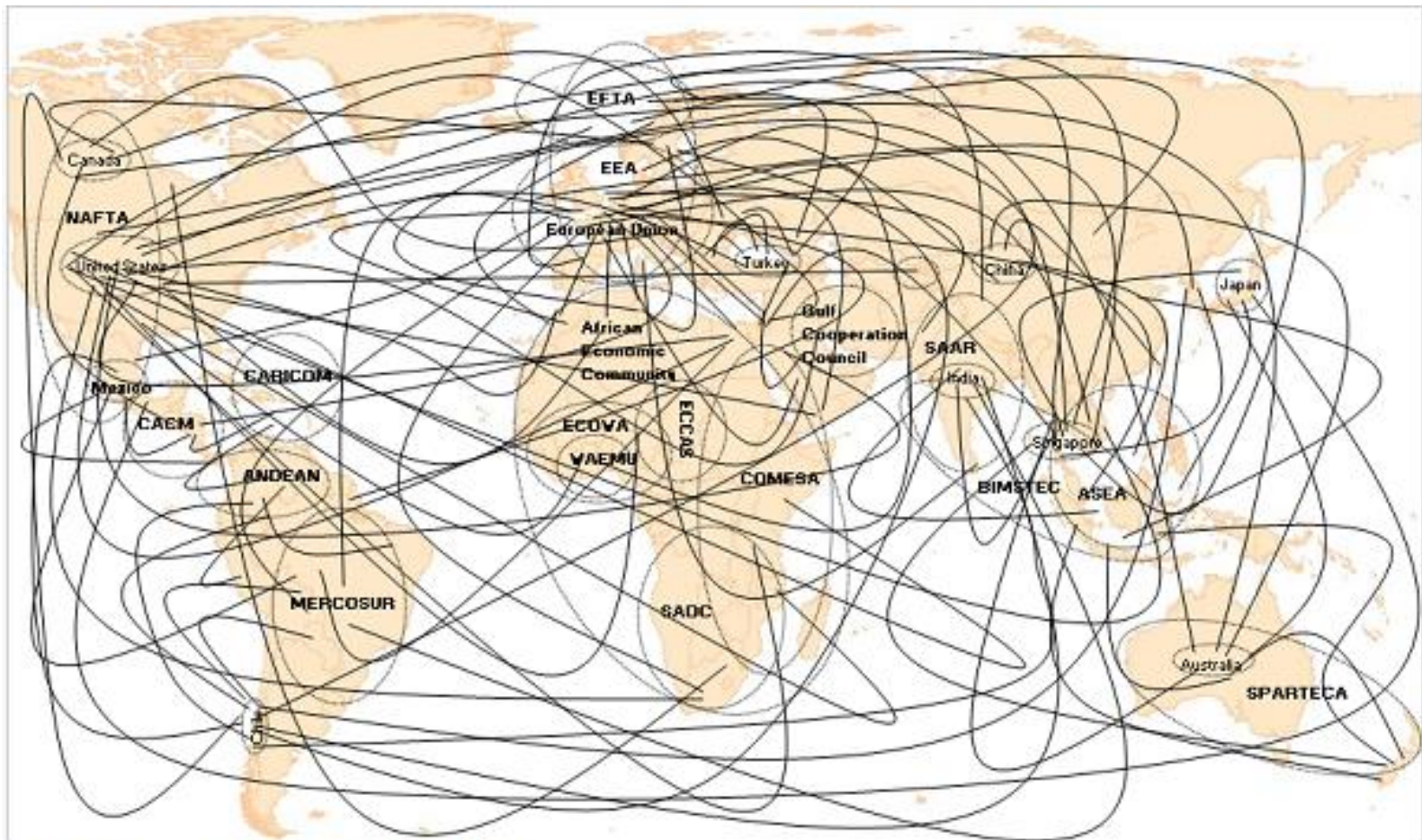
No Substitute for ISDS

Christoph Schreuer, Do We Need Investment Arbitration? in RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM 879, 884 (Jean Kalicki & Anna Joubin-Bret, eds. 2015) (quoting Jan Paulsson, *Enclaves of Justice*, TDM Vol. 4, Issue 5, Sept. 2007)

□ Schreuer:

- There is not any substitute for investor state arbitration—emphasizing inadequacy of the alternative, quoting Jan Paulsson, *Enclaves of Justice*:
 - After assessing numerous international reports on state of judiciary reaches “depressing” conclusion: “it would be preposterous to imagine that even half of the world’s population lives in countries that provide decent justice” and “[t]he rule of law is pure illusion for most ...”

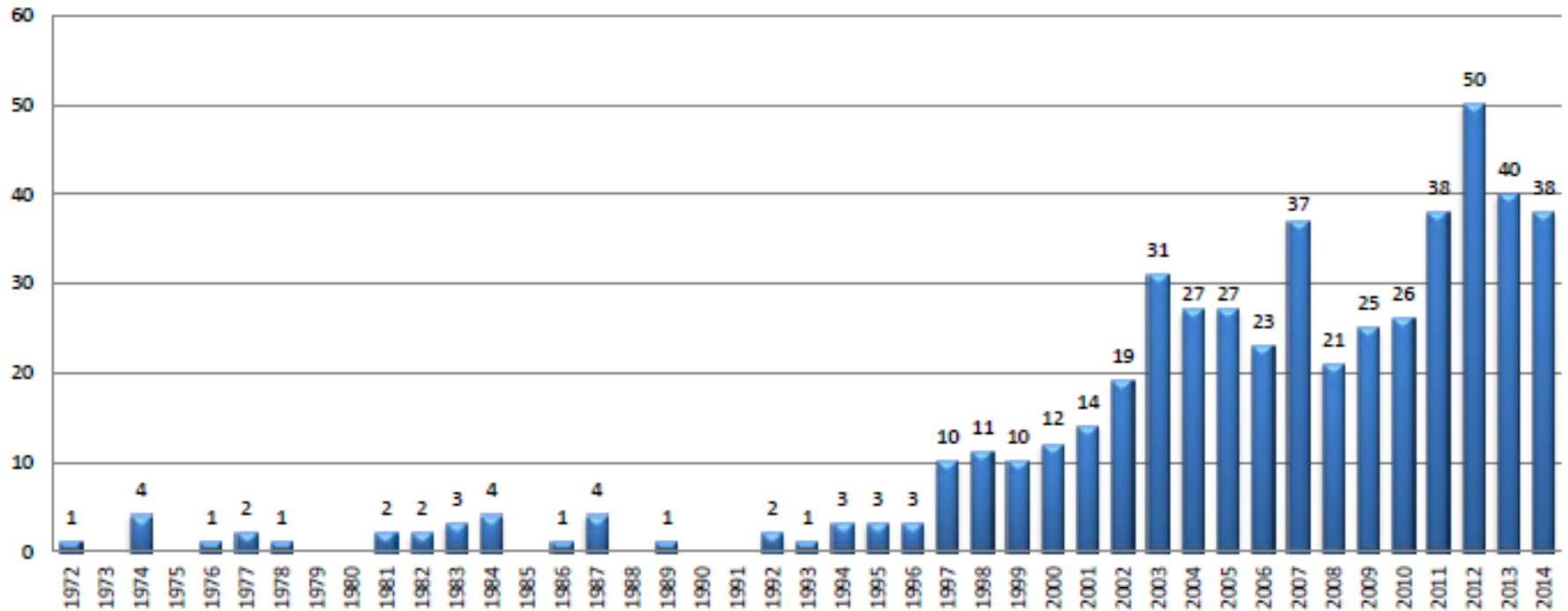
3,000+ BITs and Other Treaties Providing for ISDS



"Spaghetti bowl" of IIAs. Source: UNCTAD

Cases Registered by ICSID

ICSID, The ICSID Caseload-Statistics (Issue 2015-1), at 7

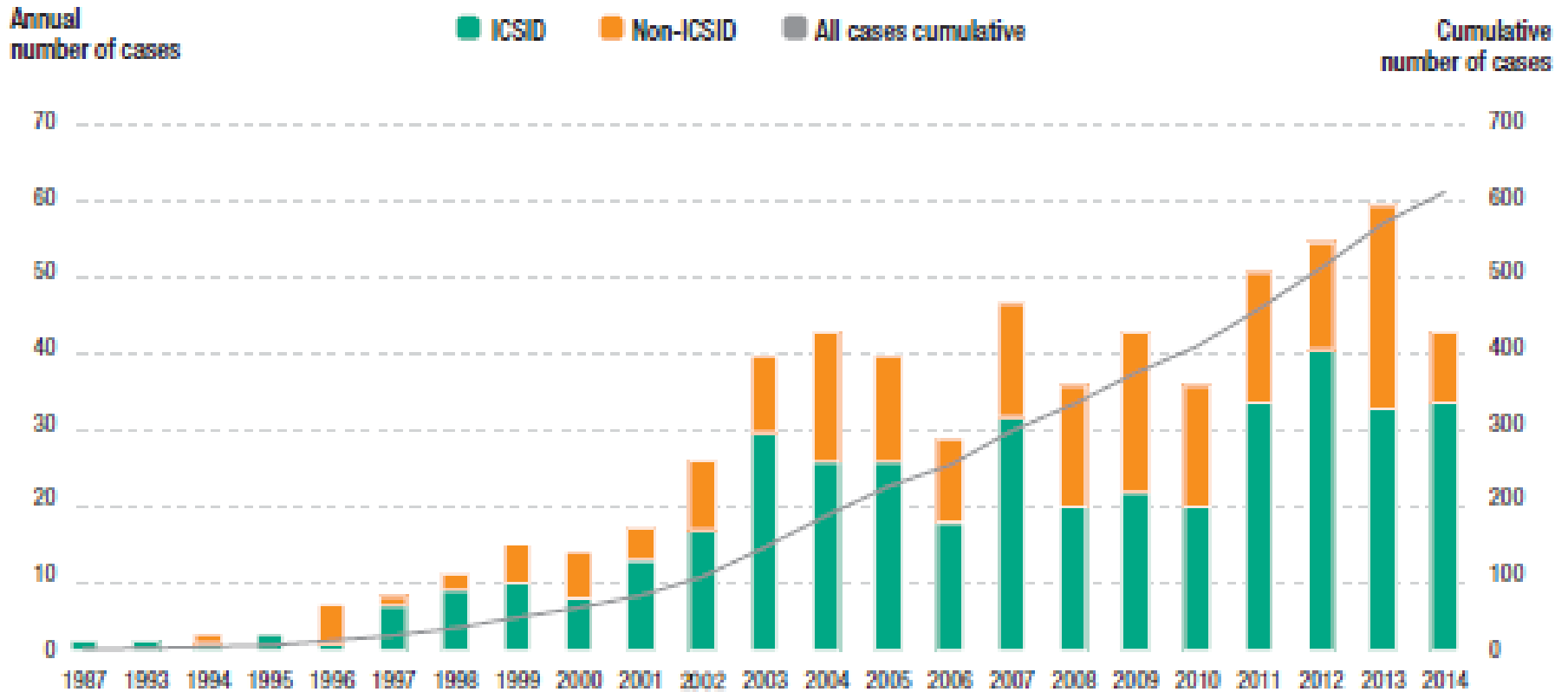


Total ICSID Cases registered as of 31 December 2014: 497

Total cases under investment treaties: approx. 600

Known ISDS Cases, 1987-2014

UNCTAD, World Investment Report 2015, at 114



Some Propose Addressing Legitimacy Concerns Through Legislation And Improved Treaties

"ISDS Questions and Answers," by Jeffrey Zients, White House Advisor (Feb. 26, 2015)

- Further legislative remedies and guidelines:
 - New (and better) BITs
 - Ethical and Procedural Guidelines
 - Institutional Rules
 - Better transparency protections
- Many concerns have already been addressed

Safeguards to Protect State Regulation of Health, Safety and Environment

- TPP reportedly contains broad exceptions
- Trend to include such exceptions/safeguards:
 - NAFTA, Art. 1114 (1992)
 - US Model BITs (since 2004) and FTAs with Colombia, Korea, Panama and Peru
 - CAFTA-DR (2004)
 - Canada Model FIPA
 - EU FTAs with Canada (CETA) and Singapore

Costs of Unmeritorious Claims

- Arbitral Tribunals have discretion to award costs, including legal fees:
 - ICSID Arbitration Rules, Rules 28, 47(1)(j)
 - UNICTRAL Arbitration Rules, Art. 42

- Examples:
 - *Plama v. Bulgaria*: \$7.46 million
 - *Libananco v. Turkey*: \$15.6 million + interest
 - *Fraport v. Philippines*: \$ 5 million

Transparency

- CAFTA-DR (2004), Art. 10.21
- US Model BIT (2012), Art. 29
- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
- UN Convention on Transparency in Treaty-Based Investor-State Arbitration (“Mauritius Convention”), adopted Dec. 10, 2014
- UNCITRAL Transparency Register (2015)
- ICSID Register (improved online, 2015)

Amicus Curiae Participation

- ICSID Arbitration Rules, Rule 37(2)
- CAFTA-DR, Art. 10.20(3)

Participation of Non-Disputing Party

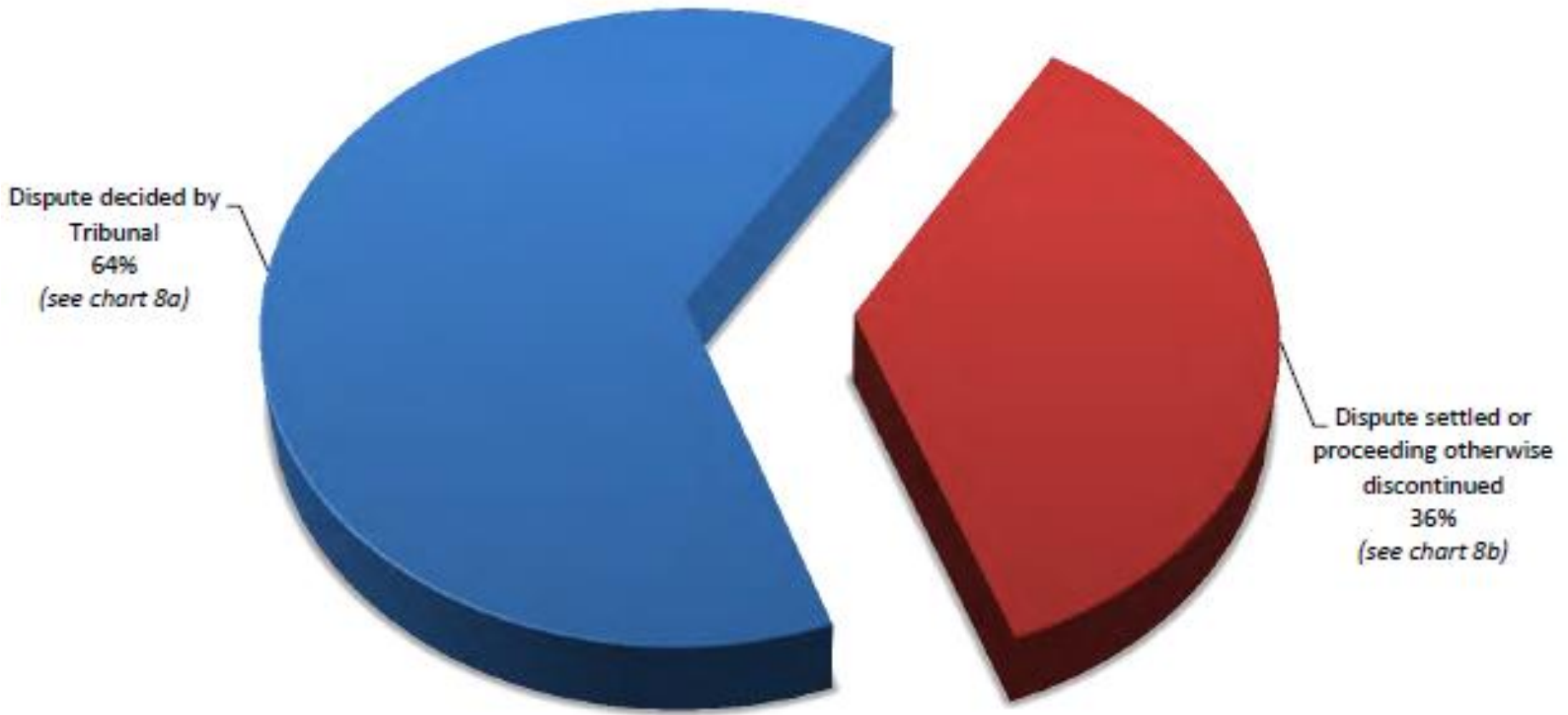
- US Model BIT (2012), Arts. 20, 28, 29, 34
- NAFTA, Art. 1128
- CAFTA-DR, Art. 10.20(2)
- *Aguas del Tunari v. Bolivia*
 - Inherent power of tribunal to seek views from the investor's home State

Neutrality & Impartiality

- Outcomes do not support the contention that ISDS is “rigged” in favor of multinational corporate interests
 - Only 30 % of ICSID cases result in awards for Investors
 - Declining average of amounts awarded vs. claimed
- Many ISDS claims are brought by SMEs and individuals

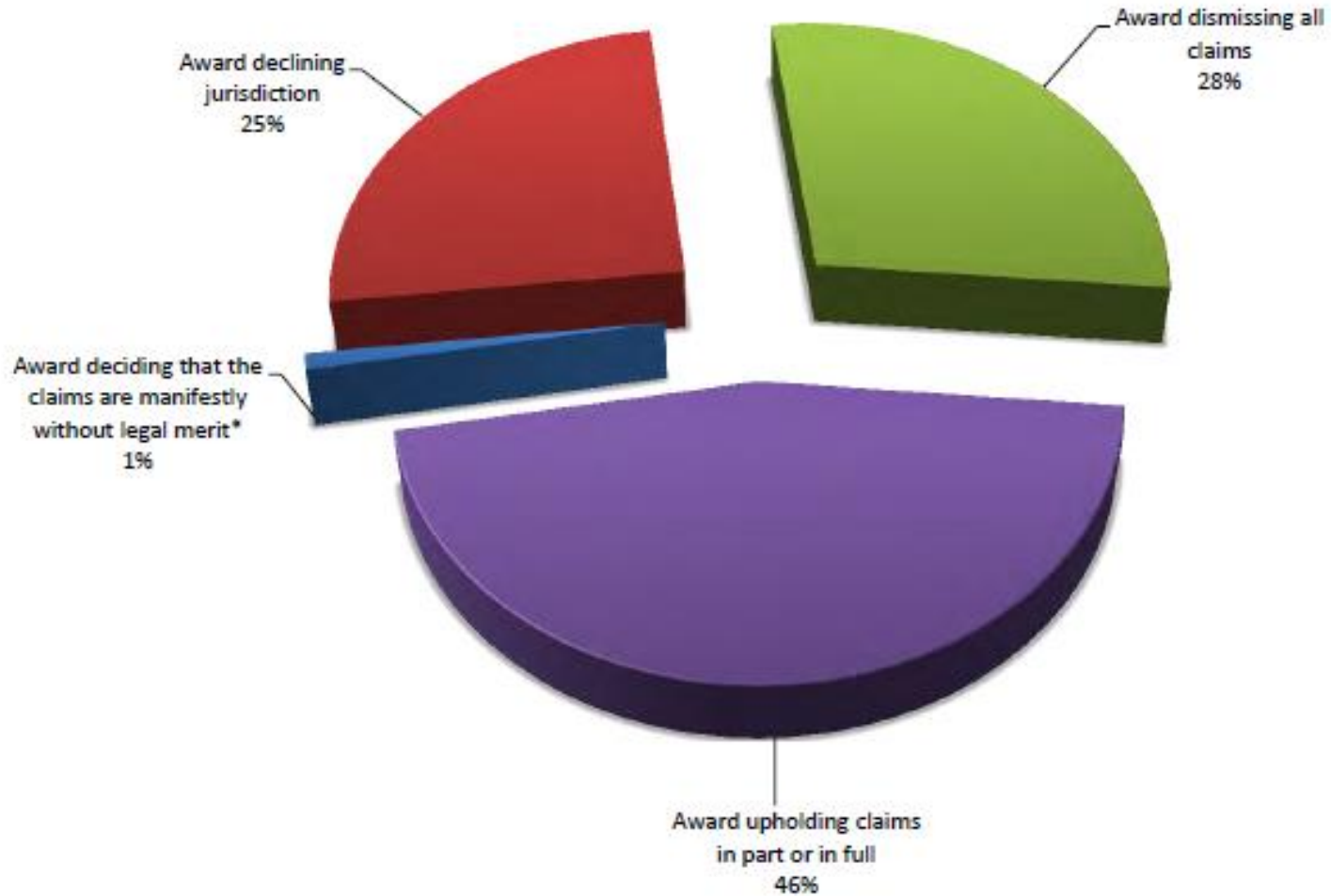
ICSID Arbitration: Outcomes

ICSID, The ICSID Caseload-Statistics (Issue 2015-1), at 13



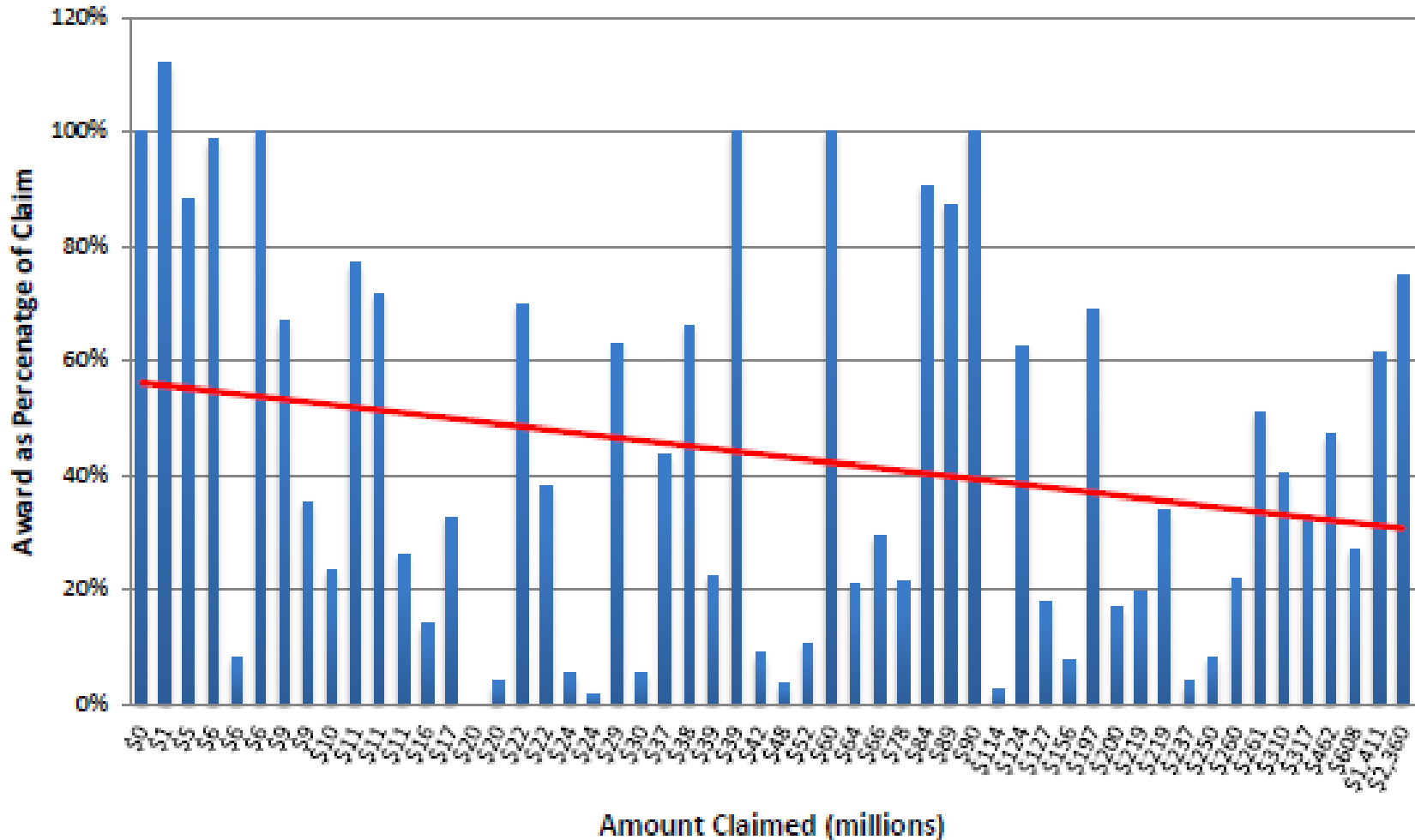
ICSID Arbitration: Outcomes (cont'd)

ICSID, The ICSID Caseload-Statistics (Issue 2015-1), at 14



Amounts Awarded vs. Claimed

Tim Hart, Study of Damages in International Center for the Settlement of Investment Disputes Cases (Credibility International, June 2014), at 7



Appellate Mechanism

- Contemplated as a possibility by US treaty practice:
 - US Model BIT (2012), Art. 28(10)
 - US-Chile FTA, Annex 10-H
 - CAFTA, Annex 10-F
- ICSID Annulment
 - Limited procedural and due process grounds
- Domestic court review of non-ICSID awards
 - National law applies

Global Investment Court - Questions

- One court for all investment treaties?
- Who appoints the judges: only States?
- Judges' qualifications?
- Financing?
- Location?
- How would it better meet any concerns than one-off arbitral tribunals?

EU Commission Proposal: Overview

European Commission, Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (Sept. 16, 2015)

- Tribunal of First Instance (“Investment Tribunal”)
 - 15 Judges:
 - 5 EU + 5 US + 5 third State nationals
 - Disputes allocated randomly to 3 judges
 - 1 EU + 1 US + 1 third State national who presides

- Appeal Tribunal
 - 6 Members
 - 2 EU + 2 US + 2 third State nationals

EU Commission Proposal: Details

European Commission, Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (Sept. 16, 2015)

- Judges appointed jointly by EU and US for 6-year terms
 - High qualifications (similar to ICJ and WTO Appellate Body; also ICSID)
- Judges cannot act as counsel in investment disputes
 - Code of conduct for judges
- Judges' remuneration costs to be shared by EU and US
 - Monthly retainer plus fees for days worked, similar to WTO Appellate Body
- Appeal Tribunal to review Investment Tribunal's decisions for legal correctness

EU Commission Proposal: More Details

European Commission, Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP) (Sept. 16, 2015)

- Online transparency of submissions and hearings
 - Similar to UNCITRAL Transparency Rules
- Disclosure of third-party funding
 - See recent tribunal orders in *EuroGas v. Slovakia* and *Sehil v. Turkmenistan*
- Government control of interpretation
 - Bilateral Commission, similar to NAFTA Free Trade Commission
- Early dismissal of claims unfounded “as a matter of law”
 - Similar to ICSID Arbitration Rule 41(5) (“manifestly without legal merit”)
- Loser pays principle
 - Similar to UNCITRAL Arbitration Rules; trend among ICSID tribunals

A Complementary Proposal: “Legitimacy Concerns” Should be Addressed in Part by Protecting the Process

Judge Stephen Schwebel, *In Defense of Bilateral Investment Treaties*, Keynote Address ICCA, April 2014 (quoting RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 20 (2008))

□ ICSID/BITs

- Judge Schwebel (quoting Dolzer & Schreuer) describes creation of ICSID as “the boldest and most innovative steps in the modern history of International cooperation concerning the role and protection of foreign investment.”
- Today we assess whether the “legitimacy concerns” are “growing pains” given the combination of public and private international law and procedure—that can be addressed with attention to process

□ Arbitrator and Counsel:

- **Duty to parties** to assure due process and application of the rule of law: international/national
- Fair and efficient method of dispute resolution: procedural due process

Perspectives to Consider

- Parties to international arbitration must feel that their case was heard
- **Arbitrators must be active guardians of the process and avoid idiosyncratic approaches**
- Witnesses must not be abused or subjected to intimidation
- Counsel must conduct themselves according to the agreed rules

Questions of Due Process Arise During Each Procedural Stage of Arbitration

- **Establishing the Procedural Schedule**
 - Strict Equality vs. Special Needs
- **Addressing Bad Faith Tactics**
 - “Document Dump” vs. “Stonewalling”
 - “Sandbagging” – Surprise Evidence at the Hearing
 - Frivolous Challenges to Arbitrators’ Impartiality
- **Transparency in the Tribunal’s Assessment of the Issues**
 - The Tribunal’s Key Concerns vs. What the Parties Want to Present
- **Selection of Witnesses for Examination**
 - Just Cross-Examination?
 - Flexibility to Use Hearing Time as Needed
 - Vigorous Examination by Arbitrators
- **Closing Statements**
- **Annulment**
 - Gratuitous Criticism and Comments

Tribunals' Power (and Duty) to Protect the Arbitral Process

CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 987 (2nd ed. 2009); RESTATEMENT OF THE LAW THIRD, THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, Council Draft No. 3 (Dec. 23, 2011) § 4-13, cmt. c

- Only the Tribunal can ensure the integrity of the proceedings:
 - Arbitral tribunal may conduct the arbitration in such manner as it considers appropriate,
 - provided that the **parties are treated with equality** and
 - **each party is given a reasonable opportunity of presenting its case.**

- The Tribunal needs to inspire confidence in and safeguard the system
 - Requires attention to the process to assure a balance and correct record on which to decide issues.

Tribunals' Power (and Duty) to Protect the Arbitral Process

- Tool box: procedural orders, provisional measures, and interim decisions
 - Regarding Transparency: Allow Amicus Submissions
 - *Philip Morris v. Uruguay*
 - CAFTA-DR; NAFTA; ICSID
 - Prevent Unlawful Collection of Evidence
 - *Libananco v. Turkey*; *Methanex v. United States of America*
 - Stay Proceedings
 - *SGS v. Philippines*
- Tribunal's regulation of its own conduct
 - Independent and unbiased
 - Allow parties to present their case freely and fully

Meet Much of the Current Criticism by Arbitrator and Counsel Assuring Both Parties Due Process

- **Many criticisms of international arbitration can be addressed through increased due process, consistency, and transparency**
 - Due Process is essential for the system of international arbitration
 - Fair system = fair results
- **Arbitrators must be active guardians of the process and avoid idiosyncratic approaches**
- **Arbitrators must seek the truth in order to serve justice**
 - Do not allow the opposing party to control the selection of witnesses
 - Assure that parties and counsel can present their case and confront the evidence
 - Take measures to develop the full record of the case, disclose key issues, and permit parties to address them

White & Case

701 Thirteenth Street, NW

Washington, DC 20005

T +1 202 626 3600

F +1 202 639 9355