



ABHINAWA LAW CHAMBERS
advocates & legal consultants

Ministry of Law, Justice and Parliamentary Affairs

Comprehensive Training on Treaty Drafting and Negotiations

Business and Investment Treaties

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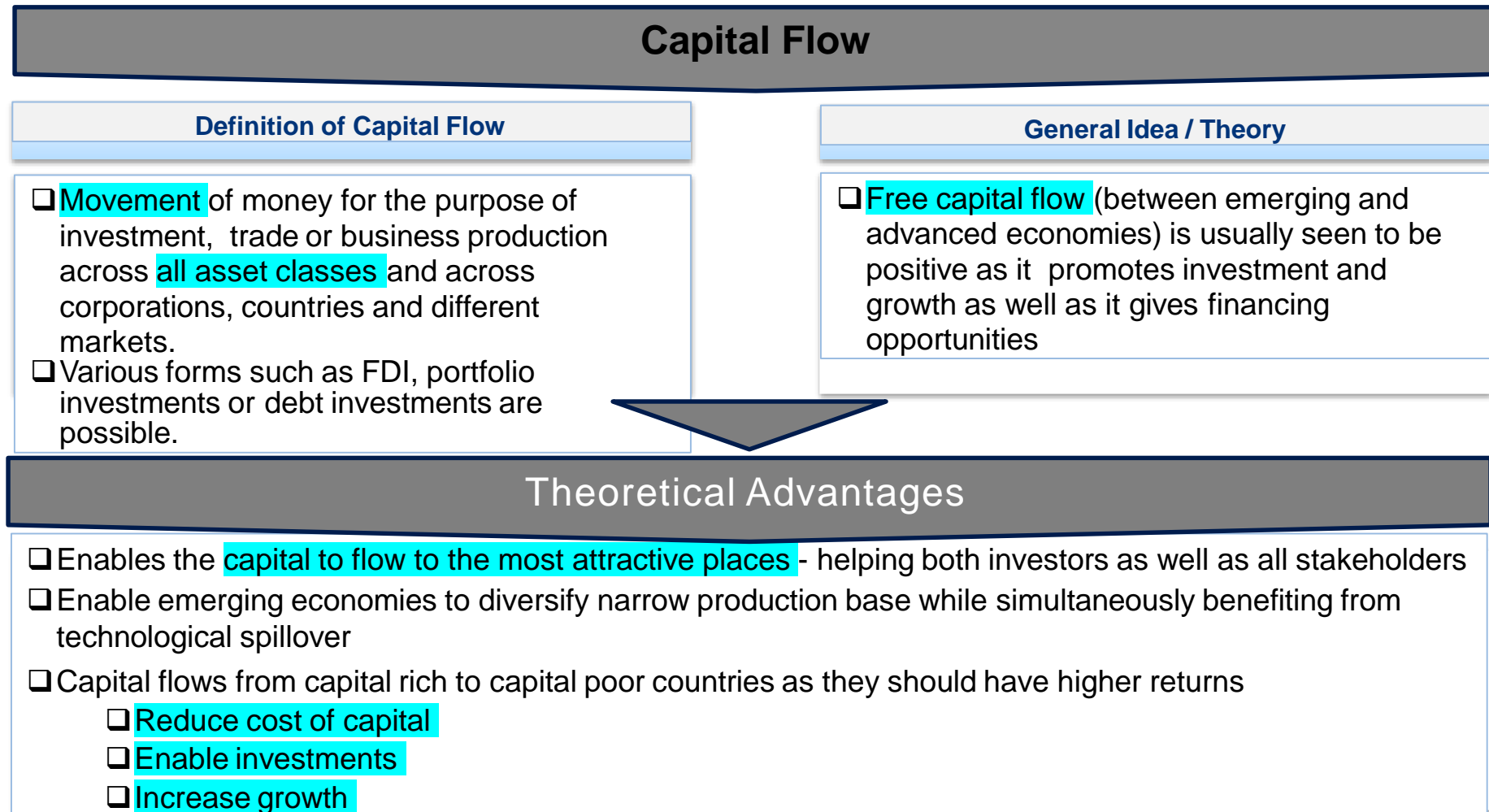


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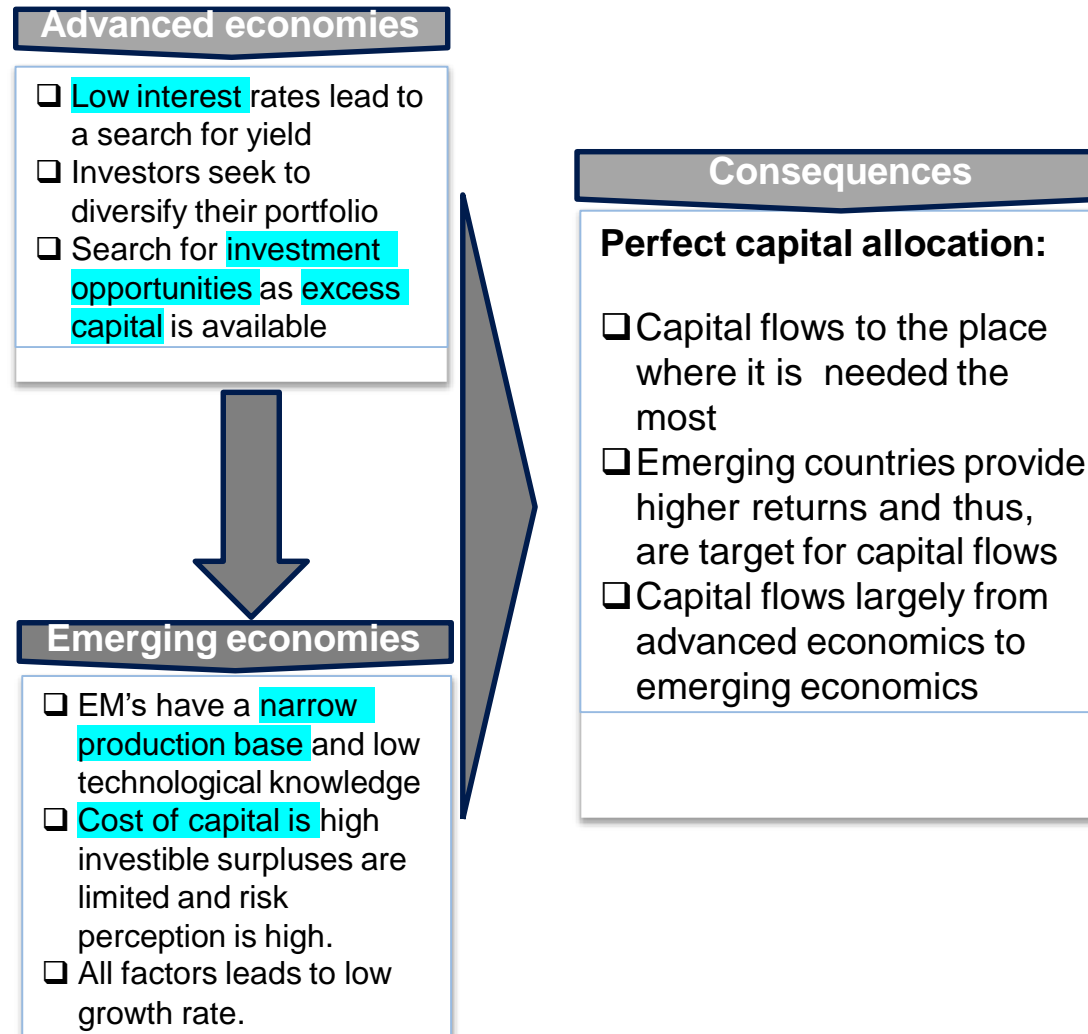
PART- 1

THE CONCEPT OF CAPITAL FLOW

1.1 Capital Flow - Meaning



1.2 Free Capital Flow





1.3 Complementarities in Capital Flow

Investor Benefits

Investors gain higher returns:

- ☐ Investors are able to diversify their portfolio and thereby reduce risk
- ☐ Provides investment opportunities for investors
- ☐ Access to new and attractive markets
- ☐ Free capital flow enables investors to seek the individually desired yield to the specific risk appetite
- ☐ Increases returns due to lower transaction costs with no capital controls.

Host Country Benefits

Local economy grows due to:

- ☐ Large capital inflows allow for domestic investments
- ☐ The local economy benefits from technological spillover
- ☐ Investments attract foreign managerial / organizational expertise
- ☐ Improvement of local human capital
- ☐ Due to higher local profits, tax revenues increase
- ☐ Positive side effects on the development of local financial markets, legal system, and political stability



1.4 Meaning of Foreign Direct Investment

- FDI a cross-border investment in which a resident in one economy (the direct investor) acquires a **lasting interest** in an enterprise in another economy.
- The **lasting interest implies a long-term relationship between the direct investor and the enterprise** and usually gives the direct investor an effective voice in the management of the enterprise.

1.5 FDI Flows (2023-2024)

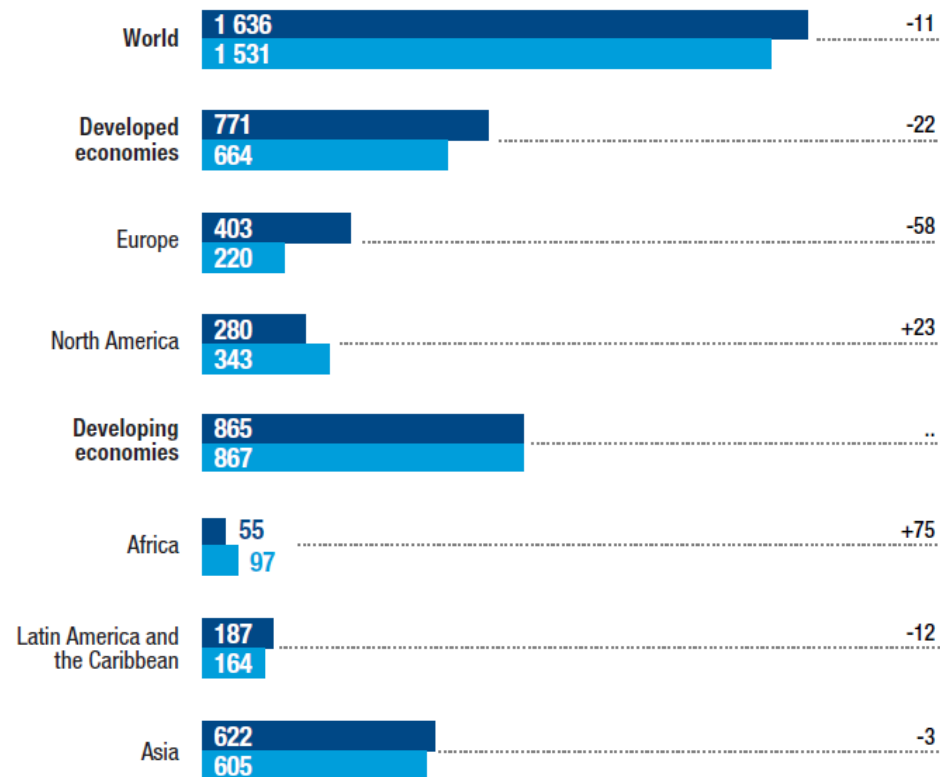


Figure I.2

Foreign direct investment declined in several regions

Inflows by economic grouping and region
(Billions of dollars and percentage change)

■ 2023 ■ 2024



Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics).

1.6 Nepal FDI Data



Annex table 1
FDI flows, by region and economy, 2019–2024
(Continued)

Region/economy	FDI inflows						FDI outflows					
	2019	2020	2021	2022	2023	2024	2019	2020	2021	2022	2023	2024
Cambodia	3 663	3 625	3 483	3 579	3 959	4 395	102	127	92	150	151	172
Indonesia	23 883	18 591	21 131	25 390	21 497	24 212	3 352	4 448	3 845	7 323	7 080	9 703
Lao People's Democratic Republic	756	968	1 072	636	1 668	988	..	-	-	-	..	..
Malaysia	7 813	3 160	12 173	17 136	8 468	11 259	6 231	2 419	4 676	14 275	6 610	7 399
Myanmar	2 509	1 907	2 067	1 239	1 520	1 095	..	..	..	..	..	..
Philippines	6 020 ^b	3 254 ^b	10 225 ^b	5 939 ^b	6 452 ^d	8 938 ^d	700 ^b	-6 ^b	493 ^b	308 ^b	1 052 ^d	2 880 ^d
Singapore	98 083	71 550	130 955	142 128	135 104	143 352	67 776 ^b	39 793 ^b	61 368 ^b	52 230 ^b	62 997 ^b	55 257 ^b
Thailand	3 781	-5 630	14 648	11 705	8 053	10 580	8 410	17 270	18 668	7 656	15 213	8 151
Timor-Leste	-239	-713	-419	-395	138	247	-3	-26 ^c	-26	-34	-68	5
Viet Nam	16 120	15 800	15 660 ^b	17 900 ^b	18 500 ^b	20 170 ^b	465	380	358 ^b	2 674 ^b	-950 ^b	20 ^b
South Asia	58 073	69 951	51 360	55 556	34 578	34 569	13 269	11 204	17 704	15 923	14 068	24 142
Afghanistan	23 ^b	13 ^b	21 ^b	..	..	..	26 ^b	37 ^b	31	..	..	..
Bangladesh	1 857	1 465	1 572	1 518	1 464	1 270	21	10	80	33	6	7
Bhutan	3	1	1	15	14	100	..	..	..	..	..	..
India	50 558	64 072	44 763	49 380	28 076	27 556	13 144	11 109	17 253	14 618	13 893	23 782
Iran (Islamic Republic of)	1 508	1 342	1 425	1 500	1 422 ^c	1 449 ^c	85	78 ^c	82 ^c	100 ^c	87 ^c	89 ^c
Maldives	961 ^b	441 ^b	643 ^b	732 ^b	767 ^b	806 ^b	..	..	..	..	..	..
Nepal	185	126	196	65	74	57	..	..	..	..	..	..
Pakistan	2 234	2 057	2 147	1 462	2 048	2 568	-85	-45	242	1 157	32	153
Sri Lanka	7 420 ^b	4 924 ^b	5 000 ^b	6 024 ^b	7 420 ^b	7 024 ^b	77 ^b	47 ^b	47 ^b	47 ^b	54 ^b	44 ^b

Source: UNCTAD



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PART- 2

INVESTMENT PROTECTION FROM INVESTOR'S PERSPECTIVE



2.1 How and Why Investment Disputes Arise?

Key Considerations

Investment involves medium/long-term exposure to a host state's different, less known environment

Investors are unknown to culture, traditions, legal system, political infrastructure

Issues can include foreign exchange, legal, political, taxation, and regulatory measures

Investor complaints in relation to actions of host-State courts

Cancellation of licenses or termination of Agreement

Imposition of fines or other administrative action

Nationalization

2.2 (a) Country Focus – Venezuela

- Broad picture of stability and receptive to foreign investment
- 1989 - opened up petroleum sector to foreign participation
- Considering privatisation of PDVSA
- 60 foreign companies from 14 countries in oil sector
- 1998 – Chavez elected





2.2 (b) Country Focus – Venezuela

- 2001 – New Hydrocarbons Law
- Oil production and distribution to be domain of state
- Private investors could not own more than 50%
- 2005 – fields that had not been "migrated" to new contracts were seized
- National Assembly grants powers to nationalise further
- Nationalisation of telecommunications and electricity sectors
- Reaction of foreign investors – negotiate, arbitrate, negotiate again



2.3 Investor Confidence



- Limit political risk
- Effective, functioning business
- Avoid “hostage effect” of having assets trapped overseas
- Ensure return on investment for shareholders



- Effective structuring of investment to ensure:
 - legal protections at international level
 - method of non-national dispute resolution
- In event of dispute, potential for enforcement outside the country of investment



how can this be achieved?



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PART- 3

LEGAL PROTECTION OF INVESTMENTS



3.1 Sources of Investment Law

International Law

- Main legal instruments are investment treaties – primarily aimed at protecting the foreign investor in the host state
- Treaties may have no governing law clauses as the treaty (and public international law) itself is the governing law.
- States may also enter into contracts where the national law of one of the parties governs the contract. VCLT does not apply to these.

Investment Contracts

- May take the form of Concession Agreements or Project Development Agreements.
- Disputes arising from investment contracts may be heard in the national courts or before arbitral tribunals.

Foreign Investment Laws

- Normally provides the basic provisions of the desired investment, incentives and guarantees, investment controls, and sets out the administration of the foreign investment process.
- Promote and control investment



3.2 On What Basis Might Disputes Arise?

- Investment Agreement/Concession Contract

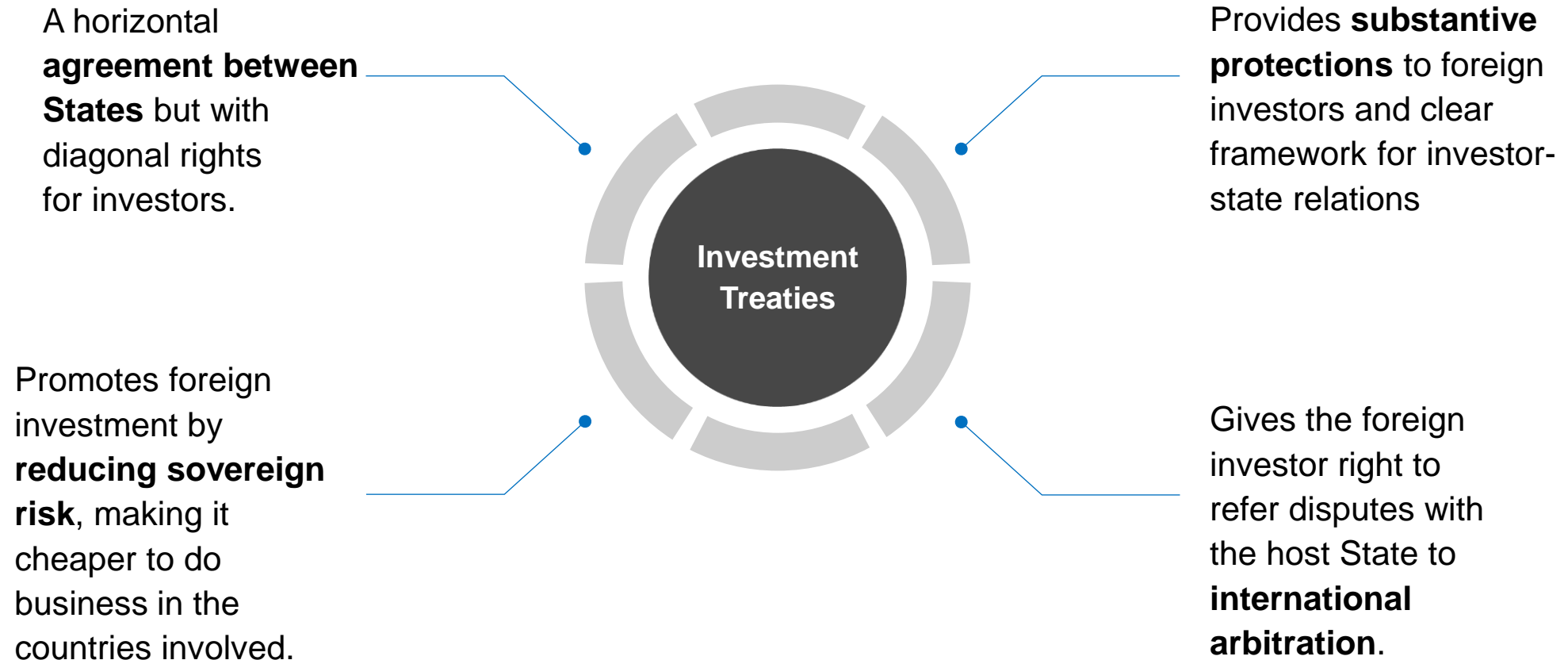
- Domestic Law on Foreign Investment

- Bilateral Investment Treaty

- Multilateral Investment Treaty

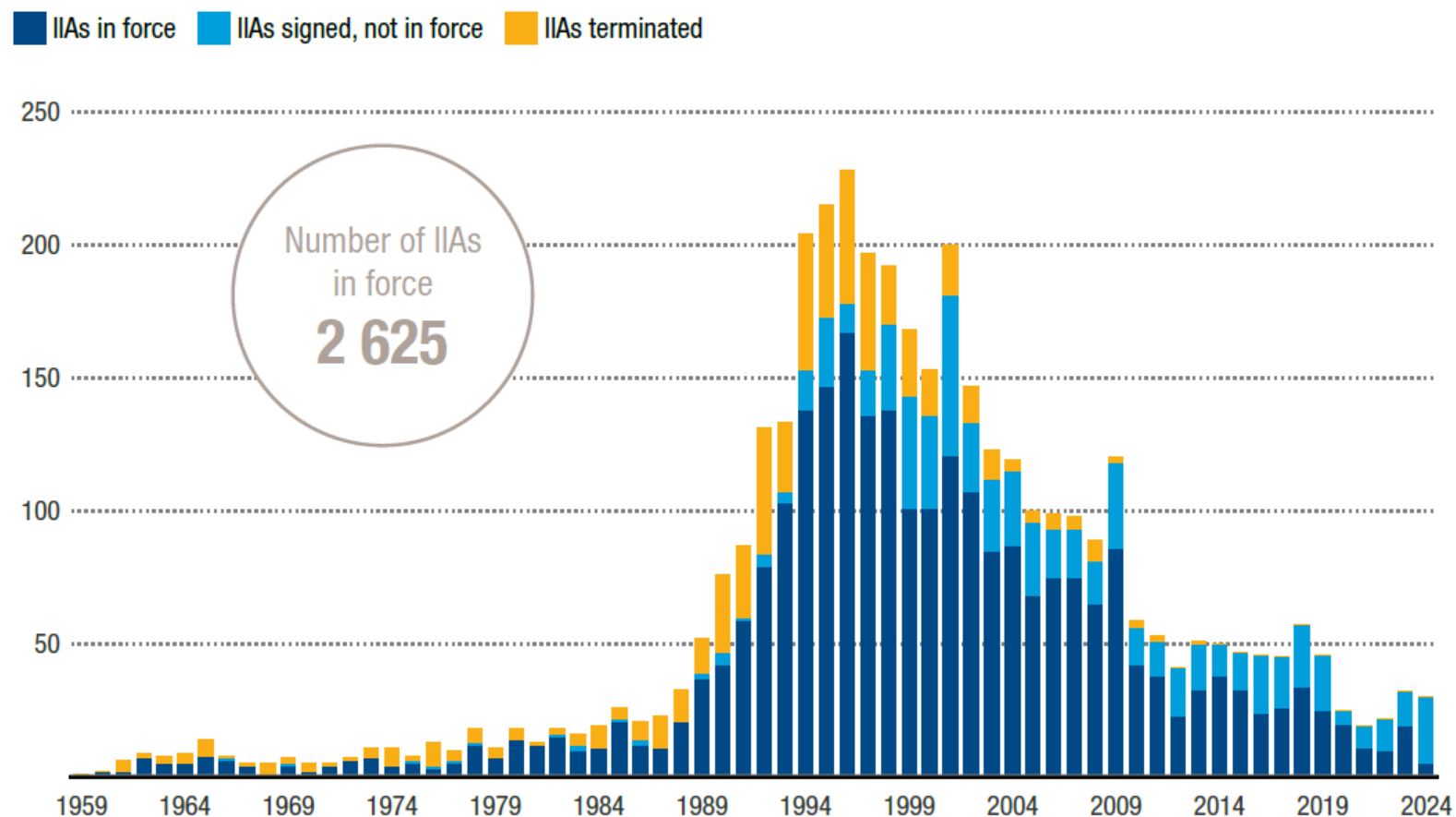


3.3 International Investment Agreements/Treaties



3.4 (a) Trends in International Investment Agreements

Stock of IIAs signed and in force, 1959–2024 (By date of signature)
Agreements from the 1990s and 2000s continued to dominate the international investment regime
Number and status of agreements by year of signature

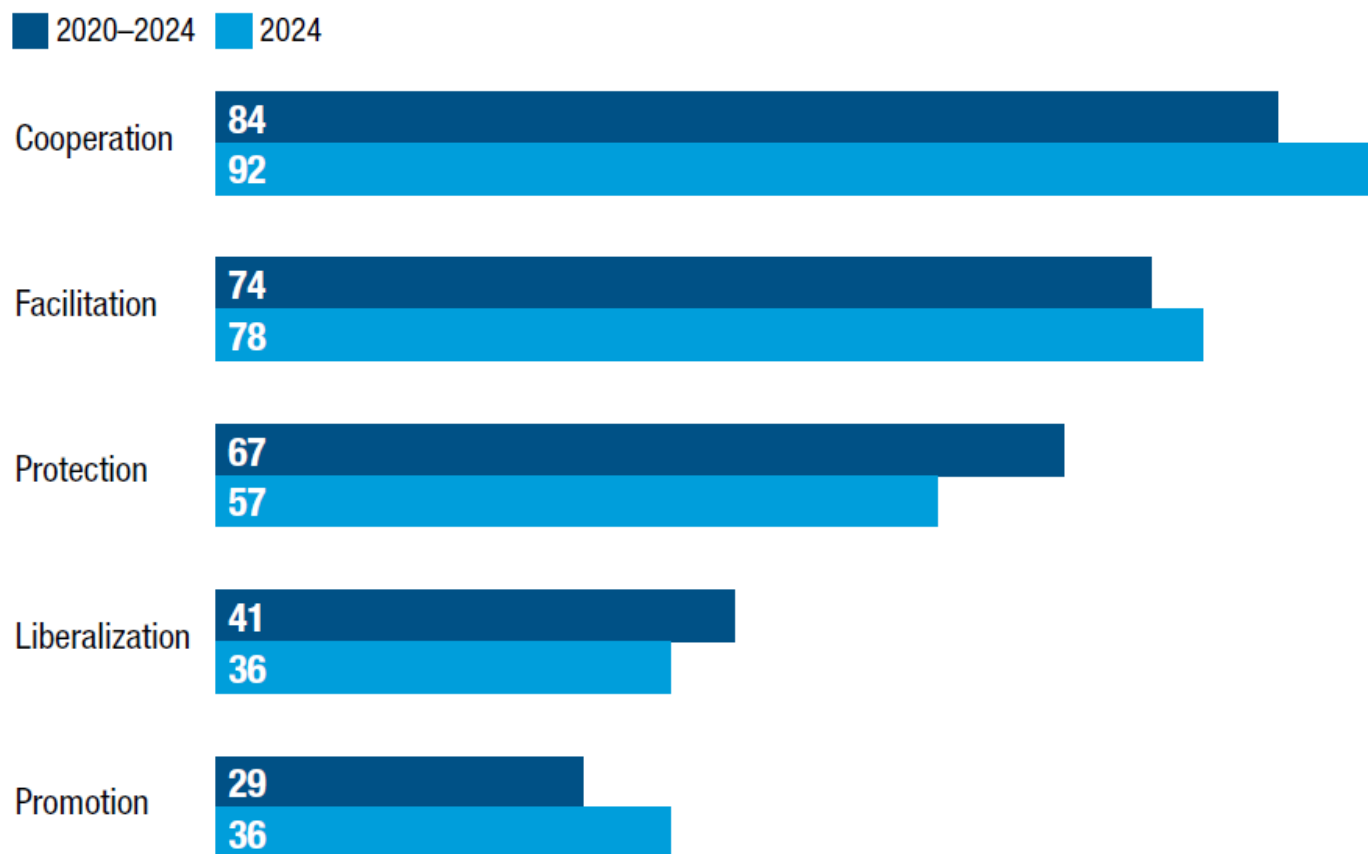


3.4 (b) Trends in International Investment Agreements

The content of investment agreements has continued to evolve

Agreements signed by type of provision, 2020–2024

(Percentage)



Source: UNCTAD, IIA Navigator database, accessed 24 March 2025.



3.5 Key Features of BIT





3.6 Key Features of MIT

- Treaties signed by a number of States containing rights and obligations applicable between all those States
- Examples include:
 - Energy Charter Treaty 1994
 - NAFTA 1994
 - ICSID Convention 1965
 - OIC Agreement 1988
 - 1987 ASEAN Agreement for the Promotion and Protection of Investments
 - CAFTA-DR
- **AN EXAMPLE OF AN MIT: THE ENERGY CHARTER TREATY**
 - Response to end of Cold War- legal framework in order to promote long-term co- operation in the energy field
 - 52 original signatories, 48 ratifications, Russia since withdrawn (47 left)
 - As with BITs give legal rights to private parties against foreign governments and mechanism to enforce those rights outside jurisdiction



3.7 BITs entered by Nepal

NO.	SHORT TITLE ▲	STATUS ▲	PARTIES ▲	DATE OF SIGNATURE ▼	DATE OF ENTRY INTO FORCE ▲
1	India - Nepal BIT (2011)	Terminated	India	21/10/2011	
2	Finland - Nepal BIT (2009)	In force	Finland	03/02/2009	28/01/2011
3	Mauritius - Nepal BIT (1999)	Signed (not in force)	Mauritius	03/08/1999	
4	Nepal - United Kingdom BIT (1993)	In force	United Kingdom	02/03/1993	02/03/1993
5	Germany - Nepal BIT (1986)	In force	Germany	20/10/1986	07/07/1988
6	France - Nepal BIT (1983)	In force	France	02/05/1983	13/06/1985



3.8 (a) Substantive Provisions in BITs

Fair and equitable treatment (“FET”)

- Host State must not:
 - harm the investment by unreasonable or arbitrary conduct; or
 - act in a way which is not transparent or contrary to the reasonable expectations of the investor.

Full protection and security (“FPS”)

- Host State must physically protect the investment

National treatment (“NT”)

- Host State must grant investors the same treatment that is given to its nationals.

Most-favoured-nation (“MFN”) treatment

- The investor is entitled to treatment as favourable as that given to nationals of any third countries.



3.8 (b) Substantive Provisions in BITs

No unlawful expropriation

- Host State must not expropriate investments of investors from the other contracting State unless it is done:
 - for a public purpose;
 - which is non-discriminatory;
 - is in accordance with the due process of law; and
 - against prompt, adequate and effective compensation.= (customary) public international law standard

Non-discrimination

- Host State must not act in a way that discriminates against investments of investors of the other contracting State.



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PART- 4

OVERVIEW OF BITS' SUBSTANTIVE PROVISIONS



4.1 Principles of Standards of Protection

- Today, international investment law is largely positivist, meaning it is mostly based on rules expressed in written instruments such as treaties.
- Commit state-parties to afford specific standards of treatment to foreign investors from other state-parties
- However, Customary International Law (CIL) still plays an important role. For example:
 - Contributes the principles that investor-State tribunals use to interpret treaties;
 - CIL also provides the substantive law for certain types of claims, such as “denial of justice”.
 - Indeed, there is a new phase of CIL renaissance, as States are increasingly drafting-in references to CIL in new generation trade and investment treaties (particularly in “Fair and Equitable Treatment” clauses)

Expropriation

Fair and
Equitable
Treatment

Most
Favoured
Nation



4.2 (a) Expropriation

- Two main forms of expropriation are recognised under international investment law:
 1. **Direct Expropriation:** the host State openly and deliberately seizes or confiscates foreign-owned property or transfers title of that property to the state (or a State-mandated third party).
 2. **Indirect Expropriation (Creeping):** the host State takes measures which do not amount to a direct expropriation but do result in a ***substantial deprivation*** of the foreign investor's property rights or the economic benefits that it would have derived from those rights.
- Most investment treaties recognise this distinction by prohibiting both expropriation and measures “*having effect equivalent*” to expropriation (see eg, Article 5 of the UK-Nepal BIT)



4.2 (b) Expropriation

- The classical form of direct expropriation is nationalisation.
- Most common trigger for a direct expropriation claim is where a ***critical concession (such as a production permit) is revoked by the host State***.
Eg. Cancellation of Maldives Airport Concession
- Most common trigger for an indirect expropriation claim is ***adverse regulation***. To combat such claims, clarifications (limitations) relating to indirect expropriation are now being included in investment treaties (see eg, Annex 2 of the ASEAN Comprehensive Investment Agreement):
 - *An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.*
- **Lawful expropriation?**



4.3 (a) Fair and Equitable Treatment (FET)

- The FET standard is meant to protect the investor (and its investments) against host State conduct that does not fall within the scope of the expropriation clause
- An example of a typical FET:

Article 3 of the France-Nepal BIT:

“Each Contracting Party undertakes to ensure in its territory and in its maritime zones fair and equitable treatment of investments of the nationals and companies of the other Party and to ensure that the exercise of the right so recognized shall not be hindered either in law or in fact.”



4.3 (b) Fair and Equitable Treatment (FET)

- It is well established that FET includes:
 - The protection of the “basic expectations that were taken into account by the foreign investor to make the investment” (*ie*, legitimate expectations);
 - A requirement that the host state maintain a transparent, stable and predictable legal and regulatory environment for the investment;
 - A requirement that the host State refrain from treating the investor or its investments in a manner that is discriminatory, arbitrary, or unfair
- Denial of Justice
 - Coercion and Harassment
- Administrative decision making
 - Procedural Fairness or Due Process
 - Bad Faith
 - Discrimination
 - Protection of Investor’s Legitimate Expectations



4.4 Most Favoured Nation

- MFN treatment requires that each Contracting State extend to investors from the other Contracting State any greater benefit that it grants to an investor from a third country.
- MFN clauses are important in practice because they can be used to:
 - Import substantive protections and standards that the applicable investment treaty does not otherwise contain;
 - Improve the substantive protections and standards that the applicable investment treaty does not otherwise contain; and
 - Potentially, avoid unfavourable carve-outs in the applicable investment treaty.
- For such MFN clauses to have any value, the host State must have given a “better deal” to investors from other countries.



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PART- 5

ENFORCING UNDER A BIT AND ARBITRAL AWARDS



5.1 Investor State Dispute Settlement

International Investment Agreements (“IIAs”) allow foreign investors (individuals and companies) to allege treaty violations by suing States through arbitration.

The legal basis for ISDS is found in the IIAs, which forms the overwhelming majority.

ISDS

Arbitral tribunals are appointed and paid for by one or both of the disputing parties

Tribunals are not bound by precedent and can order remedies (usually in the form of monetary awards) to investors if they find that states have breached treaty obligations.



5.2 Example Provision (Nepal-Finland BIT)

ARTICLE 9 DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties to the dispute.

2. If the dispute has not been settled within three (3) months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted to:

(a) the competent courts or arbitral or administrative bodies of the Contracting Party in whose territory the investment is made; or

(b) arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965

(hereinafter referred to as the “Centre”), provided that both Contracting Parties are parties to the said Convention, or if the Centre is available; or

(c) arbitration by the Additional Facility of the Centre, if the Centre is not available; or

(d) an ad hoc arbitration tribunal to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).



5.3 Jurisdictional Hurdles

- Agreement to arbitrate

- Exhaustion of local remedies



the Convention as a company of the other Contracting Party. If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether

- Fork in the road
- Cooling off period
- Qualifying investment
- Qualifying investor



5.4 Forums for Settlement of Investment Disputes

ICSID/ICSID Additional Facilities

- The International Centre for Settlement of Investment Disputes (“ICSID”) is an international arbitration institution established in 1965 for legal dispute resolution and conciliation between states and foreign investors.
- Parent Organization is World Bank
- ICSID Convention, 158 contracting states including Nepal.
- Provide administrative services for ad hoc arbitrations and has its own “Additional Facility” arbitration rules for countries that are not party to the ICSID Convention.

UNCITRAL ARBITRATION RULES

- Created in 1985 and updated several times since then, arbitration rules often used for all types of ad hoc arbitrations (commercial and investor-state), most popular alternative to ICSID arbitration (often combined with the Permanent Court of Arbitration as administering institution).

Permanent Court of International Arbitration

- International organisation established by treaty in 1899 to act as arbitration centre for all types of State-to-State disputes (as an alternative to International Court of Justice) and disputes between a state, based in The Hague (Netherlands), has its own arbitration rules but is often used as administering institution for investor-state arbitrations using the UNCITRAL Arbitration Rules.

Commercial Arbitral Institutions

- Generally ICC, sometimes SIAC or SCC (Stockholm Chamber of Commerce), could be any other institution (provided the institution accepts to administer the dispute), some institutions have developed additional arbitration rules dedicated to investor-state disputes to promote themselves as alternatives to ICSID and the PCA.



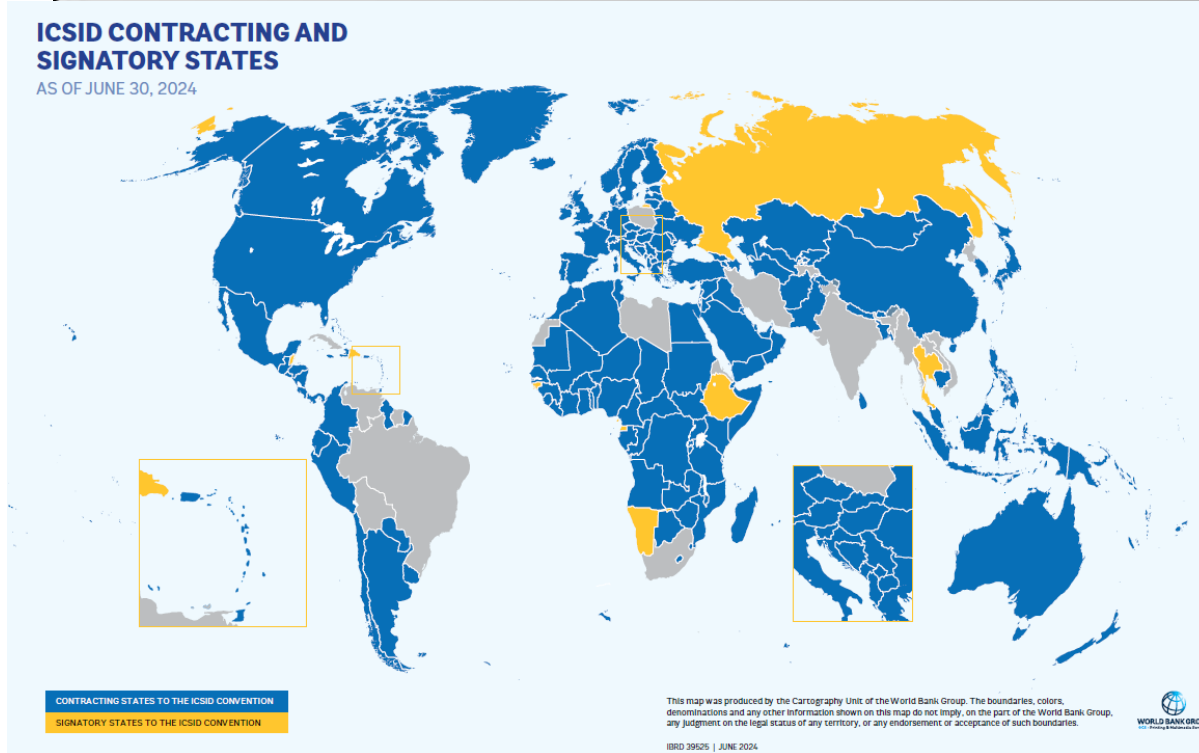
5.5 (a) World's Bank Investment Centre: ICSID

Headquarters: Washington, D.C., United States
Founded: 14 October 1966, Washington ("ICSID")
Convention
Secretary-General: Meg Kinnear
Parent organization: The World Bank
Has Nepal Participated?: Yes

Full self-contained system: ICSID is:

- an arbitration & mediation institution (like ICC, SIAC...)
- a seat of arbitration (with its own arbitration law and annulment system)
- an enforcement convention (like the New York Convention)

5.5 (b) World's Bank Investment Centre: ICSID

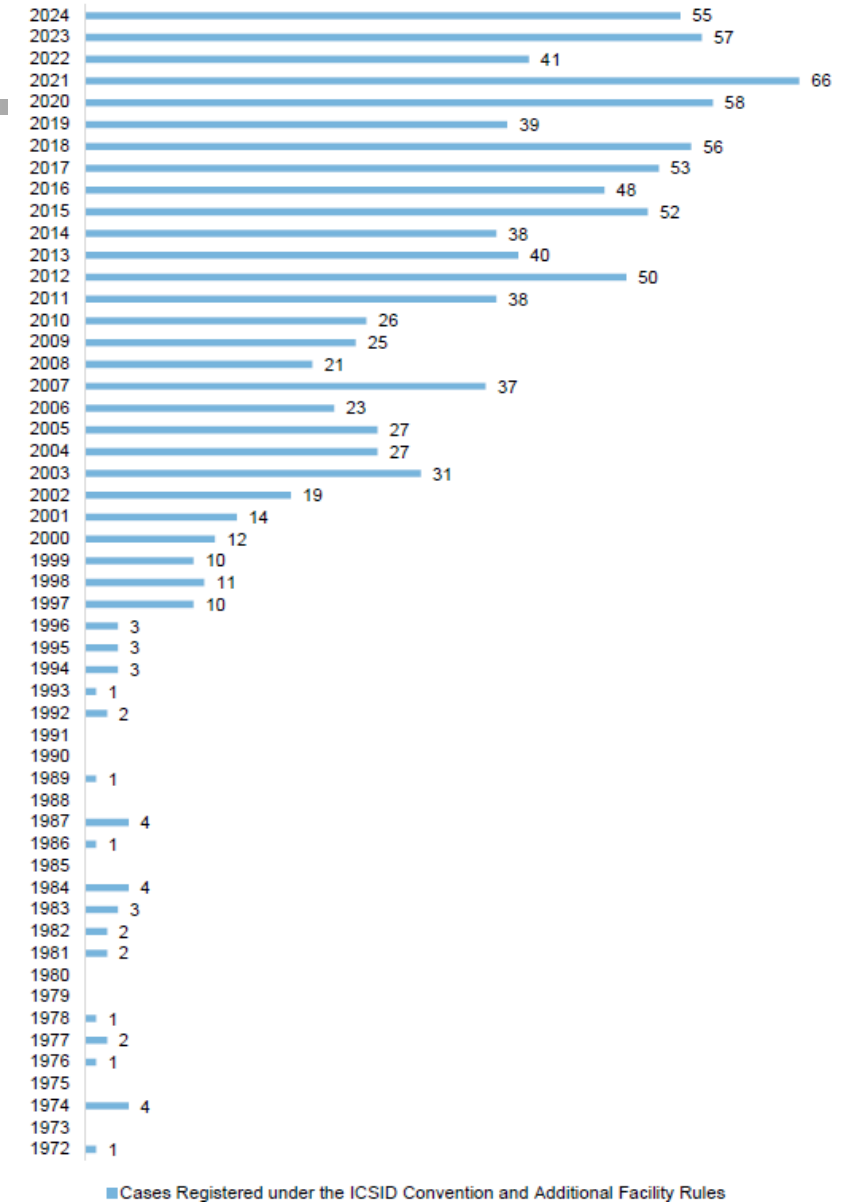


Member States

ICSID Cases by Calendar Year



Chart 3: ICSID Cases Registered by Calendar Year





5.6 Features of Awards

- Awards are typically in the form of monetary damages to investors.
- Tribunals will sometimes award **injunctive relief** against states and find states monetarily liable for government decisions not to comply with the orders.
- There are also cases where the claimant seeks requests for relief that affect non-disputing third parties. For example, an indigenous community and investor have competing claims over rights to a piece of land, and the investor sues in ISDS to secure an award ordering the state to provide it clear title to the disputed property.
 - It may be argued that in ISDS disputes, the state represents the rights and interests of its citizens and thus concerns regarding effects on third-party rights do not arise.



5.7 Enforcement of ICSID Awards – 5 Principles

1

Contracting States are obliged to recognise an ICSID award as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State.

2

1.No scope for national courts to refuse recognition of awards that have not been annulled, including on jurisdictional, procedural, public policy, or merit-based grounds.

3

All that is required to seek recognition is to furnish to the competent court or other authority a copy of the award certified by the Secretary-General of ICSID.

4

Although there is no scope for a national court to refuse recognition of ICSID awards, an ICSID tribunal or annulment committee may provisionally stay enforcement under the ICSID Convention. Otherwise, ICSID awards are immediately binding and enforceable

5

Execution is governed by national laws concerning execution of judgments



5.8 Annulment of ICSID Awards

- Awards under ICSID can only be ‘annulled’ by an *ad hoc* ‘annulment committee’ appointed by the Chairman of the ICSID Administrative Council on limited grounds:
 - Tribunal not properly constituted.
 - Tribunal manifestly exceeded its powers.
 - Corruption on the part of a member of the tribunal.
 - Serious departure from a fundamental rule of procedure.
 - Award has failed to state the reasons on which it is based.
- If award is not annulled, every state party to the ICSID Convention must enforce as if it were a decision of domestic courts.



5.9 Enforcement of Non ICSID Awards

- An award under the UNCITRAL Arbitration Rules/ Other Commercial Arbitration Rules can usually be set aside by the domestic court at the place of the arbitration.
 - Grounds are established under domestic law in the place where the set aside application is brought.
- Further enforcement of awards under the UNCITRAL Arbitration Rules/ Other Commercial Arbitration Rules can be challenged pursuant to provisions of the New York Convention on Enforcement of Arbitral Award.
- Refusal to secure enforcement under New York Convention are:
 1. incapacity of the parties or invalidity of the arbitration agreement;
 2. violation of due process rules;
 3. differences not falling within the terms of, or decisions on matters beyond the scope of, the submission to arbitration;
 4. improper composition of the arbitral authority or non-respect of arbitral procedure; and
 5. award not yet binding, set aside or suspended;
 6. differences that cannot be settled by arbitration; and
 7. violation of public policy.



5.9 And Finally – Something to Think About.....

- What BITs/MITs exist and are potentially applicable?
 - What do they cover?
 - Identify any projects of concern?
 - “MFN” provisions
 - “Treaty Shopping”
 - Restrictions on protection to shell companies/control by investors of third countries (indirect investment)



THANK YOU

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