

Protecting your investments and assets: using investment treaty structuring and arbitration clause drafting to your advantage

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Why Arbitration?

Advantages

- Speed
- Flexibility
- Enforceability
- Expertise
- Expense
- Relative privacy and confidentiality
- No rights of appeal

Disadvantages

- Speed
- Timing of expense
- No rights of appeal
- Lack of third party privity
- Tribunal not bound by precedent

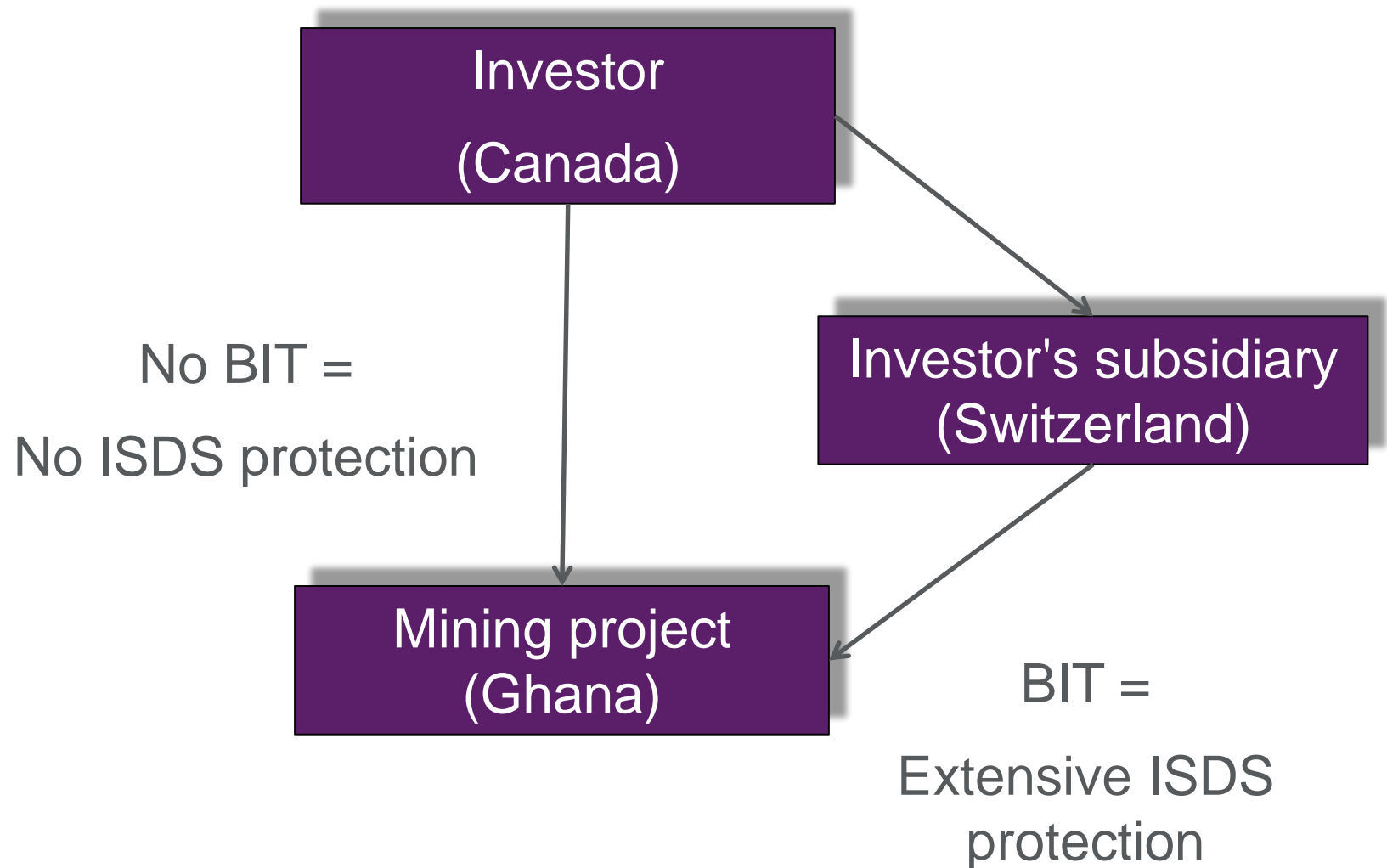
Tailoring an international arbitration process

- Tiered or stepped clauses
- Institutional or *ad hoc*
- Expedited procedures
- Emergency arbitrator
- Interim measures
- Multiparty / multi-contract / consolidation / joinder issues
- Time limits

Structuring a mining investment

- Bad news: easy to get it wrong
- Good news: easy to get it right

Structuring a mining investment: example of a *Canadian company investing in a gold mine in Ghana*



What are investment treaties?

- State-to-state treaties that cover disputes between foreign investors and states/state entities or organs
- Designed to promote foreign direct investment
- Governed by public international law
- Treaty rights are independent of domestic law, domestic courts and do not require a direct contractual relationship with the government or state entities
- If the host state breaches its obligations in the investment treaty, the investor can initiate a claim directly against the host state under international law (at or outside of ICSID); this is referred to as ISDS (Investor State Dispute Settlement)
- This right is over and above any contractual arbitration right (e.g. ICC) that may exist under the relevant contract

Investment treaty protection often trumps political risk insurance or contractual protections

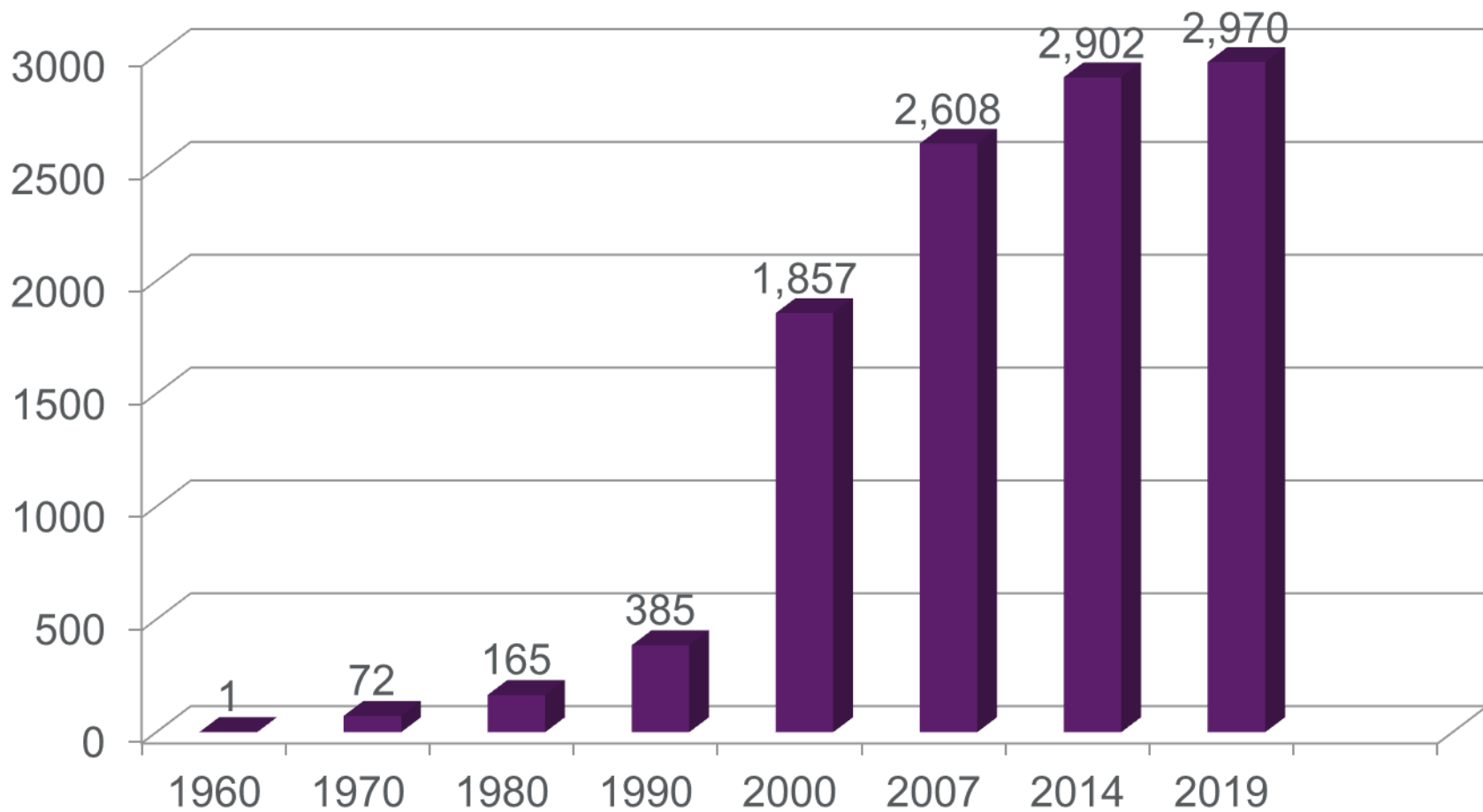
- **Political risk insurance**

- **Cost:** Investment treaty protection has no or minimal cost associated with it, whereas political risk insurance can be expensive
- **Scope:** Investment treaty protection offers more expansive coverage than political risk insurance
- **Returns:** Investment treaty protection entitles you to the fair market value of your assets, which can often include future lost profits. In contrast, political risk insurance often entitles you only to the "book value" of the asset

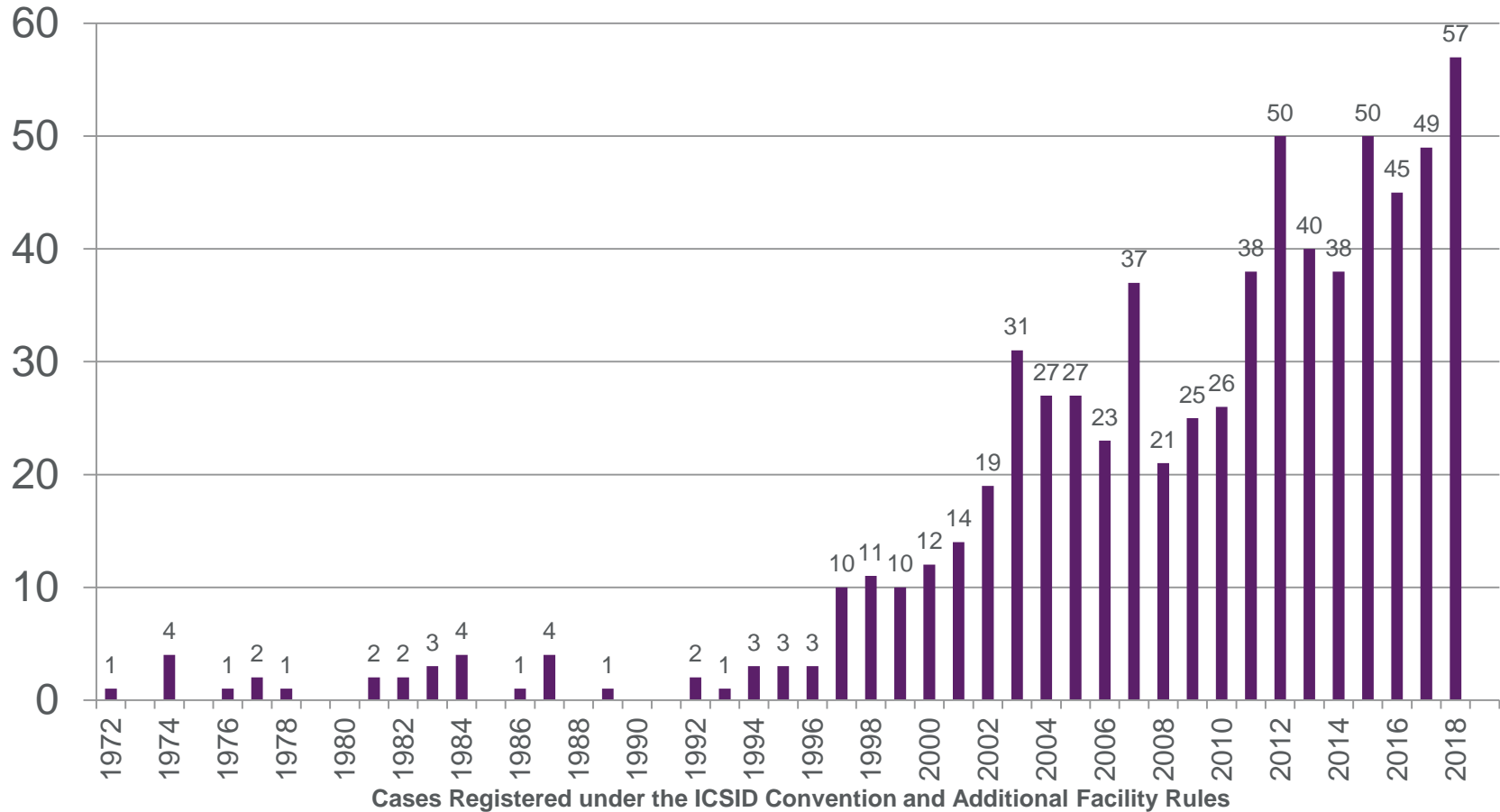
- **Contractual protections**

- Limited to what you can negotiate e.g. stabilisation clause
- Subject to contractual restrictions and applicable law, jurisdiction

The BIT Revolution

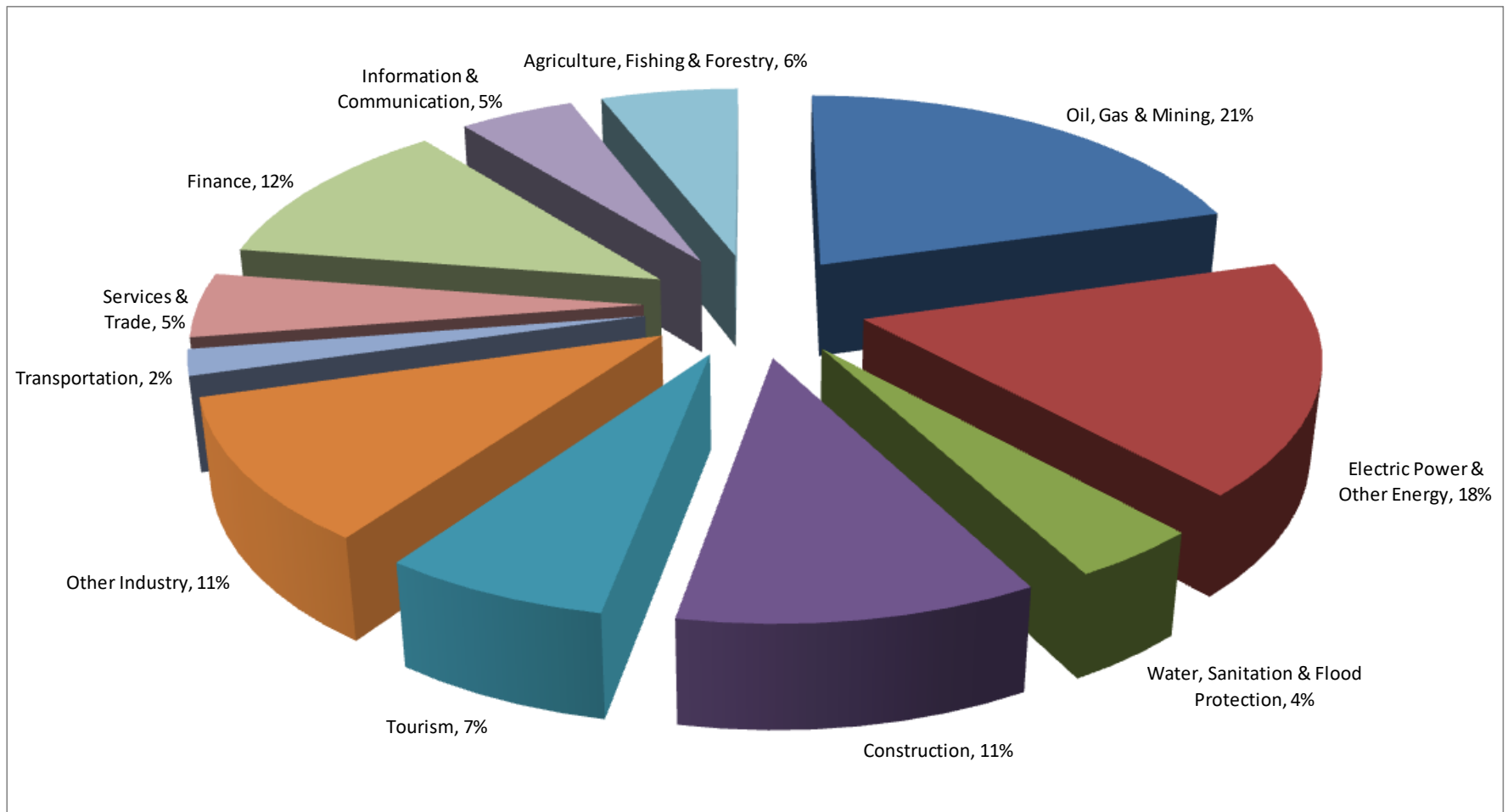


Total number of ICSID arbitrations registered

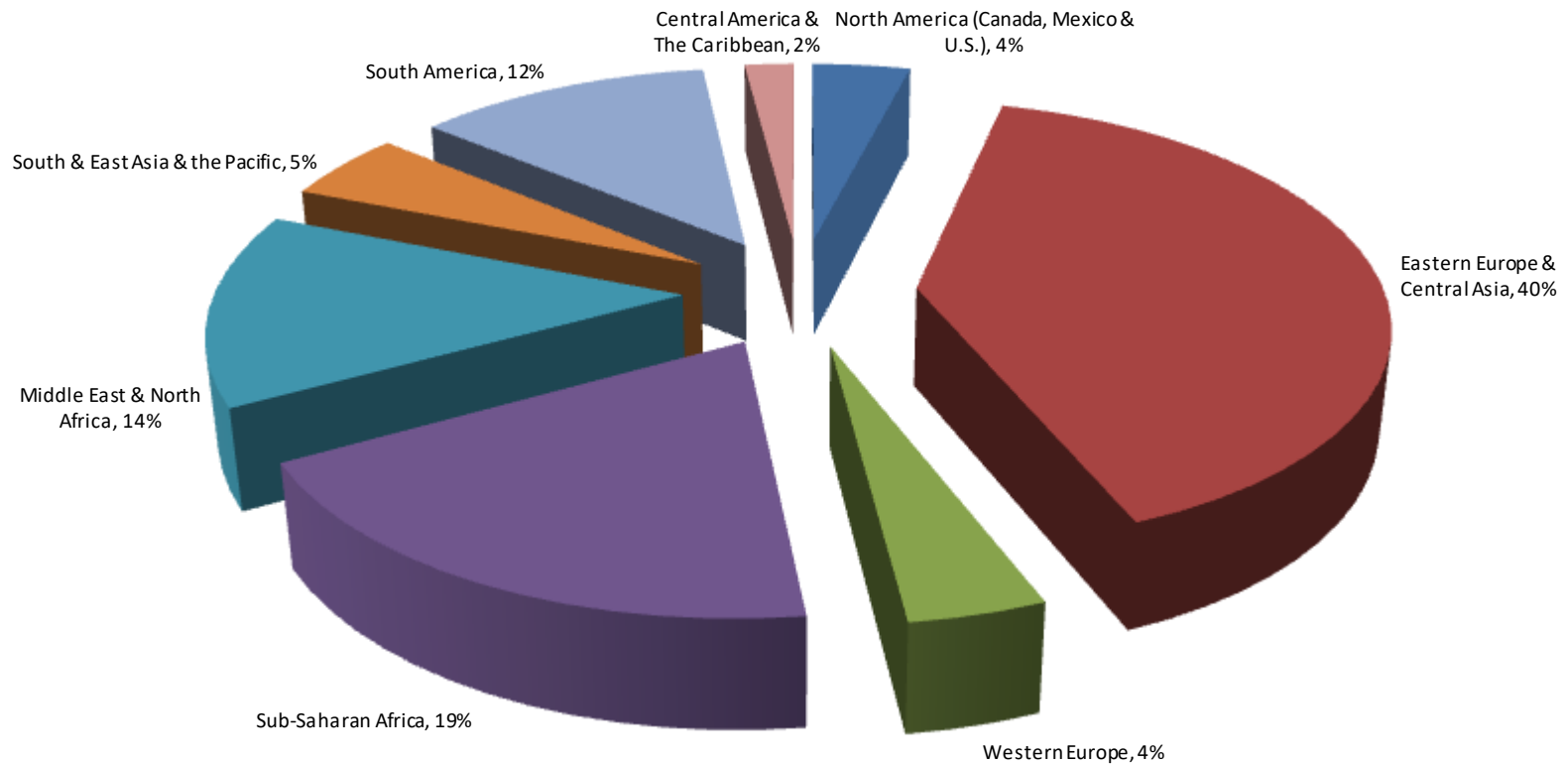


From ICSID Report

Distribution of ICSID arbitrations by economic sector



Geographic distribution of ICSID arbitrations (respondent states)



Who and what is protected?

"Investors" with "investments" as defined in relevant instrument

Article 1

Definitions

For the purpose of this Agreement:

- (1) The term "investor" refers with regard to either Contracting Party to
 - (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
 - (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;
 - (c) legal entities established under the law of any country which are effectively controlled by nationals of that Contracting Party having a substantial part in the ownership.

Who and what is protected?

- (2) The term "investments" shall include every kind of assets and particularly:
 - (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
 - (b) shares, parts or any other kinds of participation in companies;
 - (c) claims to money or to any rights to any performance having an economic value;
 - (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and other business assets;
 - (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

Who and what is protected?

- Tribunals sometimes impose additional criteria, none of which poses any real issue for mining projects:
 - Substantial commitment or contribution
 - Duration
 - Risk
 - Contribution to economic development of the host State

What are the substantive protections offered?

- Compensation for expropriation
 - Direct expropriation
 - Indirect expropriation
- Fair and equitable treatment
 - Protection of "legitimate expectations" of investors
 - Transparent, stable and predictable legal environment
 - Prohibition against "denial of justice"
- National treatment
- Full protection and security
- Most favoured nation treatment

Successfully enforcing awards

- ICSID awards for money quasi-automatically enforceable under the “self-contained” regime of the 1965 ICSID Convention
- 1958 New York Convention (where applicable) for other awards
- Some basics about enforcement strategy

Financing or funding for an arbitration

- Institutional Third-Party Funding (TPF)
 - An arrangement between a company that specializes in the business of financing disputes and an entity (usually a claimant), where the funder provides financing to that entity that is secured against the dispute
- Different TPF funding models
- Funding could be used for the arbitration, or other business costs

Thank you

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Jean-Christophe Honlet is a partner in Dentons' Paris office and Global Head of Dentons' International Arbitration group. He concentrates on international arbitration, both commercial and investor-State, and acts as counsel, expert witness and arbitrator. He is in charge of the international arbitration seminar at the Project Finance Master of the Ecole Nationale des Ponts et Chaussées/University of Paris Ouest.

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Rachel is a partner in the [Litigation and Dispute Resolution](#) Group and co-leader for Dentons Canada's national ADR and Arbitration group. Her clients are primarily in the energy and natural resources industries, where she advises on complex matters that have an international or multi-jurisdictional aspect. Rachel also advises domestic and international clients on the drafting of dispute resolution clauses in transactional documents and she is a frequent speaker and author on matters of international and domestic arbitration.

In her arbitration practice, Rachel has acted on matters involving issues across Canada and in South America, Central Asia and South-East Asia. She has experience under several institutional rules, including ICSID, and in *ad hoc* proceedings. In her commercial litigation practice, Rachel has appeared before all levels of Court in Alberta.

Rachel works with clients to resolve disputes involving industry relationships and agreements including joint venture agreements, farmout agreements, ownership and operating agreements, gas purchase and sale agreements, electricity purchase and sale agreements, oil and gas asset purchase and sale agreements, royalty agreements, services agreements, seismic licensing agreements, confidentiality agreements, and operating agreements. She also acts in matters involving environmental issues, such as claims for contribution to remediation and issues relating to water and soil contamination, accounting and audit rights, claims of *force majeure*, disputes arising from production on aboriginal lands, shareholder disputes, product liability claims, distribution agreements, professional negligence and in defending defamation claims.

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Mike is a commercial litigator with almost 25 years' experience handling significant disputes, including class actions. He has also acted as counsel on many large international and domestic arbitrations and, in 2017, obtained the Q. Arb. designation. Mike has particular expertise in auditor's liability and financial services litigation, professional negligence, real estate litigation, shareholder disputes, securities litigation, including proxy contests and contested M&A deals, and regulatory and appellate energy cases. Mike is currently a member of the Canada Region National Board, to which he was elected after serving as co-lead of the Dentons Canada [Litigation and Dispute Resolution](#) (LDR) group, and manager of the Toronto LDR group. Mike has also acted as practice leader for the global [Litigation and Dispute Resolution](#) group.