British Institute of International and Comparative Law

Baker McKenzie.

Empirical Study: Corporate Restructuring and Investment Treaty Protections

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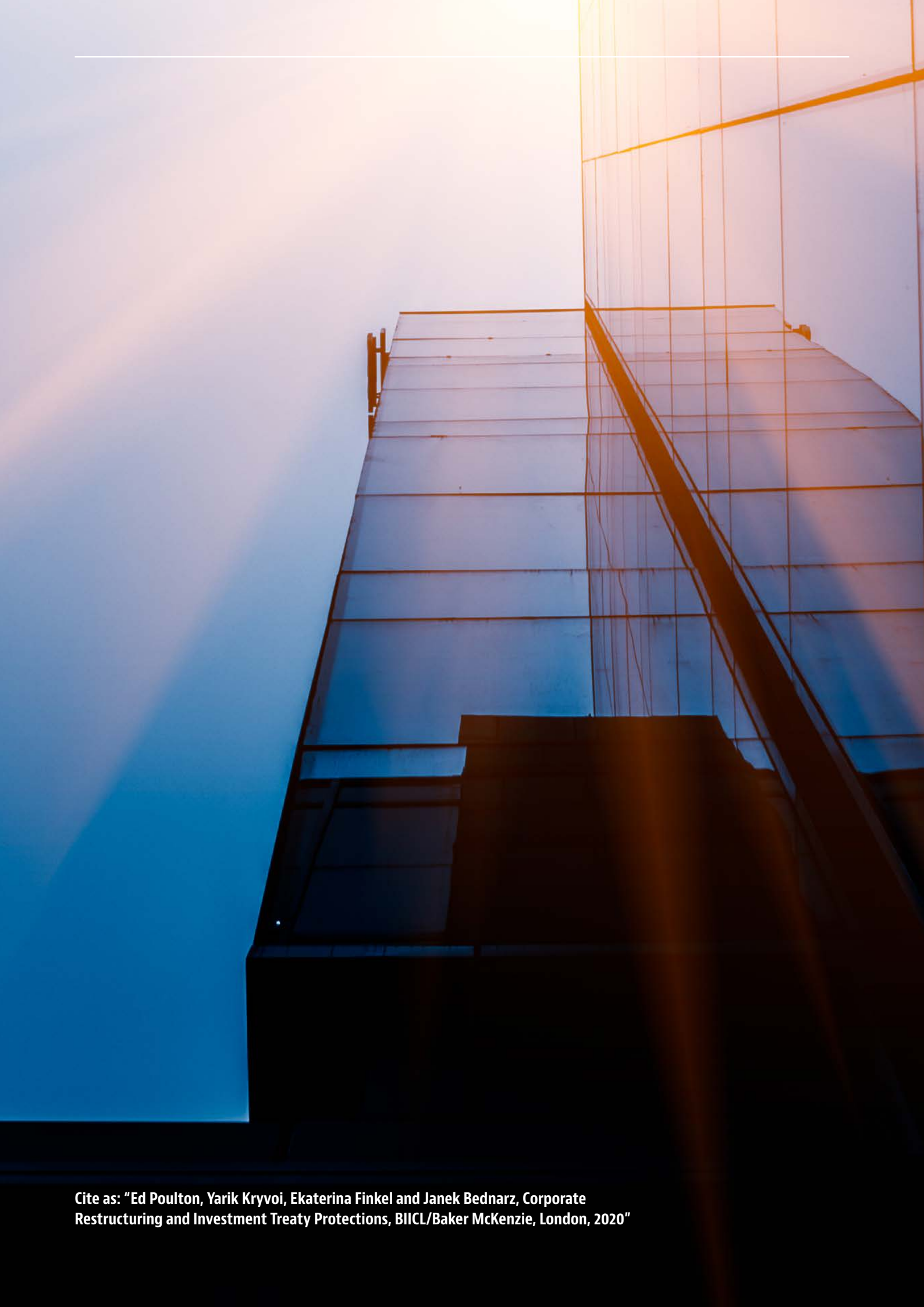
London, 2020



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Introduction

BIICL and Baker McKenzie present the first comprehensive empirical study on corporate restructuring and investment treaty protections.[1] The study examines all publicly available decisions of investor-state tribunals dealing with issues of corporate structuring and restructuring.[2]

Facilitating the consistency and correctness of decisions remains an important concern for states including with regards to divergent interpretations relating to jurisdiction and admissibility.[3] The UNCITRAL working group that is currently working on reforming the system of investor-state disputes (ISDS) expressed concerns with respect to the cost and duration of such proceedings and in particular the lack of mechanisms to address frivolous or unmeritorious claims, including limitations on the standing of investors.[4]

In the context of investor-state disputes, the term "corporate restructuring" refers to decisions to incorporate companies in certain jurisdictions to benefit from more favourable conditions, most commonly related to tax matters but also to investment treaty protections. This study shows when such restructuring is seen as permissible under international investment agreements and when it leads respondent states to successfully object to the jurisdiction of tribunals.

The study shows that the top five most effective objections of respondent states were based on the interpretation of the relevant treaty provisions and the timing of the restructuring. Other key factors considered by tribunals were the existence of genuine economic activity of the claimant in the host state and the underlying reason for the corporate restructuring.

In the absence of detailed guidance in relevant international treaties, tribunals have significant freedom in deciding on the permissibility of corporate restructuring. However, certain trends have already crystallised and can subsequently be reflected in reformed international investment agreements or practice of investor-state tribunals. Also, these findings may help inform decisions of investors on how to structure their business activities to benefit from international investment agreements.

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Executive summary

A majority of tribunals find they have jurisdiction despite the respondents' objections to restructuring

- In all decisions but one, tribunals reviewed the validity of the corporate restructuring as part of ascertaining whether or not they had jurisdiction.
- A large portion of the respondent states' objections rely on traditional jurisdictional grounds, such as the definition of "investor" or "investment" to criticise the claimants' restructuring. These traditional grounds are rarely successful and in two thirds of the decisions tribunals find that they have jurisdiction despite the respondents' objections to the restructuring.
- Once tribunals find that they have jurisdiction, they are significantly more likely to find in the claimant's favour on the merits.

Timing is key to the decision on the validity of restructuring, but it is viewed subjectively

- Tribunals distinguish between original investment structuring and subsequent restructuring. Where the claim is brought by the original investor, tribunals tend to abide by the strict wording of the treaty.
- Where the claimant is not the original investor, the tribunals are more likely to apply additional criteria, e.g. considering whether the corporate restructuring was an abuse of process or applying the *Salini* test.
- The investor-state tribunals paid particular attention to whether the restructuring was done before or after the dispute arose and whether such dispute was foreseeable to the investor at the time of restructuring.

The treaty's scope of application appears critical to the decision on validity of the restructuring

- Tribunals rendered the vast majority of decisions under bilateral or multilateral investment treaties, with almost two thirds issued under the ICSID Convention. Therefore, international law or a combination of international and domestic law govern the issues of restructuring.
- While the study finds no significant effect on the outcome of the respondent state's objections as a result of the applicable arbitration rules (e.g. ICSID Convention, UNCITRAL, SCC or ICSID Additional Facility), the exact language of the investment treaty matters.
- The majority of claims are brought under a treaty with a broad scope of application. Where the claim is based on a broadly worded investment treaty, claimants succeed in overcoming objections to a restructuring in 83.5% of decisions.

Claimants with a genuine economic activity in the host state and a good reason for the restructuring seem more likely to succeed

- Where tribunals find that the claimant engaged in a genuine economic activity in the respondent state, the investors succeed in overcoming jurisdictional objections in nearly all decisions.
- In the absence of genuine economic activity in the respondent state, tribunals almost always agree with the respondent state's objections (92.5%).
- Where the tribunal is persuaded that the reasons for the restructuring were other than solely access to ISDS, the respondents' objections fail in over 80% of decisions. If the tribunal decides that the only purpose was access to ISDS, the respondents' objections fail in just 21.5% of decisions.

What do we mean by corporate restructuring in investment disputes?

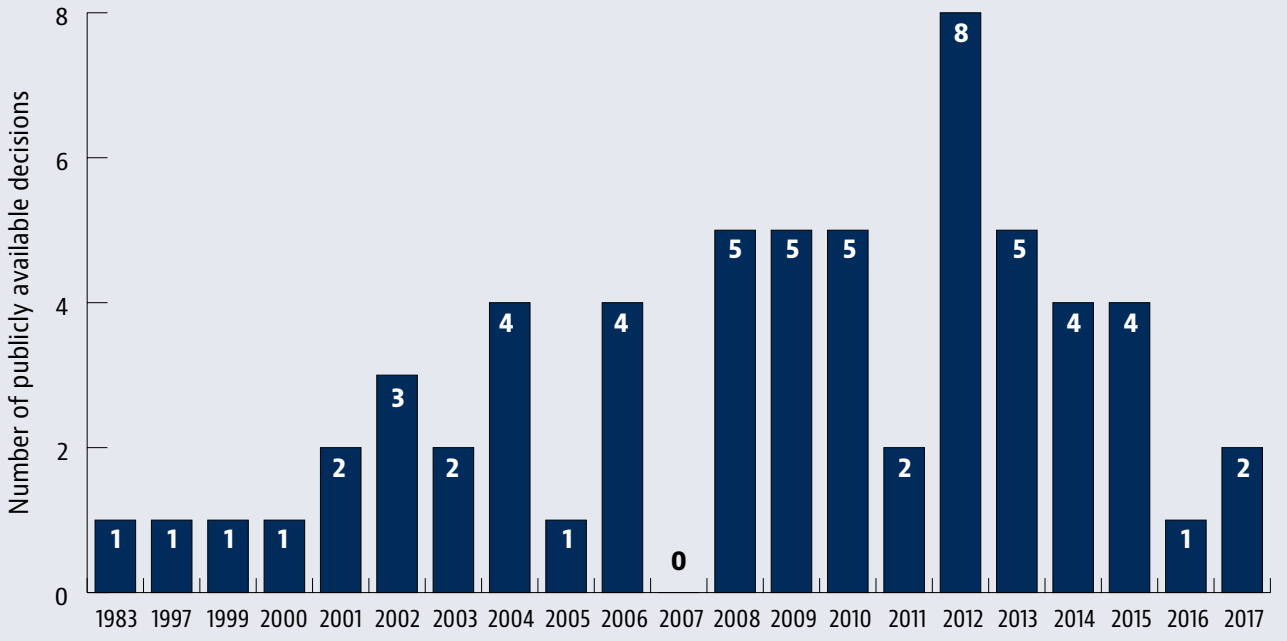
Over 2,300 international investment treaties currently in force commit to promote and protect investments made by foreign investors. Through careful corporate restructuring businesses seek to benefit from legal protections contained in investment treaties. They can do so by introducing in the chain of ownership of the investment a company incorporated in a country which has signed an investment treaty with the host state.

This type of restructuring[5] provides investors with a gateway to international law protection of their rights. The nature of such legal protections is procedural, such as access to an independent and impartial arbitration tribunal, and substantive, such as protection from unlawful expropriation. An investor can directly enforce such rights against the state hosting the investment.

To some, structuring investments to benefit from these protections is completely acceptable and no more than sensible risk management; to others, this form of "treaty shopping" is an abuse of the intricate system of investment protection which has developed in public international law.[6]

The 2004 case of *Tokios Tokelés v. Ukraine* is one of the most well-known decisions on this topic.[7] In that case,

Chart 1: Number of publicly available decisions related to restructuring objections



Based on 61 analysed decisions

Tokios Tokelés brought a claim against Ukraine on the basis of a bilateral investment treaty (BIT) with Lithuania, the state in which the company was incorporated. Although the claimant was registered in Lithuania, it was wholly owned and controlled by nationals of Ukraine.

Moreover, the claimant conducted no business activities in Lithuania and its only assets were shares in a company in Ukraine. A majority of the tribunal decided that the terms of the BIT allowed for claims by such 'letterbox' companies, notwithstanding their ultimate ownership. The tribunal chairman disagreed and dissented.[8] Many commentators have subsequently described this case as an illustration of the improper use of investment treaties, which are aimed to protect foreign rather than domestic investors.[9]

Since *Tokios Tokelés*, the number of decisions where respondent states have objected to the claim on grounds of investment restructuring has significantly increased (Chart 1).[10] At least 61 publicly available decisions concern a respondent state's objection to corporate restructuring.[11] Although respondent states won the case generally in approximately half of the decisions (Chart 2), their objection to the restructuring was successful around a third of the time (Chart 3).

The decisions on corporate restructuring turn on their specific context, both legal and factual. This study breaks them down to draw out key trends. It identifies the legal, factual and regional indicators that ultimately have an impact on whether a challenge on the grounds of corporate structuring is likely to succeed.

Chart 2: Overall success of investors on the merits of the disputes

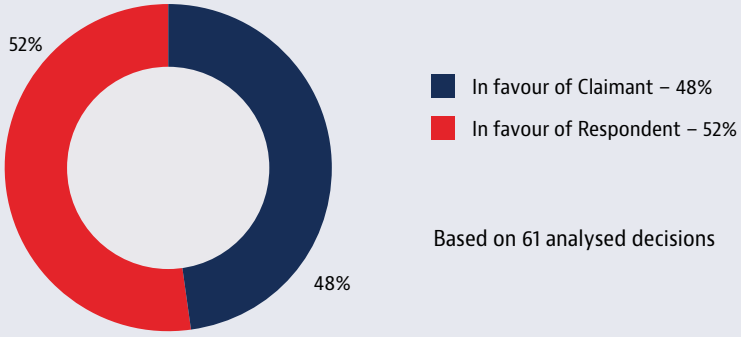
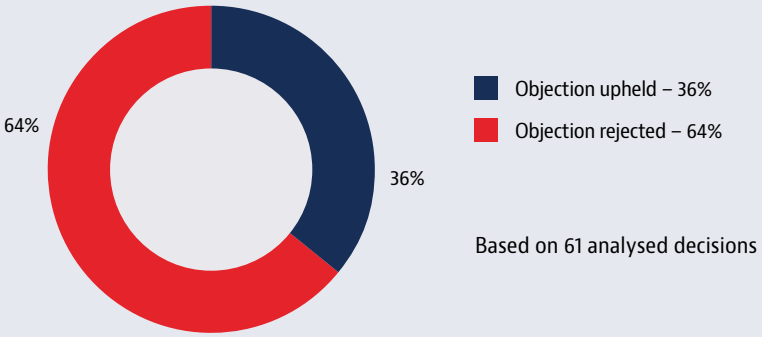


Chart 3: Overall success rate of state respondents' objections on restructuring



The context in which restructuring disputes arise

The legal basis for claims involving questions of investment restructuring

The vast majority (95%) of the decisions were issued under a bilateral or multilateral investment treaty, including the North American Free Trade Agreement (NAFTA)[12] and the Energy Charter Treaty (ECT) (Chart 4).[13] The remaining 5% were issued under an investment contract which provided for arbitration under the Convention for the International Centre for Settlement of Investment Disputes (ICSID Convention).[14] ICSID Arbitration Rules were applied in the majority of decisions (62%), both in treaty-based and contract-based disputes (Chart 5).

Each investment treaty has a distinct scope of application, usually informed by the definitions of 'investor' and 'investment'. A denial of benefits provision may further limit the scope of the treaty application. It allows a state to deny the benefits of an investment treaty to certain investor companies for lack of a sufficient connection with the state in which they are incorporated. Article 25 of the ICSID Convention contains its own set of jurisdictional requirements, which overlap with the requirements set out in the investment treaties.

This study analysed the provisions of the publicly available investment treaties that were relied on in the decisions on corporate structuring to determine how broadly or narrowly they define an "investor" and whether they contained

Chart 4: Basis of the dispute – Treaty or Contract

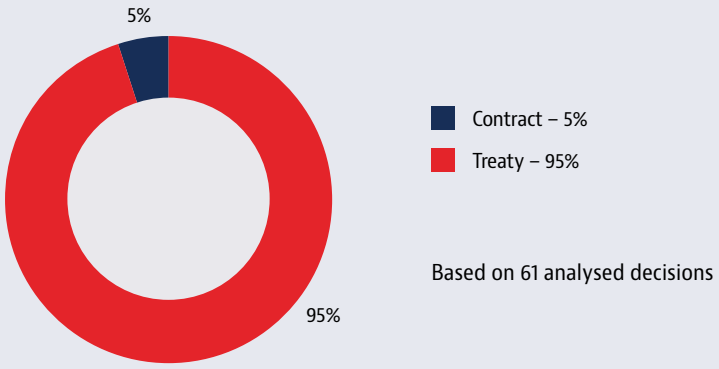
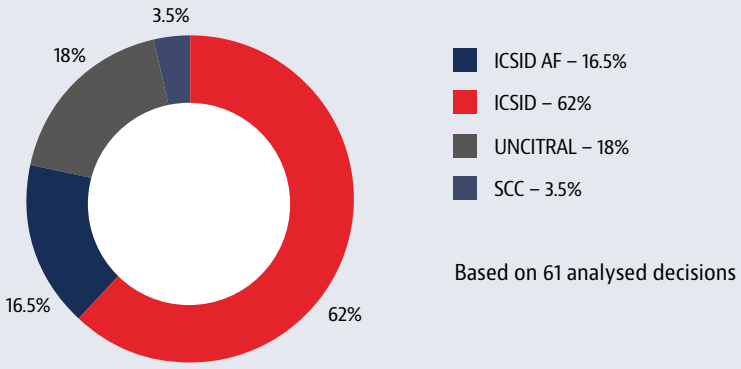


Chart 5: Applicable arbitration rules

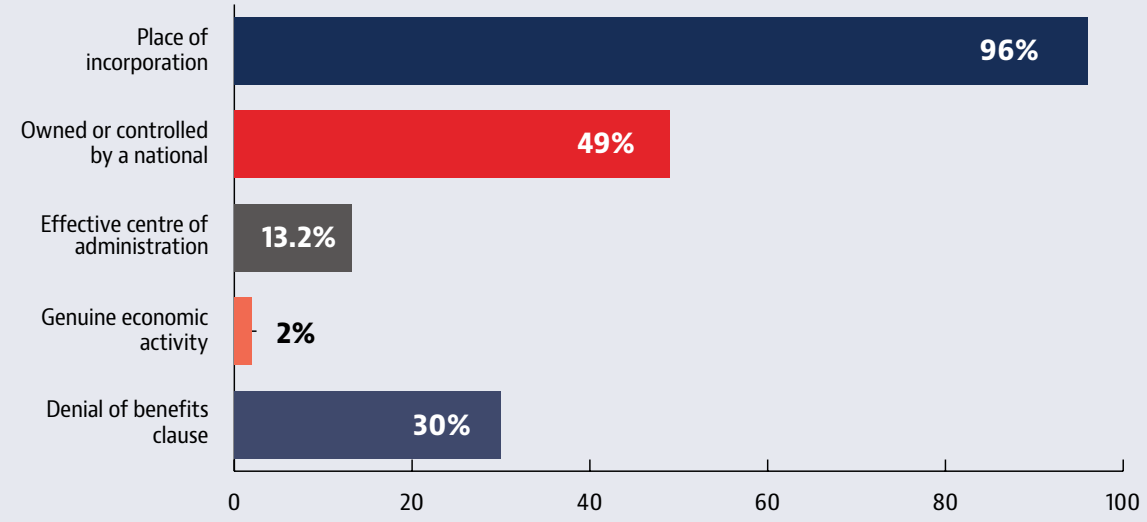


a denial of benefits clause (Chart 6). It found that almost all of the decisions applied treaties that provide that an investor can be a company incorporated in the home state, which has previously been viewed as allowing for a 'letterbox' claimant.

A further half of the decisions applied treaties allowing for an entity 'owned or controlled' by a national of the home state to qualify as an investor from that home state. Only a small fraction of the treaties (15%) imposed any additional restrictions to the definition of an 'investor', e.g. requiring an 'effective centre of administration' or 'genuine economic activity' in the home state. In addition, almost a third of the decisions applied treaties that contained some form of 'denial of benefits' provision.

The study further classified treaties as either having a 'broad' or 'narrow' scope of application. Treaties were classified as having a 'broad' scope of application when they contained a definition of "investor" which allowed a company to qualify as a national of a contracting state if it was incorporated in the home state or if it was owned or controlled by a national of that state. As a further requirement, it excluded any treaty that contained a denial of benefits clause. This accounted for approximately 56.5% of the

Chart 6: Treaty terms tracked

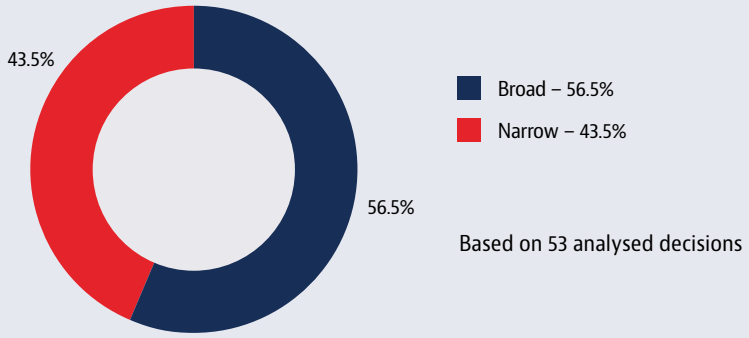


Based on 53 analysed decisions

treaties (Chart 7). All other treaties were considered to have a 'narrow' scope of application (43.5%).

Definitions of "investment" were not as variable in the investment treaties applied. However, the ICSID Convention contains a definition of "investment" that must be met regardless of the underlying investment treaty language. Table 1 sets out examples of typical definitions of "investment", "investor" (both "narrow" and "broad"), a "denial of benefits" clause as well as Article 25 of the ICSID Convention.

Chart 7: Treaties interpreted as having a broad or narrow scope of application



Based on 53 analysed decisions

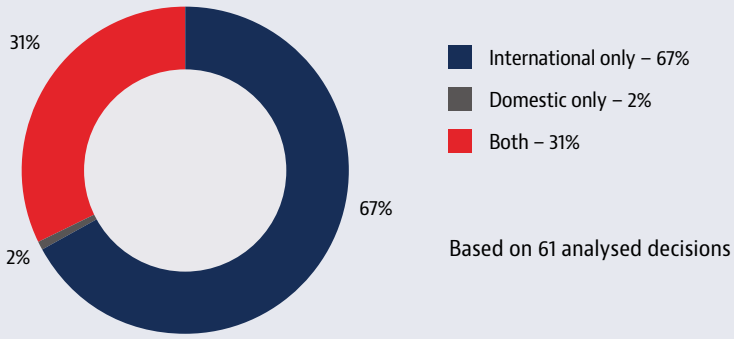
Table 1	Examples of Key Treaty Provisions
Definition of investor (broad example)	**Article 1 of the Netherlands - Ukraine BIT (1994)** For the purposes of the present Agreement: ... (b) the term 'nationals' shall comprise with regard to either Contracting Party: i. natural persons having the nationality of that Contracting Party; ii. legal persons constituted under the law of that Contracting Party; iii. legal persons not constituted under the law of that Contracting Party but controlled by natural persons as defined in i. or by legal persons as defined in ii. above.
Definition of investor (narrow example)	**Netherlands Model BIT (2019)** For the purposes of the present Agreement: ... (b) "investor" means with regard to either Contracting Party: (i) any natural person having the nationality of that Contracting Party under its applicable law; (ii) any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; or (iii) any legal person that is constituted under the law of that Contracting Party and is directly or indirectly owned or controlled by a natural person as defined in (i) or by a legal person as defined in (ii). ... (c) Indications of having 'substantive business activities' in a Contracting Party may include: (i) the undertaking's registered office and/or administration is established in that Contracting Party; (ii) the undertaking's headquarters and/or management is established in that Contracting Party; (iii) the number of employees and their qualifications based in that Contracting Party; (iv) the turnover generated in that Contracting Party; and (v) an office, production facility and/or research laboratory is established in that Contracting Party; These indications should be assessed in each specific case, taking into account the total number of employees and turnover of the undertaking concerned, and take account of the nature and maturity of the activities carried out by the undertaking in the Contracting Party in which it is established.
Definition of investment	**Article 1 of the Netherlands - Ukraine BIT (1994)** For the purposes of the present Agreement: (a) the term 'investments' shall comprise every kind of asset and more particularly, though not exclusively: i. movable and immovable property as well as any other rights in rem in respect of every kind of asset; ii. rights derived from shares, bonds and other kinds of interests in companies and joint ventures; iii. claim to money, to other assets or to any performance having an economic value; iv. rights in the field of industrial and intellectual property, such as copyrights, patents, industrial design or models, trade or service marks, trade names, technical processes, goodwill and know-how and any other similar rights; v. rights granted under public law, including rights to prospect, explore, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of competent authorities in accordance with the law.
Denial of benefits	**Article 17(1) of the Energy Charter Treaty** Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party: (a) does not maintain a diplomatic relationship; or (b) adopts or maintains measures that: (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.
Jurisdiction under the ICSID Convention	**Article 25 of the ICSID Convention** (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. (2) "National of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

The law governing questions of investment restructuring

Tribunals predominantly apply international law to the issue of corporate restructuring. In a third of decisions, tribunals apply international law in conjunction with domestic law (Chart 8). In those decisions, international law was applied to assess whether the requirements of the relevant treaties have been met and domestic law was applied to determine whether the actual restructuring was valid under the relevant domestic laws.

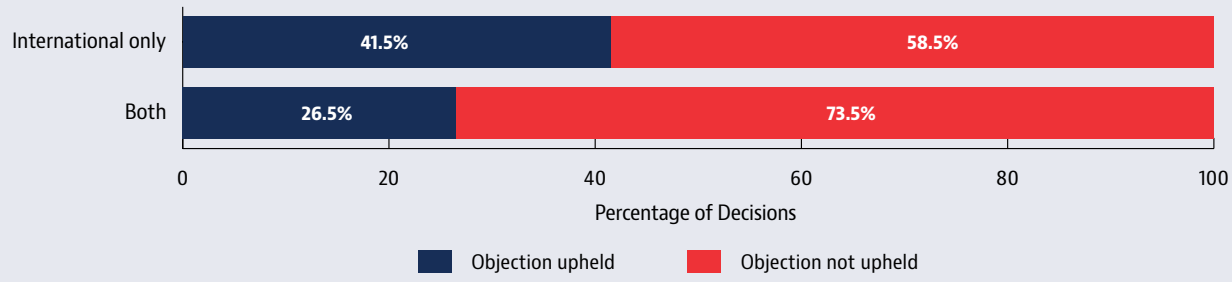
For example, the tribunal in *Gemplus v Mexico* applied local law to determine whether a share purchase agreement was effective in transferring a treaty claim from one company in a corporate group to another.[15] The respondent states' objections based on corporate restructuring were marginally more successful in decisions where the tribunal applied only international law (41.5%) than where it applied both international and domestic law (26.5%) (Chart 9).[16]

Chart 8: Law applicable to corporate restructuring



Based on 61 analysed decisions

Chart 9: Law applicable to restructuring – success rate of objection



Based on 61 analysed decisions

Is investment restructuring a question of jurisdiction, admissibility or merits?

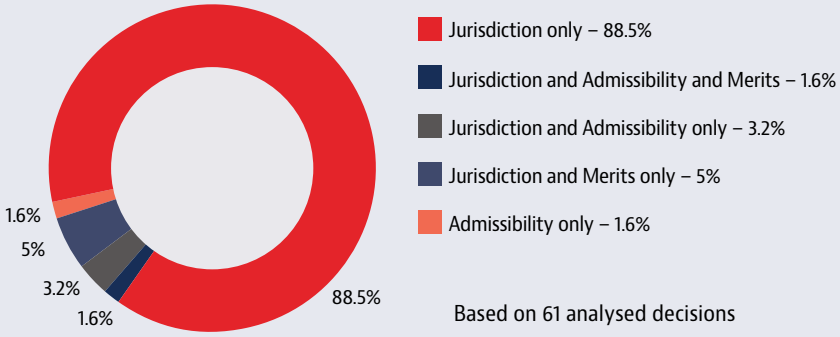
As was the case in *Tokios Tokelés*, the majority of decisions deal with objections based on investment restructuring as part of ascertaining jurisdiction, including through the construction of the definitions of 'investor' and 'investment' under the relevant treaties (Chart 10).[17] In 33% of the decisions, tribunals found that the investment restructuring barred the tribunal's jurisdiction (Chart 11). Where the tribunal found it had jurisdiction, however, the claimant went on to win on the merits in 77% of the decisions (Chart 12).

More recently, tribunals have had to grapple with other arguments, such as the concept of 'abuse of process'. The tribunal in *Philip Morris v Australia* dismissed the claim on admissibility grounds because it considered the corporate restructuring to be an abuse of process.[18] However, the tribunals in *Alapli Elektrik, Mobil* and *ConocoPhillips* considered abuse of process to be a question of jurisdiction.[19] The tribunals in *Gremcitel* and *Pac Rim* did not reach a decision on this point, explaining that this was a "*distinction without difference*".[20]

Corporate restructuring may also affect the merits of a claim. In *Daimler v Argentina* and *EnCana v Ecuador,* the tribunals accepted jurisdiction but held that the timing of claimant's restructuring was likely to affect the level of recoverable damages.[21]

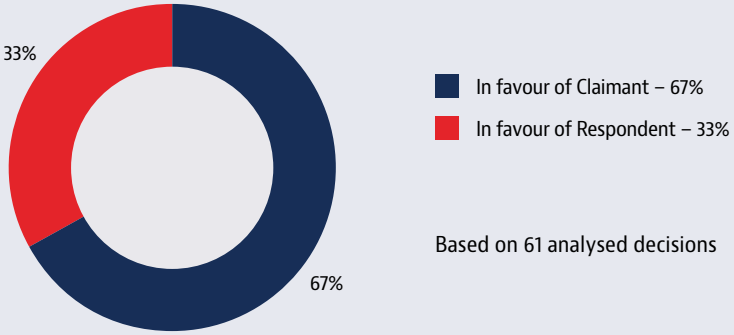
In another case, the original investor had transferred its shares to another company outside its group. The tribunal found that the new company had jurisdiction to bring the claim because it had satisfied the nationality requirements of the BIT and had made an investment by acquiring the shares (even at nominal value).[22] However, the claim failed on grounds of admissibility and merits. The tribunal found that the transfer was in breach of a shareholder agreement between the original shareholder and the state. The tribunal concluded that the adverse actions taken by the state entity in relation to the investment were a legitimate exercise of contractual rights.[23]

Chart 10: Restructuring viewed by tribunals as an issue affecting jurisdiction/admissibility/merits



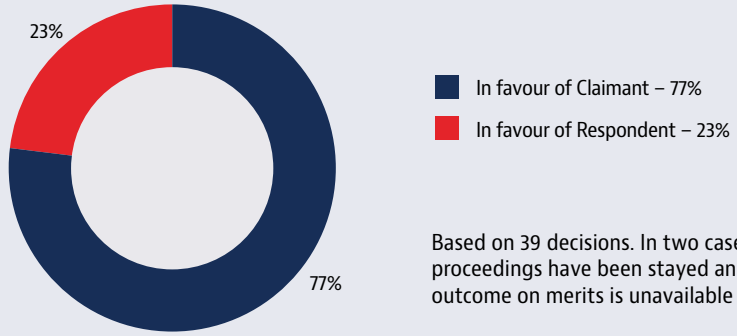
Based on 61 analysed decisions

Chart 11: Overall success rate on jurisdiction



Based on 61 analysed decisions

Chart 12: Success rate on merits (including admissibility), if the tribunal finds it has jurisdiction



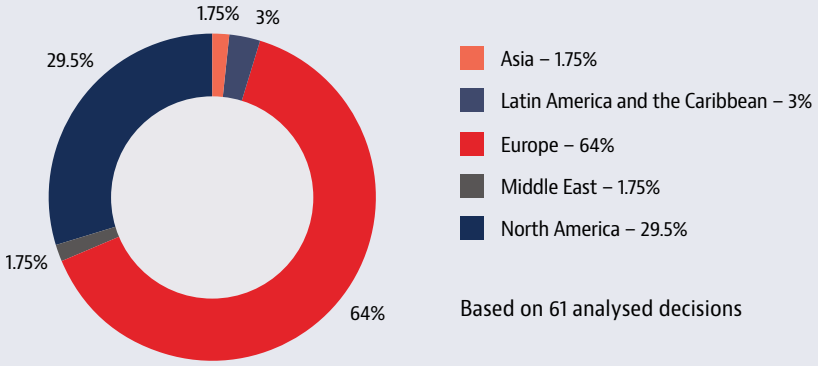
Based on 39 decisions. In two cases, proceedings have been stayed and outcome on merits is unavailable

Geographical patterns in tribunals' decision-making

Nearly all (around 95%) of the investors are based in Europe and North America (Chart 13). The majority of the respondent states are based in Latin America and the Caribbean (38%) and Europe (36%) (Chart 14). Investors from Europe were more likely to overcome jurisdictional objections based on corporate restructuring (Chart 15). Respondent states in Latin America and the Caribbean were significantly less likely than other states in defeating investment claims in the context of a corporate restructuring (Chart 16).

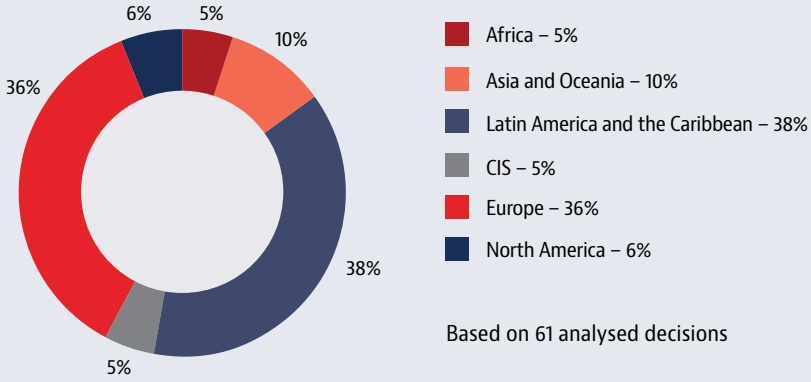
A significant portion of the decisions involving Latin American and Caribbean states includes awards which were rendered in relation to the nationalisation programme in the oil and gas sector in Venezuela.[24] After Venezuela started introducing measures adversely affecting the oil and gas industry, a number of local investors transferred their shares to an investment vehicle based in Europe, primarily in the Netherlands. Their aim was to benefit from the broad scope of application and protections of the relevant BIT.[25] Following nationalisation, the foreign companies brought a number of investment treaty claims. In each of these cases, the tribunal dismissed objections to jurisdiction and allowed the claims to proceed, ultimately also finding for the investors on the merits.

Chart 13: Region of investors



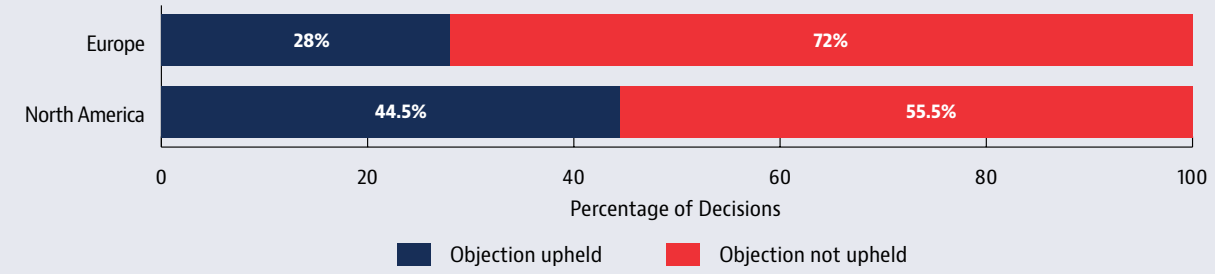
Based on 61 analysed decisions

Chart 14: Region of states



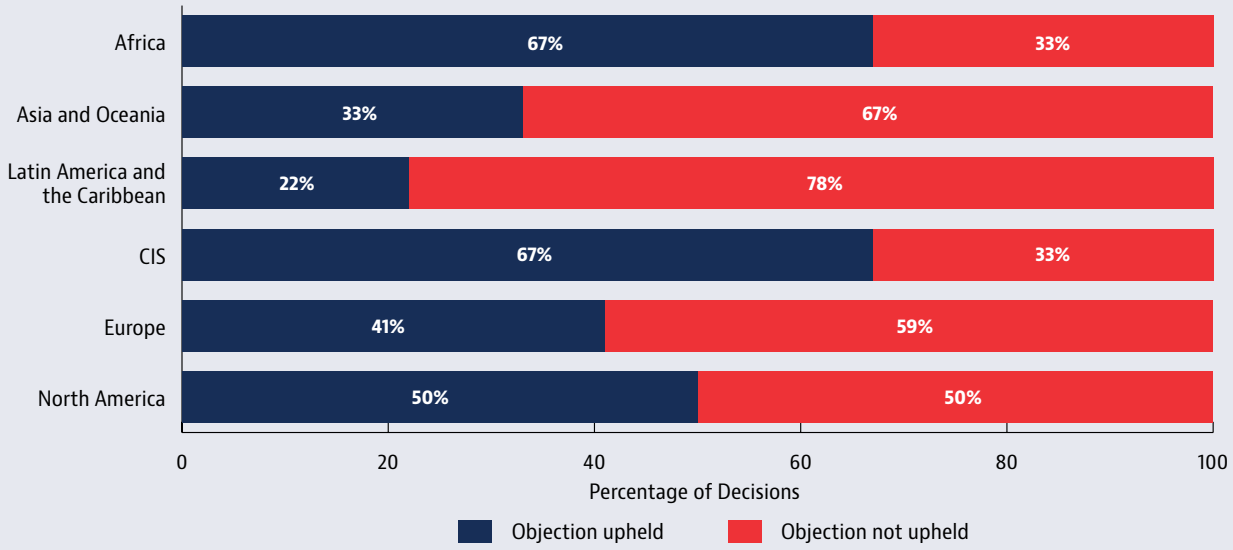
Based on 61 analysed decisions

Chart 15: Region of investor – success rate of objection



Based on 57 analysed decisions

Chart 16: Region of states – success rate of objection



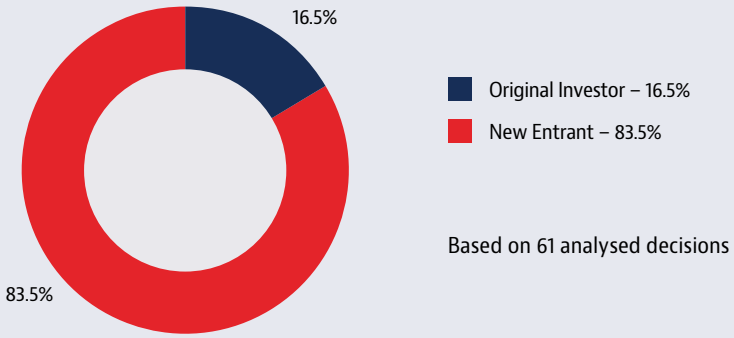
Based on 61 analysed decisions

The types of investment restructuring that were considered

The majority of decisions (83.5%) involved objections to jurisdiction over entities which had been 'inserted' into the investment structure after the initial investment was made (i.e. new entrants). The remaining decisions concerned an objection to the quality or standing of an original investor – i.e. an investor which had been embedded in the structure since the beginning of the investment (Chart 17). Whether a restructuring was internal (within the original investors' group of companies) or external, made no difference to the success rate of the respondents' objections, which succeeded just over a third of the time in both cases (Charts 18 and 19).

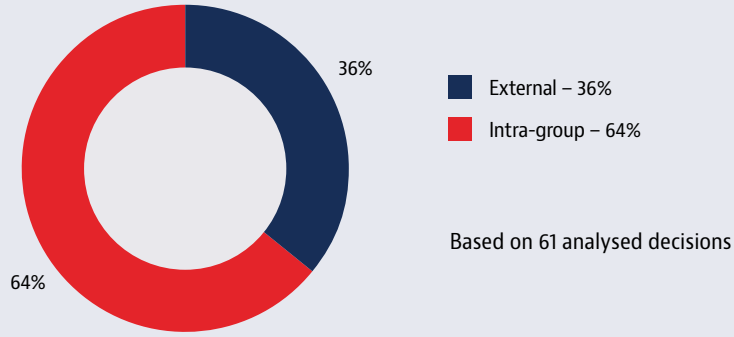
The method for restructuring chosen by the investor also had a limited effect on the success of the respondent state's objections. The success in overcoming the objections of the respondent state was around 40% irrespective of whether the claim was brought following a transfer of shares or other methods of restructuring, including any form of assignment (Charts 20 and 21).

Chart 17: New entrant or original investor



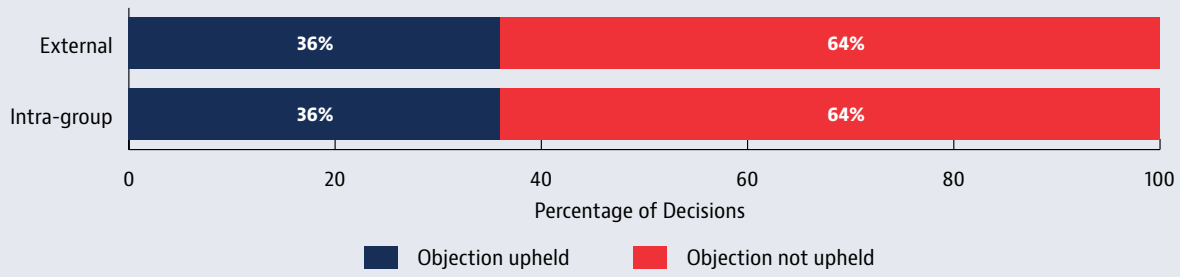
Based on 61 analysed decisions

Chart 18: External and intra-group restructuring



Based on 61 analysed decisions

Chart 19: External and intra-group restructuring – success rate of objection

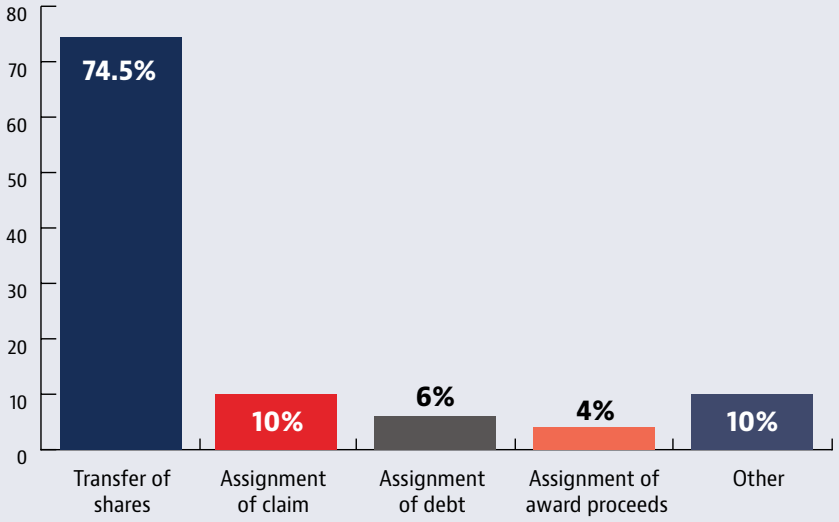


Based on 61 analysed decisions

The most common form of corporate restructuring was a transfer of shares and claimants were more likely to defeat the respondent state's objection when they held the investment directly. Two thirds of the decisions involved a transfer of shares at the level of the company that directly held the investment (direct), with the remaining decisions involving a change of shareholder higher up in the chain (indirect) (Chart 22). The respondent state's objection was upheld in just under 40% of the decisions involving a transfer of shares (Chart 21). However, although this was never mentioned or relied on by the tribunals in their findings, the objection was rejected in 86% of decisions involving a restructuring in the company that indirectly held the investment (Chart 23).

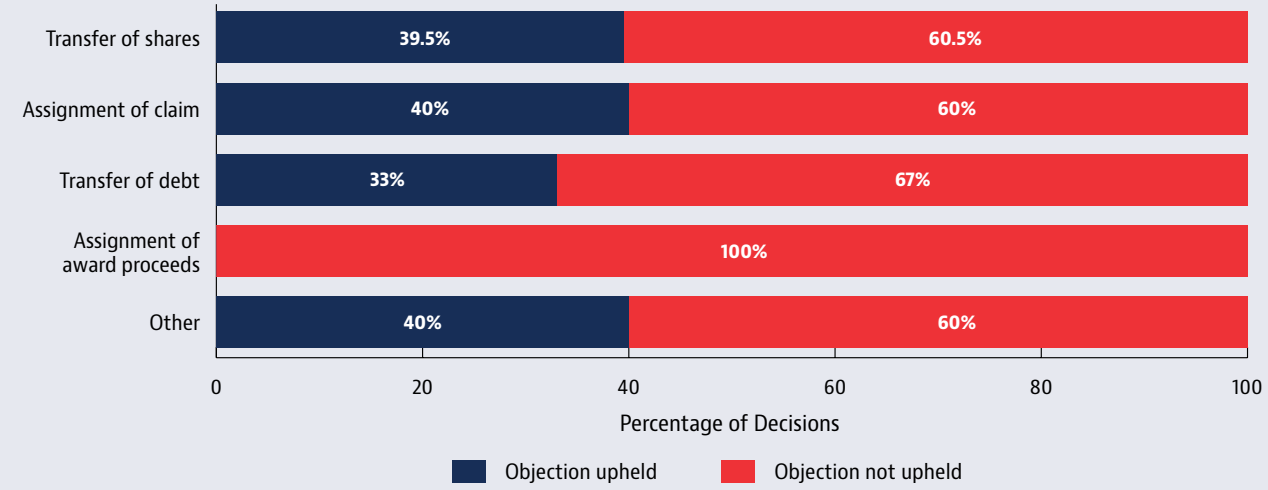
In 10% of reviewed decisions, the restructuring took on the form of an

Chart 20: Method of restructuring



Based on 51 analysed decisions. This chart excludes 10 decisions concerning original investors which did not involve any form of transfer.

Chart 21: Method of restructuring – success rate of objection



Based on 51 analysed decisions

assignment of the claim (Chart 20). In most decisions, the assignment took place after the date of the claim, and therefore did not affect the tribunal's jurisdiction (as explained in *CSOB v Slovakia*).[26]

However, in certain decisions the tribunal has taken issue with such an assignment. In *Mihaly v Sri Lanka*, the tribunal found that the transferor was not able to assign an ICSID claim to the claimant as the transferor's home state was not a party to the ICSID Convention.[27] Accordingly, the transferor could not assign a right it did not itself have.[28]

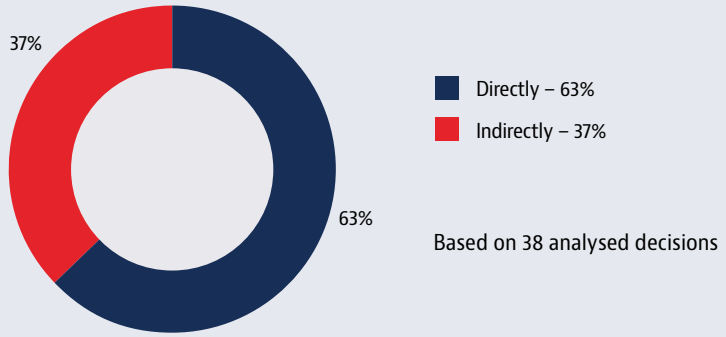
Similarly, *Loewen v US* involved the assignment of a NAFTA claim by a Canadian investor after its liquidation to a US shell company. The tribunal rejected jurisdiction on the basis that there had to be a "*continuous national identity from the date of the events giving rise to the claim through the date of the resolution of the claim*".[29]

On the other hand, tribunals consistently allowed the assignment of the proceeds of an award, i.e. the transfer of the benefit to receive monies under an award in the investor's favour. A number of respondent states argued that, once the proceeds of the award were assigned, the true party having an interest in the outcome of the award was the assignee and not the claimant-assignor. Tribunals rejected this argument because, in their view, the assignment of the proceeds had no impact on the claimant's standing as an 'investor' and its ability to bring a claim in its own right.[30]

Decisions concerning assignment of a debt were less straightforward. The tribunal in *Fedax v Venezuela* held that promissory notes forming the basis of an investment were intended to be freely transferrable and therefore subject to treaty protection.[31] However, the tribunal in *Standard Chartered v Tanzania* held that a parent company of a bank that had no involvement in the acquisition of a loan by its indirect subsidiary could not be considered as having made an 'investment'.[32]

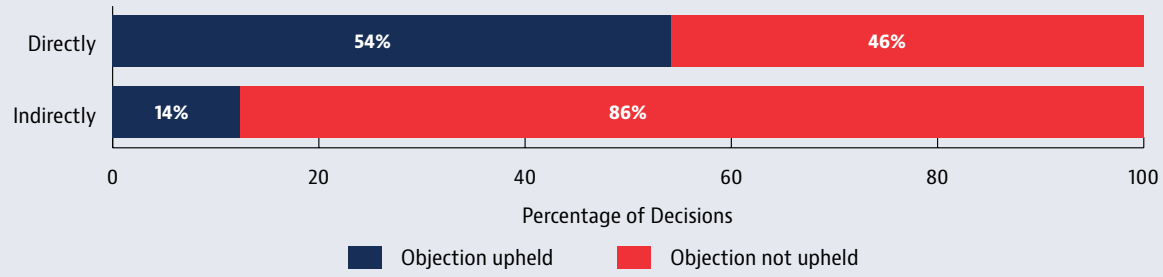
The approach taken by tribunals differed depending on the claimant's position in the restructuring. The claimant could

Chart 22: Transfer of shares – Company holding the investment



Based on 38 analysed decisions

Chart 23: Transfer of shares – Company holding the investment – success rate of objection



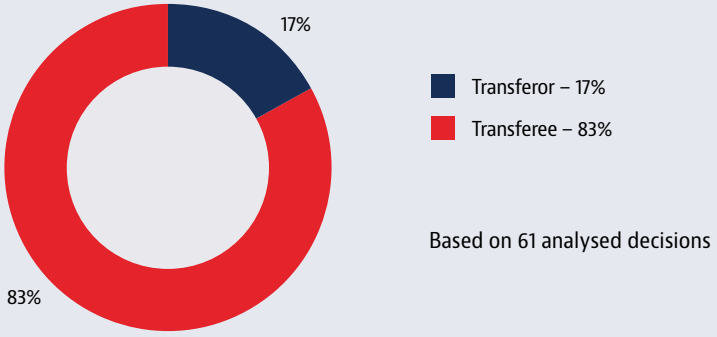
Based on 61 analysed decisions

either be a "transferor" (i.e. exiting the structure by transferring its investment to another entity) or a "transferee" (i.e. a new entrant to the investment structure).

Although the majority of decisions involved transferees (Chart 24), the respondent state's objection were less likely to succeed in decisions involving transferors (Chart 25). Out of the 83% of decisions which involved a transferee, the respondent's objection was rejected approximately 40% of the time. In the remaining 17% of decisions involving a transferor, nearly 80% of claimants were successful in defeating the respondent state's objections.

In decisions involving a claimant transferor, the prevailing view (expressed in *Daimler* and *Mondev*) appears to be that the status as an 'investor' is at least in principle separable from the investment itself.[33]

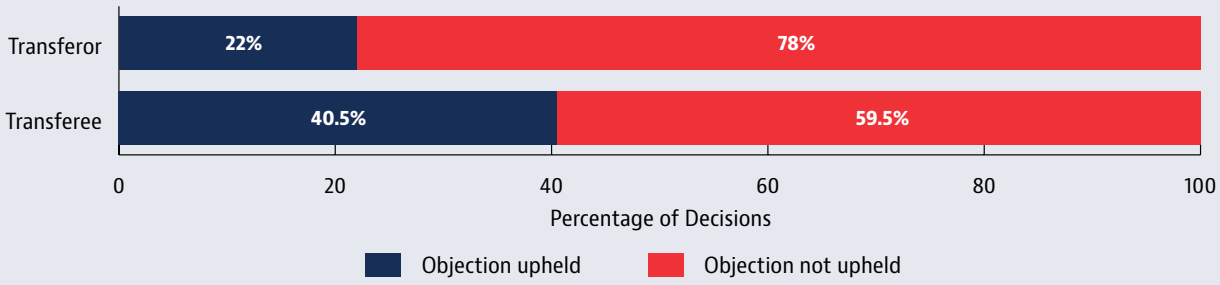
Chart 24: Claimant is a transferor or transferee



Based on 61 analysed decisions

As a result, transferring away the investment does not generally defeat the BIT claim as there is no 'continuous ownership' requirement in investment law.[34] Therefore, in most decisions, the transferor did not have an issue in establishing jurisdiction. There may, however, be an impact on the quantum of a claim. A number of tribunals found that the timing of the disposal or refusal to retain the affected subsidiary may affect the quantum of the transferor's claim as it will impact the amount of loss that the transferor suffered.[35]

Chart 25: Claimant is a transferor or transferee – success rate of objection



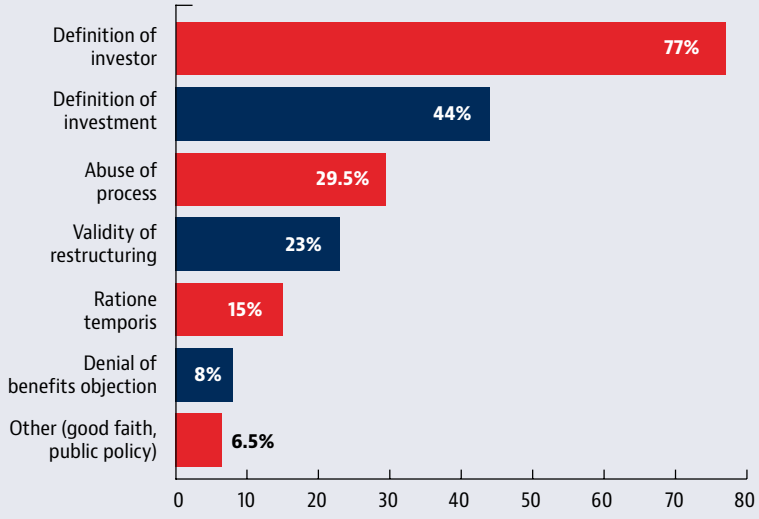
Based on 61 analysed decisions

Key factors in decisions on corporate structuring

The type of objection raised by respondent states

The study shows that the type of objections raised by the respondent states in the context of investment structuring were likely to affect the tribunals' views of such structuring. Objections broadly fall into three categories: (1) the claimant's quality as an investor, (2) whether or not the claimant made an investment, and (3) the timing of the claim and restructuring (Chart 26). More recently, respondent states raised a number of novel objections, such as the claimant's alleged abuse of process and challenges based on denial of benefits clauses.

Chart 26: Most commonly raised objections to corporate restructuring by respondent states



Based on 61 analysed decisions

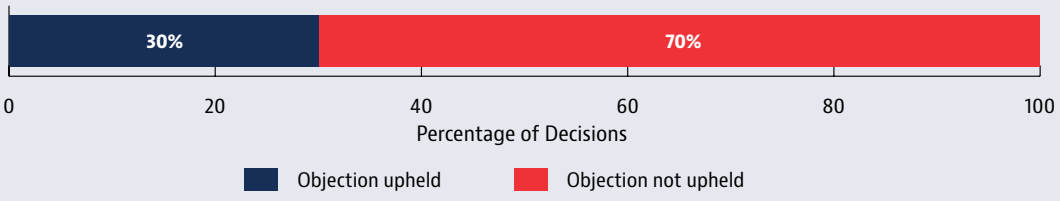
Traditional objections to jurisdiction

(a) Definition of 'investor'

Respondent states most commonly object by asserting that the claimant does not qualify as an investor under the relevant investment treaty or under Article 25 of the ICSID Convention (77%). This objection is the least likely to prevail (30%, Chart 27).

Respondent states argue that because of the 'letterbox' nature of the claimant, it cannot be considered as a national of the other contracting state. Tribunals tend to interpret the terms of the BIT strictly and refuse to read in additional requirements. In *Tokios Tokelés*, the tribunal stated that the

Chart 27: Definition of investor – success rate of objection



Based on 47 analysed decisions

'letterbox' nature of an investor under the BIT (which referred only to the place of incorporation) was satisfied by the claimant[36] and observed that the parties to the BIT were free to include additional clauses and wording:

> *capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country…"* and it was *"not for tribunals to impose limits on the scope of BITs not found in the text.*[37]

In *ADC v Hungary*, the tribunal followed similar reasoning where the respondent state argued that the claimants were not Cypriot entities because they were 'controlled' by Canadian nationals, who were the true investors.[38] The tribunal rejected the objection on the basis of a strict reading of the 'letterbox' definition of investor under the BIT stating that there was no room for piercing the corporate veil or evaluating who the "true" investor was by reference to the source of capital.[39]

In *Rompetrol v Romania*, the tribunal also refused a challenge to an investor's "*real and effective nationality on the basis of its … source of capital*", also relying on a broadly worded definition of investor.[40]

(b) Definition of investment

The second most commonly raised objection is the definition of 'investment' (just over 40%). Tribunals upheld it in just over 40% of the decisions (Chart 28). This may be attributable to the wide range of positions that tribunals take in relation to this issue, with a trend towards a more holistic approach to the definition of 'investment', particularly under Article 25 of the ICSID Convention.

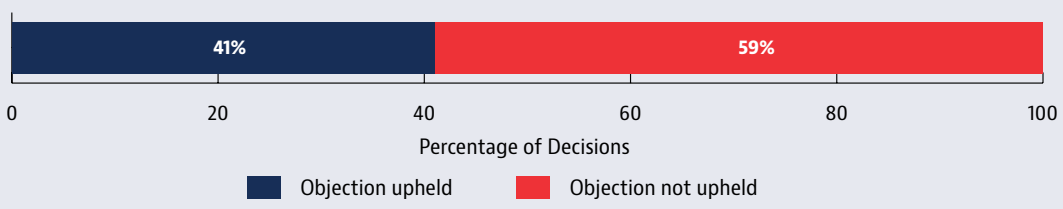
Setting the trend, in *Tokios Tokelés*, the tribunal considered the definition of "investment" in the BIT, which included *"every kind of asset invested by an investor of one Contracting Party"*.[41] The respondent state's objection was that the assets in the host state were not "invested" by the claimant, a foreign shell entity, because the claimant had not shown that it had used capital outside of the host state to finance the investment.[42] The tribunal was satisfied that a certain amount of money had been invested by the claimant and noted that any requirement regarding the source of capital was "*plainly absent from the text*" and could not be implied into the treaty.[43] Another case followed a similar reasoning, where the tribunal also refused to read into the text of the BIT a requirement for the "*injection of foreign capital*".[44]

Other tribunals apply the *Salini* criteria in the context of investment structuring to see whether an investment had been made under the ICSID Convention.[45] For instance, *Phoenix Action, LTD. v. The Czech Republic* involved the insertion of a foreign entity into a domestic investment structure after a dispute with the government had arisen. There, the tribunal implied a requirement that the assets had to be invested *bona fide* into the definition of "investment" under Article 25 of the ICSID Convention. The respondent state's objection prevailed on the sole basis that the investment was not bona fide, all the more widely known *Salini* criteria having been met.[46]

Similarly, the tribunal in *Saba Fakes v Turkey* held that, although the share transfer to a 'letterbox' foreign company was valid under domestic law, it was a sham and therefore not an 'investment' under the BIT and Article 25 of the ICSID Convention. The tribunal noted the lack of the transferee's involvement in the business, the purchase of shares at an undervalue and the fact that the share certificates remained in the transferor's possession.[47]

In another case, the tribunal recently applied Article 25 of the ICSID Convention to defeat a claim brought by a 'letterbox' company which was beneficially owned by a national of the host state and which held shares in a bank of the host state.[48] The tribunal was satisfied that the entity met the nationality requirements of an investor. Applying the *Salini* test it found that the claimant had not made an investment in the host state as it purchased the shares at an undervalue,

Chart 28: Definition of investment – success rate of objection



Based on 27 analysed decisions

made no contribution itself[49] and held them for only 16 months prior to the date of the claim.[50]

However, in some instances tribunals adopt a broad interpretation of the *Salini* criteria. In one such case, following an internal reorganisation, the claimant received the shares in two companies incorporated in the host state and forming the basis of the dispute.[51] The respondent state alleged that the claimant made no "*contribution*" to the investment.[52] The tribunal considered that by virtue of holding the shares in the companies, the claimant had made an investment for the purposes of the relevant BIT. As to the requirement for a contribution under the *Salini* criteria, the tribunal found that the claimant's group had invested a significant amount of money in the host state since the beginning of the project and that not extracting all distributable profits amounted to contribution, as did the continuing management of the companies.[53]

(c) Validity of restructuring

In nearly a quarter of all decisions, respondent states objected to the tribunal's jurisdiction arguing that the transfer was invalid or without effect under the relevant applicable laws. Such objections succeeded in just over half of the decisions (57%, Chart 29).

A number of objections focus on requirements under domestic law. In *Daimler*, the tribunal applied domestic law to determine whether, by selling shares in the subsidiary that suffered the loss, the claimant had also transferred its investment treaty claim.[54] The tribunal in *Gemplus* applied domestic law to consider whether instruments transferring the shares and investment treaty claims were effective.[55] Similarly, a tribunal found that a claim was validly assigned from one of the claimants (which had been liquidated) to its parent company applying domestic insolvency succession laws and a domestic law deed of assignment registered with a local corporate registry.[56]

In other decisions, respondent states focused on the investor's failure to prove that a transfer had taken place. One tribunal found that, on the evidence, the claimant failed to prove with sufficient certainty that he had acquired shares in the host state company (constituting the investment) prior to the date of the dispute arising. The tribunal considered expert evidence that the claimant and his lawyers engaged in a practice of backdating documents to establish a paper trail of a transfer that never really occurred. Without making a finding of fraud, the tribunal held that the claimant's burden of proof was not met.[57]

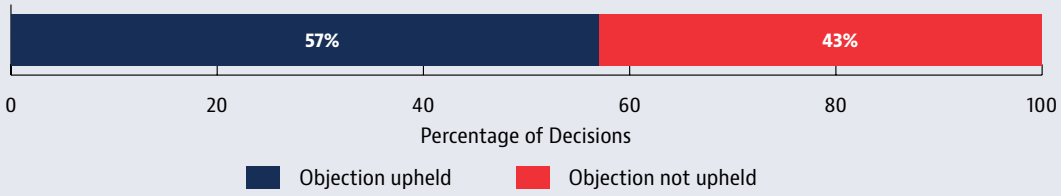
This issue arose in a series of cases involved the Uzan family in Turkey which attempted to establish a series of investment claims against Turkey by transferring their shares in domestic investments to entities incorporated abroad. In each of these cases, the tribunals found that there was insufficient evidence that the transfers actually had occurred and were genuine.[58]

(d) Timing of the claim

In the context of investment restructuring, tribunals consider the timing of such restructuring to be an important factor. Respondent states often successfully argue the tribunal does not have jurisdiction to hear the claim *ratione temporis*. For the objection to succeed, the respondent state has to show that the dispute had already arisen at the time of the investment. Although this objection is rarely made (15% of the decisions, Chart 26), when it is made it has by far the best chance of prevailing (78%, Chart 30).

Vito G Gallo v Canada represents an example of a straightforward and

Chart 29: Validity of restructuring – success rate of objection



Based on 14 analysed decisions

successful application of this objection. The tribunal found that the claimant failed to demonstrate that it had acquired the shares in the investment entity prior to the disputed measures.[59] Similarly, in *ST-AD GmbH v. Bulgaria* the shares had been acquired after the dispute arose and the tribunal found that it had no jurisdiction to hear the claim.[60]

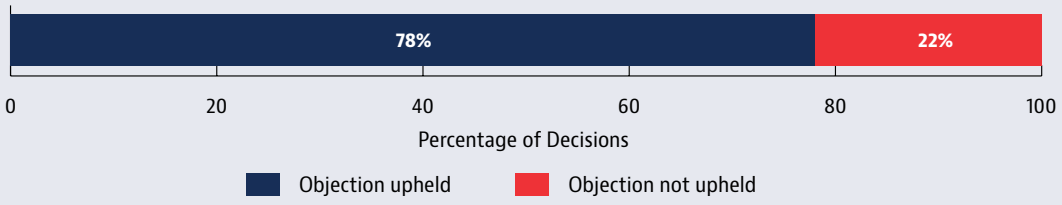
An objection *ratione temporis* differs from other objections where timing is a factor, and notably from any allegation that there is an abuse of process. According to one tribunal, the former required that the dispute "had already arisen" at the time of the investment, whereas the latter only required that the restructuring took places before the dispute became "foreseeable". In that case, because the respondent state had only raised an objection *ratione temporis* and the claimant had made the investment before the dispute arose, the tribunal rejected the objection.[61]

Similarly, the tribunal in *Gremcitel v Peru found*:

> *If a claimant acquires an investment after the date on which the challenged act occurred, the tribunal will normally lack jurisdiction ratione temporis and there will be no room for an abuse of process. Here, the Tribunal has established that Ms. Levy acquired her investment prior to the challenged measure, even if it was just slightly before. In such a situation, a tribunal has jurisdiction ratione temporis but may be precluded from exercising its jurisdiction if the acquisition is abusive.*[62]

Ultimately, the tribunal asserted its jurisdiction, but dismissed the claim because the acquisition was an abuse of process.[63]

Chart 30: Ratione temporis – success rate of objection



Based on 9 analysed decisions

The abuse of process objection

Parties and tribunals are still grappling with the meaning and scope of the relatively new 'abuse of process' objection. More recently, respondent states argue that the restructuring of the investment or the investment claim is in some way an abuse of process (30% of decisions, see also Chart 31). When raised, the objection is successful 55.5% of the time (Chart 32).

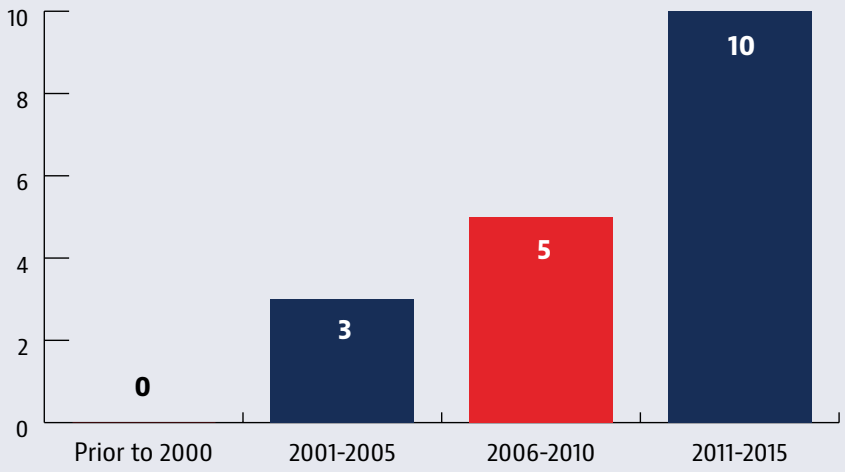
The tribunal in *Philip Morris* set out a two part test for an abuse of process objection to be upheld. First, the dispute had to be foreseeable at the time of the restructuring. Second, the purpose of the restructuring had to be to gain access to investor-state dispute settlement.[64] The tribunal found that the reorganisation was at a time when the plain packaging laws were foreseeable and rejected the other reasons put forward by the claimant as to the basis for the restructuring (including management, tax, cash flow).[65]

A number of other decisions made similar findings as to the timing requirement,[66] seemingly stepping away from an earlier decision that found that an abuse of process was only applicable where the restructuring came after the dispute had already arisen.[67]

On timing, tribunals' decisions regarding whether a dispute has become foreseeable are very fact specific. In *Gremcitel*, even though the restructuring had occurred 1,123 days before the claim was brought, the tribunal found that on the facts the measures forming part of the dispute were foreseeable to the claimant.[68] In *Alapli*, one member of the majority of the tribunal found that a restructuring which took place 3,059 days before the date of the claim took place when the relevant dispute had already become foreseeable.[69]

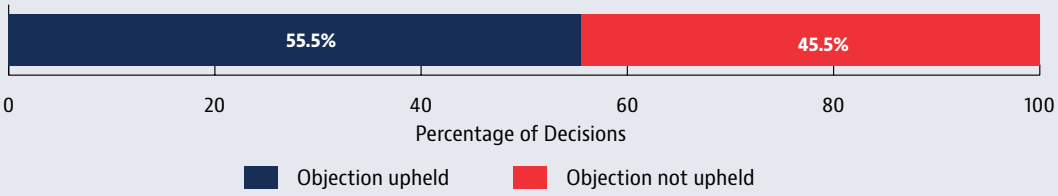
However, the tribunals in *Tidewater* and *ConocoPhillips* found that restructurings that took place less than a year before the claim (344 days and 295 days) were not an abuse of process as the expropriatory measures taken by the host state in relation to the investments had not become foreseeable; even though the host state had already taken a number of other measures adverse to the investments.[70]

Chart 31: Abuse of process objections raised by period



Based on 18 analysed decisions

Chart 32: Abuse of process – success rate of objection



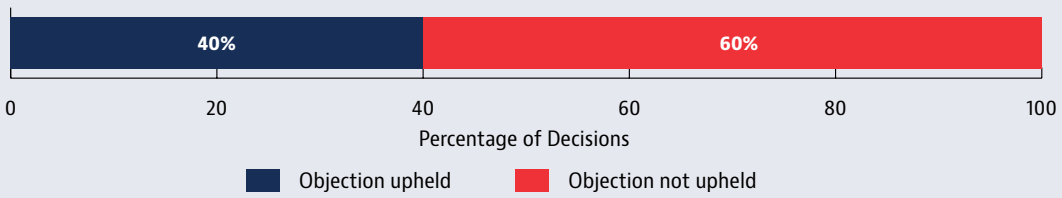
Based on 18 analysed decisions

The denial of benefits objection

Respondent states raise an objection based on a denial of benefits clause in less than 10% of the decisions (Chart 26).[71] When they are raised, such objections are successful 60% of the time (Chart 33).

The decisions in which respondents' objection is rejected all arise under the ECT. In these decisions, tribunals found that the respondent state had failed to notify the claimant that it was being denied the benefits of the protections as was required by the denial of benefits clause in that treaty.[72] Conversely, the decisions where the respondent state's objection was successful involved denial of benefits clauses that did not contain the same wording and were viewed as not requiring such notification.[73]

Chart 33: Denial of benefits objection – success rate of objection



Based on 5 analysed decisions

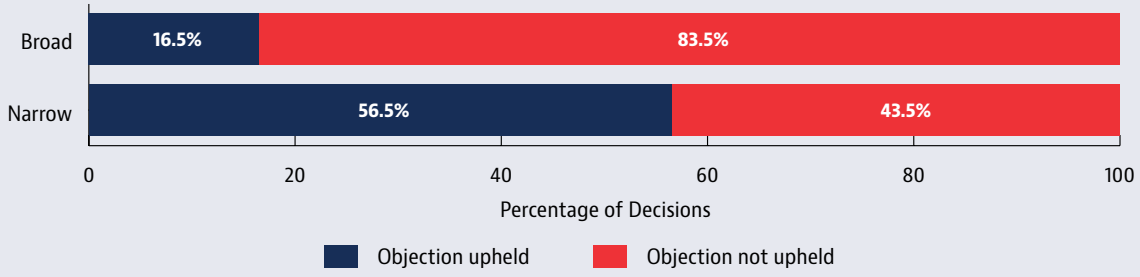
Treaty language

Whether the underlying investment treaty is worded broadly or narrowly (see Chart 7) matters to the success of the respondent state's objections based on corporate restructuring.[74] Where the investment treaty has a broad scope of application, the respondent state's objection fails 83.5% of the time (Chart 34). When the scope is narrow, the respondent state's objection succeeds 56.5% of the time.[75]

However, different sets of procedural rules have no meaningful impact on the outcome of the respondent state's objection.[76] The respondent state's objections were rejected in 63% of the decisions where the claim was brought under the ICSID Convention and in 65% of the decisions where the claim was brought under other rules (Chart 35).

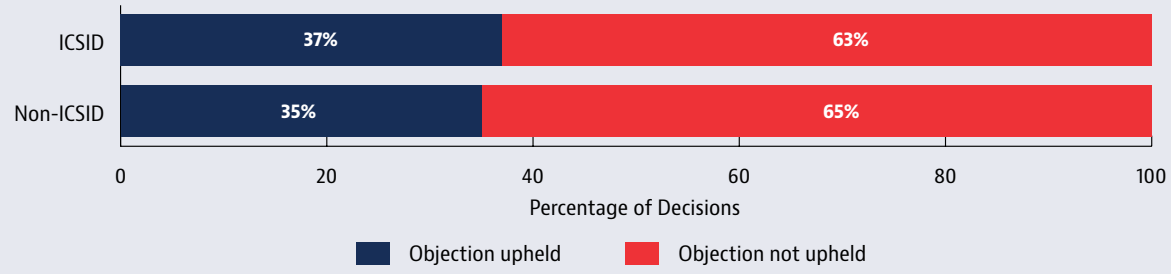
The scope of application of an investment treaty often predicts the outcome of the issue of corporate structuring. This is to be expected in circumstances where most claims are brought under investment treaties, tribunals apply international law (i.e. the law of the treaties) to the issue of corporate structuring and considered it to be a question of jurisdiction.[77] However, bringing a claim under the ICSID Convention as opposed to other instruments did not seem to have a significant effect on the permissibility of corporate restructuring. This may in part come down to the manner in which the respondent states raised their objection to the corporate structuring, and whether a separate argument was made under Article 25 of the ICSID Convention and the *Salini* criteria.

Chart 34: Success rate of objection brought under treaties interpreted as having a broad or narrow scope of application



Based on 53 analysed decisions

Chart 35: Applicable arbitration rules – success rate of objection



Based on 61 analysed decisions

Pervasive and factual considerations

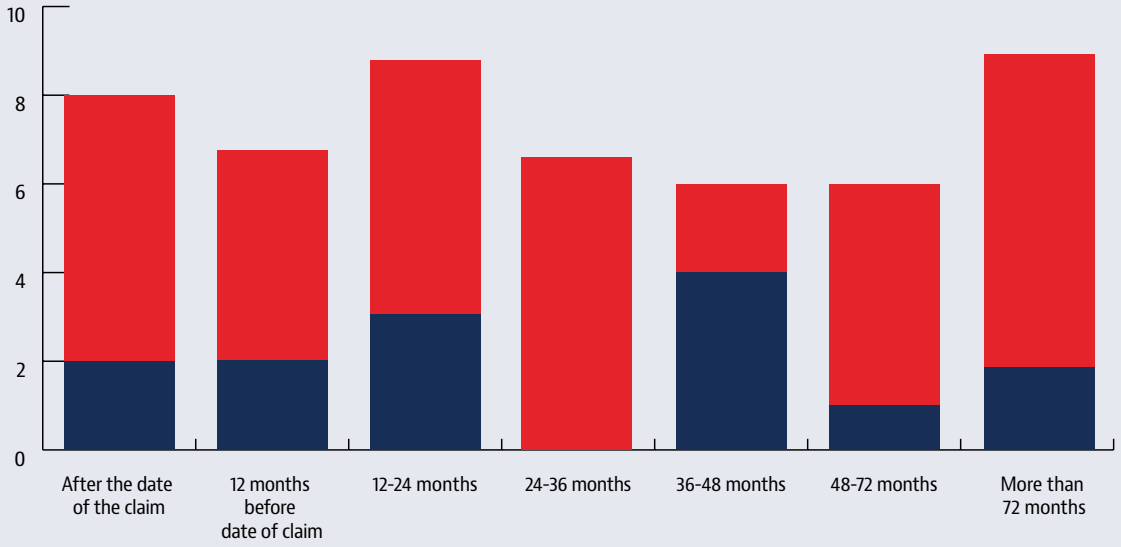
Timing of the corporate restructuring

The timing of the investment structuring is a key factor in whether an objection on the basis of such restructuring is successful. The study found no correlation between the number of days elapsed between a restructuring and a claim on one hand and the success of the claim on the other (objective, see Chart 36). Instead, timing is examined in each case based on its facts (subjective).

It matters whether the investor is part of the original structure (an original investor) or if it is 'inserted' at a later date (a new entrant, see Chart 17 above). In relation to new entrants, it matters whether the restructuring had been done before or after the dispute arose or had been foreseeable. This was key to the 'abuse of process' objection, but timing of the restructuring also impacted the validity of the transfer of shares and considerations of good faith.

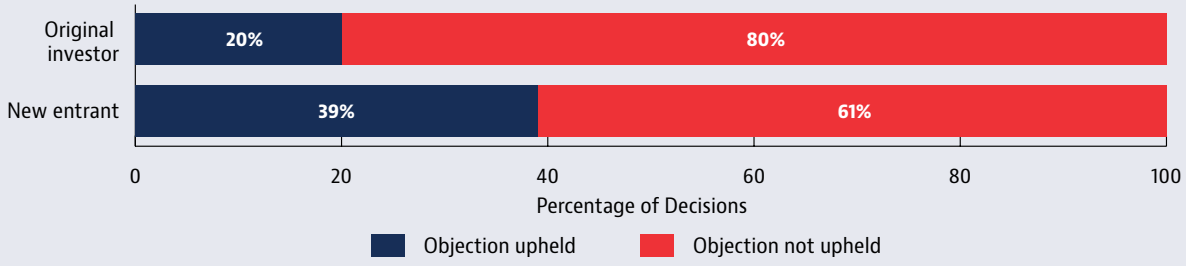
In decisions where the investment structure is in place from the outset, a respondent state's objections is very likely to fail. Original investors (like in *Tokios Tokelés*) are involved in only 16.5% of the decisions (Chart 17) but are successful in defeating the respondent state's objections 80% of the time (Chart 37).

Chart 36: Success rate of objections based on timing of the restructuring



Based on 61 analysed decisions

Chart 37: Success rate of objections based on whether the decision involved a new entrant or original investor



Based on 61 analysed decisions

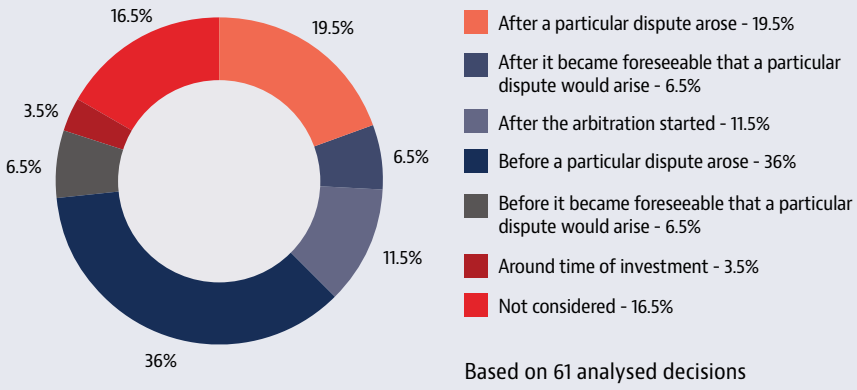
Conversely, new entrants are involved in 83.5% of the decisions, but are only successful in defeating the objection 61% of the time. A closer look at the tribunals' rationale shows that where the claim is brought by an original investor, tribunals tend to follow the terms of the treaty strictly.

In decisions involving an original investor, where the respondent state's objection failed, tribunals held that there was no scope to imply any additional requirements, such as the source of capital, or to imply the ability to pierce the corporate veil. It was up to contracting states to decide whether they wanted to include a letterbox definition of 'investor' easily satisfied by a de-facto shell company.[78]

Where the respondent state's objection was successful in relation to original investors, tribunals similarly relied on the terms of the treaty. In *TSA Spectrum*, the claimant incorporated in the host state argued that under the applicable definition of "investor" it was a national of the home state as it was "owned or controlled" by a company incorporated in that state. In the circumstances, the tribunal held that the company was in fact controlled by its ultimate shareholder, a national of the host state.[79] In *Guararachi v Bolivia*, the tribunal rejected jurisdiction where the denial of benefits clause was broadly worded and the claimant had no substantial activities in the home state.[80]

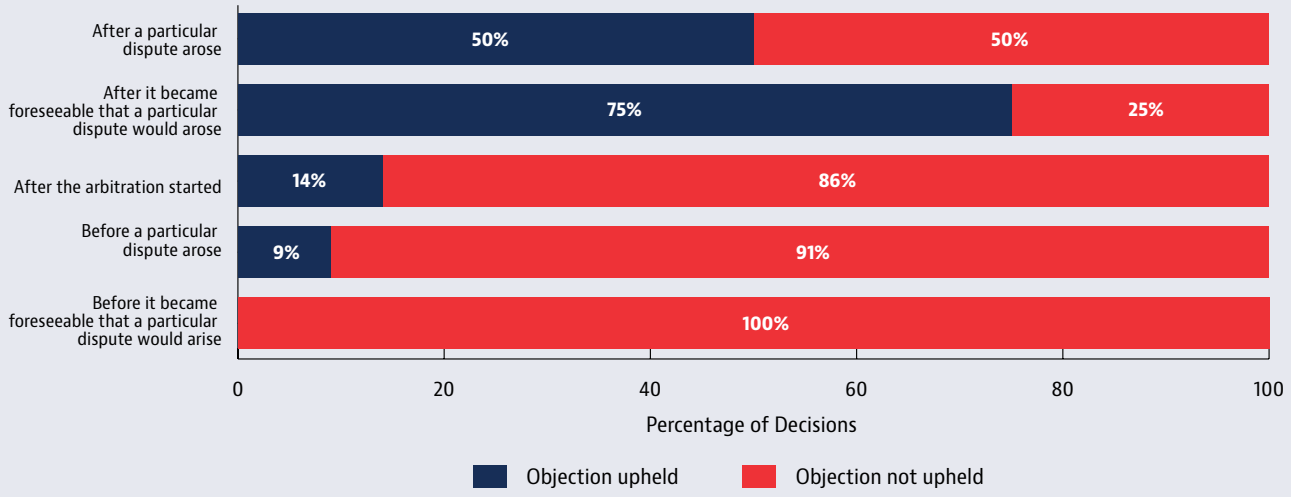
Where the tribunal makes a factual finding that the restructuring predated the dispute, the claimants usually succeeded (91% of decisions, Charts 38 and 39). If the restructuring occurred after the proceedings had been commenced, the claimants were successful in 75% of decisions (Chart 39). This is because tribunals have taken the approach that jurisdiction is established at the point at which the claim is made and disposals after the date of the request for arbitration are unlikely to affect the tribunal's jurisdiction.

Chart 38: Finding of the tribunal on the timing of the restructuring



Based on 61 analysed decisions

Chart 39: Success rate of objections based on the finding of the tribunal on the timing of restructuring



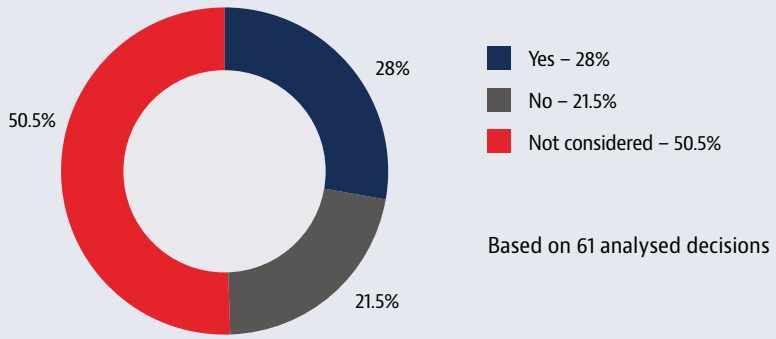
Based on 49 analysed decisions

Undertaking a genuine economic activity in the respondent state

The existence of genuine economic activity by the claimant in the respondent state has an impact on the success rate of the respondent state's objection on the basis of corporate structuring. Although not advanced as an objection in its own right, it is considered in half of all decisions involving investment structuring (Chart 40). If the tribunal finds a genuine economic activity by the claimant entity in the host state, the respondent state's objection fails in nearly all decisions. In the absence of such activity, the respondent's objection is almost bound to prevail (92.5%, Chart 41).

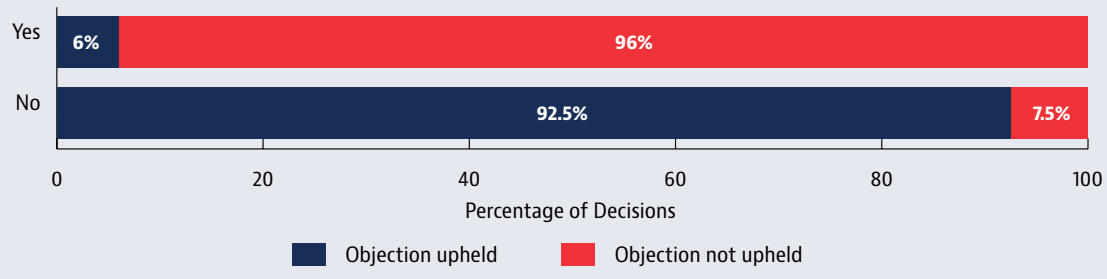
A majority of tribunals analyse whether there is a genuine economic activity as part of the definition of "investment". However, in *ADC v Hungary*, the tribunal considered the presence of an economic contribution of a "shell" investor as part of a *ratione personae* analysis.[81] In *Mobil v Venezuela*, an allegation of abuse of process was rejected on the grounds that the claimants continued to honour their investment contribution after the restructuring.[82] Similarly, the tribunal in *ConocoPhillips v Venezuela* considered the claimant's genuine desire to continue carrying out the projects (notably in light of the continuing expenditure following the restructuring) to be a "*major factor*" in rejecting an abuse of process argument.[83]

Chart 40: Was any economic activity performed or genuinely intended by the post-restructuring investor? – tribunals' findings



Based on 61 analysed decisions

Chart 41: Was any economic activity performed or genuinely intended by the post-restructuring investor? – success rate of objection



Based on 30 analysed decisions

The underlying reasons for restructuring

The claimants' underlying reasons for investment structuring correlate with the tribunals' decisions. In about a quarter of all decisions, the tribunals held that the sole reason for structuring or restructuring the investment was to gain access to investment treaty protection (Chart 42).

When they did, the tribunals upheld the respondent state's objections to the restructuring 78.5% of the time (Chart 43). In the majority of decisions where the tribunal was persuaded by other reasons for the investment structuring or restructuring, the respondent state's objections failed (83.5%).

Tribunals tend to side with the investor claimant where they find that the restructuring occurred as part of a general corporate reorganisation within the claimant's group[84] or where the ownership structure is put in place so as to allow indirect beneficial interest in the companies by a number of individuals and companies further up the chain.[85]

A number of tribunals suggested that a legitimate treaty structuring (or restructuring) could in principle be acceptable. In *Mobil*, the tribunal held that:

> *The aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.*[86]

The *Mobil*, *ConocoPhillips* and *Tidewater* decisions are the only decisions where, despite the finding that a restructuring was made mainly to access ISDS, the tribunals rejected the respondent's objection.[87] In each of these decisions, the tribunal took the view that (1) there was genuine economic activity by the post-restructuring investor and (2) the timing criterion was satisfied.[88]

This suggests that even if the tribunal makes a finding that the sole purpose of the restructuring is to gain access to ISDS under an abuse of process analysis, it will only accept the objection if the dispute had also become foreseeable at the point of the restructuring.

Chart 42: Reasons for the restructuring - tribunal's findings

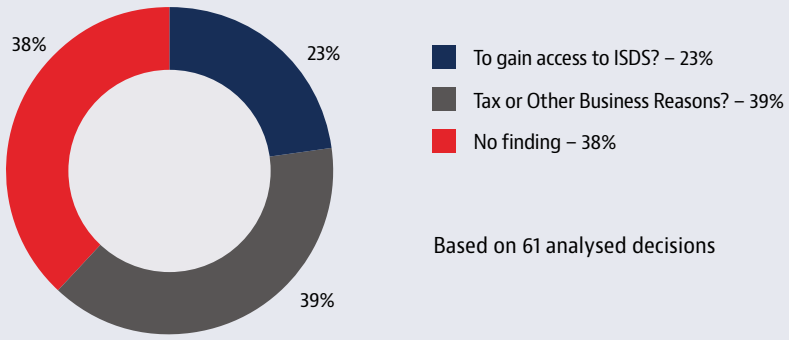
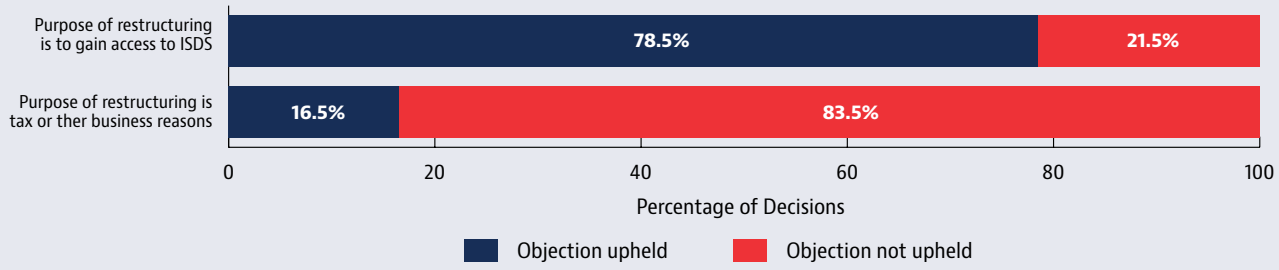


Chart 43: Reasons for the restructuring – success rate of objection



Based on 38 analysed decisions

Endnotes

1 Although this is the first comprehensive empirical study on the matter, related topics have been extensively examined in earlier sources: Emanuel Gaillard. '*Abuse of Process in International Arbitration*'. ICSID Review – Foreign Investment Law Journal 32(1) (Winter 2017): 17–37; Jorum Baumgartner, '*Treaty Shopping in International Investment Law*'. Oxford University Press (2016); Christoph Schreuer. '*Nationality Planning*'. In Contemporary Issues in International Arbitration and Mediation: The Fordham Papers. Brill (2012): 15-27; Matthew Skinner, Cameron Miles and Sam Luttrell. '*Access and Advantage in Investor-State Arbitration: The law and practice of treaty shopping*'. Journal of World Energy Law and Business 3 (2010): 260. Yarik Kryvoi, '*Piercing the Corporate Veil in International Arbitration*'. Global Business Law Review, 1 (2010): 169. These publications primarily focused on qualitative description of individual cases and applicable legal doctrines. This is the first study that has sought to measure success rate of particular objections to corporate restructuring using quantitative methodology.

2 The authors would like to thank Ruihan Liu and Lauren Gest for their research assistance as well as Professor Loukas Mistelis, Derek Soller, Nicholas Kennedy and Markus Altenkirch for their comments on earlier drafts of this study.

3 See, e.g., United Nations Commission on International Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, A/CN.9/WG.III/WP.150, 28 August, 2018, accessed on 27 February 2020 at https://undocs.org/en/A/CN.9/WG.III/WP.150 para. 15.

4 See United Nations Commission on International Trade Law, Draft Report of Working Group III (Investor-State Settlement Reform) on the work of its third-sixth session, UNCITRAL A/CN.9/964, 6 November 2018, accessed on 27 February 2020 at: https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf paras. 118 and 122.

5 Corporate structuring and restructuring are used interchangeably unless expressly stated otherwise.

6 See *Saluka Investments BV (the Netherlands) v The Czech Republic* (UNCTIRAL 1976), Partial Award dated 17 March 2006, para. 240; see also *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, paras. 92 - 94.

7 *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction dated 29 April 2004.

8 Ibid., paras. 21 - 93; see also Dissenting Opinion of Prosper Weil dated 29 April 2004.

9 For an example of such a critique, see Andriy Alexeyev & Sergiy Voitovich, "*Tokios Tokelés Vector: Jurisdictional Issues in ICSID Case Tokios Tokelés v. Ukraine*", 9 J. World Investment & Trade 519 (2008).

10 20% of the decisions came before or at around the time of the *Tokios Tokelés* decision; the remaining 80% came afterwards.

11 The present study is based on 58 cases but in three of these cases, the tribunal considered objections to two separate "restructurings", which were considered as separate 'decisions' in the study: *PSEG v. Republic of Turkey* (ICSID Case No. ARB/02/5), Decision on Jurisdiction dated 4 June 2004; *Khan Resources v. The Government of Mongolia MonAtom LLC* (PCA Case No. 2011-09), Decision on Jurisdiction dated 25 July 2012; *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (PCA Case No. 2011-17), Award dated 31 January 2014.

12 Further details on NAFTA can be found on the following websites, accessed last on 27 February 2020: https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta and https://www.nafta-sec-alena.org/Home/Welcome.

13 Further details on the ECT can be found on the following websites, accessed last on 27 February 2020: https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ and https://www.energycharter.org/what-we-do/dispute-settlement/overview/.

14 Further details on the ICSID Convention can be found on the following website, accessed last on 27 February 2020: https://icsid.worldbank.org/en

15 *Gemplus v Mexico* (ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4), Award dated 16 June 2020, para. 5-28.

16 The claimant was also successful in the one case where the tribunal applied only domestic law to the issue of investment structuring: *Khan Resources v. The Government of Mongolia MonAtom LLC* (PCA Case No. 2011-09), Decision on Jurisdiction dated 25 July 2012, paras. 327-342.

17 In all but one decisions, tribunals found that investment structuring affected their decisions on jurisdiction.

18 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12), Award on Jurisdiction and Admissibility dated 17 December 2015, para. 588.

19 *Alapli Elektrik B.v. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Award dated 16 July 2012, para. 417; *Mobil Corporation v. Bolivian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction dated 10 June 2010, para. 206; *ConocoPhillips v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Jurisdiction and Merits dated 3 September 2013, para. 281.

20 *Renee Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17), Award dated 9 January 2015, para. 181; *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections dated 1 June 2012, para. 2.10.

21 *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award dated 22 August 2012, para. 141; *EnCana Corporation v. Republic of Ecuador* (LCIA Case UN3481), Award dated 3 February 2006, 1. 131.

22 *Vanessa Ventures Ltd v. The Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Award dated 16 January 2013, paras. 168-169.

23 Ibid., paras 125, 214.

24 *Mobil Corporation v. Bolivian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction dated 10 June 2010; *ConocoPhillips v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Jurisdiction and Merits dated 3 September 2013; *Tidewater Investment SRL v Venezuela* (ICSID Case No ARB/10/5), Decision on Jurisdiction dated 8 February 2013.

25 *Tidewater*, op.cit., para. 183; *Mobil*, op.cit., para. 204; *ConocoPhilips*, op.cit., para. 279.

26 *Ceskoslovenska Obchodni Banka, A.S v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999, para. 32.

27 *Mihaly v Sri Lanka* (ICSID Case No. ARB/00/2), Award dated 15 March 2002, para. 24.

28 Ibid.

29 *Loewen v US* (ICSID Case No. ARB(AF)/98/3), Award dated 26 June 2003, para. 225.

30 *Ceskoslovenska Obchodni Banka, A.S v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999, para. 32; *Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Award dated 21 July 2017, para. 242; R*umeli Telekom A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award dated 29 July 2008, paras. 324-325.

31 *FEDAX N.V. v. The Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction dated 11 July 1997, paras. 39.

32 *Standard Chartered v Tanzania* (ICSID Case No. ARB/10/12), Award dated 2 November 2012, paras 266, 270.

33 *Daimler*, op.cit., para. 145; *Mondev v USA* (ICSID Case No. ARB(AF)/99/2), Award dated 11 October 2002, para. 91.

Endnotes

34 Ibid.

35 *Daimler*, op.cit., para. 141; *EnCana*, op.cit., para. 131. See, however, *Gemplus v Mexico*, op.cit., para. 5-34, and Loewen, op.cit., para. 225.

36 *Tokios Tokelés*, para. 28.

37 *Tokios Tokelés*, para. 38.

38 *ADC & ADMC Management Limited v. The Republic of Hungary*, op.cit.

39 Ibid., para. 357.

40 R*ompetrol Group N.V v Romania* (ICSID Case No. ARB/06/3), Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, para. 100.

41 *Tokios Tokelés*, para. 17.

42 *Tokios Tokelés*, para. 75.

43 *Tokios Tokelés*, para. 77.

44 *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), Interim Award on Jurisdiction and Admissibility dated 30 November 2009, para. 432.

45 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction dated 31 July 2001, para. 52.

46 *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award dated 15 April 2009, paras. 135-144. The case involved the insertion of an Israeli entity into a domestic Czech investment structure after a dispute with the government had arisen.

47 *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award dated 14 July 2010, paras. 89-149.

48 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award dated 17 October 2013, paras. 160-223.

49 Ibid., paras. 188-206.

50 Ibid., paras. 207-216.

51 *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Award dated 10 March 2015.

52 Ibid., see para. 193.

53 Ibid., paras. 193 - 247.

54 *Daimler*, op.cit., para 141.

55 *Gemplus*, op.cit., paras. 5-28 to 5-33.

56 *Quasar de Valores SICAV S.A., Orgor de Valores SICA*V S.A., *GBI 9000 SICAV S.A. v. The Russian Federation* (SCC Case No. 24/2007), Award dated 20 July 2012.

57 *Vito G. Gallo v. The Government of Canada* (UNCITRAL, PCA Case No. 55798), Award dated 15 September 2011, paras. 281 - 297.

58 *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Award dated 2 September 2011; *Saba Fakes v The Republic of Turkey; Cementownia Nowa Huta v. Republic of Turkey* (UNCITRAL), Award dated 1 January 2009; *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2), Award dated 13 August 2009.

59 *Vito G Gallo v Canada*, op.cit., paras. 281 - 297 (as before).

60 *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL, PCA Case No. 2011-06), Award on Jurisdiction dated 18 July 2013, paras. 298 - 333.

61 *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Award dated 6 August 2019, paras. 68-83, 122-157.

62 *Gremcitel*, op.cit., para. 182.

63 Ibid., para. 195. However, the tribunal left open the question of whether the abuse of process objection was a jurisdictional or admissibility issue (para. 181).

64 *Philip Morris*, op.cit., para. 554.

65 Ibid., paras. 555-569, 570-584.

66 See *Pac Rim*, op.cit., para. 2.99; see also *Lao Holdings*, op.cit., para. 76, where the tribunal required the dispute to be "highly probable".

67 *Mobil*, op.cit., paras. 203, 205.

68 *Gremcitel*, op.cit., para. 191.

69 *Alapli*, op.cit., paras. 410-417.

70 *Tidewater*, op.cit., paras. 193-196 and *ConocoPhillips*, op.cit., paras. 278-279.

71 See Table 1 for an example of a typical denial of benefits clause.

72 *Yukos*, op.cit., para. 512-557; V*eteran Petroleum*, op.cit., paras. 456-555; *Khan Resources*, op.cit., paras. 410-431.

73 *Pac Rim*, op.cit., paras. 4.18-4.23 and *Guaracachi*, op.cit., paras. 366-384.

74 Table gives examples of the key terms. See above for definition of 'narrow' and 'broad' scope of application in this study.

75 This is based on broad definition of 'investor', 'investment' and no DOB clause, excluding claims brought under contract and the one applying domestic laws only.

76 The four different procedural rules that were applied are: ICSID Arbitration Rules, ICSID Additional Facility Arbitration Rules, UNCITRAL 1976 and 2010, and SCC Arbitration Rules.

77 See earlier section in this study.

78 *Tokios Tokelés*, para. 36; *ADC & ADMC Management Limited v. The Republic of Hungary*, op.cit., para. 357; *Alpha Projektholding GMBH v. Ukraine* (ICSID Case No. ARB/07/16), Award dated 8 November 2010, para. 345. For a strict interpretation of the Denial of Benefits Clause in the ECT, see also: *Yukos*, op.cit., paras. 456-459; *Veteran Petroleum*, op.cit., paras. 512-515.

79 *TSA Spectrum De Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/05/5), Award dated 19 December 2008, para. 159.

80 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (PCA Case No. 2011-17), Award dated 31 January 2014, para. 383.

81 *ADC & ADMC Management Limited v. The Republic of Hungary*, op.cit., para. 353.

82 *Mobil*, op.cit., paras. 196-198.

83 *ConocoPhillips*, op.cit., para. 280.

84 *Gold Reserve v Venezuela* (ICSID Case No. ARB(AF)/09/1), Award dated 22 September 2014, para. 270; *Millicom International Operations B.V. v The Republic of Senegal* (ICSID Case No. ARB/08/20), Decision on the Jurisdiction of the Tribunal dated 16 July 2010, paras. 106-115.

85 *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), Interim Award on Jurisdiction and Admissibility dated 30 November 2009.

86 *Mobil*, op.cit., para. 204.

87 *Tidewater*, op.cit., para. 183; Mobil, op.cit., para. 204; *ConocoPhilips*, op.cit., para. 279.

88 *Pac Rim*, op.cit., paras. 2.41, 2.43 and 2.52 and *Philip Morris*, op.cit., para. 554.

Appendices

Methodology and disclaimer

The research was conducted in three phases:

- **Phase 1:** Collection of publicly available decisions on provisional measures by tribunals in investor-state disputes on the ICSID, Italaw, ISLG, UNCTAD, KluwerArbitration and other major databases. A total of 58 publicly available awards which contain 61 decisions in which tribunals considered an objection to a corporate structuring were collected. The study only included decisions that were published in their original form or that were quoted significantly in an academic article. These primarily included decisions on claims brought under bilateral and multilateral investment treaties.

  In deciding whether a decision fell within the scope of the study, the study examined whether:

  - the fact pattern of the case concerned a corporate structuring or restructuring of the claimant;
  - the respondent state raised an objection specifically to the corporate structuring; and
  - the objection was considered by the tribunal in considering jurisdiction, admissibility or merits of the claim.
- **Phase 2:** Establishing research questions, performing legal research, analysing and summarising the relevant parts of the decisions on objections to corporate restructuring.
- **Phase 3:** Generating the statistical data presented in this study. For ease of reading, all of the statistics were rounded up to the nearest number or referred to as a fraction (e.g., 22.95% is shown as 23% or referred to as "nearly a quarter of the decisions"). The study analyses the statistical data in the context of key issues considered to be significant to understanding the relationship between corporate structuring and ISDS.

In evaluating corporate structuring, tribunals carry out a subjective assessment which is heavily dependent on the specific facts of the case. This study has sought to identify key trends through a quantitative analysis as to how tribunals have approached various objections in the past. However, the prior results explored in this study do not guarantee a similar outcome in future decisions.

Nothing in this study constitutes legal advice or gives rise to a solicitor/client relationship. Specialist legal advice should be taken in relation to specific circumstances. The authors would like to emphasise that the analysis set out, and any views expressed, in this paper reflect the decisions of the arbitral tribunals and are based on data only. They do not reflect the views of Baker & McKenzie LLP or BIICL as to the correctness of those decisions or the approach adopted by different tribunals.

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