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EMPIRICAL STUDY:

International Investment Law Protections in Global Banking and Finance

FINAL VERSION

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I. Introduction

The British Institute of International and Comparative Law (BIICL) and Dechert have the pleasure to present a comprehensive empirical study on investment protection in global banking and finance. The present study examines the publicly-available decisions of investor-State tribunals addressing the protection of foreign investments in the banking and finance sector. It complements the first detailed treatise dedicated to the subject, co-authored by Prof. Arif Ali and Dr. David Attanasio, entitled *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (2021).[1]

Confronted by rising geopolitical tensions, price instability and a lack of prospects for stable growth, host States may act precipitously in the face of real, imagined, or invented financial instability in banks and other financial institutions. More than ever, banking institutions and investors in financial products face increased regulatory risks which may arise out of politically motivated measures.[2]

An example is the impact of economic risk on foreign holders of sovereign bonds. With higher interest rates and increases in government spending, the risks of States and related entities defaulting on their debts has also increased. According to the IMF, as of April 2024, 34 low-income economies were already experiencing, or at high risk of, debt distress.[3] For example, in December 2023, Ethiopia, grappling with severe inflation, defaulted on its sovereign debt following stalled restructuring negotiations with private credit and pension funds.[4]

1 The views and opinions expressed in this study do not necessarily reflect the personal opinions of each author or those of Dechert LLP, AHALI Dispute Resolution LLC, Womble Bond Dickinson (US) LLP, or BIICL. The authors would like to thank Georges Affaki, Marinn Carlson, and Todd Weiler for their helpful review of and comments on the preliminary version of this study. They would also like to thank the excellent contributions of Heather Allison and Anna Aviles Alfaro throughout the development process. All errors remain the responsibility of the authors.

2 For example, in *Bank Melli Iran and Bank Saderat Iran v. Bahrain*, PCA Case No. 2017-25, the Central Bank of Bahrain placed a bank into administration and subsequently closed it, based on its alleged failure to comply with the sanctions regime against Iran. Shareholders of the bank brought a claim before an arbitral tribunal constituted under the Bahrain-Iran bilateral investment treaty (BIT). The arbitral tribunal deemed the State's actions to be politically motivated and ordered it to compensate the bank's owner.

3 International Monetary Fund, List of LIC DSAs for PRGT-Eligible Countries, April 2024, https://www.imf.org/external/pubs/ft/dsa/dsalist.pdf.

4 "Ethiopia defaults on sovereign debt after deadline expires on $33mn payment," *Financial Times* (27 December 2023), https://www.ft.com/content/8225e96f-d3f3-4160-9154-87d2e8aa23e7.

Countries like Ghana, Zambia and Sri Lanka were engaging in serious yet difficult discussions with their international lenders on ways to restructure their debts.[5] Faced with these difficulties, foreign investors in the sovereign bonds of these countries may find their rights impaired during the debt restructuring process.

Sovereign debt is just one example of an investment that can be affected by a State: no banking or finance investment is immune from governmental measures, some of which may adversely impact the investment or the investor. Does international law offer effective protection to investors in the banking and finance sector affected by purported emergency regulations, sovereign debt restructuring, financial sector reform, or other measures? How can investors in the banking and financial sector benefit from the protection of international law?

We address these and other questions in this first empirical study of 149 international investment cases related to banking and finance.

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5 "Sri Lanka central bank says sovereign lenders yet to outline debt talks plans," *Reuters* (11 April 2023), https://www.reuters.com/markets/asia/sri-lanka-central-bank-says-sovereign-lenders-yet-outline-debt-talks-plans-2023-04-11/; "Zambia: UN experts concerned over delay in the country's debt restructuring," *UN News* (7 April 2023), https://news.un.org/en/story/2023/04/1135752; "Ghana's debt restructuring takes another step forward," *Reuters* (24 May 2024), https://www.reuters.com/markets/ghanas-debt-rework-quest-hits-international-bonds-hurdle-2024-04-15/.

II. Executive Summary

Investor-State disputes in the banking and finance sector have increased dramatically, but often arise in clusters.

Over the last 20 years, the number of cases brought by banking and finance investors has grown considerably. This study shows that, based on publicly-available information, such disputes often occur in clusters following external events like economic crises. Investors typically file claims within 1-3 years following the State measures that they believe violated investment protections. Most cases are resolved through arbitration within 2-4 years, faster than the overall average investor-State case. Bilateral investment treaties rather than investment contracts or multilateral investment agreements serve as the main instrument of consent in the overwhelming majority of cases.

Some States face a disproportionately high number of claims and investors are clustered in a small number of developed States.

Several States (*e.g.*, Argentina, India, Croatia) have experienced far more arbitrations than others. Investors brought about a third of all banking and finance cases against just seven respondent States, while 31 respondent States have had just one dispute apiece. Nevertheless, the home States of the investors in banking and finance disputes are even more concentrated. Over half of all such disputes were brought by investors hailing from just six states, with the Netherlands, United States and United Kingdom at the top of the list. In more than a quarter of cases, the home State of the investor was different from that of the entity or person that owned or controlled the investor.

Investors are awarded a higher proportion of requested damages and have a higher likelihood of settlement than investors in investor-State arbitration generally.

The majority of investors are successful at the jurisdictional stage, and most investors who prevail at the jurisdictional stage also obtain a favorable result on the merits. Looking at the 96 concluded cases, the investors prevailed in 28% of cases and settled approximately a quarter of all cases, while the State prevailed (through a favorable arbitral decision) in nearly a half of all cases. That said, banking and finance cases have seen higher rates of settlement than other types of investor-State cases. When it comes to the amount of compensation awarded, the median percentage approaches one half of the requested sum (46%), which significantly surpasses the overall median for investment claims (33%).

The likelihood of success depends on the type of investment and the type of measures at issue.

Investors holding investments in financial instruments have had a greater chance of succeeding on jurisdiction than those holding investments in financial institutions. So far, investors have prevailed in all cases with decisions on the merits related to sovereign debt but were less successful than respondent States on the merits in cases concerning currency regulations and emergency measures addressing purported instability in financial institutions.

Tribunals confirm limits on permissible State interference with banking and finance investments.

The investor prevailed fully or partially in nearly two thirds of the merits decisions (65%) and the State prevailed in just over one third (35%). Tribunals have sided with investors on the merits citing a range of factors, including the influence of improper motives, the frustration of legitimate expectations (however understood), or the comission of illegitimate acts such as instrumentalizing the judicial system, orchestrating raids, or imposing disproportionate penalties.

III. Overview of Banking and Finance Disputes

The question of whether international law offers effective protections to foreign investments in "intangible" investments in the banking and finance sector was once a subject of debate. While the historically dominant view has answered this question in the affirmative,[6] others have sought to distinguish banking and finance investments from other investments, such as concession contracts or physical assets.[7]

However, this discussion has been put to rest by the conclusion of thousands of bilateral investment treaties ("BITs") as well as multilateral investment treaties, and trade treaties containing investment protections, including international arbitration. Through these instruments, States now generally offer international protection to a wide range of banking and finance firms and assets. These treaties allow foreign investors to bring claims based on government actions or omissions before an independent international arbitral tribunal—investor-State dispute settlement ("ISDS"). A review of international treaty practices on banking and finance matters is available in Annex A.

One of the first modern investment treaty cases in the banking and finance sector resulting in an award, *Fedax v. Venezuela*, was submitted in 1996.[8] The dispute arose out of Venezuela's failure to pay promissory notes based on debt owed for services provided. The *Fedax* tribunal found the promissory notes to constitute a protected investment and ordered the State to pay both the principal and interest to the investor.[9]

6 *See e.g.*, *Ina M. Hofmann and Dulcie H. Steinhardt v. Turkey*, American-Turkish Claims Commission, 15 May 1937, in Fred K. Nielsen, *American-Turkish Claims Settlement* (1937), p. 287 ("International tribunals have from time to time dealt with cases involving contractual obligations including some evidenced by bonds. . . . Occasionally opinions have revealed a confusion of thought and reasoning with respect to these subjects and also with respect to legal questions and the policy of governments relating to the diplomatic treatment of such cases. . . . Apart from the question of jurisdiction which in each case is of course determined by the terms of an arbitral agreement, it may be observed that there appears to be no reason why international reclamations cannot properly be predicated, under the law of nations, on violations of property rights acquired in connection with the acquisition of bonds issued by governments.").

7 *See e.g.*, Luis Drago, *State Loans in Their Relation to International Policy*, 1 American Journal of International Law 692, 695 (1907); Edwin M. Borchard, *Contractual Claims in International Law*, 13 Columbia Law Review 457, 460, 476 (1913).

8 According to the UNCTAD database, *Hanover Trust Co. v. Arab Republic of Egypt and General Authority for Investment and Free Zones*, ICSID Case No. ARB/89/1, was the first ISDS case in the finance and banking sector. The case, brought pursuant to Egypt's Foreign Investment law, was settled in 1993.

9 *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997; Award, 9 March 1998.

Since the days of the *Fedax* arbitration, foreign investors in the banking and finance sector have frequently invoked investor-State arbitration regarding host State measures that have allegedly adversely affected their investments. These banking and finance disputes have concerned a range of cross-border investments in both banking and financial institutions (such as banks and insurance companies) and financial instruments (such as loans and bonds).

A. What are the main types of investments that have given rise to disputes?

Investor-State arbitration has been used to resolve disputes related to a wide range of banking and finance investments. Of the 149 cases analyzed for this study, approximately half (77 cases) involved ownership interests in a financial *institution*, be it in a bank, an insurance company, or other entities. The other half (72 cases) involved investments in financial *instruments*, such as loans and bonds.

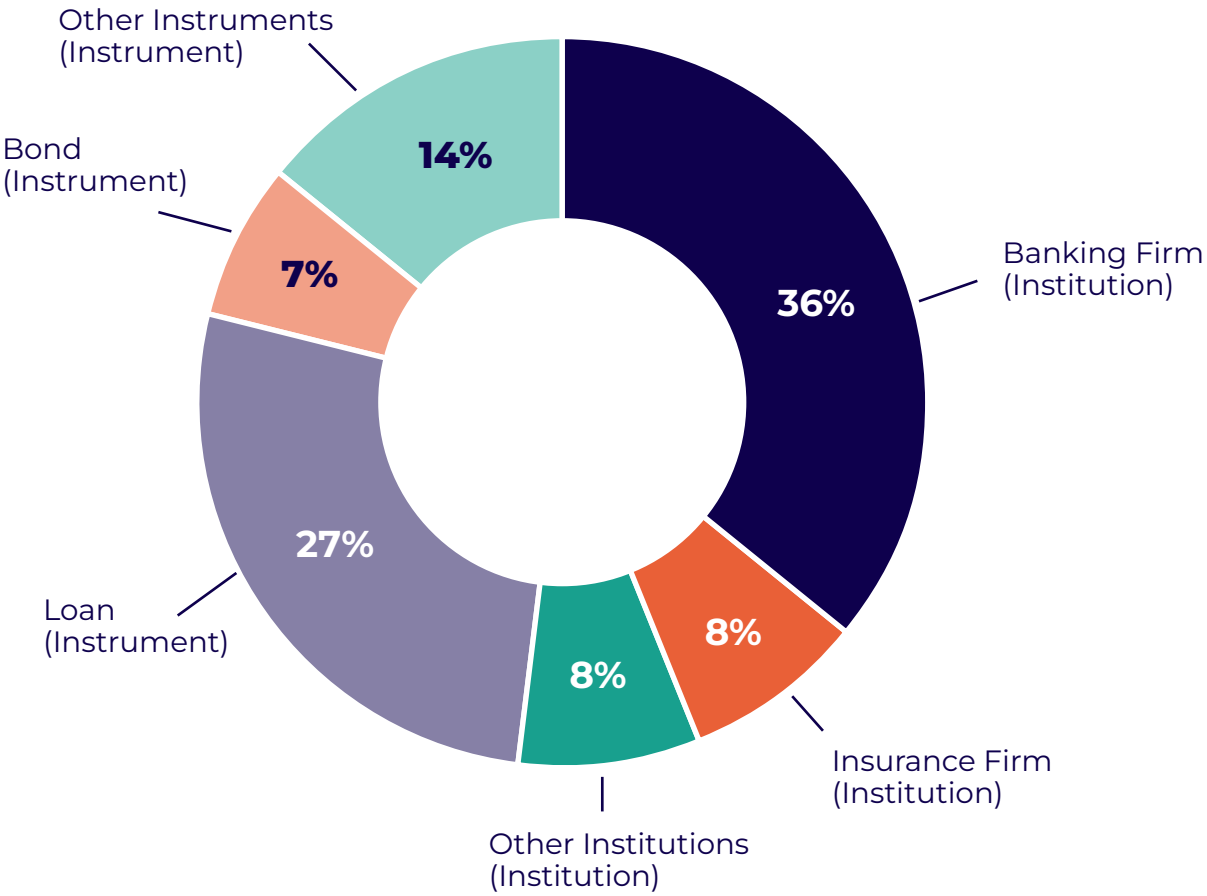
For the purposes of this study, banking and finance disputes include any dispute regarding a banking and finance investment (see Table 1 below). Within each major category, there are a number of investment subtypes, reflecting the ample diversity of both institutions and instruments in the modern-day global banking and finance industry. Examples of each category are available in Annex B.

Table 1: Types of Banking and Finance Investments

INSTITUTIONS	
Banking Institutions	Interests in banking institutions.
Insurance Institutions	Interests in insurance institutions.
Other Financial Institutions	Interests in other types of institutions, such as pension funds or investment management companies.
INSTRUMENTS	
Loans	Loans and other debt instruments that are not readily tradable, including those issued to or guaranteed by States, State-owned companies, or other companies.
Bonds	Bonds and other readily tradable debt instruments, including those issued by States, State-owned companies, or other companies.
Other Financial Instruments	Other types of financial instruments, most often derivatives, such as futures, options, and swaps.

The most common banking and finance investments at issue in investor-State arbitrations are those in foreign banks, held either in the form of a subsidiary or a local branch (36% of cases) (see Chart 1 below). Following closely are investments in cross-border loans, frequently but not always extended by a financial institution (27% of cases).

Chart 1: Key Types of Banking and Finance Investments at Issue in Investment Disputes



While disputes over bonds and tradable debt obligations represent a relatively small proportion of all cases (7%), they have resulted in several high-profile and controversial arbitrations. Most notably, a series of bond disputes against Argentina, arising from measures taken by the government in response to the financial crisis that the country underwent in 2001-2002, not only provoked extensive reflection on the proper role of investor-State arbitration in sovereign debt disputes, they also generated arbitral decisions addressing the novel jurisdictional issues presented by certain types of bond-related disputes.[10]

10 Notable examples include *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5; *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8.

B. What are the types of State measures at issue in disputes?

The State measures involved in banking and finance disputes vary and there are multiple feasible ways to classify these measures. They may include actions taken during and in response to financial crises, government interventions in financial institutions, and legislative changes affecting financial contracts. Nevertheless, many of the cases do present distinctive, recurring fact patterns and broadly similar underlying measures. Factual scenarios from real cases corresponding to each of these categories are available in Annex C.

For the purposes of this study, we have sought to group the types of measures based on the more common fact patterns (see Table 2 below).

Table 2: Types of Measures at Issue in Banking and Finance Disputes[11]

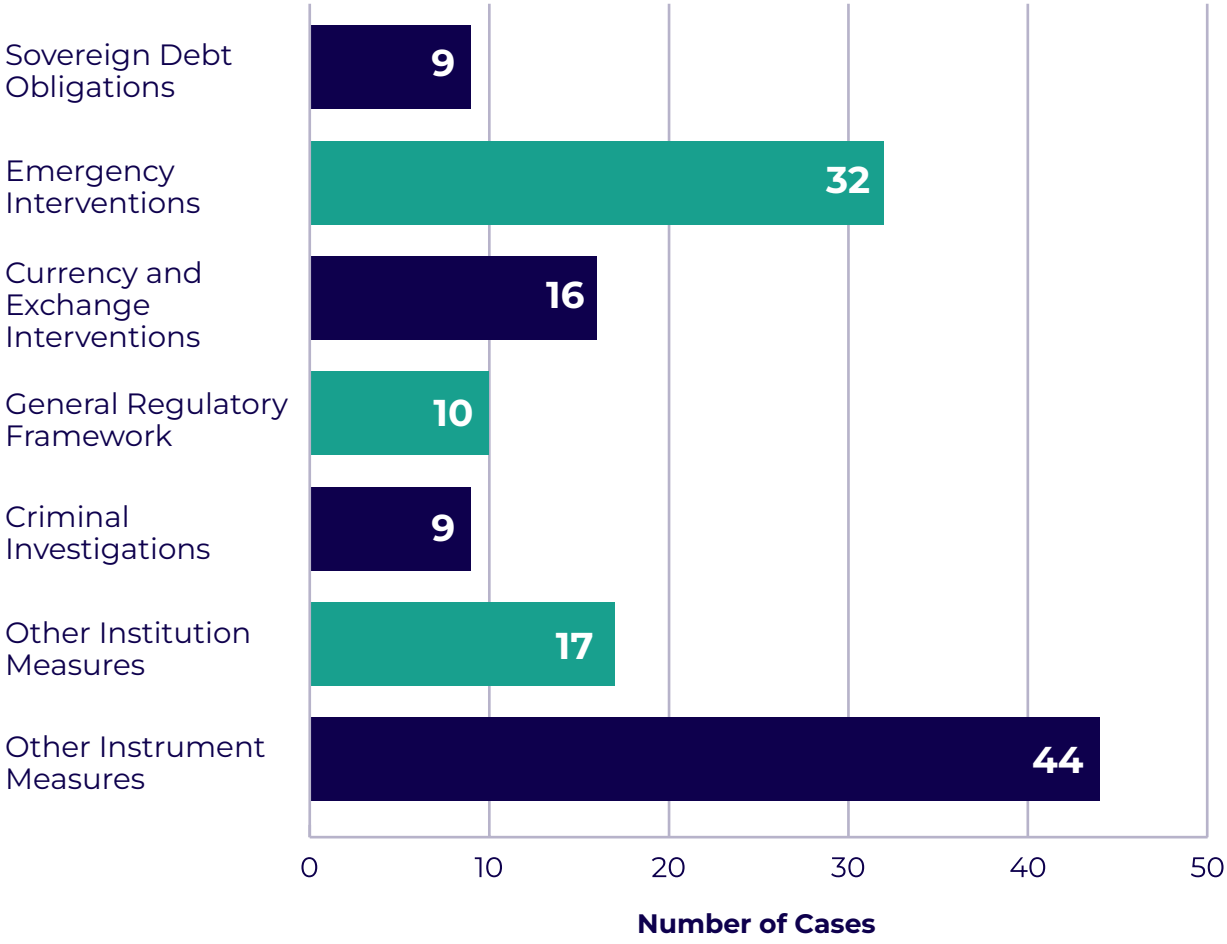
Sovereign Debt Measures	Measures relating to sovereign debt default and restructuring.
Emergency Interventions	Measures ostensibly in response to an emergency affecting an individual financial institution or the financial sector more broadly.
Currency and Exchange Interventions	Measures relating to exchange controls, asset redenomination, and capital controls.
General Regulatory and Sectoral Reform	Measures ostensibly to reform or restructure the banking and finance sector broadly, such as the privatization or nationalization of a particular financial subsector.
Criminal Investigations	Investigations or prosecutions for actions in connection with banking and finance sector investments.
Other Institution-related Measures	Other measures that, directly or indirectly, affect institutions in the banking and finance sector.
Other Instrument-related Measures	Other measures that, directly or indirectly, affect financial instruments.

The most prevalent type of dispute pertains to the investor's ownership in financial instruments such as bonds and loans (33%) (see Chart 2 below).

11 For additional analysis of these measures, see Arif H. Ali and David L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer, 2021), Chapter 7.

Emergency governmental measures targeting an allegedly unstable financial institution – often a bank – are also common subjects of claims before arbitral tribunals (24%).[12] Other types of measures have generated a significant number of disputes as well. For example, although relatively few in number, disputes over sovereign debt defaults and restructuring have led to cases involving Argentina and Greece, sparking considerable debate over the role played by international tribunals in judging actions taken by States with economies in distress (7%).[13]

Chart 2: Key Types of Measures at Issue in Investment Disputes



12 Notable examples include *Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-04 (claims arising out of discriminatory treatment of an investor during a banking crisis) and *Invesmart v. Czech Republic*, UNCITRAL (claims arising out of denial of emergency financing during a banking crisis).

13 *See e.g.*, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5; *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9; *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8.

IV. Overall Trends in Banking and Finance Disputes

The data show that banking and finance disputes often occur in clusters following external events like economic or financial crises. While the frequency of disputes has generally increased, an apparent drop off in the most recent years is likely due to the delay between the occurance of State measures and the filing or public disclosure of arbitrations. Investors typically file claims within 1-3 years after the alleged breach. Most arbitrations are resolved within 2-4 years, shorter than the overall average ISDS case duration of around 4-5 years. The majority of banking and finance disputes are brought under BITs and resolved through ICSID arbitration.

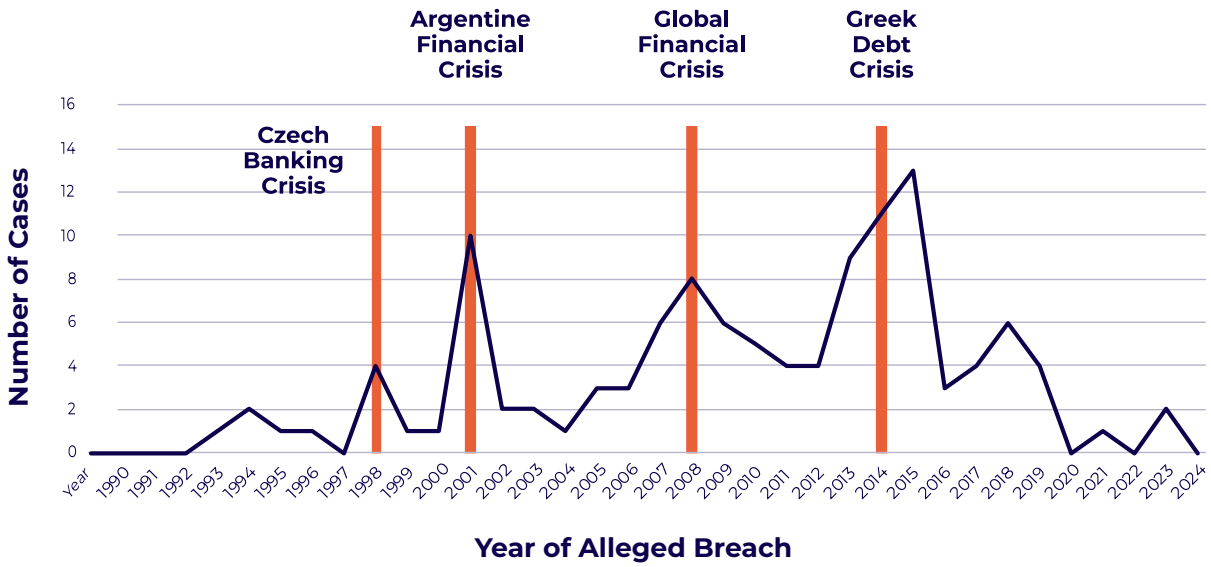
A. When have the alleged breaches occurred?

Investor-State disputes in the banking and finance sector have not arisen uniformly over time but instead often occur in distinctive clusters, provoked by external events (see Chart 3 below). For example, the Czech banking crisis of 1997-1998, the Argentine financial crisis of 2001-2002, the global financial crisis of 2007-2008, and the height of the Greek debt crisis between 2013 and 2015 – which itself was an aftershock of the global financial crisis – each gave rise to significant spikes in the number of disputes.

Not all banking and finance disputes arise from measures taken in times of crisis. A steady stream of such disputes has emerged from other underlying causes, sometimes individual in nature and specific to a particular investment. The frequency of such disputes has generally increased during the past several decades, roughly in line with the overall increase in the volume of investor-State arbitration.

The apparent drop off in banking and finance disputes since 2020 may be a mirage, since many recent disputes would not have had time to make it to international arbitration or to become publicly known. This study considers only those cases that were public as of June 30, 2024.

Chart 3: Year of Alleged Breach for Banking and Finance Disputes



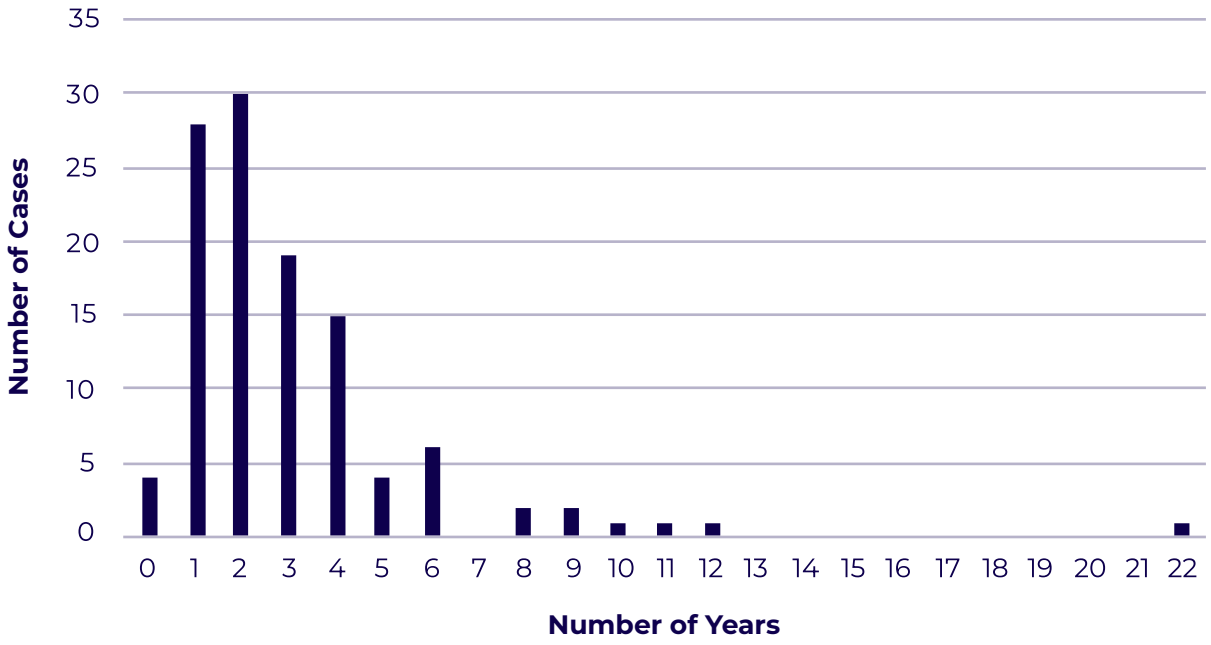
B. When are the resulting arbitrations commenced and concluded?

On average, investors in the banking and finance sector have filed their claims 3.1 years after the first alleged breach, with a median of 2 years.[14] Most cases were filed within 1 to 3 years after the alleged breach (see Chart 4 below). After excluding one outlier, the average time to filing is 2.9 years (with the median remaining at 2 years). Several cases arising out of Argentina's response to the financial crisis of 2001-2002, for example, were filed in 2004.[15]

14 The outlier is *ABCI v. Tunisia*, ICSID Case No. ARB/04/12: while the case was filed in 2004, the dispute began in 1982, when the investment was made. "Analysis: ICSID tribunal concludes that Tunisia breached FET standard under customary international law, but awards only nominal damages for lost shares in local bank," *IA Reporter* (1 January 2024), https://www.iareporter.com/articles/analysis-icsid-tribunal-concludes-that-tunisia-breached-fet-standard-under-customary-international-law-but-awards-only-nominal-damages-for-expropriated-shares-in-local-bank/.

15 *See e.g.*, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5; *RGA Reinsurance Co. v. Argentine Republic*, ICSID Case No. ARB/04/20; *CIT Group Inc. v. Argentine Republic*, ICSID Case No. ARB/04/9. Based on such past delays in filing, the numbers of cases for recent years may be understated due to the possibility that relevant cases have either not yet been filed or have not yet emerged into the public domain.

Chart 4: Number of Years Between Breach and Filing of a Claim



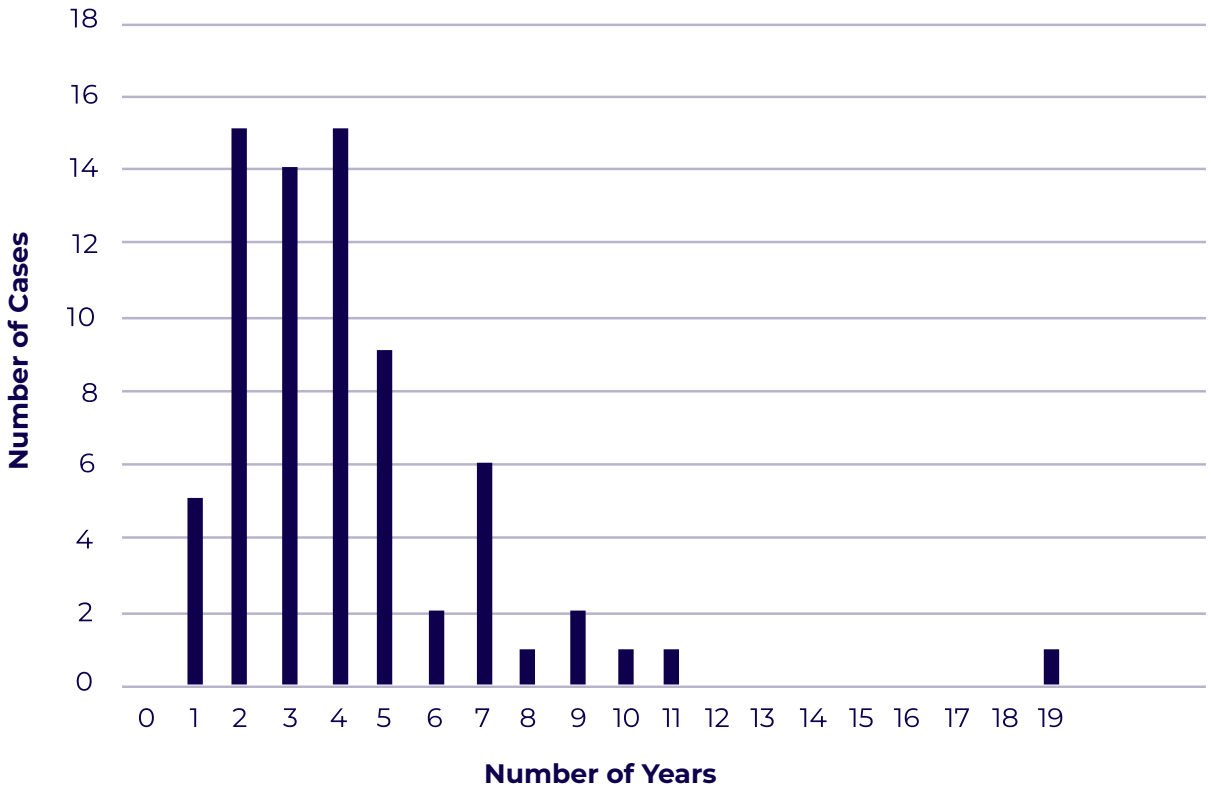
Most of the banking and finance cases took around 2 to 4 years to resolve through international arbitration (see Chart 5 below).[16] After excluding two outliers, the overall average time to resolution was 3.8 years, with a median of 4 years.[17] In comparison, a previous empirical study conducted by BIICL in 2021 concluded that the overall average duration of ISDS cases was 4.4 years, with cases from 2017 to 2020 having a mean duration of 5.5 years.[18] This suggests that investment tribunals have been able to resolve global banking and finance disputes with relative efficiency.

16 For purposes of this study, a dispute is considered resolved by arbitration upon the issuance of the arbitral award, whether on jurisdiction or on the merits, partial, final, or by consent.

17 There are two outliers in terms of the duration of proceedings: *ABCI v. Tunisia*, ICSID Case No. ARB/04/12 (19 years) and *Goetz and others v. Republic of Burundi (II)*, ICSID Case No. ARB/01/2 (11 years). In *ABCI*, while the case was brought in 2004, the investor only appointed an arbitrator in 2007. The proceedings were also sporadically delayed following the signing of an agreement between the investor and an organ of the host State in 2012, after the tribunal confirmed its jurisdiction in 2011. The proceeding did not return to its normal pace until 2022, one year prior to the issuance of the final award. In *Goetz*, the proceeding was significantly delayed following the passing of the lead claimant, Mr. Antoine Goetz, in 2005. The average duration including the *Antoine Goetz* and *ABCI* arbitrations would be 4.19 years (with a median of 4 years).

18 BIICL 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration, p. 32.

Chart 5: Duration of Proceedings in Banking and Finance Disputes



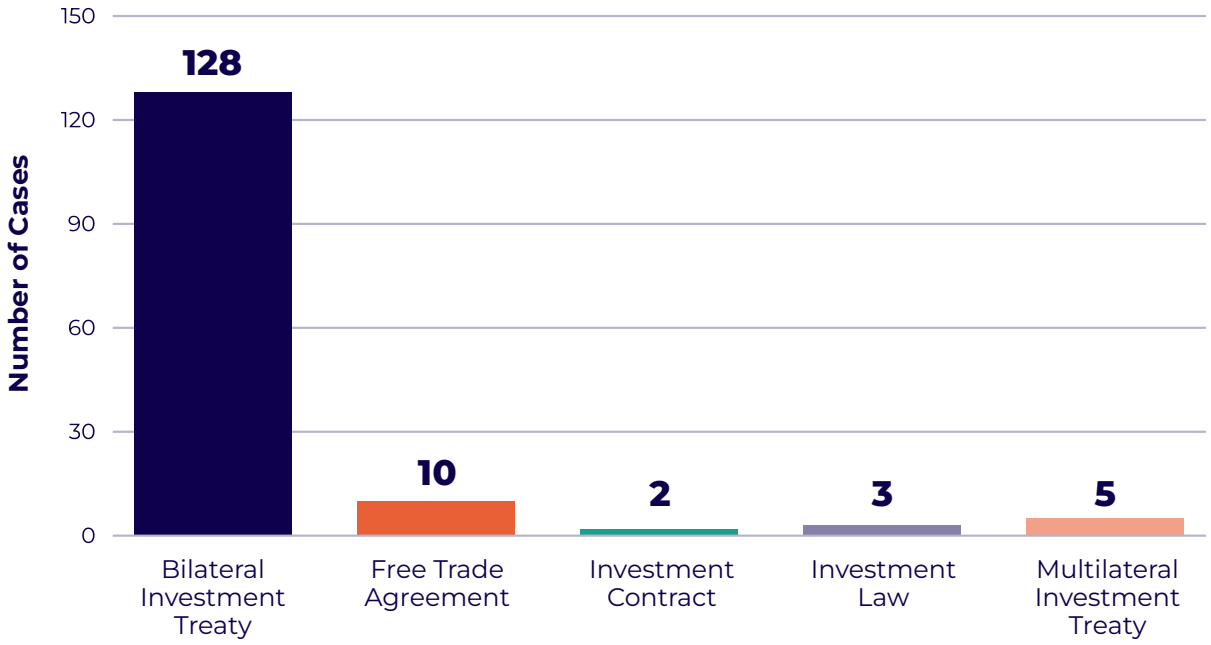
C. What fora and rules have been used to resolve banking and finance disputes?

The overwhelming majority of investor-State arbitrations in banking and finance disputes have been brought under a BIT (see Chart 6 below). A handful, however, have been filed under free trade agreements, multilateral investment treaties, foreign investment laws, and investment contracts. The distribution, in fact, aligns with the overall trend in ISDS, where cases filed under investment contracts and investment laws constitute only a small percentage of all cases.[19]

19 *See, e.g.*, The ICSID Caseload, Statistics, Issue 2024-1, https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf, p. 7.

Unlike in investor-State arbitrations more generally, very few banking and finance cases are brought under multilateral investment treaties. One possible explanation is that these disputes are rarely brought under the Energy Charter Treaty—the multilateral treaty most frequently invoked in investor-State arbitration and specific to the energy sector.[20] There is no investment treaty analogous to the Energy Charter Treaty in the finance and banking sector.

Chart 6: Instrument of Consent in Banking and Finance Disputes



Most banking and finance investor-State arbitrations have been brought before the International Centre for Settlement of Investment Disputes ("ICSID") under its arbitration rules (see Charts 7 and 8 below). A substantial number have also been brought under the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, with either ICSID or the Permanent Court of Arbitration ("PCA") administering the proceedings.

20 According to the UNCTAD database, out of the 369 cases brought under multilateral investment treaties, 162 cases (43.9%) were brought under the Energy Charter Treaty, followed by NAFTA (92 cases, 24.9%) and the USMCA (20 cases, 5.4%).

Chart 7: Arbitral Rules Applied in Banking and Finance Disputes

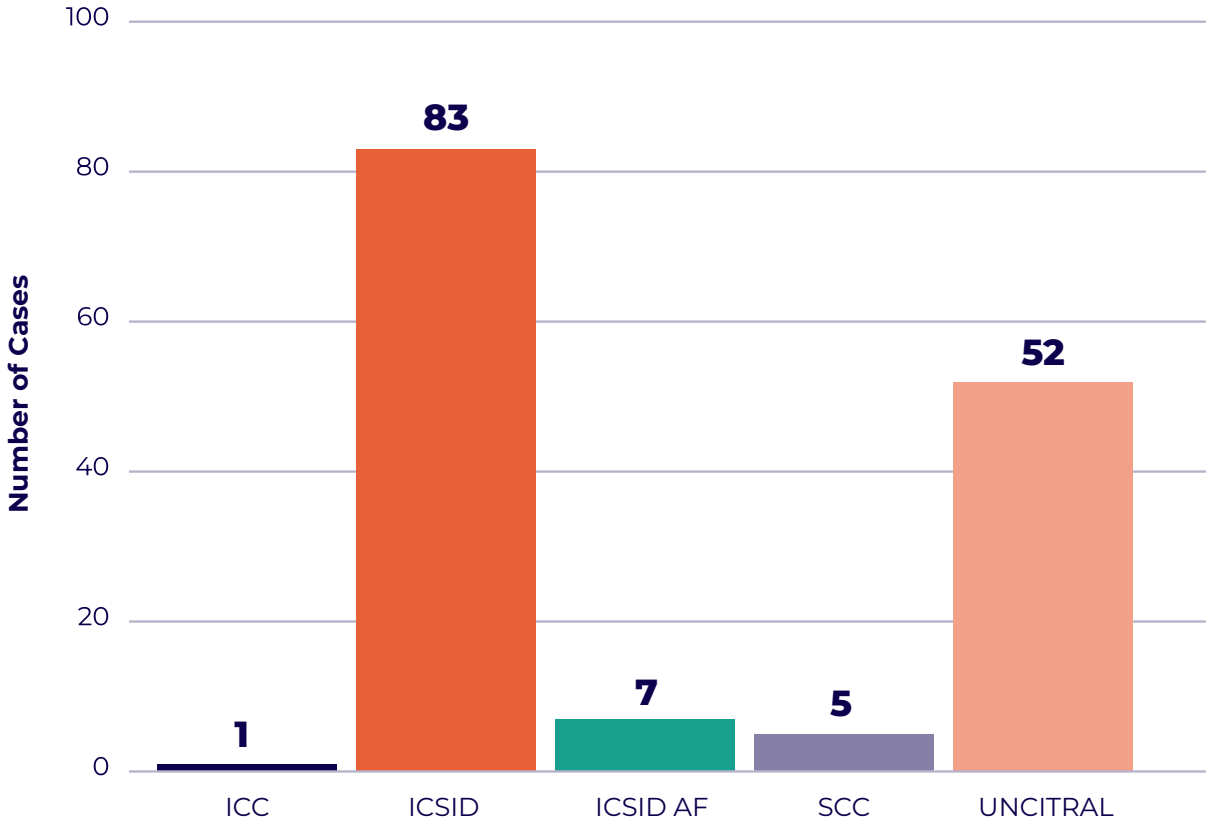
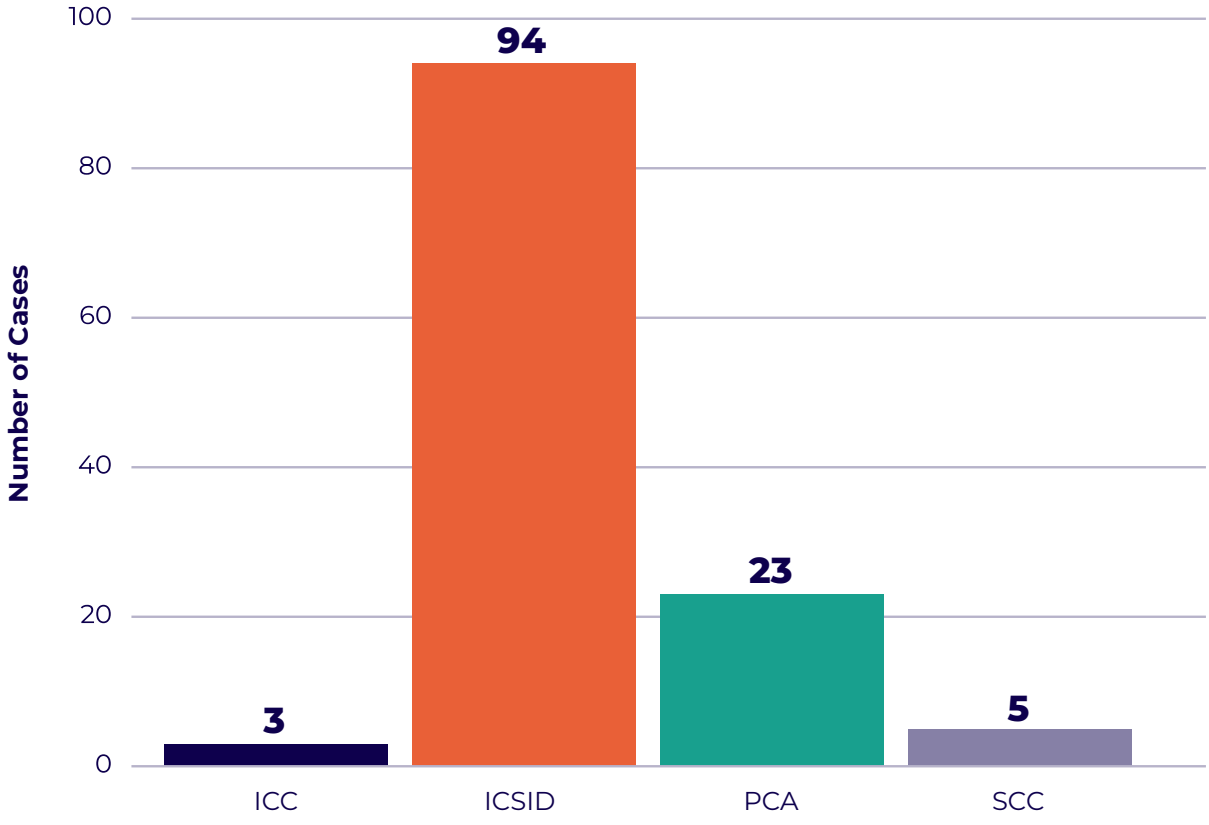


Chart 8: Arbitration Institutions Administering Banking and Finance Disputes



The ICSID Convention continues to be the favored choice of banking and finance investors for dispute resolution due to its key features, particularly the limited grounds for annulment and the States' obligation to enforce the monetary obligations set out in the award as if it were a final court judgment in that State.[21] Around 56% of banking and finance cases were filed under the ICSID Convention.[22] This figure is slightly higher than the general proportion of ICSID cases, which stands at approximately 53%.[23]

It is noteworthy that investors have apparently not shied away from ICSID arbitration despite its oft-asserted additional jurisdictional requirements. Respondent States often argue that ICSID only has jurisdiction if, for example, the investment involves (i) a contribution, (ii) a certain duration, (iii) operational risk, and (iv) a contribution to the host State's development.[24]

These additional requirements have often been at issue for investments in financial instruments, such as sovereign bonds, where States have claimed that the instrument does not reflect a sufficient contribution or does not involve the right sort of risk.[25]

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21 ICISD Convention, arts. 52-55.

22 ICSID arbitration, of course, is not be available if the applicable investment treaty does not contain the consent of the State Party to ICSID arbitration. For example, the Czech and Slovak Republic - Netherlands BIT (1991) only allows investors to bring claims under UNCITRAL Arbitration Rules. Czech and Slovak Republic-Netherlands BIT (1991), art. 8(5) ("The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL) arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL)."). Claims brought under this BIT include *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11; *Konsortium Oeconomicus v. The Czech Republic, ad hoc; Achmea B.V. v. The Slovak Republic (I)*, PCA Case No. 2008-13; *Achmea B.V. v. The Slovak Republic (II)*, PCA Case No. 2013-12. ICSID arbitration would also be unavailable if the claimant or the respondent State is not yet or is no longer a party to the ICSID Convention. ICSID Convention, Article 25(1) (requiring the dispute to be one between a Contracting State and a national of another Contracting State). For example, in *Anderson v. Costa Rica*, the applicable treaty allows for ICSID Convention arbitration only if "both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention." Canada-Costa Rica BIT (1998), art. XII(4)(a). The claimants therefore brought their claims under the ICSID Additional Facility Rules (and not the ICSID Rules) as Canada, the investors' home State, was not yet a party to the ICSID Convention when the claims were brought in 2007. *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶ 15. The ICSID Convention entered into force with respect to Canada in 2013. Similarly, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia* was brought in 2005 under UNCITRAL Rules, as Serbia did not become a party to the ICSID Convention until 2007.

23 According to the UNCTAD database, out of the 1,303 recorded investor-State cases, 699 were filed under ICSID arbitration rules.

24 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, ¶ 91. ICSID tribunals have nevertheless at times refused to apply the *Salini* test. *See, e.g.*, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 364. On the *Salini* test, see Arif H. Ali and David L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer, 2021), pp. 130-142.

25 *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶ 361. On the criterion of contribution in the *Salini* test, see Arif H. Ali and David L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer, 2021), pp. 135-138.

Among the non-ICSID arbitrations, there are significantly more institutional arbitrations than *ad hoc* arbitrations in global banking and finance disputes.[26] In terms of arbitral institutions, the majority of investors have elected arbitration administered by the PCA (but subject to the UNCITRAL Rules). However, where allowed by the applicable treaty, investors have also chosen the Stockholm Chamber of Commerce ("SCC")[27] and the International Chamber of Commerce ("ICC")[28] as administrating institutions.

A key distinction between ICSID arbitrations and all other types of arbitrations is that the former are fully de-nationalized, *i.e.*, with no legal "seat" in any individual State.[29] In contrast, in other types of arbitration, the parties (or sometimes the arbitral tribunal) have to select a seat whose legal system would govern key procedural matters of the arbitration as well as any application to set aside the award.[30] In such cases, parties (or tribunals) in banking and finance disputes have chosen popular arbitral seats such as Geneva,[31] Zurich,[32] Frankfurt,[33] Paris,[34] the Hague,[35] and Washington, D.C.[36]

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26 There have been only a limited number of confirmed *ad hoc* arbitrations in the banking and finance sectors. Examples include *Invesmart v. Czech Republic*; *Alps Finance v. Slovakia*; *Artashes Rafikovich Amalyan v. Russian Federation*.

27 *UK Bank v. Russian Federation*; *TSIKinvest LLC v. Republic of Moldova*, SCC Case No. EA 2014/053; *Evrobalt LLC v. The Republic of Moldova*, SCC Case No. 2016/082; *VEB.RF v. Ukraine*, SCC Case No. 2019/113 and V2019/088; *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163.

28 *Konsortium Oeconomicus v. Czech Republic*; *Bryn Services Ltd. v. Latvia*; *Ayoub-Farid Saab and Fadi Saab v. Republic of Cyprus*, ICC Case No. 20588/ZF/AYZ. *See also IuteCredit Europe v. Republic of Kosovo*, ICC Case No. 25135/HBH (not public).

29 *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, ¶ 231.

30 In non-ICSID cases, the location of the arbitral seat has sometimes had an impact on the resolution of banking and finance disputes. In the first case brought by Dutch insurance company Achmea against the Slovak Republic, for example, the tribunal, operating under the 1976 UNCITRAL Rules, determined Frankfurt, Germany to be the place (seat) of the arbitration. The tribunal ruled in favor of the investor. *Achmea B.V. v. The Slovak Republic (I)*, PCA Case No. 2008-13, Final Award, 7 December 2012. While the Frankfurt Higher Regional Court initially upheld the award, finding that there were no incompatibilities between intra-EU BITs and EU law, *Achmea B.V. v. The Slovak Republic (I)*, PCA Case No. 2008-13, Judgment of the Higher Regional Court of Frankfurt, 18 December 2014, the award was ultimately set aside by the German Supreme Court, *Achmea B.V. v. The Slovak Republic (I)*, PCA Case No. 2008-13, Decision of the Federal Court of Justice of Germany, 31 October 2018, and then litigated before the European Court of Justice.

31 *See, e.g.*, *Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-04; *Achmea B.V. v. The Slovak Republic (II)*, PCA Case No. 2013-12.

32 *See, e.g.*, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*.

33 *See, e.g.*, *Achmea B.V. v. The Slovak Republic (I)*, PCA Case No. 2008-13 and *Konsortium Oeconomicus v. The Czech Republic*.

34 *See, e.g.*, *Invesmart v. Czech Republic*; *Valeri Belokon v. Kyrgyz Republic*; *Oschadbank v. Russian Federation*, PCA Case No. 2016-14; *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2.

35 *See, e.g.*, *Bank Melli Iran and Bank Saderat Iran v Bahrain*, PCA Case No. 2017-25; *Fynerdale Holdings B.V. v. Czech Republic*; *Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB(AF)/18/5; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18.

36 *See, e.g.*, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2.

V. The Parties to Banking and Finance Disputes

Investor-State disputes in the global finance and banking sector have distinctive features compared to those in other economic sectors like energy, oil, and mining that are more traditionally associated with international arbitration.

One key difference is the range of parties involved. In finance and banking disputes, a wider variety of States have participated, whether as the respondent State, the home State of the investors filing claims, or the home State of the entities that own or control those investors.[37] This broader set of stakeholders reflects the global nature of the finance and banking industry, where investments and actors can be spread across many different countries. By contrast, disputes in sectors like energy and mining tend to more frequently involve a narrower set of States, usually the ones where the underlying investments are located.

The diverse involvement of States in finance and banking arbitrations highlights how these disputes can have widespread geopolitical implications, beyond just the specific parties directly involved in the case. Understanding these dynamics is important for policymakers and others following the evolving landscape of international investment law and arbitration.

A. What States are respondents in banking and finance disputes?

Although 63 distinct States have been respondents in the 149 banking and finance disputes considered for this study, some States have faced far more arbitrations than others. About a third of all banking and finance cases have been brought against just seven respondent States, while 31 respondent States have had just one dispute apiece. The most frequent respondent States generally held that position because of a single measure or a series of closely related measures (see Table 3 and Chart 9 below).

37 For example, a study shows that 77.6% of all mining disputes in ISDS between 2016 and 2022 concerned mineral assets located in Africa and Latin America. *See* Charles River Associates, Disputes Involving Mineral Assets: Statistics & Trends, 30 June 2023, https://media.crai.com/wp-content/uploads/2023/06/20085712/Disputes-involving-mineral-assets-Statistics-and-trends.pdf, p. 11.

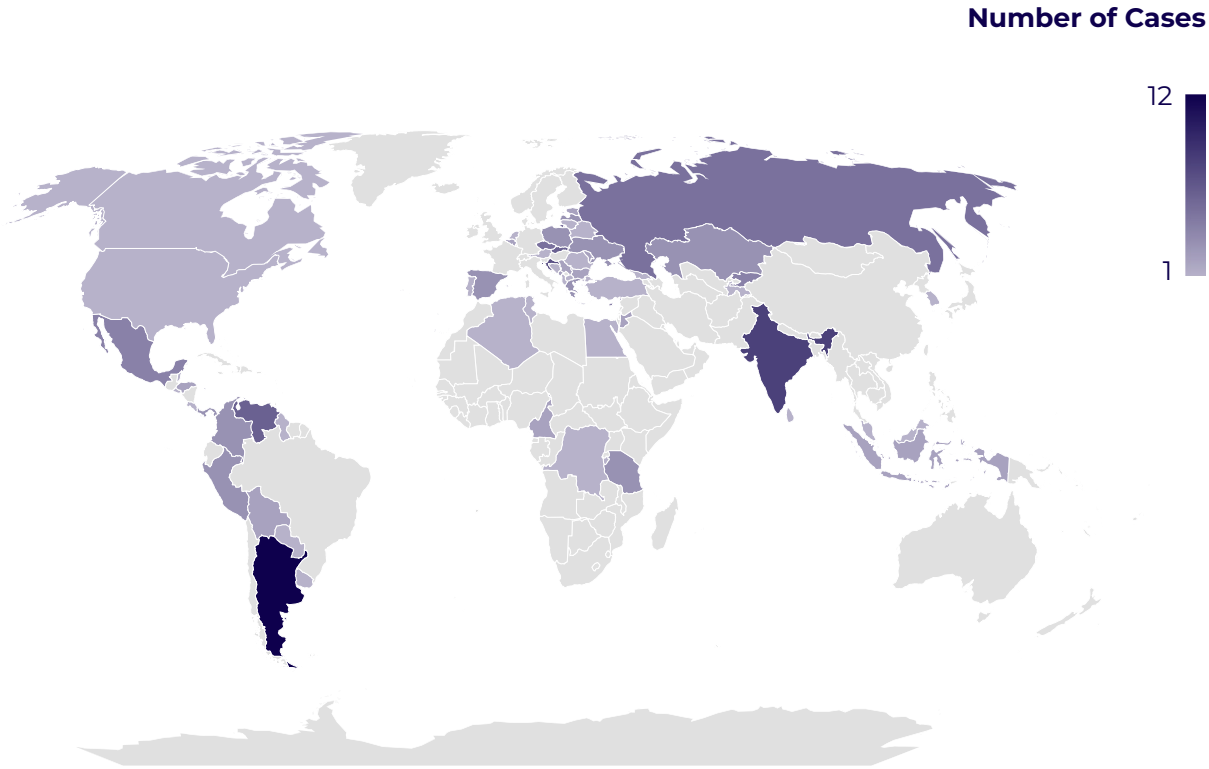
For example, some of the best-known banking and finance cases concern a series of measures taken by Argentina in the midst of its 2001-2002 financial crisis, including debt restructuring, restrictions on cash withdrawals and access to foreign exchange, and the mandatory conversion of US dollar obligations into Argentine peso obligations.[38] The objective statistics reflect Argentina's prominence among respondent States for banking and finance disputes: Argentina has been the most common respondent State in such disputes.

Table 3: Most Common Respondent States

RANKING	NUMBER OF CASES	STATE
1	12	Argentina
2	8	India
3	7	Croatia
4 (tie)	6	Slovak Republic, Venezuela
6 (tie)	5	Czech Republic, Russian Federation
8 (tie)	4	Cyprus, Mexico, Kyrgyzstan
11 (tie)	3	Bahrain, Colombia, Greece, Kazakhstan, Panama, Peru, Poland, Spain, Tanzania, Latvia, Ukraine
22 (tie)	2	Belgium, Bolivia, Bulgaria, Cameroon, Estonia, Moldova, Montenegro, Honduras, Indonesia, Jordan, Serbia
33 (tie)	1	Albania, Algeria, Austria, Belarus, Belize, Bosnia and Herzegovina, Burundi, Canada, Costa Rica, Democratic Republic of the Congo, Egypt, El Salvador, Georgia, Guyana, Lithuania, Korea, Macedonia, Mauritius, Malaysia, Malta, Netherlands, Paraguay, Portugal, Romania, Seychelles, Sri Lanka, Tajikistan, Tunisia, Türkiye, United States, Uruguay

38 These cases include: *Metalpar S.A. and Buen Aire S.A. v. Argentina*, ICSID Case No. ARB/03/5; *Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9; *CIT Group Inc. v. Argentina*, ICSID Case No. ARB/04/9; *RGA Reinsurance Co. v. Argentina*, ICSID Case No. ARB/04/20; *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1; *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5; *Giovanni Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8; *Ambiente Ufficio S.p.A. and others v. Argentina*, ICSID Case No. ARB/08/9.

Chart 9: Most Common Respondent States



Many respondent States have faced multiple cases due to measures taken in the midst of economic or financial crises, when the measures have affected numerous foreign investors simultaneously. These include the previously mentioned Argentina (2001-2002 financial crisis)[39] as well as a number of EU Member States, such as the Czech Republic (Czech banking crisis in the 1990s),[40] Belgium[41] and Spain (2007-2008 global financial crisis),[42] as well as Cyprus[43] and Greece (Greek economic crisis).[44]

39 *See e.g.*, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5; *RGA Reinsurance Co. v. Argentine Republic*, ICSID Case No. ARB/04/20; *CIT Group Inc. v. Argentine Republic*, ICSID Case No. ARB/04/9; *Daimler v. Argentina*, ICSID Case No. ARB/05/1.

40 *See Saluka Investments B.V. v. Czech Republic*, PCA Case No. 2001-04 and *Invesmart v. Czech Republic*.

41 *See Ping An v. Belgium*, ICSID Case No. ARB/12/29.

42 *See GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable and others v. Kingdom of Spain*, ICSID Case No. ARB/18/33; *Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17.

43 *See Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49; *Marfin Investment Group Holdings S.A. and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27.

44 See *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8; *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16; *Bank of Cyprus Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/17/4.

However, some States have been repeat respondents due to measures taken outside of such crises. Croatia, for example, received a series of claims arising out of the 2015 Conversion Law that required banks to convert all mortgages held in foreign currency (primarily Swiss Francs) to euros at the request of borrowers.[45] The measures were taken in response to the Swiss central bank's decision in 2015 to abandon exchange rate controls. Many of these cases were ultimately settled, and thus far, none have progressed to the merits stage.[46]

India's position as the second most common respondent State also bears additional comment. Seven of the eight cases against India were filed in the same year (2004) and all arose from loans made to the Dabhol power plant project, which foundered in 2001 after protests and allegations of corruption.[47] All of these cases were subsequently settled.[48]

45 *UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31; *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34; *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37; *Erste Group Bank AG, Steiermärkische Bank und Sparkassen AG, Erste & Steiermärkische Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/49; *Société Générale S.A. v. Republic of Croatia*, ICSID Case No. ARB/19/33; *OTP Bank Plc v. Republic of Croatia*, ICSID Case No. ARB/20/43.

46 The first series of claims concerning the Conversion Law were filed in 2016 and 2017. After tribunals ruled in favor of several claimants on jurisdictional grounds in mid-2020, Croatia settled with the majority of claimants in early 2021.

47 *Credit Lyonnais S.A. v. Republic of India*; *Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India*; *Standard Chartered Bank v. Republic of India*; *Credit Suisse First Boston v. Republic of India*; *ABN Amro N.V. v. Republic of India*; *ANZEF Ltd. v. Republic of India*; *BNP Paribas v. Republic of India*. It was reported that the remaining case, *Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust with Ace Hospitality Management DMCC UAE v. Republic of India*, has not progressed due to the claimants' difficulties with securing third-party funding. "An update on investment treaty disputes involving the government of India," *IA Reporter* (23 Aug. 2018), https://www.iareporter.com/articles/an-update-on-investment-treaty-disputes-involving-the-government-of-india/.

48 It was reported that each bank sought monetary compensation of around USD 42.8 million. In July 2005, just seven months after the banks filed their claims, India agreed to settle the claims for a reported total amount of USD 230 million. "Looking Back: Dabhol power plant saga led to numerous commercial, investment treaty and inter-State arbitrations and perhaps foreshadowed India's later concerns over BITs," *IA Reporter* (11 Sept. 2019), https://www.iareporter.com/articles/looking-back-dabhol-power-plant-saga-led-to-numerous-commercial-investment-treaty-and-inter-state-arbitrations-and-perhaps-foreshadowed-indias-later-concerns-over-bits/.

B. What are the home States of the investors in banking and finance disputes?

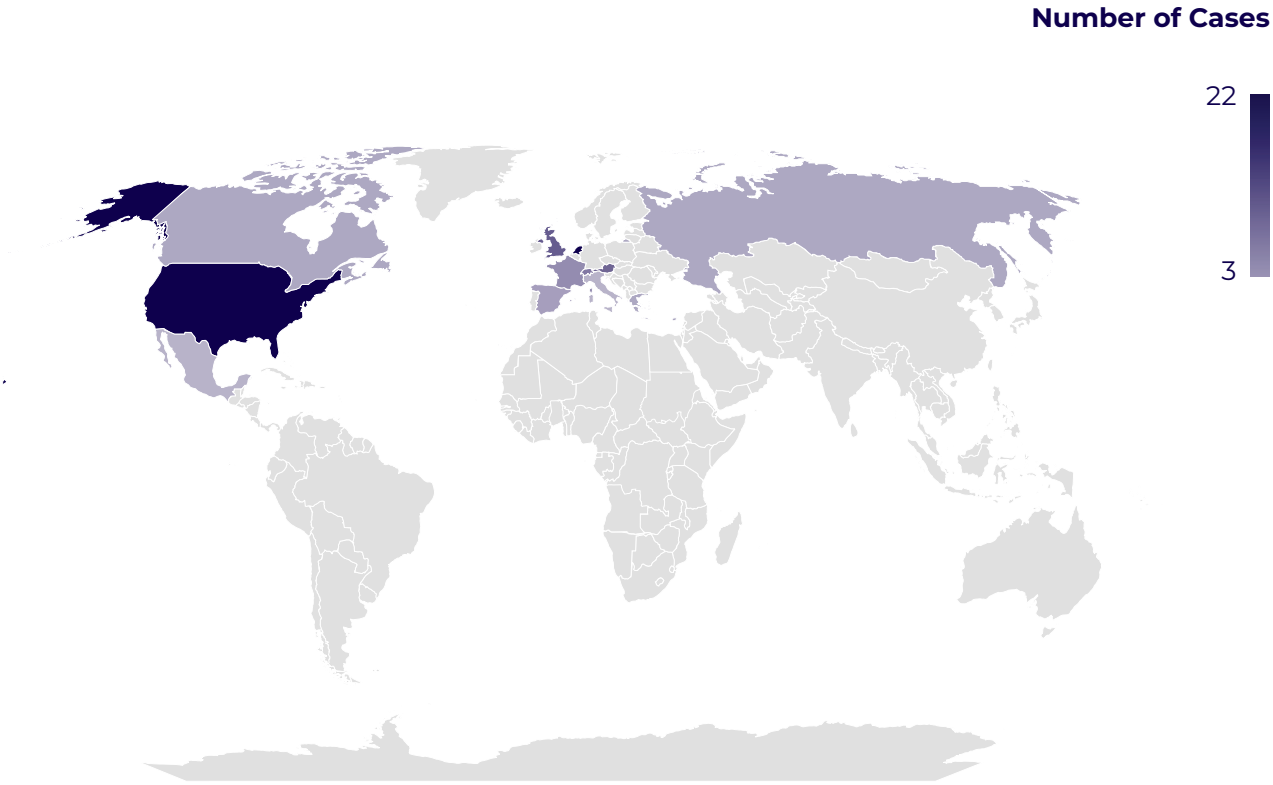
The home States of investors in banking and finance disputes are significantly more concentrated than the respondent States. Over half of all such disputes have been brought by investors hailing from just six states (see Table 4 and Chart 10 below). This concentration can be attributed to the general economic significance of the relevant States and the fact that many of those States—like Switzerland, the United Kingdom, and France—serve as regional or global financial hubs and have concluded a considerable number of investment treaties.[49]

Table 4: Most Common Home States of Investors

RANKING	NUMBER OF CASES	HOME STATE OF INVESTORS
1	22	Netherlands
2	19	United States
3	12	United Kingdom
4	11	Austria
5	9	Switzerland
6	7	France
7.	5	Spain
8 (tie)	4	Canada; Cyprus; Greece; Luxembourg; Russia
13 (tie)	3	Mexico; Italy

49 According to the UNCTAD database, Switzerland has entered into 113 investment treaties, of which 110 are in force; the United Kingdom has 96 investment treaties, with 85 in force; and France has 91 investment treaties, with 84 in force. These figures place these States among the top 8 States by number of investment treaties signed.

Chart 10: Most Common Home States of Investors



These common home States not only harbor a large number of banking and finance firms, but also attract entities and individuals from abroad who establish companies there for various reasons, including the stable regulatory environments and favorable tax regimes. For example, several legal investors are established in these States' overseas territories, such as Curaçao (Netherlands Antilles) or Turks and Caicos (British Overseas Territory).[50] These local companies have then invoked the protection of the investment treaties concluded by those States.

In *Saluka v. Czech Republic*, for example, the claim was brought by Saluka Investments B.V., a Dutch special-purpose vehicle indirectly owned by Japanese banking giant Nomura, under the Netherlands-Czech Republic BIT.[51] In the absence of an investment treaty between Japan and the Czech Republic, Nomura was able to invoke investor-State arbitration by virtue of Saluka's incorporation in the Netherlands.

50 *See, e.g.*, *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3 (legal investor registered in Curaçao, Venezuelan effective investor); *British Caribbean Bank Ltd v. Government of Belize*, PCA Case No. 2010-18 (investor registered in Turks and Caicos Islands). It is worth noting that, by default, UK BITs typically do not cover British Overseas Territories.

51 *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶¶ 70, 226-230.

C. Who owns or controls the investors in banking and finance disputes?

In more than a quarter of all cases (43 out of the 149 cases considered), the home State of the investor was different from that of the entity or person that owned or controlled the investor.[52] For example, although 22 claims were brought by Dutch investors, ten of those investors were owned or controlled by non-Dutch interests.[53] The same can be observed with claims filed by investors from the United Kingdom and Switzerland.

Overall, the home States of those who own or control the investors are less concentrated than the home States of the investors themselves (see Table 5 and Chart 11 below). About 40% of the claims were brought by investors owned or controlled by interests in the top six States. In comparison, 50% of claims were brought by investors located in the top six States. However, the concentration for both is greater than that among the respondent States, where the top six respondent States received about 30% of the claims.

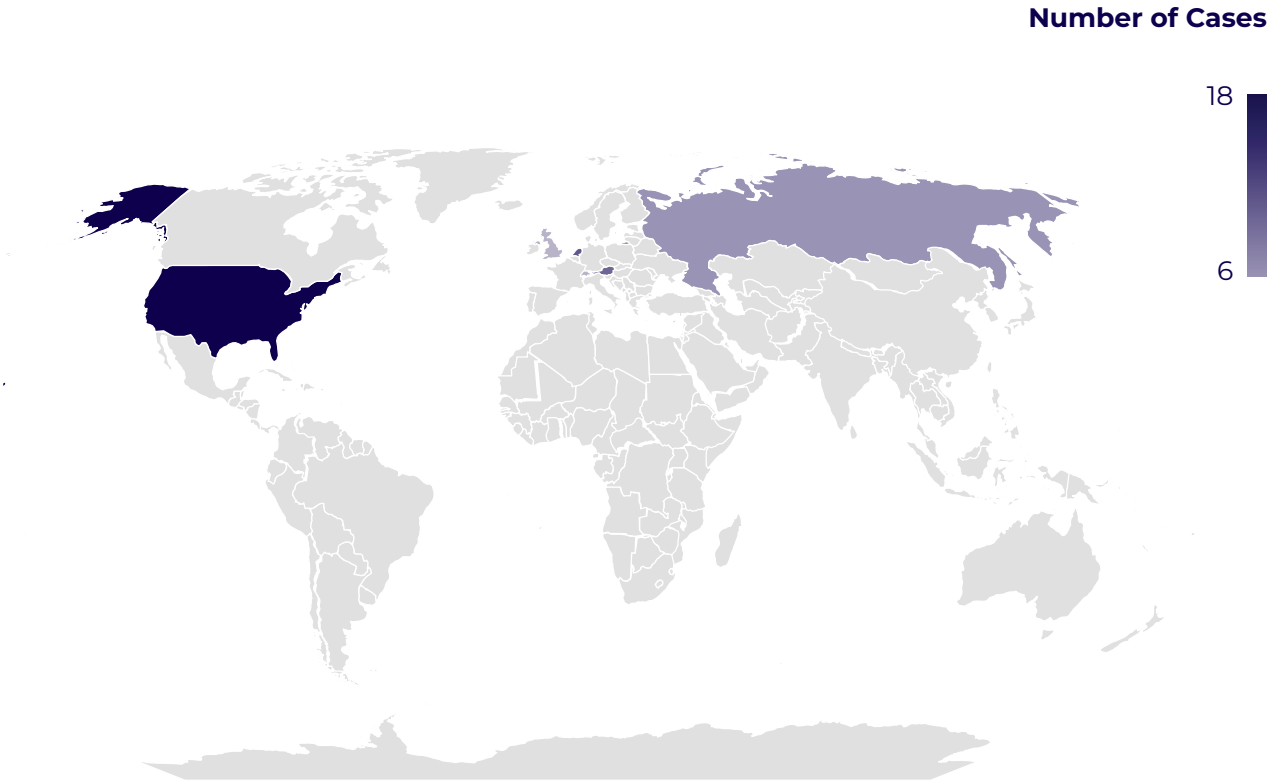
Table 5: Most Common Home States of the Owner or Controlling Entity

RANKING	NUMBER OF CASES	HOME STATE OF OWNER OR CONTROLLING ENTITY
1	18	United States
2	12	Netherlands
3	11	Austria
4	8	Russian Federation
5	6	Switzerland
6	6	United Kingdom

52 For the purpose of this study, "control" does not mean ultimate control, but rather any controlling entity mentioned in relevant decisions or media reports. The study does not use "control" to indicate a legal categorization. In addition, different treaties specify the home State of an investor differently, with a traditional approach looking to the place of incorporation but with other approaches employing additional or alternative factors, such as looking to the principal place of business or to the seat of a company.

53 *See, e.g.*, *Saluka Investments B.V. v. The Czech Republic*, PCA Case No. 2001-04 (Dutch nominal investor, Japanese effective investor); *Invesmart v. Czech Republic* (Dutch nominal investor, Italian effective investors).

Chart 11: Most Common Home States of the Owner or Controlling Entity



There are many reasons for a person or company of one State to register a legal entity in another State. However, some of the divergence between the home States of the investors and the home States of those who own or control the investors may result from investment treaty planning—a corporate structuring and tax planning process designed to obtain protection from investment treaties. For example, in *PL Holdings v. Poland*, which was brought under the BIT between Belgium-Luxembourg Economic Union and Poland, the investor was a Luxembourg-based company indirectly held by a Jersey-registered private equity firm that operates in Poland.[54] The tribunal accepted jurisdiction, noting that the investor conducted all its business and held all its meetings in Luxembourg.[55]

54 *PL Holdings S.a.r.l. v. Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017, ¶¶ 1, 275.

55 *PL Holdings S.a.r.l. v. Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017, ¶¶ 298-299. However, as shown elsewhere, the success of such claims may depend on a range of factors such as the language used in the treaty, the timing of the restructuring, the existance of genuine business activities in the home State, the laws of the host State, etc. *See* 2020 BIICL Empirical Study: Corporate Restructuring and Investment Treaty Protections, pp. 16-28.

By bringing claims through a related entity registered in a foreign State, investors are sometimes criticized as using a "fabricated" nationality.[56] As observed in a previous empirical study co-authored by BIICL, tribunals have generally dismissed respondent's jurisdictional objections relating to corporate restructuring, unless the restructuring was undertaken to access investor-State arbitration following the "crystallization" of the dispute.[57] Similarly, a number of tribunals in banking and finance disputes have refused to examine the "real" nationality of the investor based on alleged investment planning and, instead, have confirmed that "the only requirement is that the legal person is constituted under the law of one of the Contracting Parties."[58]

Finally, it is noteworthy that, although not predominant, there are some recent cases in which investors from the Global South asserted their rights against governmental measures taken in the Global North. Thanks to the widespread acceptance of investment treaties by countries in the Global South in the past decades, many of these investors do not need to channel their claims through entities incorporated in other States.[59]

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56 *See, e.g.*, "Corporate investors' nationality and reforming investment treaties: Can older-generation treaties undermine substantive reforms?," *International Institute for Sustainable Development* (19 December 2020), https://www.iisd.org/itn/en/2020/12/19/corporate-investors-nationality-and-reforming-investment-treaties-can-older-generation-treaties-undermine-substantive-reforms-anil-yilmaz-vastardis/.

57 2020 BIICL Empirical Study: Corporate Restructuring and Investment Treaty Protections, p. 2.

58 *Invesmart v. Czech Republic*, Award, 26 June 2009, ¶ 180. *See also Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 229 ("the Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands - such as, in this case, Saluka - the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none."); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 116.

59 *See, e.g.*, *Ayoub-Farid Saab and Fadi Saab v. Cyprus*, ICC Case No. 20588/ZF (claim brought by Lebanese investor under the Lebanon-Cyprus BIT); *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria*, ICSID Case No. ARB/15/43 (claim brought by Omani entity under the Bulgaria-Oman BIT); *Aggarwal and others v. Bosnia and Herzegovina*, PCA Case No. 2018-03 (claim brought by Indian investors under the Bosnia and Herzegovina-India BIT); *Antonio del Valle Ruiz et al v. Kingdom of Spain*, PCA Case No. 2019-17 (claim brought by Mexican investors under the Mexico-Spain BIT); *GBM Global and others v. Spain*, ICSID Case No. ARB/18/33 (claim brought by Mexican investors under the Mexico-Spain BIT); *Abdallah Andraous v. Netherlands*, ICSID Case No. UNCT/23/3 (claim brought by Lebanese investor under the Lebanon-Netherlands BIT); *Libyan Investment Authority v. Belgium*, ICSID Case No. ARB(AF)/23/3 (claim brought by Libyan entity under the Libya-Belgium BIT).

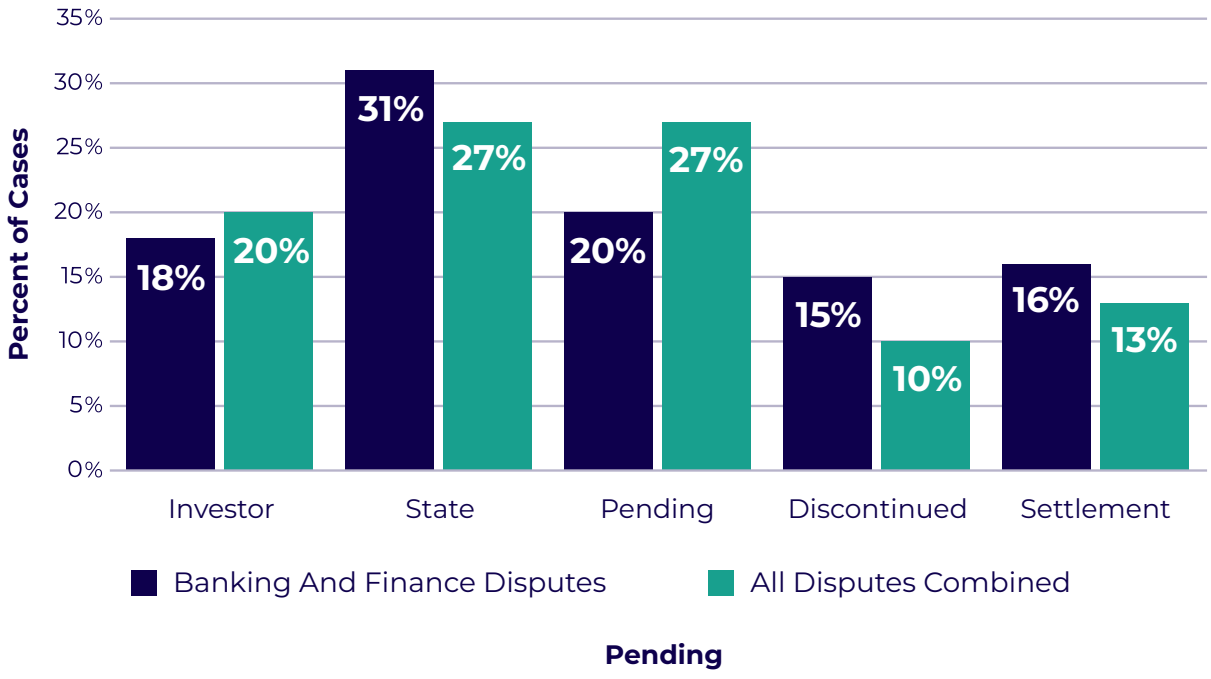
VI. The Prevailing Parties in Banking and Finance Disputes

Although the chances of success in banking and finance arbitrations inevitably depend on the specific facts and the applicable treaty in each individual case, there are meaningful trends observable from the data. Parties to banking and finance arbitrations, whether through arbitration or post-filing settlement, have achieved success rates comparable to those in other sectors. However, the specific types of disputes do have a meaningful effect on success rates for decisions on jurisdiction and admissibility, on the merits, and on compensation.

A. Who has prevailed overall in banking and finance disputes?

In the 149 cases surveyed, 23 cases were discontinued (15%), 27 cases were won by the investor by way of arbitral decision (18%), 30 cases are pending (20%), 23 cases were settled (16%), and 46 cases were won by the State on jurisdiction, merits, or damages (31%) (see Chart 12 below).

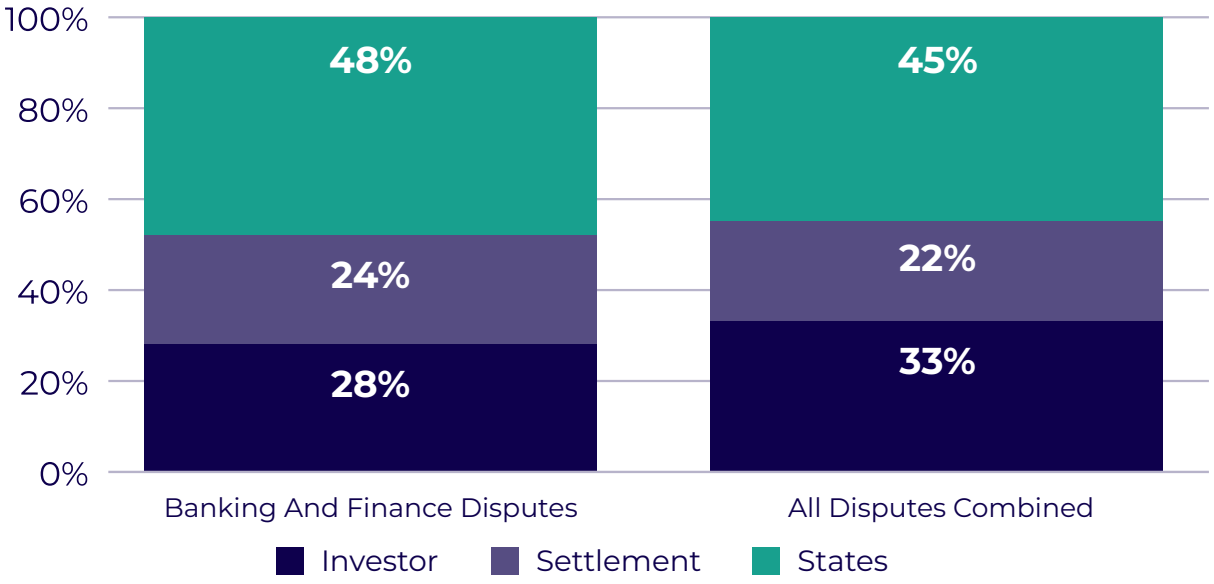
Chart 12: Comparison of Outcome or Status between Banking and Finance Cases and Investor-State Cases in General



Looking at only the cases with a final resolution, the investors prevailed in 28% of cases and settled a further 24%, while the State prevailed by arbitral decision in 48%. In comparison to the outcomes of all investment disputes, where investors have prevailed in 33% of cases that reached a final award, investors in banking and finance disputes have obtained favorable arbitral awards in fewer cases.[60]

If, however, settlement is counted as a favorable outcome for the investor, then investors had a similar percentage of favorable final resolutions for banking and finance cases (52%) as for investor-State cases in general (55%) (see Chart 13 below). This is because banking and finance cases have seen a higher rate of settlement than have other types of cases.[61]

Chart 13: Comparison of Final Outcomes between Banking and Finance Cases and Investor-State Cases in General



60 According to the UNCTAD database, out of more than 1300 cases, 128 cases (10%) were discontinued, 268 cases were won by the investor (20%), 354 cases (27%) are pending, 177 cases (13%) were settled, and 361 cases (27%) were won by the State.

61 We have not taken into account discontinued cases for present purposes. Due to the confidential nature of arbitrations and settlements, cases marked as discontinued might have been settled privately by the parties. In other cases, banking and finance cases may be discontinued due to the claimant's lack of funding to proceed with the dispute, even following a favorable decision on jurisdiction. As a result, the actual settlement rate may well be higher than that indicated in the chart.

In fact, some of the largest victories for investors in banking and finance cases have been settlements reached after an arbitral decision on jurisdiction or the merits:

- In *Eureko B.V. v. Republic of Poland*, the parties reached a multi-billion-dollar settlement after Poland failed to set aside a partial award on the merits before the Belgian courts.[62]
- In *Saluka Investments BV v. The Czech Republic*, the Czech Republic paid about USD 300 million after failing to set-aside the award before Swiss courts.[63]

Indeed, even if the investors do not achieve a successful outcome in international arbitration, they sometimes have still achieved their broader strategic objectives as a result of filing the claim.[64] International adjudication allows the parties to meet in one place, to present their respective views on the subject matter of the dispute, and to put on record the background of their contentious relationship.[65]

B. Who has prevailed on jurisdiction and admissibility?

Of the 81 cases reviewed in which a decision on jurisdiction was issued, the investor prevailed in 54 cases (67%) (see Chart 14 below). In three cases, while the investor only achieved a partial success on jurisdiction, the case nevertheless continued to the merits.[66]

62 *Eureko B.V. v. Republic of Poland*, Ad Hoc, Partial Award, 19 August 2005; "Eureko settles one claim with Poland but quietly pursues a separate health insurance suit against the Slovak Republic," *IA Reporter* (14 Oct. 2009), https://www.iareporter.com/articles/eureko-settles-one-claim-with-poland-but-quietly-pursues-a-separate-health-insurance-suit-against-the-slovak-republic/.

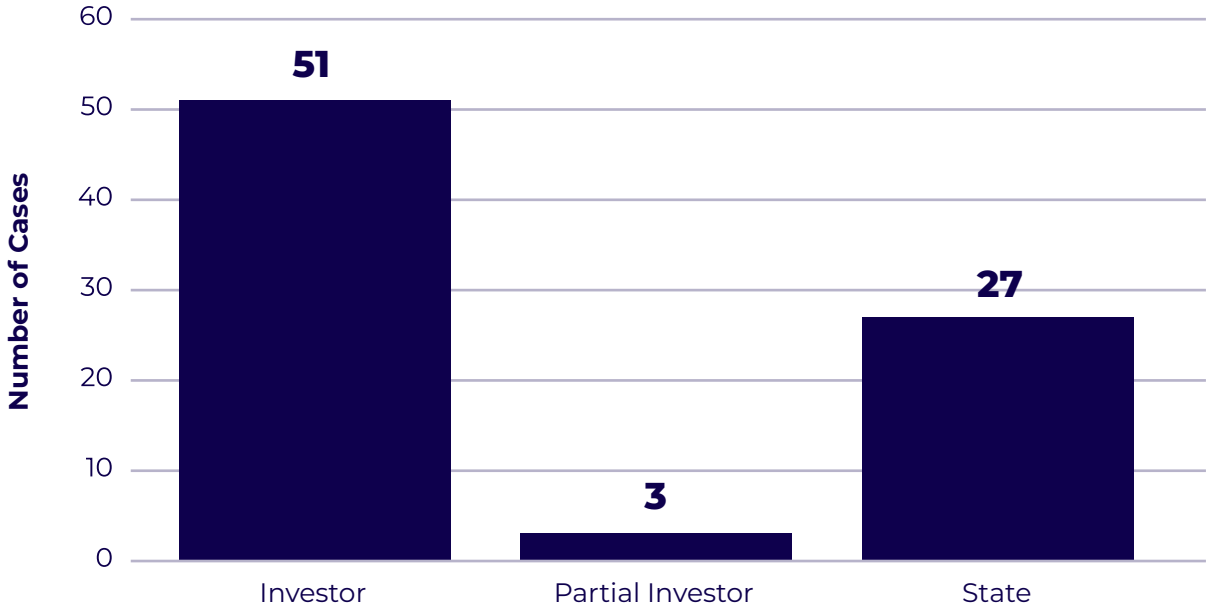
63 *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006; "Looking Back: At merits phase, Saluka v. Czech Republic discusses the role of regulatory powers in establishing expropriation and FET breaches," *IA Reporter* (3 April 2017), https://www.iareporter.com/articles/looking-back-at-merits-phase-saluka-v-czech-republic-discusses-the-role-of-regulatory-powers-in-establishing-expropriation-and-fet-breaches/.

64 In *Achmea B.V. v. The Slovak Republic (II)*, for example, the Dutch insurance company was faced with a potentially imminent threat of expropriation. The company did not seek damages, but instead asked the tribunal to order the Slovak Republic to refrain from expropriating the investments. *Achmea B.V. v. The Slovak Republic (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶¶ 96, 221. The tribunal declined jurisdiction, as the applicable BIT did not prohibit expropriation. *Achmea B.V. v. The Slovak Republic (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 238. Nevertheless, the result remains a success for the claimant, as it obtained the Slovak Republic's response, as confirmed by the arbitral award, that plans of expropriation had been shelved. "Achmea discloses awards of Arbitration Tribunals," *Achmea* (5 June 2014), https://news.achmea.nl/achmea-discloses-awards-of-arbitration-tribunals; "Arbitrators dismiss claims by Dutch insurer, but investor says it has acheived goal of averting Slovak nationalization and creation of single-payer health system," *IA Reporter* (23 May 2014), https://www.iareporter.com/articles/arbitrators-dismiss-claims-by-dutch-insurer-but-investor-says-it-has-achieved-goal-of-averting-slovak-nationalization-and-creation-of-single-payer-health-system/.

65 *See Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ, Declaration of President Yusuf, 1 October 2018, ¶ 11.

66 *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1 (dismissing jurisdiction under NAFTA Chapter 11 on Investment, but upholding jurisdiction under Chapter 14 on Financial Services); *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (upholding jurisdiction over mortgages, but declining jurisdiction over promissory notes with maturity of less than three years); *Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17 (dismissing jurisdiction over investments made after alleged violations took place).

Chart 14: Overall Success on Jurisdiction and Admissibility



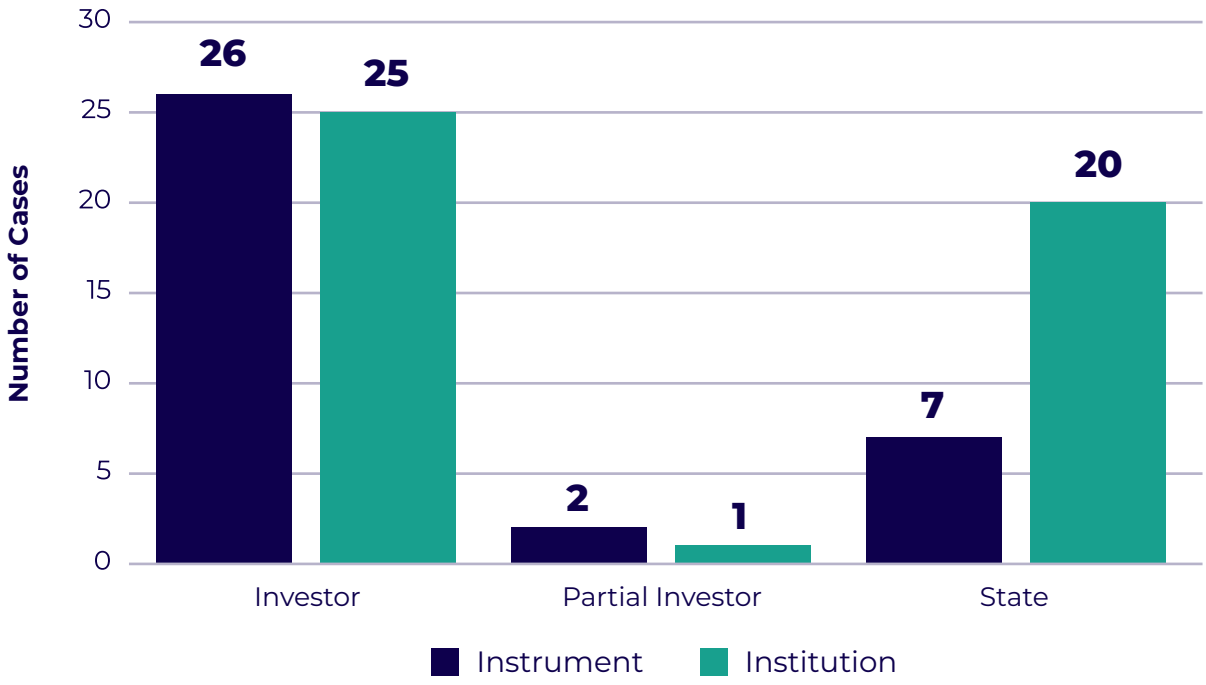
When distinguishing between investments in financial instruments and those in financial institutions, the data show (see Chart 15 below) that investments in financial instruments have had higher rates of success (74%) on jurisdiction than investments in financial institutions (54%). The lower rates of success on jurisdiction for investments in institutions may be attributable to the fact that, beyond the usual jurisdictional obstacles (such as the investor's nationality[67] and the treaty's limitation period[68]), these investors must demonstrate ownership or control of the financial institution and financial institutions may have complex ownership structures.[69]

67 *See, e.g.*, *Alberto Carrizosa Gelzis and others v. Republic of Colombia*, PCA Case No. 2018-56.

68 *See, e.g.*, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5.

69 *See, e.g.*, *Stephane Benhamou v. Uruguay*, Award, 19 December 2002 (declining jurisdiction as, under Uruguayan law, the claimant was not the ultimate owner of the banking institution); *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011 (declining jurisdiction as the claimant, which held the investment through a local holding company, did not "directly" own the insurance companies); *Guardian Fiduciary v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award, 22 September 2015 (declining jurisdiction as the complicated ownership structure of the banking institution failed to meet the treaty's requirement that the investment must be controlled directly or indirectly by investors); *Anglo-Adriatic Group Limited v. Republic of Albania*, ICSID Case No. ARB/17/6, Award, 7 February 2019 (declining jurisdiction as the claimant failed to prove that it obtained beneficial ownership over the investment); *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Award, 23 December 2021 (declining jurisdiction as the claimant failed to prove that it obtained the shares in the company in question).

Chart 15: Success on Jurisdiction and Admissibility: Instruments versus Institutions

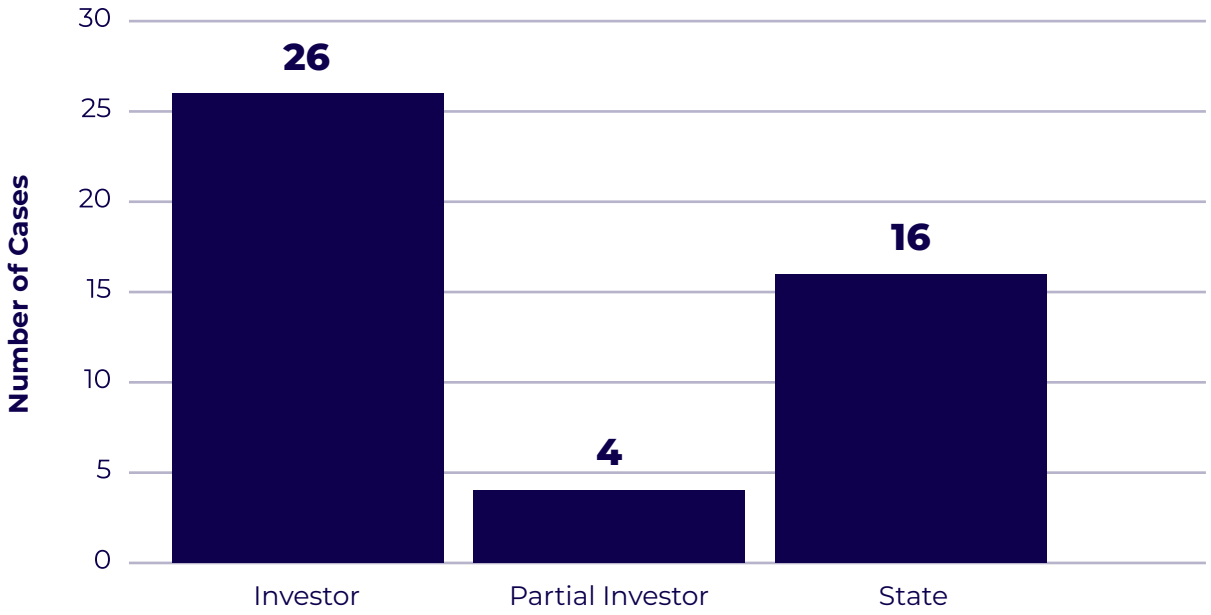


C. Who has prevailed on the merits?

In cases where a decision on the merits has been issued, the investor prevailed fully or at least partially in 30 of the 46 cases (65%) and the State prevailed in 16 of the 46 cases (35%) (see Chart 16 below).[70] While investors have succeed on the merits in many cases, their rates of success vary considerably across the various types of measures at issue.

70 The investors in three cases are not considered to have prevailed on the merits for the purposes of this study, even though the tribunals have issued the decision on the merits. In one case, the tribunal have ruled in favor of claimants on the merits but have not yet decided on the quantum. *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21. In two other cases, the parties reached a settlement after a favorable decision on the merits for the investor. *Eureko B.V. v. Republic of Poland*, Ad Hoc; *Saluka Investments B.V. v. The Czech Republic*, PCA Case No. 2001-04.

Chart 16: Overall Success on Merits



1. Sovereign Debt Measures

Although disputes over sovereign debt defaults and restructuring are not the most common type of banking and finance disputes, they have been among the highest profile. Investors have prevailed in the two cases with decisions on the merits.

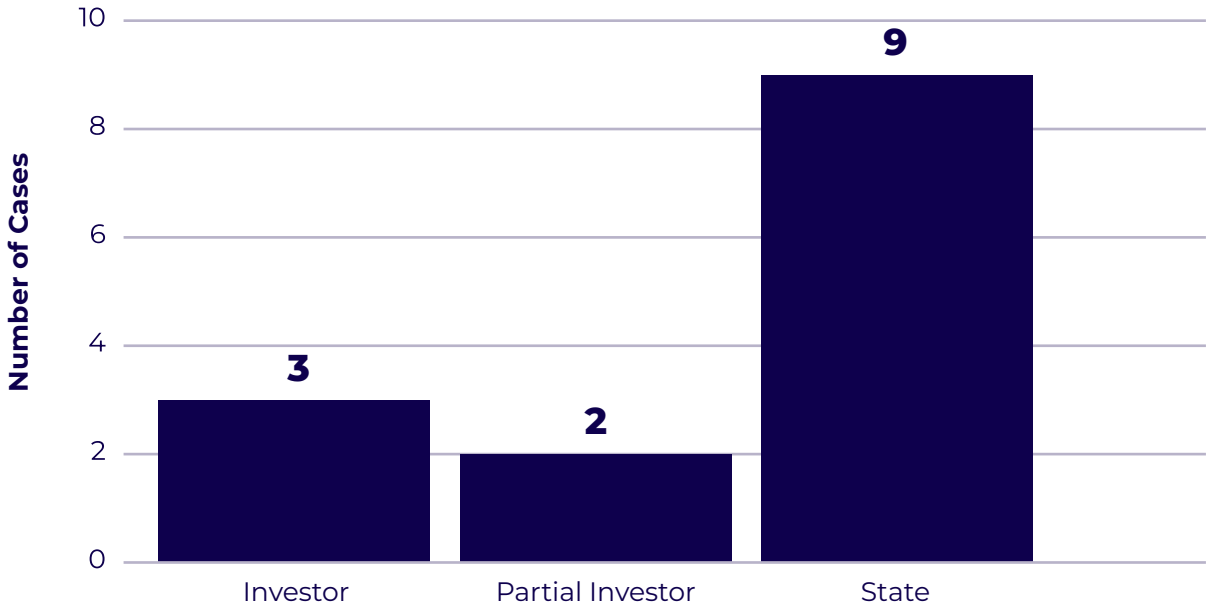
In addition to the cases won outright by investors, some other cases have settled in favor of the investors after a jurisdictional decision. For example, in *Abaclat and others v. Argentine Republic*, in which claims were brought by more than 50,000 Italian holders of defaulted Argentine bonds over which the tribunal found that it had jurisdiction, Argentina agreed to settle the dispute with a cash payment equal to 150% of the original principal amount of those affected bonds.[71]

2. Emergency Interventions

By contrast, States have prevailed significantly more often in cases concerning emergency measures ostensibly implemented to stabilize individual institutions or the financial sector more broadly. The respondent State has received a favorable outcome in most cases (see Chart 17 below).

71 "Third and largest of Italian bondholder claims against Argentina is settled; cases blazed a trail, but arbitrators continue to disagree as to scope for ICSID to be used for sovereign debt disputes," *IA Reporter* (2 February 2016), https://www.iareporter.com/articles/third-and-largest-of-italian-bondholder-claims-against-argentina-is-settled/.

Chart 17: Outcome of Cases Involving Emergency Interventions



In the context of emergency measures, tribunals may look favorably on the investor's claim if, for example, the measures were not taken in good faith or were discriminatory in nature.[72] Tribunals have also examined whether measures taken during emergency situations had an adequate connection with the policy objective they sought to achieve.[73]

However, as the statistics indicate, tribunals have quite often shown deference to the State's actions in the context of a *bona fide* emergency. For example, the *Invesmart* tribunal noted that "investment treaties were never intended to do away with their signatories' right to regulate" in banking and finance matters.[74]

72 *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019, ¶¶ 1344-1345. On the issue of comparators in banking and finance disputes, see Arif H. Ali and David L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer, 2021), pp. 268-270.

73 *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014, ¶ 232 (accepting investor's claim as the forced administration of a bank was not rationally related to legitimate policy objectives). Although French courts subsequently set aside the award on suspicion of money laundering, they did not concern the tribunal's findings on the merits of the case. See Judgment of the French Court of Cassation, No. 17-17.981, 23 March 2022.

74 *Invesmart v. Czech Republic*, Award, 26 June 2009, ¶¶ 498, 501. *See also Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 100 (emphasizing that the tribunal "is mindful of the Respondent's right to regulate its economy as it sees fit. This right adheres in the sovereign Government of Argentina both in times of economic crisis and otherwise. But the Respondent's general sovereignty is not at issue in these proceedings. What is at issue is the Respondent's obligation to observe its treaty commitments under the German-Argentine BIT.").

It has been observed that the concept of public welfare in international law extends to "the health and optimal operation of the banking system . . . , the protection of depositors and clients, and ultimately, the protection of taxpayers."[75]

In this particular context, the police powers doctrine has played a critical role. In every published case of emergency measures where a tribunal has decided in favor of the State on the merits, the tribunal has emphasized the States' police powers in banking and finance matters. Following the police powers doctrine, these tribunals have found that *bona fide*, non-discriminatory, and proportionate emergency measures for the purpose of protecting the public welfare do not amount to expropriation.[76] The findings of these tribunals are summarized in Annex D.

This, however, does not mean that tribunals have found they lack the power to review the host State's exercise of its regulatory powers.[77] It simply means that some tribunals have felt the need to strike a delicate balance between finance and banking investors' expectations of a fair and stable business environment, on the one hand, and the State's sovereign right to regulate, on the other hand.[78]

75 *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (Redacted), 26 July 2018, ¶ 905.

76 *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (Redacted), 26 July 2018, ¶ 829; *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 475; *Saluka Investments B.V. v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶¶ 254-255.

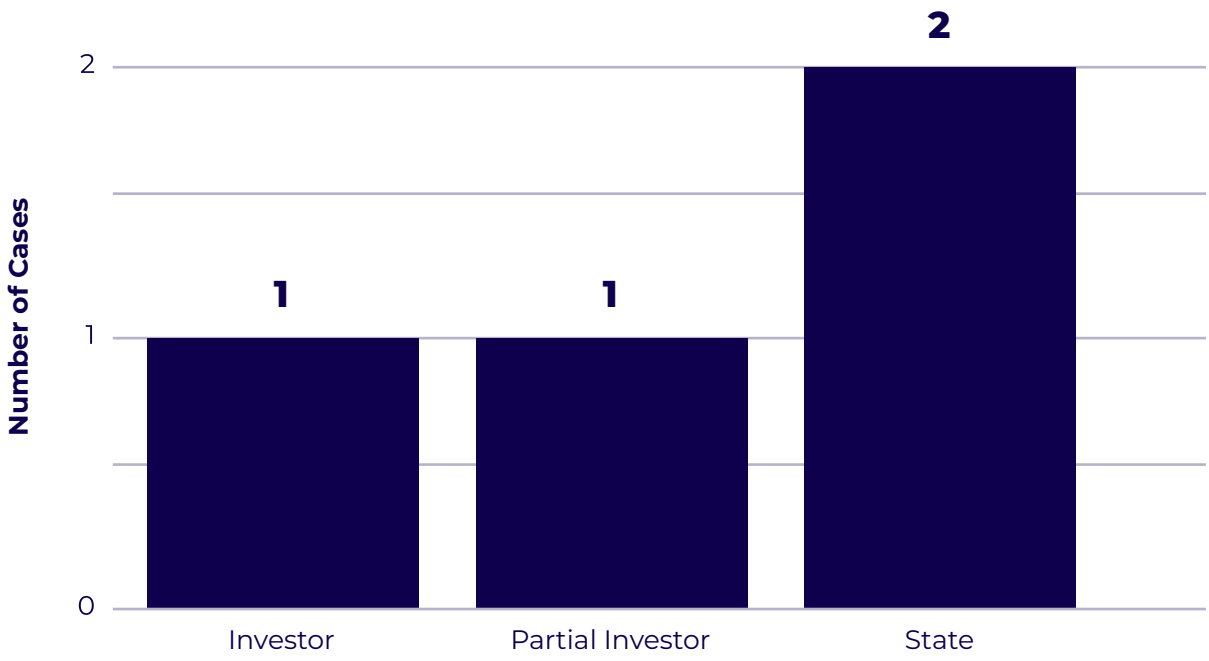
77 *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023, ¶ 293 (emphasizing that "the Tribunal has jurisdiction to consider whether the Respondent failed to exercise its regulatory powers in matters of financial stability, which are sovereign powers, in breach of the Treaty standards").

78 *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award (Excerpts), 24 November 2021, ¶ 659. *See also Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019, ¶ 1129 (observing that the "legitimacy or reasonableness of the investor's expectations must be assessed in conjunction with the political, socioeconomic, cultural and historical conditions in the host State, and in particular, balancing the right of the State under international law to regulate within its borders"); *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 319 (observing that "for an investor to make a decision on an investment, an important element usually considered is the stability of the country's legal system" but that "stability does not mean a freezing of the legal system or making it impossible for the State to reform laws and other regulations in force at the time the investor made the investment").

3. Currency and Exchange Interventions

Investors have, in the limited number of decisions, been somewhat less successful than respondent States on the merits in cases concerning currency regulations and related measures (see Chart 18 below). In some such cases, tribunals have pointed to the State's general right to regulate and its freedom of monetary policy to support their decisions.[79] However, the statistics on merits decisions belie the high rate of settlements in such cases, as evidenced by the settlements reached by Croatia and Argentina with investors who filed claims, sometimes following a favorable jurisdictional decision for the investors.[80]

Chart 18: Outcome of Cases Involving Currency and Exchange Interventions



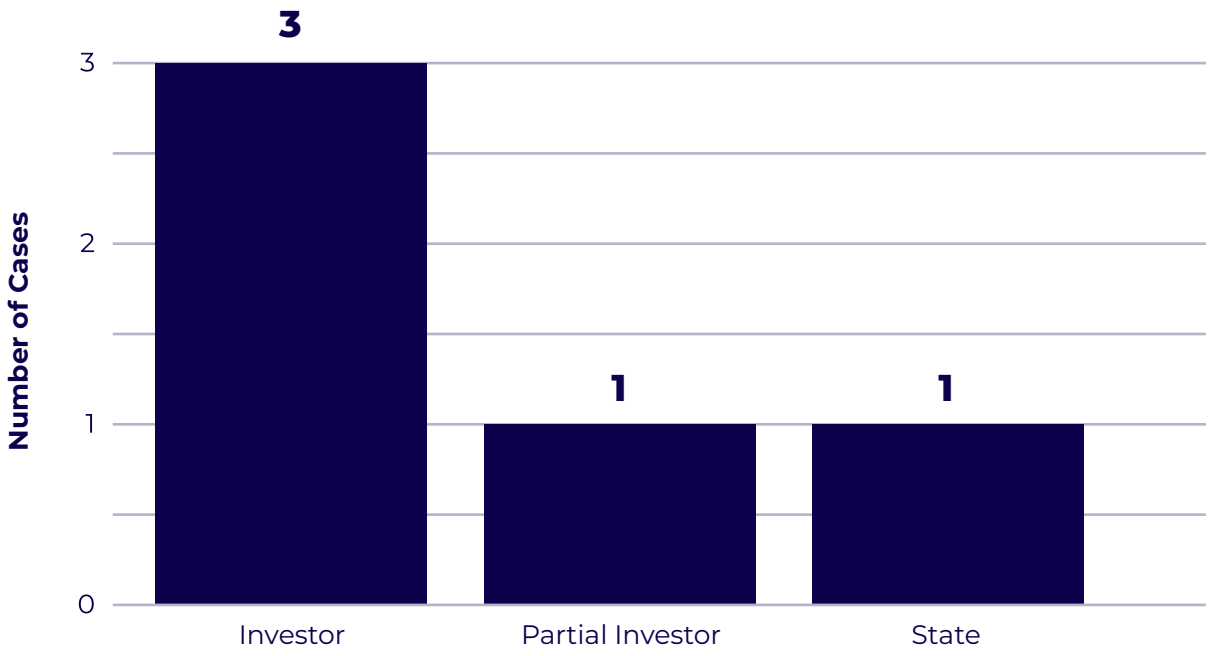
79 In *Metalpar v. Argentina*, for example, the claim arose out of Argentina's so-called "pesification" of US dollar-denominated contracts and deposits. In rejecting the investor's claim on the merits, the tribunal confirmed that the investor could not have had legitimate expectations regarding Argentina's monetary policy in the absence of a stabilization agreement. *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, ¶¶ 186-188. *See also Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award (Excerpts), 24 November 2021, ¶ 560 (rejecting the claim as "when balancing a State's right to regulate against an investor's expectations, the Tribunal must afford significant latitude to the State to decide what is appropriate for its own internal needs.").

80 *CIT Group Inc. v. Argentine Republic*, ICSID Case No. ARB/04/9; *UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia*, ICSID Case No. ARB/16/31.

4. General Regulatory and Sectoral Reform

The rates of success on the merits tilt in favor of investors in cases involving systemic reform of the financial sector (see Chart 19 below). As with emergency measures and currency regulations, tribunals have sometimes pointed to the State's regulatory power in deciding in favor of the respondent State for claims regarding systemic reforms.[81] Nevertheless, such regulatory power does not affect the investors' right to receive compensation in cases of direct expropriation[82] or due process violations during the implementation of the reform.[83]

Chart 19: Outcome of Cases Involving General Regulatory and Sectoral Reform



81 In *Achmea B.V. v. Slovak Republic*, for instance, Slovakia reversed the brief liberalization of the health insurance market and imposed a ban on profits in the sector. Confronted with the Slovak Republic's assertion of its regulatory authority to reform its regulatory framework, the tribunal affirmed that investment treaties are not hostile towards specific policies, and that countries "are free to adopt the policies that they choose." The tribunal noted that "if, for example, reforms had been introduced in a phased manner together with provisions for compensation," the State would not be liable for its reform efforts. *See Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 294. See also *Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB(AF)/18/5, Award, 12 July 2022, ¶ 651 (refusing to question the actions of a regulatory authority that were unchallenged before domestic courts, as the pension system of a country is a "highly regulated business").

82 *MetLife, Inc., MetLife Seguros de Retiro S.A. and MetLife Servicios S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Award, 5 April 2024.

83 *Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB(AF)/18/5, Award, 12 July 2022.

5. Criminal Investigations

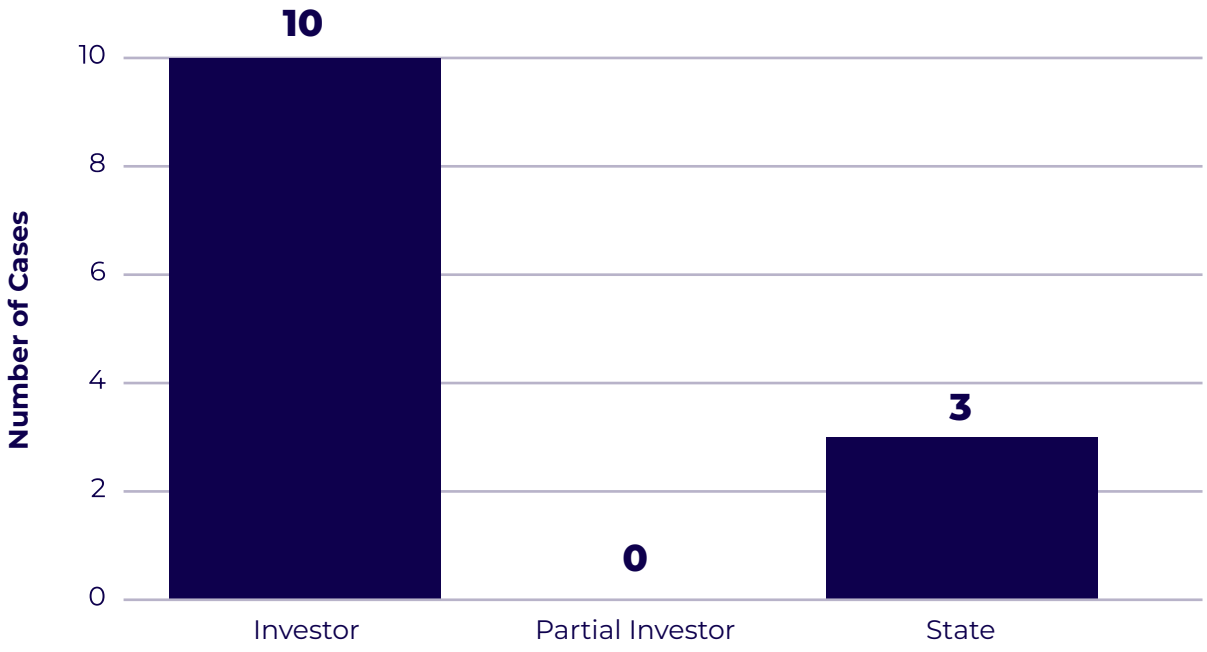
Criminal investigations into banking and finance investments may also also be the basis of claims before international tribunals. Only a few such cases have reached decisions in arbitration, and there is only a single public merits decision in our data. That sole merits decision went in favor of the State.

The limited data available at present does not, however, preclude the possibility that investor-State arbitration might be employed to hold States accountable for criminal prosecutions that violate fundamental principles of justice. In *Valeri Belokon v. Kyrgyzstan*, for example, the tribunal found against the State due to criminal investigations targeting former officials of the bank owned by the investor. In addition, the "perfunctory but persistent" criminal allegations against the investor adversely affected the management of the bank.[84]

6. Other Measures Affecting Financial Instruments

Investors have generally prevailed in disputes over State measures that have negatively affected particular financial instruments (see Chart 20 below). A substantial number of these disputes have also been resolved through settlement.

Chart 20: Outcome of Cases Involving Other Measures Affecting Instruments



84 *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518, Award, 24 October 2014, ¶¶ 267-272. For the purposes of this study, the *Belokon* case was categorized as concerning emergency intervention measures, as the primary aspect of the claim pertained to emergency temporary measures allegedly taken by Kyrgyzstan to secure its banking sector during civil unrest.

Although tribunals have sometimes found that the State's interference with an investor's private financial instrument (e.g., State measures to invalidate contracts) was legitimate, they have insisted that the State must follow due process and act proportionally and in good faith while doing so.[85] Tribunals have concluded that States may not interfere with foreign investor's private financial instruments except in good faith and for legitimate public purposes.[86] In several cases, even interference with investors' financial instruments through actions of the judiciary has been found to violate the applicable investment treaty.[87]

7. Other Measures Affecting Financial Institutions

Investors have achieved a high rate of success in cases involving State measures targeting specific institutions, prevailing in the seven cases studied for the purposes of this report. Although the number of such cases is limited, tribunals have sided with investors when they have proven that the State has engaged in illegitimate acts such as instrumentalizing its judicial system,[88] orchestrating raids,[89] or imposing disproportionate penalties[90] targeting the investor's holdings.

The reasons why an institution might become the target of such measures vary from case to case. For example, in one dispute involving the Republic of Korea, the tribunal determined that the actions of Korean financial authorities had targeted the investor's investment with improper motives and exerted political pressure, driven by a desire to appease politicians and other domestic critics of the investor.[91]

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85 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 522; *British Caribbean Bank Ltd. v. The Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, ¶¶ 282-283.

86 *See* Arif H. Ali and David L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer, 2021), pp. 323-326.

87 *See, e.g.*, *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, ¶¶ 497-499 (finding that the Polish courts committed denial of justice by failing to allow the investor to enforce registered mortgages that secured loans to an insolvent real estate developer); *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, ¶¶ 610-615 (finding that the Mexican courts committed denial of justice by failing to give the investor an opportunity to defend itself in the legal proceedings that led to the cancellation of several mortgages in which it had invested).

88 *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Liability, 17 July 2017 (finding that the Tunisian authorities, including the central bank, had instrumentalized the Tunisian courts to hurt the investor's interests). *See* "Analysis: ICSID tribunal concludes that Tunisia breached FET standard under customary international law, but awards only nominal damages for lost shares in local bank," *IA Reporter* (1 Jan. 2024), https://www.iareporter.com/articles/analysis-icsid-tribunal-concludes-that-tunisia-breached-fet-standard-under-customary-international-law-but-awards-only-nominal-damages-for-expropriated-shares-in-local-bank/.

89 *Oschadbank v. Russian Federation*, PCA Case No. 2016-14, Award, 26 November 2018, ¶ 307.

90 *PL Holdings S.a.r.l. v. Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017, ¶¶ 354-391.

91 *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022, ¶¶ 943-945. *See also Oschadbank v. Russian Federation*, PCA Case No. 2016-14 (claims arising out of the ousting of State-owned Ukrainian bank from Crimea by Russian financial authorities).

D. What compensation has been awarded?

Banking and finance disputes range widely in the amount of monetary compensation sought and the amount actually awarded or agreed upon in settlement. While nothing in principle prevents tribunals from awarding non-monetary remedies, such as restitution,[92] investors in banking and finance disputes commonly seek only compensation and tribunals rarely award remedies that extend beyond the requested compensation.[93] The present study separated the cases into four categories of compensation: (1) below USD 100 million, (2) from USD 100 million to under USD 250 million, (3) from USD 250 million to under USD 1 billion, and (4) over USD 1 billion.[94]

Of these four categories, investors in banking and finance disputes have sought compensation below USD 100 million in the greatest number of cases (41%). This indicates that investment arbitration has been seen as a desirable forum for dispute resolution even when the amount in dispute is relatively low.[95] At the same time, over a fifth of claims exceed the USD 1 billion (22.4%) threshold, for the most part in disputes over investments in banking firms and sovereign bonds.[96]

92 *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 570 (finding that the claimant "may elect between the available forms of reparation and may prefer compensation to restitution," as "restitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State.") *See also* Michelle Bradfield and David L. Attanasio, "Non-Pecuniary Remedies Revisited: Expanding Influence of the ILC Articles?," 37 *ICSID Review* 313 (2022).

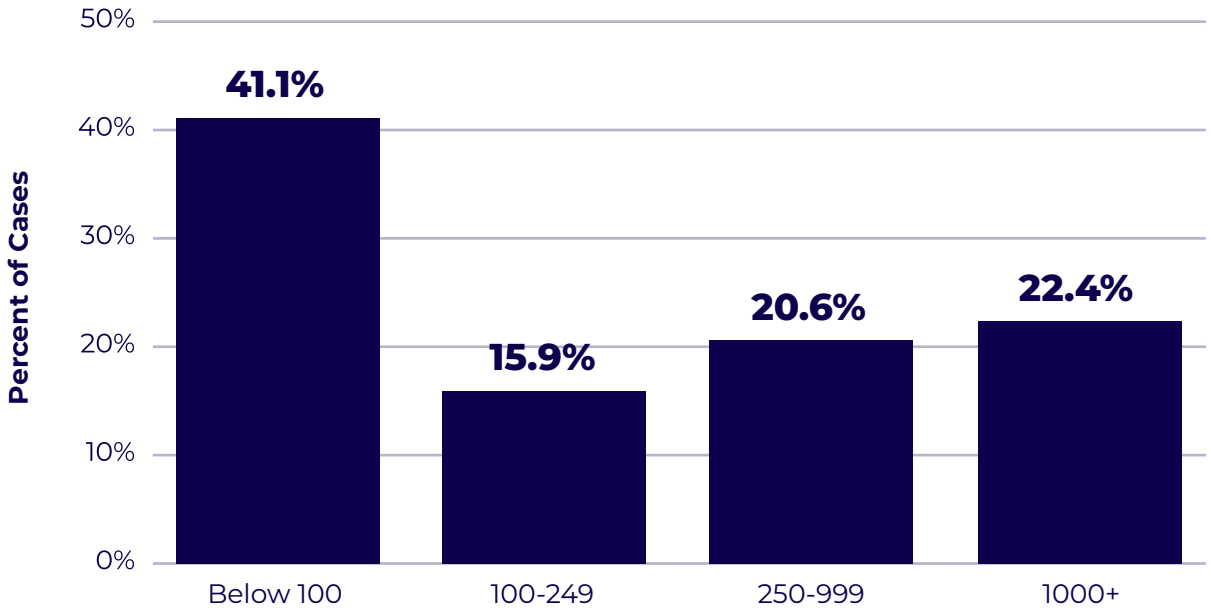
93 Monetary compensation, of course, is often appropriate in banking and finance disputes because it seeks to "cover any financially assessable damage," *i.e.*, to place the investor in the same pecuniary position in which it would have been if the State had not violated its obligations under the BIT. *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Award, 15 April 2021, ¶ 193; *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 30 August 2022, ¶ 890. *See also Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022, ¶ 1302.

94 For the purposes of this study, compensation includes both the amount awarded by the tribunal and the amount received in settlement after the treaty claim was filed (where available).

95 Recent examples of claims below USD 100 million include: *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, ¶ 252 (requesting compensation of USD 50.5 million); *OTP Bank Plc v. Republic of Croatia*, ICSID Case No. ARB/20/43 (reportedly requesting compensation of USD 35 million); "Croatia is facing another arbitration arising from mandatory loan currency conversion, after Hungarian bank files claims," *IA Reporter* (19 October 2020), https://www.iareporter.com/articles/croatia-faces-another-arbitration-arising-from-mandatory-loan-currency-conversion-after-hungarian-bank-files-claims/.

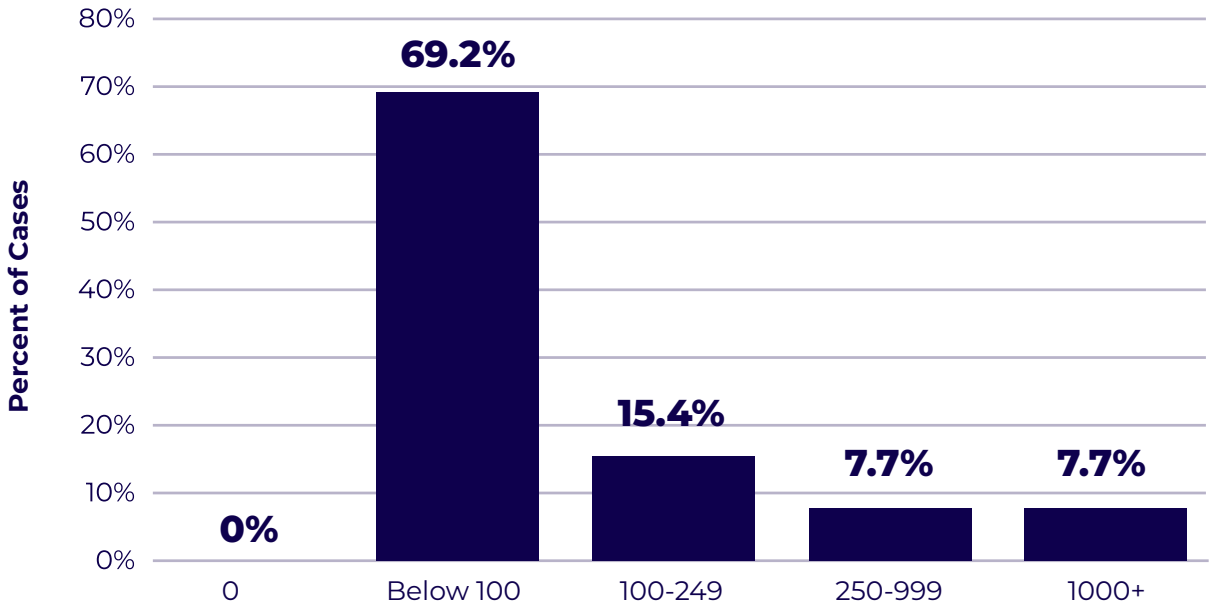
96 *See, e.g.*, *Saluka Investments B.V. v. The Czech Republic* (seeking USD 1.9 billion in monetary damages); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8 (seeking USD 1.5 billion in monetary damages); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (seeking USD 3 billion in monetary damages); *Gramercy v. The Republic of Peru*, ICSID Case No. UNCT/18/2 (seeking USD 1.8 billion in monetary damages).

Chart 21: Amount of Damages Sought (in Million USD)



As to the compensation actually awarded, about 70% of cases with a damages award resulted in compensation of less than USD 100 million.

Chart 22: Amount of Damages Awarded (in Million USD)



Only 15.4% of the cases with damages awards had compensation exceeding USD 250 million. Nevertheless, tribunals have not shied away from issuing awards with such amounts of compensation, especially in disputes over the expropriation of banking assets.[97]

The data indicate that, in terms of compensation, investors in the banking and finance sector have experienced greater success with their claims than have investors in other sectors. When the amount of damages requested is compared with the amount of damages awarded, the median percentage is slightly less than half the requested sum (46%), which significantly surpasses the overall average for investment claims, with a previous study co-authored by BIICL calculating the median at one third (33%).[98]

97 *See, e.g.*, *Oschadbank v. Russian Federation*, PCA Case No. 2016-14, Award, 26 November 2018 (ordering respondent to pay USD 1.1 billion in damages for the unlawful expropriation of a banking firm's investments in Crimea); *Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, 9 November 2021 (ordering respondent to pay EUR 243 million in damages for the political expropriation of a banking firm's investments).

98 BIICL 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration, p. 28.

VII. METHODOLOGY

For this study, we compiled a dataset of 149 international investment cases initiated by investors in the global banking and finance sector through 30 June 2024. We gathered basic details about each case, including the year of filing, the respondent State, the applicable arbitration rules, and other pertinent information. Where available, we also scrutinized tribunal decisions and related news reports to assess success on jurisdiction and merits, as well as to gather details on quantum and settlement.

The present study was conducted in three main phases.

Phase 1: Identify public banking and finance investor-State arbitrations filed under treaties, local laws, and contracts in the databases provided by ICSID, italaw, UNCTAD, Global Arbitration Review, and Investment Arbitration Reporter. By the end of June 2024, the present study identified a total of 149 cases.

Phase 2: Review and analyze the publicly available cases and decisions from banking and finance investor-State arbitrations and code those cases and decisions. The decisions were coded for, *inter alia*, the year of alleged breach, year of filing, year of final award, instrument of consent, arbitral rules applied, administering institution, applicable law, identity of nominal and effective investors, identity of host state, type of investment, type of measure at issue, type of alleged breach, types of defenses, and outcome. We label decisions on jurisdiction and merits as either successes, failures, or partial successes, with the latter designation used when the investor experienced significant defeat on these matters.

Phase 3: Prepare the statistical data, tables, charts, and analysis contained in the present study. The quantitative and qualitative information was used to identify patterns and trends in global banking and finance disputes.

Phase 4: Submit the study for peer review by experts in the area of banking and finance investor-State arbitration and revise the study in light of comments.

ANNEX A:

TREATY DEFINITIONS OF PROTECTED INVESTMENTS IN THE BANKING AND FINANCE SECTOR

Modern investment treaties generally offer wide protections to foreign investments in the international banking and finance sector. This often results from the broadly worded definition of protected investments of modern investment treaties.[99] For example, BITs concluded by the Netherlands typically cover "every kind of asset . . . such as . . . rights derived from shares, bonds and other kinds of interests in companies and joint ventures."[100]

A number of investment treaties go further still and specifically cover core financial instruments, in addition to banking and finance businesses held abroad. The Mexico-Singapore BIT (2009), for example, explicitly extends protection to "(b) shares, stocks, and other forms of equity participation in an enterprise, or futures, options, and other derivatives; (c) bonds, debentures, and other debt securities of an enterprise."[101]

Some recent treaties concluded by States that serve as international financial hubs have, however, included specific caveats that may restrict the protection. The Colombia-UK BIT (2010), for instance, explicitly excludes "public debt operations" and "credits granted in relation to a commercial transaction" from the scope of protected investments.[102] Similarly, the Hong Kong-Mexico BIT (2020) excludes debt securities or loans of governments, central banks, or government enterprises from the definition of investments.[103]

Other investment treaties impose specific limits on the type of banking and finance investments that may be protected.

99 For an in-depth analysis, see Arif H. Ali and David L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer, 2021), pp. 116 et seq.

100 *See, e.g.*, Netherlands-Ukraine BIT (1994), art. 1(a)(ii); Georgia-Netherlands BIT (1998), art. 1(a)(2); Netherlands-Macao SAR BIT (2008), art. 1(a)(ii).

101 Mexico-Singapore BIT (2009), art. 1(7). See also Iran-Japan BIT (2016), art. 1(c), (d).

102 Colombia-UK BIT (2010). art. 1(2). See also Israel-Myanmar BIT (2014), art. 1(6).

103 Hong Kong-Mexico BIT (2020), art. 1. See also Canada-Peru BIT (2006), art. 1.

- Various BITs signed by Singapore require "loans and other debt instruments" to "relate to a business activity and do not refer to assets which are of a personal nature."[104]
- Some treaties entered into by Mexico and Canada stipulate that debt securities must have a minimum maturity of three years to be considered protected investments.[105] In *Lion Mexico v. Mexico*, the tribunal found that the North American Free Trade Agreement (NAFTA) requires that loans to unaffiliated enterprises must have an original maturity of at least three years to qualify as protected investments.[106] This led the *Lion Mexico* tribunal to decline jurisdiction over promissory notes with a maturity of less than three years.[107]
- Certain treaties also specify that loans and debt instruments issued by financial institutions are typically recognized as investments under the financial services chapters only if they qualify as "regulatory capital"—that is, they contribute to the capital adequacy requirements—in the jurisdiction where they are issued.[108]
- Other treaties exclude the "extension of credit in connection with a commercial transaction," such as trade financing, from the scope of protected investments.[109]

Although treaties typically offer broad protections to banking and finance investors, the wording in individual treaties may play a role in determining the scope of their protection. In *Standard Chartered Bank v. Tanzania*, for instance, the applicable Tanzania-UK BIT requires that investments be *made* by the investor.[110] That tribunal concluded that reference to the verb *made* "implies some action in bringing about the investment, rather than purely passive ownership."[111]

104 Korea-Singapore FTA (2005), n. 10.2; Panama-Singapore FTA (2006), art. 9.1, n. 2; Kazakhstan-Singapore BIT (2018), art. 1.

105 For Mexico, see, *e.g.*, Iceland-Mexico BIT (2005), art. 1; Mexico-United Kingdom BIT (2006), art. 1; China-Mexico BIT (2008), art. 1. For Canada, see, *e.g.*, Canada Model BIT (2004), art. 1; Canada-Honduras FTA (2013), art. 10.1.

106 NAFTA, art. 1139(d).

107 *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, ¶ 191.

108 *See, e.g.*, Canada-China BIT (2012), art. 1(1)(e); Canada-Peru BIT (2006), art. 1; Canada-Hong Kong SAR BIT (2016), art. 1. *See also* Arif H. Ali and David L. Attanasio, *International Investment Protection of Global Banking and Finance: Legal Principles and Arbitral Practice* (Kluwer, 2021), pp. 385-386.

109 *See, e.g.*, Mexico-Portugal BIT (1999), art. 1(c)(ii); Greece-Viet Nam BIT (2008), art. 1(1)(c)(ii); Albania - United Arab Emirates BIT (2015), art. 1(1)(vi)(b).

110 Tanzania-United Kingdom BIT (1994), art. 1(a) (defining investments as "every kind of asset admitted in accordance with the legislation and regulations in force in the territory of the Contracting Party in which the investment is made").

111 *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶¶ 222-224. Recently, the *Nachingwea v. Tanzania* tribunal, which also applied the Tanzania-UK BIT, disagreed with the interpretation given by the *Standard Chartered Bank* tribunal. It found that the term "made" is not the same as "actively made," and that that the term "investment" should be interpreted broadly. *See Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v. United Republic of Tanzania*, ICSID Case No. ARB/20/38, Award, 14 July 2023, ¶¶ 151-160.

ANNEX B:

KEY TYPES OF BANKING AND FINANCE INVESTMENTS PROTECTED BY INVESTMENT TREATIES

The table below provides examples of the main types of investments that have given rise to disputes in practice. The cases range from the non-performance of loan guarantees to the expropriation of foreign investors' shares in pension funds. It shows that international arbitration provides comprehensive protection for a wide range of financial investments.

Table 6: Examples of Key Types of Banking and Finance Investments Protected by Investment Treaties

INVESTMENT PROTECTED	FACTUAL SCENARIOS
Loans	*Mytilineos v. Serbia*, Ad Hoc: Claims arising out of an alleged forced bankruptcy by Serbia of a State-owned bank that had guaranteed the investor's investment. *CDC Group v. Seychelles*, ICSID Case No. ARB/02/14: Claims arising out of the Respondent State's failure to honor loan guarantees it had given as security for a loan to its Public Utility Corporation. *British Caribbean Bank v. Belize*, PCA Case No 2010-18: Claims arising out of investor's loans to a company that the respondent State subsequently nationalized.
Bonds	*Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5: Claims arising out of Argentine legislation that unilaterally modified the terms of sovereign bonds held by approximately 60,000 Italian nationals. *Gramercy v. Peru*, ICSID Case No. UNCT/18/2: Claims arising out of a fund's investment in land bonds, instruments issued to Peruvian citizens as compensation for the expropriations of private property in the 1960s and 70s, the value of which decreased due to decisions by Peruvian courts as well as subsequent governmental decrees.

INVESTMENT PROTECTED	FACTUAL SCENARIOS
Banking Firms	*Invesmart v. Czech Republic*, ad hoc: Claims arising out of the Czech Republic's refusal to provide emergency financing to a local bank in which the investor held a majority interest. *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04: Claims arising out of the Czech National Bank's forced administration of investor's banking firm, which did not receive State financial aid unlike other banks. *Hesham Talaat M. Al-Warraq v. Indonesia*, Ad Hoc: Claims arising out of criminal prosecution of the investor for fraudulent activities in the Indonesian financial sector, which allegedly led to Indonesia's bailout of a bank in which the investor had invested.
Insurance Firms	*Achmea v. Slovak Republic*, PCA Case No. 2013-12: Claims arising out of measures introduced by Slovakia that constituted a reversal of its promise of liberalizing its health insurance market.
Other Financial Instruments	*Deutsche Bank v. Sri Lanka*, ICSID Case No. ARB/09/2: Claims arising out of measures imposed by the Sri Lankan Supreme Court and Central Bank that prevented Deutsche Bank from receiving the amount due by a State-owned company under a hedging agreement. *CIT Group v. Argentine Republic*, ICSID Case No. ARB/04/9: Claims arising out of Argentina's measures during the financial crisis that impacted the value of hundreds of commercial leasing agreements concluded by the investor's subsidiary in the country.
Other Financial Institutions	*Banco Bilbao v. Bolivia*, ICSID Case No. ARB(AF)/18/5: Claims arising out of losses related to the investors' stakes in a private pension fund in Bolivia following the country's nationalization of its pension system.

ANNEX C:

KEY TYPES OF MEASURES AT ISSUE IN INVESTOR-STATE CASES

The table below provides examples of the main types of measures that have been at issue in banking and finance investor-State arbitrations.

Table 7: Examples of Key Types of Measures at Issue in Investor-State Cases

MEASURES AT ISSUE	FACTUAL SCENARIOS
Sovereign Debt Measures	*Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9: During the 2001-2002 Argentine financial crisis, Argentina restructured its debt and adopted emergency measures, including banning the transfer of funds overseas, devaluation of the peso, and conversion of US dollar-denominated contracts and deposits to Argentine pesos. These measures impacted the portfolio of investment securities of an Argentine insurance company owned by the investor. *Poštová banka and Istrokapital v. Greece*, ICSID Case No. ARB/13/8: In the aftermath of the 2008 Global Financial Crisis, Greece confronted difficulties in servicing its sovereign debt. As a condition of an international bailout, Greece restructured its sovereign debt through an exchange of instruments with less demanding terms. The measure impacted the investors, who were holders of Greek sovereign debt.
Emergency Interventions	*Ping An v. Belgium*, ICSID Case No. ARB/12/29: Claimants held an equity investment in the Belgian-Dutch financial institution, Fortis N.V. During the 2008 Global Financial Crisis, Fortis encountered major liquidity difficulties and was subject to emergency interventions by various countries, including Belgium. When the first round of interventions was unsuccessful, Belgium took control of Fortis and eventually sold it to BNP Paribas.

MEASURES AT ISSUE	FACTUAL SCENARIOS
Currency and Exchange Interventions	*Daimler v. Argentina*, ICSID Case No. ARB/05/1: During the 2001-2002 Argentine financial crisis, Argentina adopted emergency measures that include restrictions on cash withdrawals and on access to foreign exchange, as well as mandatory conversion of US dollar obligations into Argentine peso obligations. The measure impacted the investor's interest in an Argentine company, to which it had made capital contributions through financing denominated in US dollars. *Addiko Bank AG v. Croatia*, ICSID Case No. ARB/17/37: In 2015, Croatia adopted a law that required banks to convert USD 3.4 billion worth of Swiss franc loans and mortgages into euros. The measure sought to protect borrowers from soaring exchange rates and the law provided that the banks would bear the cost of conversion. Various banks, including the investor, had suffered losses as a result.
General Regulatory Framework	*HICEE B.V. v. Slovak Republic*, PCA Case No. 2009-11: The reform of the insurance legislation in the Slovak Republic allegedly affected health insurance companies by prohibiting them from distributing profits and limiting their administrative expenses. *Eureko v. Poland*, UNCITRAL: In 1999, the investor entered into an agreement whereby it acquired a minority stake in the state-owned insurance company. As part of the privatization process, the investor was granted the right to acquire a controlling majority of the company through a public offering. However, the Polish government delayed and ultimately canceled the public offering, thereby preventing the claimant from exercising its right under the agreement.
Criminal Investigations	*Hesham Talaat M. Al-Warraq v. Indonesia*, UNCITRAL: The investor held shares in an Indonesian bank and served as its commissioner. The bank was bailed out by Indonesia during the 2008 Global Financial Crisis. Indonesia accused investor of corruption and money laundering, which allegedly contributed to bank's collapse. Indonesian courts then tried the investor for these crimes *in absentia* and ultimately convicted him.

MEASURES AT ISSUE	FACTUAL SCENARIOS
Other Instrument-Related Measures	*OKO Pankki v. Estonia*, ICSID Case No. ARB/04/6: Estrôbprom, an Estonian entity, and Valio Oy, a Finnish company, established ESVA, a joint venture company, to build a fish-processing factory in Estonia. Investors granted a loan to ESVA, which was secured by guarantees issued by Estrôbprom and Valio Oy. RAS Ookean, a State-owned entity, succeeded Estrôbprom and refused to repay the ESVA loan upon default. The Estonian judiciary directly invalidated the guarantees. *AIG Capital Partners v. Kazakhstan*, ICSID Case No. ARB/01/6: Tema, a Kazakh joint venture, purchased land for a residential housing project, financing the acquisition in part through a secured loan of USD 1,500,000 indirectly extend by AIG. After Tema obtained governmental permits, engineering designs, and financing, Kazakhstan declared these permits invalid.
Other Institution-Related Measures	*Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18: The investor held a stake in the Commercial Bank of Cameroon (CBC). It alleged that CBC shareholders, including the investor, were divested of management control over the bank, with the roles of the bank's CEO and board of directors being taken by a provisional administrator. Furthermore, the investor alleged that it lost its assets following a restructuring imposed by the government. *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37: The investors, a consortium of investment funds managed by Texas-based Lone Star Funds, held equity shares in Korea Exchange Bank (KEB). However, when they attempted to liquidate their position, they allege that local authorities intervened, obstructing the sale and compelling the investors to maintain their stake, even though KEB's value had significantly declined.

ANNEX D:

FINDINGS OF TRIBUNALS REGARDING POLICE POWERS OF STATES INVOLVING EMERGENCY MEASURES

Table 8: Findings of Tribunals on Regulatory Powers of States in Emergency Measures Cases

CASE	FINDING OF THE TRIBUNAL
***Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2**	The tribunal found that the Estonia's emergency intervention, which resulted in the revocation of a banking license, was a justified exercise of the State's statutory discretion, even though it was incompatible with "generally accepted banking and regulatory practice."[112]
***Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL**	The tribunal found that Indonesia's bail-out of a bank could not amount to a treaty breach, as financial authorities have the discretion and authority to prevent systemic risk to the entire financial system.[113]

112 *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, ¶¶ 363-373.

113 *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, 15 December 2014, ¶ 526.

CASE	FINDING OF THE TRIBUNAL
***Marfin Investment Group and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27**	The tribunal rejected the banking group's claims relating to measures taken by Cyprus in the aftermath of the global financial crisis of 2008. The tribunal, while acknowledging that Cyprus had not acted in conformity with international best practice,[114] emphasized that the country was facing a difficult situation. The tribunal decided that it was not up to it to pass judgment on difficult policy decisions of States, "particularly where those decisions involved an assessment and weighing of multiple conflicting interests and were made based on continuously developing threats to the safety and soundness of the financial system."[115]
***Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17**	The tribunal rejected claims arising out of the resolution by the Spanish government of a troubled financial institution that wiped out stakes held by shareholders and bondholders. It found that the resolution was a "valid exercise of police powers for which no compensation is required" as it "constituted an exercise of regulatory powers for a legitimate and urgent purpose."[116]

114 *Marfin Investment Group and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (Redacted), 26 July 2018, ¶¶ 1036, 1056, 1092.

115 *Marfin Investment Group and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (Redacted), 26 July 2018, ¶¶ 870-871, 875 (also finding that "BITs do not hold States to an obligation to act following international best practices"). For a similar reasoning, see *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, ¶¶ 198-199 (noting that "[r]esolving whether the actions taken by the Argentine Republic during the emergency were correct and taken in a timely manner and, consequently, whether they were key to Argentina overcoming the crisis, or whether, quite the opposite, they contributed to the creation of the crisis or, at least, made it more serious; or to evaluate the way in which international financial institutions and the global economic system conducted themselves, are discussions that go beyond this Tribunal's sphere of action.").

116 *Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023, ¶¶ 763-764.

CASE	FINDING OF THE TRIBUNAL
***Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/10/17**	The tribunal found Peru's emergency intervention in the bank owned by investor to be legitimate, as the intervention was based on its "legitimate right to regulate and to exercise its police power in the interests of public welfare."[117] It noted that the intervention was made in accordance with Peruvian law and that the investor chose to take risks at a time of a significant liquidity crisis.[118]
***Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16**	The tribunal found that the Central Bank of Greece was entitled to a "certain margin of discretion" when granting emergency capital support, especially in difficult times when decisions have to be taken "in very short time-frames requiring complex assessments and forecasts of uncertain economic and social developments." It added, nonetheless, that such power "cannot be stretched to the point that it can justify a central bank decision which is discriminatory or arbitrary."[119]

117 *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶¶ 475-476.

118 *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, ¶ 478.

119 *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 18 January 2019.

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