



Queen Mary
University of London

2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS

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Introduction

It is my great pleasure to introduce this survey of investors' experiences and perceptions towards Investor-State Dispute Settlement (ISDS) and the current reform agenda. This is the first study on the subject and it is conducted and released by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London (QMUL). It has been prepared with the generous support of the Corporate Counsel International Arbitration Group (CCIAG). The main researchers under my supervision were Caroline Croft and Giammarco Rao. We have worked closely with other academic members of the School of International Arbitration, led by Professor Stavros Brekoulakis.

The background of the survey is the relatively long-standing debate about an alleged legitimacy crisis of ISDS, a debate largely initiated by civil society and NGOs as well as by a good number of academics. In response to this debate, and in late 2017, UNCITRAL has embarked on an ambitious project exploring the potential for reform of ISDS, focusing primarily on procedural reforms. Other international organisations have also embarked on similar efforts. It has emerged, however, that the typical claimants in ISDS processes, namely the investors, whether small or big, do not have any concrete representation or input in the reform process and have never expressed their views through an unbiased and academically rigorous empirical survey. This is undisputedly a shortcoming.

In an effort to fill this gap and fulfil the critical need for this important stakeholder's representation, CCIAG has funded this research to be conducted by QMUL given our experience with more than 11 empirical surveys since 2006. Within a relatively short time frame, in November and December 2019, a survey was sent to a core group of investors, including members of the CCIAG, asking them to disseminate the survey. The survey was also disseminated via social media and various other organisations. It is noteworthy that while the survey was being conducted the reform discussions were ongoing and some important documents, such as Working Paper 185 (on the possible design of a Multilateral Investment Court) were not available to survey respondents.

We have received more than 310 responses. However, we only used data coming from 86 responses (i.e. corporate counsel or representatives of corporations). All other responses (provided by outside counsel, arbitrators, academics or arbitral institutions) were disregarded. In addition to the quantitative phase we have conducted a qualitative phase comprising nine interviews of corporate counsel ensuring diversity in terms of geography and industry sectors. Consequently, we are confident that the sample is both adequate, significant and representative and the results of the survey represent an accurate picture of investors' views towards ISDS and current reform agenda. In this sense the survey is innovative and unprecedented.

Our role was to remain independent, collect the data and present them in a useful format. We hope that the findings will generate further debate and will inform the reform process.



Professor Loukas Mistelis FCI Arb

Director, QMUL-UNIDROIT Institute of Transnational Commercial Law

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Executive summary and key findings

Executive summary and key findings

The aim of this empirical study is to collate the views of investors on the current investor-State dispute resolution landscape and identify which reforms, from their perspective, may best improve the resolution of investment disputes between states and investors and encourage foreign investment.

The survey was conducted between 28 November 2019 and 31 December 2019 and comprised two phases: an online questionnaire completed by 86 respondents (quantitative phase) and, subsequently, 9 personal interviews (qualitative phase). All respondents represent investors and are either corporate counsel (79%) or management representatives or commercial managers (15%). Further information about the questionnaire respondents and interviewees can be found in the Methodology section in the appendices. The key findings from the survey are:

The ‘State of play’

- Respondents express positive views about the existing arbitration system when comparing it to other dispute resolution mechanisms such as government negotiation, direct negotiation, mediation and litigation in the host state’s courts.

Potential for reform

- Almost four in five respondents indicate that there is scope for reforms to improve the consistency of ISDS, and three in four respondents believe that reforms could lead to a greater level of efficiency. While investors appear to be in favour of reforms that would improve the current system, it should also be noted that to a certain extent they are satisfied by the current system, as set out below.

Proposed areas for reform

- Respondents would welcome the establishment of a multilateral advisory centre open to both states and investors.
- Respondents believe the introduction of a code of conduct for arbitrators in ISDS would be a positive development.
- If the process for selecting and appointing ISDS arbitrators were to be changed, respondents have a higher level of confidence in appointments that would be made from mandatory arbitrator lists developed by an institution with equal State and investor representation or by independent institutions to ensure the impartiality and independence of ISDS arbitrators.
- While respondents would welcome regulation in this area, they think third-party funding in ISDS should be permitted and be available to investors as a commercial decision.
- Respondents expressed mixed views on the introduction of an appeals mechanism in ISDS and nine in ten respondents would be opposed to a re-hearing of the tribunal’s factual and legal findings.
- On balance, respondents do not favour the creation of a multilateral investment court.
- Respondents would welcome a mandatory requirement to go through mediation before arbitration proceedings can be commenced.

The study

The study

ISDS: The ‘State of Play’

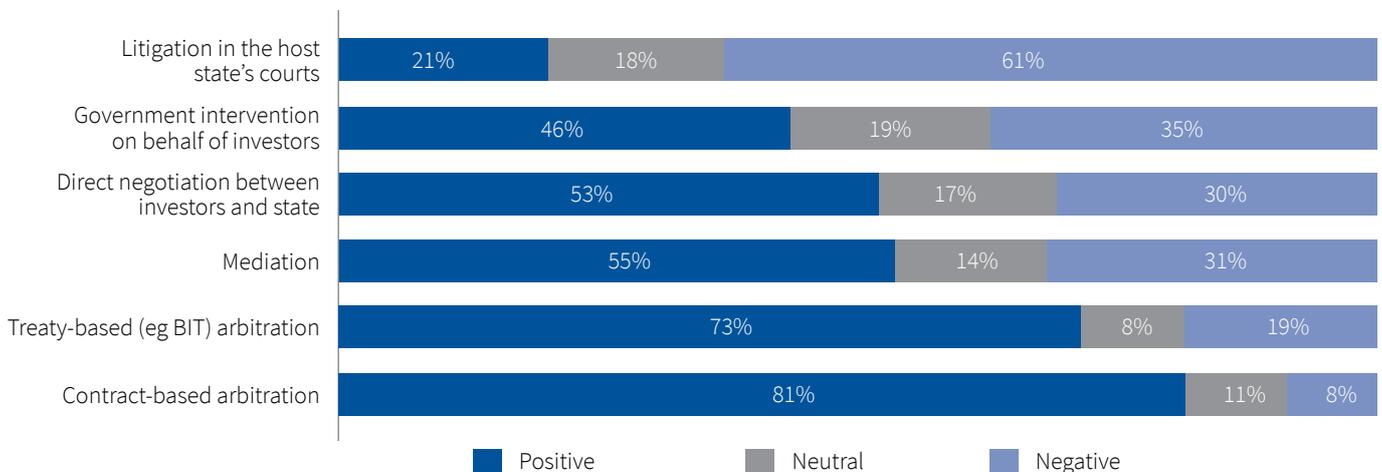
Respondents were asked for their views on the various dispute resolution mechanisms available to resolve investment disputes with states. Respondents were asked to rate their perception of each mechanism on a scale of “0” (least positive view) to “10” (most positive view). Scores from “0” and “4” were considered as negative views whereas scores between “6” and “10” were considered as positive views.

Respondents expressed positive views of ISDS as compared to other options such as government negotiation, direct negotiation between investors and states, mediation and litigation in the host state’s courts.

The response was clear: respondents expressed positive views of ISDS (as it is currently stands) as compared to other options such as government negotiation, direct negotiation between investors and states, mediation and litigation in

the host state’s courts. Contract-based arbitration was the most highly rated dispute resolution mechanism with 81% positive views and an average score of 9 out of 10, while treaty-based arbitration received a significant 72% positive views and an average score of 8 out of 10. Respondents showed less enthusiasm for other mechanisms, with 45% positive views expressed in favour of government intervention (and an average score of 6 out of 10), and 52% and 54% positive views for direct negotiation with the host state and recourse to mediation respectively (with average scores of 6 out of 10 for mediation and 7 out of 10 for direct negotiation between investors and states). Litigation in the host state’s courts received 61% negative views, with 71% of respondents ranking treaty-arbitration higher than they ranked litigation. This could reflect a general distrust of domestic courts by investors when it comes to resolving investment disputes/securing a remedy under an investment treaty.

Chart 1: Views on various dispute resolution mechanisms



The study

ISDS: The ‘State of Play’ (continued)

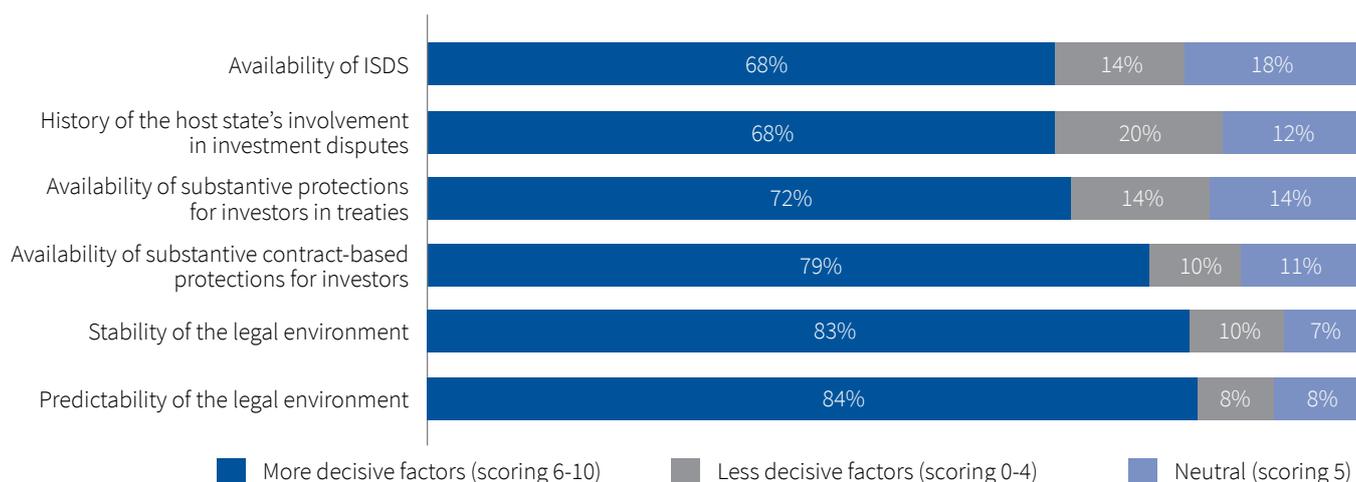
Interviewees were asked for their views about arbitration. The quality of the arbitrators was repeatedly referred to by all interviewees as a particular strength of arbitration. One interviewee commented that arbitrators tend to be more experienced than domestic judges, often because the parties appointing them have made considerable efforts to ensure the arbitrators are familiar with the subject matter, the industry sector and the geography of the case. Arbitral awards are usually viewed as measured and balanced decisions which do not usually need a great level of review or scrutiny. Another commented that arbitration is the only credible option to ensure the fair resolution of investor-state disputes. Interviewees expressed the view that arbitration gave investors a greater amount of certainty, whilst the prospects of litigation tend to vary significantly from country to country. Domestic judges may be less familiar with or have only limited time to familiarise themselves with the specificities of the case. Other strengths of arbitration cited include the speed and efficiency of the process, and the neutrality and impartiality of the arbitrators.

While interviewees generally felt positively about arbitration, they also said that arbitration is rarely a preferred course of action for their organisations. They prefer amicable solutions that preserve their relationships with states. One commented that arbitration does not typically result in a long-term

commercial outcome. Another explained that instituting arbitration proceedings is often used as last resort, where all other avenues have been explored or there is little or no hope for the investors’ operations in the country. It was suggested that commencing an arbitration would undermine the continuation of the investor’s activities in the country. Several interviewees said they almost invariably explore alternative means of dispute resolution before they initiate formal arbitration proceedings, such as direct negotiation, mediation or other forms of third party assisted amicable settlement. Several also commented that the commencement of arbitral proceedings, and in particular the appointment of an arbitral tribunal, is often used as leverage to start or progress a negotiation or a settlement. The prospect of a mutually acceptable solution or settlement, better aligned with the investor’s own business objectives, is seen as more appealing than going to a lengthy arbitration.

A number of factors were tested for their relative influence on investors’ investment decisions: the stability and predictability of the host state’s legal framework, the availability of substantive contract-based and treaty-based protections for investors, the availability of ISDS and the host state’s history of involvement in investor-state disputes. Respondents said all six factors strongly influence their investment decisions.

Chart 2: Factors that influence an investment decision



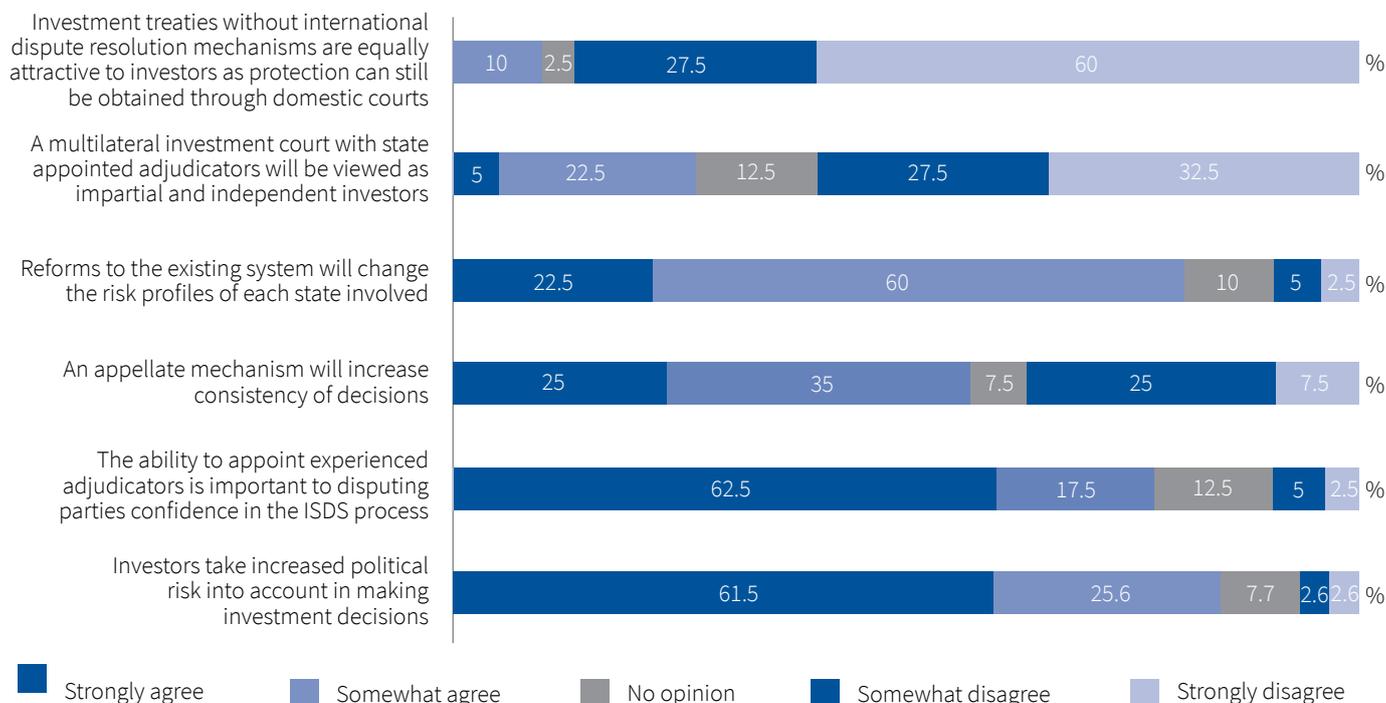
The study

ISDS: The ‘State of Play’ (continued)

According to the interviews those factors will carry different weight depending on the country. Political and judicial stability, as well as the broader geopolitical outlook in a country, inform the need for protection either under a treaty or a contract. There was a strong consensus among interviewees that the availability of ISDS played an important role and was invariably a consideration when making a decision to invest in a particular country. For a number of interviewees, the availability of recourse to ISDS was a precondition to any investment. Three said that their board or shareholders would be unlikely to go ahead with an investment without having checked the availability of arbitration for disputes and making an investment without the option or agreement for ISDS was in itself a risk. One interviewee commented that the availability of ISDS generally influenced the way their organisation structured their investments to ensure the protection of a particular treaty. Another interviewee felt that while the availability of investment protection will always be a relevant factor, other factors such as the availability of tax benefits under a double taxation treaty might be more decisive.

Several statements were presented to the respondents to challenge commonly accepted perceptions of ISDS. First, respondents were asked if they thought that international dispute resolution mechanisms make investment treaties more attractive – the answer was unambiguous: in response to the statement that ‘investment treaties without international dispute resolution mechanisms were equally attractive as protection can still be obtained through domestic courts’, 87.5% of the respondents disagreed. Investors were also asked whether they take increased political risk into account in making investment decisions. While the respondent group for this question was smaller with 40 responses received, 88% agreed, among whom 62% strongly agreed with the proposition. Respondents were also asked whether any move towards reforms (if adopted) would have an impact on a state’s risk profile. 82.5% said they agreed, a quarter of whom strongly agreed.

Chart 3: Assessment of commonly accepted ISDS perceptions



The study

ISDS Reform: Can change achieve greater consistency and efficiency?

Almost four in five respondents (78%) believe there is scope for reforms to improve the consistency of ISDS, and three in four respondents (75%) feel reforms could lead to a greater level of efficiency. Less than 6% of respondents thought that no reform could achieve more consistency, and 3% thought no reform could achieve greater efficiency.

Chart 4: Scope for reforms that can improve consistency of ISDS

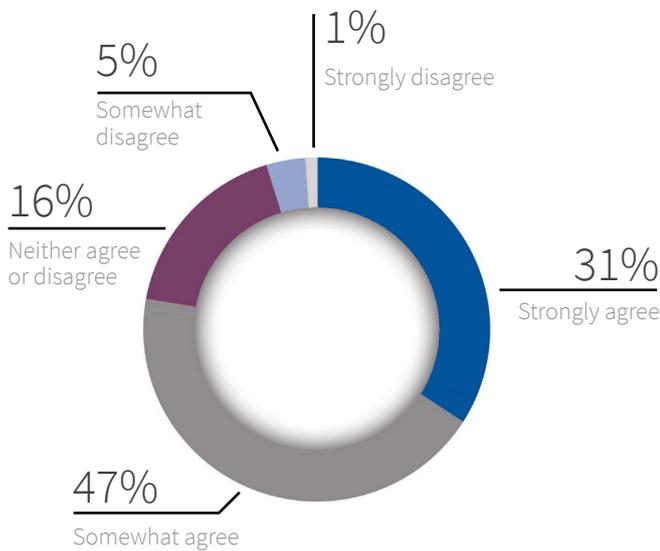
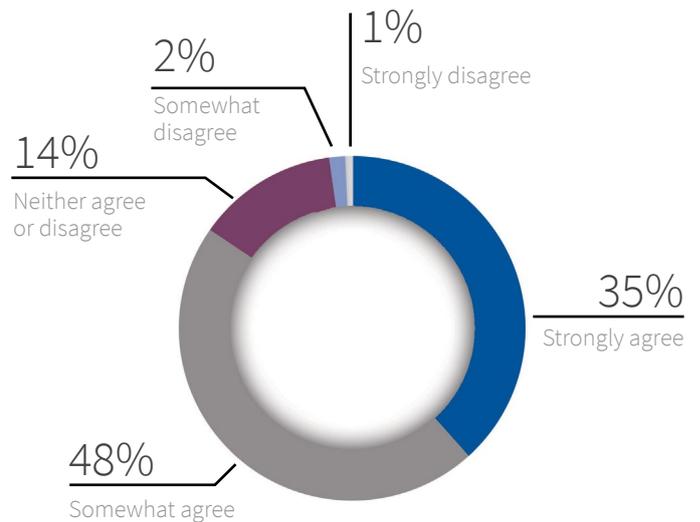


Chart 5: Scope for reforms that can improve efficiency of ISDS



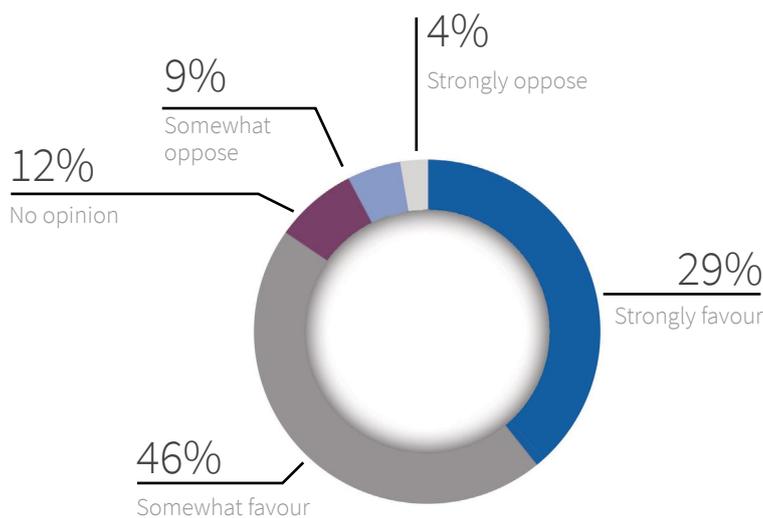
Proposed areas for reform

1. Creating a multilateral advisory centre

A primary proposal for reform is the establishment of an advisory centre for investment disputes. Those favouring the idea of a centre note that it will give parties better access to the expertise necessary to prevent investment disputes and enable parties to defend claims in arbitration proceedings more effectively. It could also foster the exchange of know-how and help create better practices and protection standards for investors. Respondents would overwhelmingly welcome its establishment (75%), with a quarter strongly in favour. There was limited opposition (13%) to the creation of the centre, with less than 4% of respondents expressing strong views against it.

75% of respondents think that the centre should be accessible to both investors and states. A minority of respondents feel that the centre should be available to states only (7%), or to states and small and medium-sized enterprises only (14%). A further 4% think the services of a multilateral advisory centre should be made available to impecunious investors or investors in financial difficulty as opposed to all investors. Several interviewees said they thought the centre could enable small investors with limited resources to access specialist advice.

Chart 6: Proposal for an advisory centre for investment disputes



Respondents would welcome the establishment of a multilateral advisory centre open to both states and investors.¹

¹ It should be noted that the quotations highlighted in the report are drawn both from the main findings and the interviews, as set out in the text of the report, and in some cases represent the views of individual respondents.

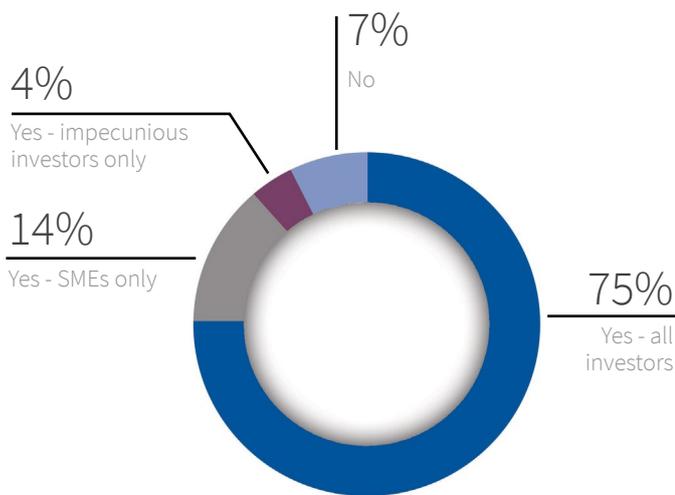
Proposed areas for reform

1. Creating a multilateral advisory centre (continued)

Respondents were asked what particular services it would be helpful for the centre to provide. The list submitted to the respondents included services falling broadly within five categories: know-how and the sharing of best practices, advisory services, capacity-building, and assistance and support during dispute settlement proceedings. Of the 15 options put forward, five were chosen by over 60% of the respondents: the sharing of information and best practices in ISDS (72%), capacity-building services including training programmes (69%), the establishment/maintenance of a database of arbitrators (67%), assistance in the setting-up of conflict management systems (64%) and advice on the potential violation of treaty obligations outside an existing dispute (64%). Many respondents also thought it

would be beneficial for the centre to assist in the drafting of international treaties, legislation, and contracts (58%) or serve as a platform for the sharing of experience of arbitrators' services (56%). There was however limited support for a centre that would provide assistance in relation to ISDS generally and take an active role in the conduct of ISDS proceedings. Specifically, 39% of the respondents felt that the centre could assist parties in the retention of external counsel and experts. Fewer respondents thought the centre could also provide help in assembling and preparing evidence (22%), briefing services on witness and documentary evidence (22%) and represent parties at hearings including helping with the presentation of oral arguments and evidence (22%).

Chart 7: Who should have access to the proposed advisory centre services?

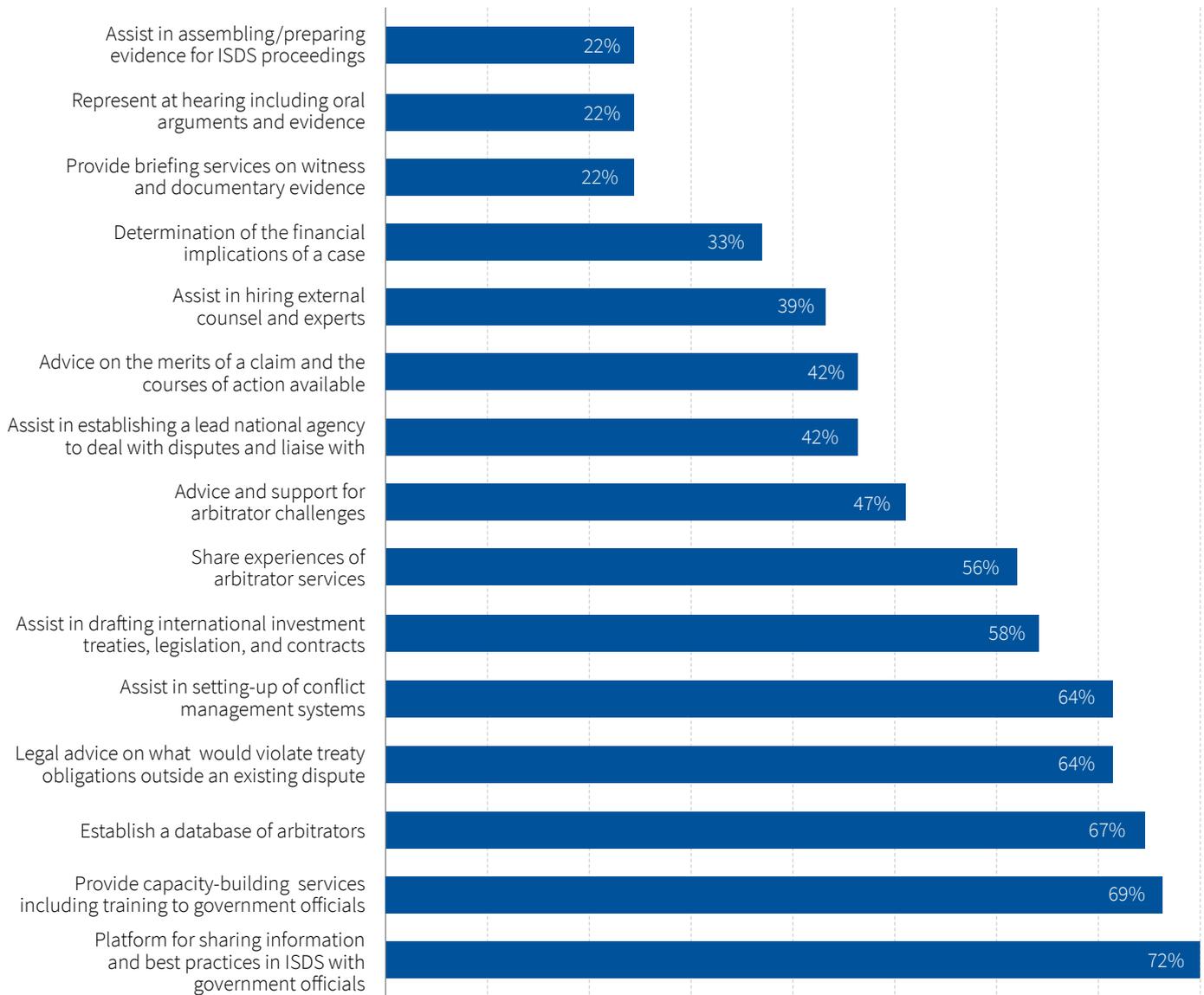


It would be beneficial for the centre to provide advice with regards to the possibility or merits of a settlement.

Proposed areas for reform

1. Creating a multilateral advisory centre (continued)

Chart 8: Investor views on services an advisory centre could provide²



The interviews revealed mixed feelings over the type of services the centre should provide. One interviewee was of the view that the centre should not give advice with respect to a particular dispute or investment. Several other interviewees thought it would be beneficial for the centre to provide advice with regards to the possibility or merits of a settlement. This was particularly true where the violation of an existing international obligation is involved. Government representatives often shy away from settlement discussions and often will be reluctant to engage in settlement discussions out of fear of being personally accountable or the subject

of bribery allegations. There was also the view expressed by several interviewees that the centre could assist states unfamiliar with ISDS in understanding their obligations towards investors.

Interviewees were asked about the potential for conflicts of interest arising if the centre was open to both investors and states. Two interviewees expressed concerns over the neutrality of the centre, but the general response was that there would not be any potential for conflicts if the centre played no role in ISDS proceedings.

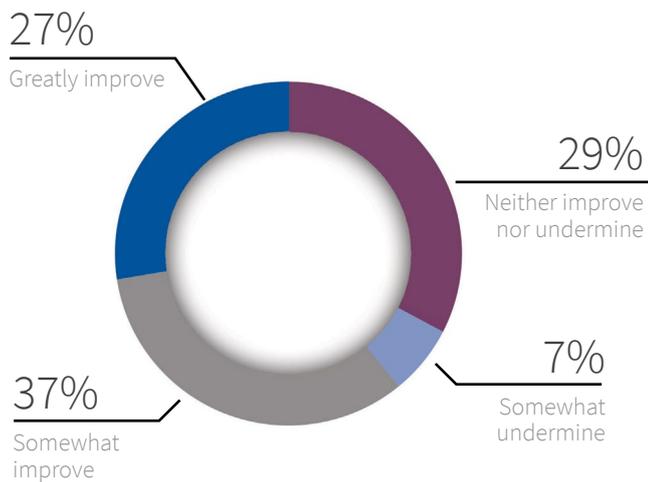
² Percentages are of respondents who believe the identified services would be helpful for the Advisory Centre to provide.

Proposed areas for reform

2. Introducing a universal code of conduct for arbitrators

Respondents were asked for their views on the introduction of a universal code of conduct for arbitrators in ISDS. Overall, respondents believe the introduction of such a code would be a welcome development. A sizeable portion of respondents (63%) were of the view that the introduction of a universal code of conduct for arbitrators would improve the current ISDS system. None of the respondents believe that a universal code of conduct would, if introduced, have a significantly detrimental impact on the ISDS system.

Chart 9: Would a code of conduct for arbitrators improve ISDS?

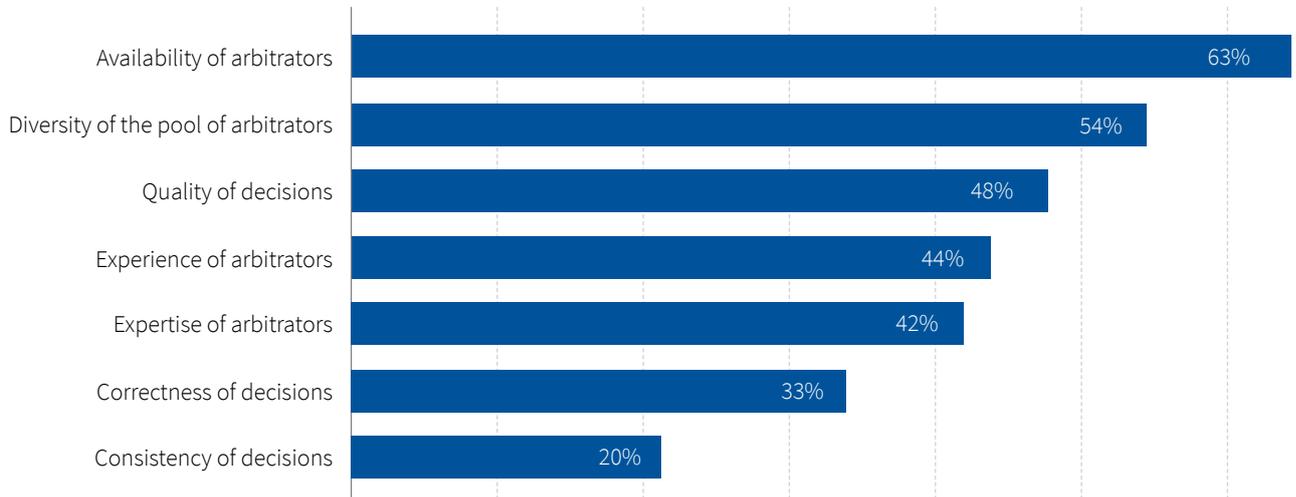


Respondents believe the introduction of a code of conduct for arbitrators in ISDS would be a positive development.

Proposed areas for reform

2. Introducing a universal code of conduct for arbitrators (continued)

Chart 10: Impact of restrictions on the activity of arbitrators



Double-hatting

Should arbitrators in ISDS be allowed to act as counsel or expert witnesses in other ISDS proceedings? A significant portion of respondents has no concerns about arbitrators taking up other roles in other proceedings, such as acting as counsel or expert witnesses. 61% of respondents said arbitrators participating in ISDS should be allowed to act as counsel in other in ISDS proceedings. 57% of respondents indicated that arbitrators should be allowed to act as an expert witness in other ISDS disputes. Respondents were asked what impact restrictions would have on the activities ISDS arbitrators can undertake. With the caveat that the response rate of this question was lower than a 50%, the two most cited impacts of such restrictions were the availability (65%) and diversity (54%) in the pool of arbitrators parties can choose from. A smaller percentage of respondents thought such restrictions would have an impact on the consistency of decisions (21%), the correctness of decisions (33%), the quality of decisions (48%), and the expertise (42%) and experience of arbitrators (44%). In the interviews, one investor felt that double-hatting was desirable because it enables arbitrators to develop a better understanding of the process and the perspectives of the parties.

Arbitral duties and case-load

Respondents were asked whether arbitrators should have particular duties. With the caveat that the response rate for this question was lower than 50%, those who did respond overwhelmingly felt that arbitrators should disclose the number of their ongoing ISDS appointments as part of the appointment process (80%). They also felt (82.5%) that there should be a maximum number of ISDS appointments an arbitrator should be involved in at any one time. There was a clear preference from respondents to cap the number of ISDS appointments at 5 (57%), with the second most popular response being no more than 10 ongoing ISDS appointments (31%).

Proposed areas for reform

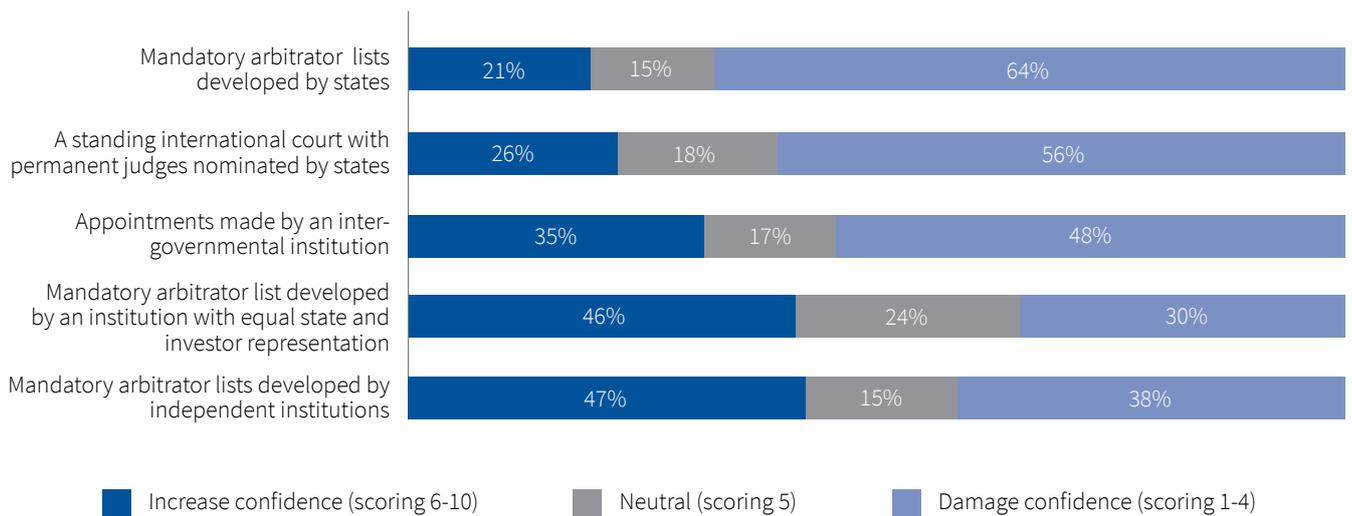
3. Changes to the process for selection and appointment of arbitrators

Several proposals have been made to reform the process for the selection and appointment of arbitrators in ISDS in an effort to increase confidence in the impartiality and independence of the system. We sought to understand which proposal would, in the views of investors, best achieve this objective. Respondents were asked to rate five options on a scale from “0” (substantially damage confidence) to “10” (substantially increase confidence). A rate of 5 was deemed to indicate a neutral view or the absence of impact on confidence. Of the five options proposed, only two stood out among respondents as increasing confidence: mandatory

lists developed by an institution with equal state and investor representation (45% positive and 24% neutral views) and mandatory arbitrator lists developed by independent institutions (47% positive and 15% neutral views).

Proposals to use mandatory arbitrator lists compiled solely by states and/or have state-nominated permanent judges sitting in a standing international court were unpopular with a majority of respondents (64% and 56% respectively) saying that they would undermine confidence in the independence and impartiality of the system.

Chart 11: Do you think the following mechanisms for the selection and appointment of ISDS arbitrators, if introduced, would increase your confidence in the impartiality and independence of the system?



All interviewees said they valued the ability of parties to select arbitrators in ISDS.



The ability to choose the decision makers is important as the parties can then ensure that they will have the background, knowledge and experience required to resolve the parties’ dispute.

Proposed areas for reform

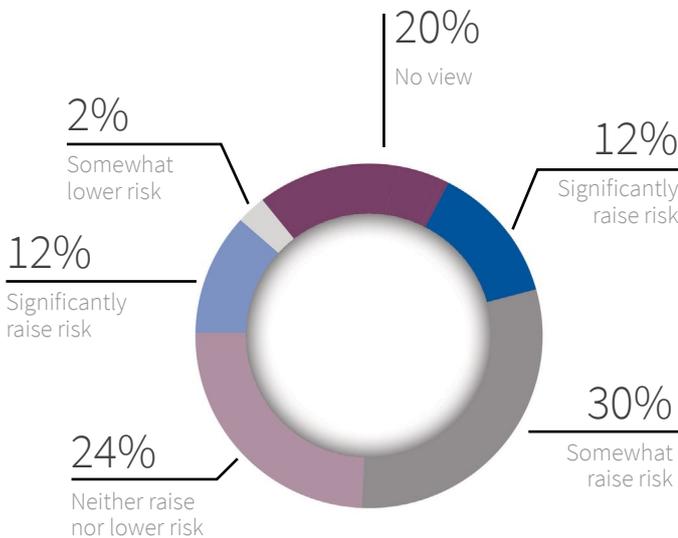
3. Changes to the process for selection and appointment of arbitrators (continued)

In interviews, two interviewees said that recourse to lists is common where an arbitration centre is involved, and feel that it does not impair the ability of the parties to make the final decision to appoint. A common theme of the interviews was the view that no major change was needed in this particular area and all interviewees said they valued the ability of parties to select arbitrators in ISDS. A number of interviewees commented that the appointment of arbitrators by the parties was an important feature of ISDS. If one eliminated that possibility, the system would lose its appeal. Other comments from interviewees included the following:

- the current party-appointment system is satisfactory and guarantees the independence and impartiality of the arbitrators;
- the ability to choose the decision makers is important as the parties can then ensure that they will have the background, knowledge and experience required to resolve the parties' dispute;
- pre-selection of potential candidates for appointment through the use of mandatory arbitrator lists would be welcomed, together with a more streamlined appointment process which would avoid any delay in the selection of the arbitrators;
- safeguards should be in place to ensure the candidates' independence and impartiality, and in particular maintaining the requirement that the arbitrators and the parties do not share the same nationality;
- A number of respondents mentioned that they would not be opposed to change in the process for the selection and appointment of arbitrators, provided that the impartiality, neutrality, experience and industry or country knowledge of the arbitrators would be preserved.

Respondents indicated that changes to the selection and appointment of ISDS tribunals would raise their organisation's risk (42%) in countries in which they have investments or in which they are considering investing. 24% said they did not perceive any impact on risk while another 20% did not have any view.

Chart 12: Impact of the method of appointment of ISDS tribunals on risk assessment

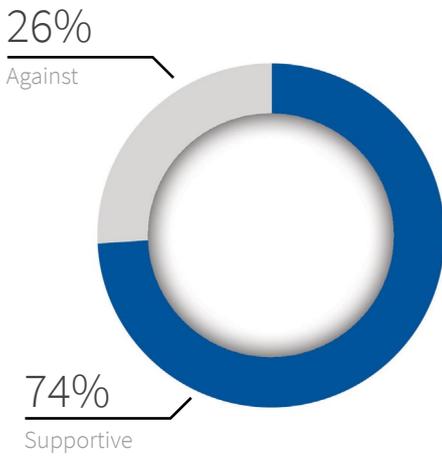


Proposed areas for reform

4. Regulation third-party funding

Respondents were asked their views on the proposed regulation of the use of third-party funding in ISDS. A strong majority (74%) of respondents think third-party funding in ISDS should be permitted.

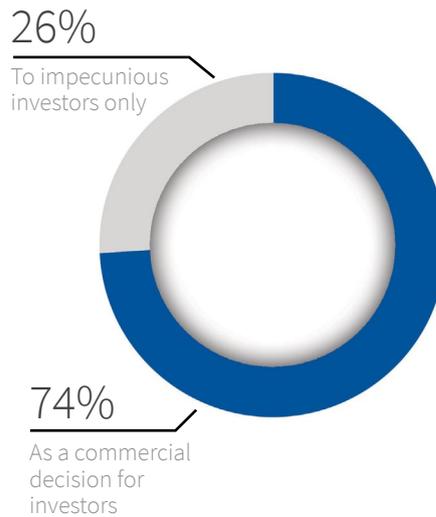
Chart 13: Should third party funding be permitted?



Should third-party funding be available for investors in financial difficulty only? The response was unambiguous: almost three quarters of respondents (74%) said third-party funding should be available to investors as a commercial decision, regardless of the depth of the investor's pockets.

Respondents were asked whether the use of third-party funding should be regulated. The responses show a consensus among investors for regulation, with 69% of respondents indicating a desire for this area to be regulated (among whom 22% are strongly in favour of regulation).

Chart 14: In what instances should third party funding be available?

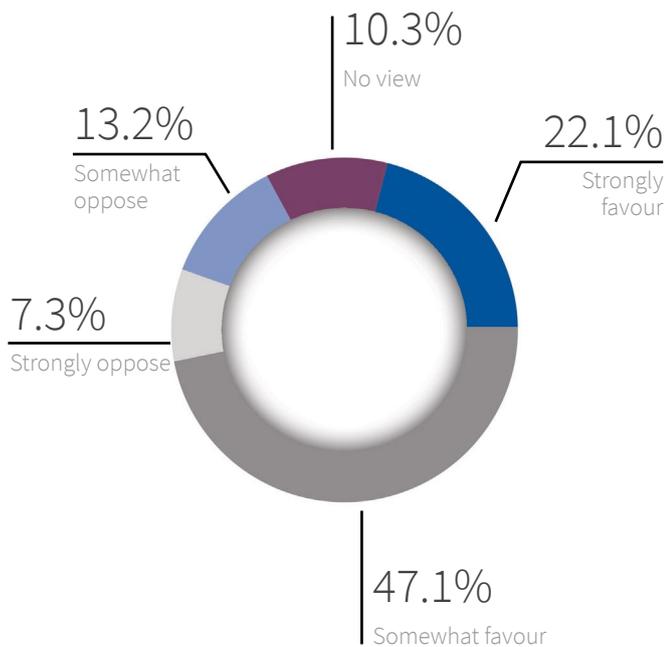


Respondents think third-party funding in ISDS should be permitted and available to investors as a commercial decision.

Proposed areas for reform

4. Regulation third-party funding (continued)

Chart 15: How do you view the proposed regulation of third party funding?



In considering whether the use of third-party funding should be subject to mandatory disclosure by the parties, there was a more limited number of responses: a majority of respondents thought a party should not be required to disclose neither the use of third-party funding (59%) nor the identity of the funder (70%). In the smaller subset of interviews, most expressed the view that regulation should be limited to disclosure of the use of third-party funding. There was also the suggestion that arbitrators should be required to disclose their appointments by different parties funded by the same funder.

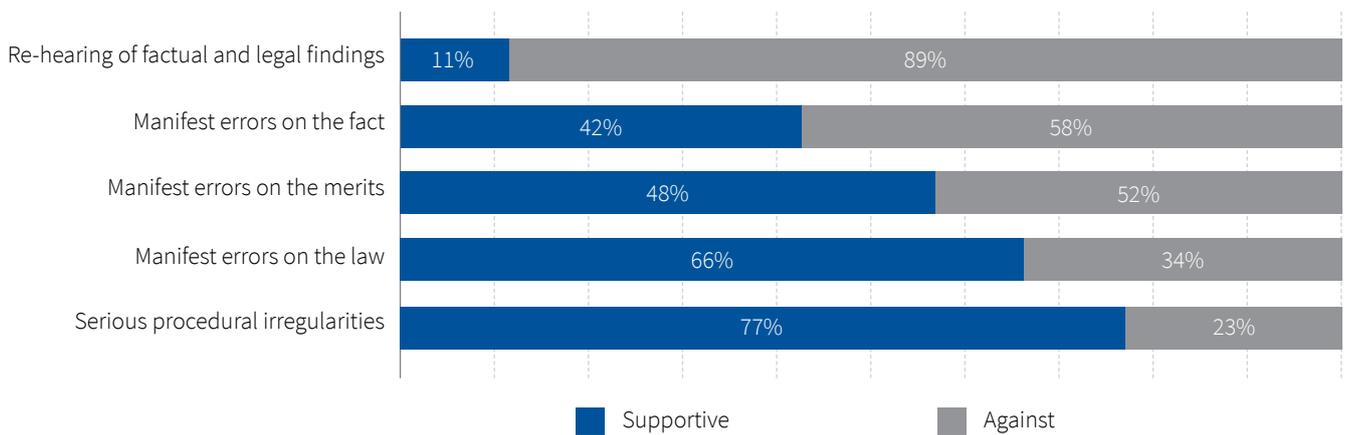
Proposed areas for reform

5. Creating an appellate mechanism³

Respondents were asked whether an appeals mechanism should be introduced in investment arbitration. Respondents expressed mixed views in response. Equal proportions of respondents favoured (35%) and opposed (35%) the inclusion of such a mechanism; 24% indicated they were strongly opposed to it, while 17% were strongly in favour. Similar figures were obtained from the respondents working in multinational organisations and respondents working for small and medium-sized enterprises.

Respondents were asked what the preferred scope of review would be if an appeals mechanism was to be introduced. They were provided with the opportunity of selecting more than one option from the list set out in the chart. A majority of respondents favour the inclusion of a mechanism for the review of serious procedural irregularity (77%) and manifest errors of law (66%). A lower proportion of respondents would welcome the review of manifest errors of fact (42%) and on the merits (i.e. the application of the law to the facts in the light of the evidence put on the record 48%). Nevertheless 89% of respondents reject the idea of a re-hearing of the tribunal’s factual and legal findings.

Chart 16: Scope of review an appellate mechanism could undertake



An appeal mechanism would impact costs and efficiency negatively, as it would open the door to an endless process which would drive up costs and would have a detrimental effect on the efficiency of the ISDS process.



Nine in ten respondents would be opposed to a re-hearing of the tribunal’s factual and legal findings.

³ It is important to note that the questions were framed before the specifics of such an appellate mechanism had been set out in detail by the UNCITRAL secretariat in working paper 185, or debated by UNCITRAL Working Group III, so respondents would have their own views on what it might entail.

Proposed areas for reform

5. Creating an appellate mechanism (continued)

Several interviewees did not express any firm views one way or another on these options. One interviewee said that introducing appeals would constitute a double-edged sword and expressed the view there would be as many benefits as disadvantages. There were concerns among interviewees that an appeal mechanism would impact costs and efficiency negatively, as it would open the door to an endless process which would drive up costs and would have a detrimental effect on the efficiency of the ISDS process.

There was overall a consensus amongst interviewees that the scope of review on appeal, if introduced, should be strictly defined and limited, with two respondents mentioning the appellate role of supreme courts in the domestic context. Several interviewees stressed the importance of finality for investors and being able to move on. One interviewee added that the introduction of an appellate mechanism would not eliminate the existing mechanisms of a domestic set-aside or an annulment of arbitral awards, which could lead to two sets of reviews and the parties having to challenge or defend the award twice.

Respondents were asked if they believe the introduction of an appellate mechanism would raise risk in countries in which they have investments or in which they are considering investing. 24% of respondents thought it would have no effect on risk or have no view (15%), 38% thought it would raise risk, and 19% thought it would lower risk.



The introduction of an appellate mechanism would not eliminate automatically the existing mechanisms of a domestic set-aside or an annulment of arbitral awards, which could lead to two sets of reviews and the parties having to challenge or defend the award twice.

Proposed areas for reform

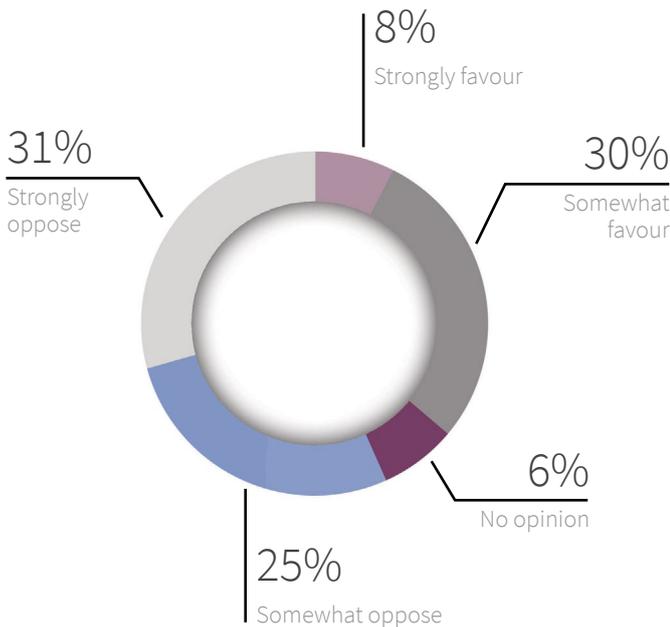
6. Creating a multilateral investment court

Respondents' views were sought in relation to the proposed replacement of the current arbitration system with a multilateral investment court with full-time judges (the "MIC") tasked to hear investment claims by investors against states.

Respondents were given five options: 'strongly favour', 'somewhat favour', 'no view', 'somewhat oppose', 'strongly oppose'. A majority of respondents does not favour creation of a multilateral investment court (56%): 31% respondents strongly oppose it, 25% somewhat oppose it. While the percentage of respondents who view the potential introduction of the MIC favourably is significant (38%), the percentage of respondents who strongly favour the MIC (8%) is considerably less than those who strongly oppose it (30%).

This is consistent with the answers given by respondents as to whether the introduction of the MIC would raise their organisation's risk in countries in which they have investments or in which they are considering investing. 37.5% of respondents thought it would raise risk, with 8% believing that it would significantly risk.

Chart 17: Investor views on the creation of a MIC for ISDS to replace arbitrators



On balance, respondents do not favour the creation of a multilateral investment court.



The MIC would negatively affect the credibility of the ISDS system and investors' confidence in it.

Proposed areas for reform

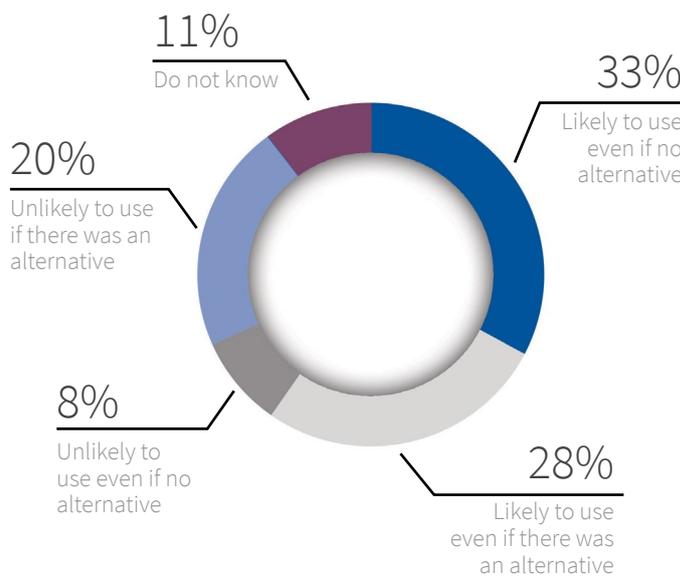
6. Creating a multilateral investment court (continued)

Interviewees were asked for their views on the introduction of the MIC. Several of them said the MIC would negatively affect the credibility of the ISDS system and investors' confidence in it, and one suggested the introduction of a MIC might lead to increased costs for the parties. Another interviewee drew a comparison between the MIC and the Appellate Body of the World Trade Organisation (the "WTO"). The suggestion being that the MIC, as a multilateral body, might lead to situations of impasse similar to those that have affected the WTO's appellate mechanism (with regard to the selection and selection of new appellate body members). The MIC might also be paralysed by the actions of a single State (like the

WTO Appellate Body), which would then put its credibility as a neutral and impartial dispute resolution body in doubt.

Respondents were asked the likelihood of their bringing proceedings in a multilateral investment court. 33% respondents would likely use the MIC if there was no alternative available while a small percentage of respondents (8%) indicated it would not use it. If an alternative to the MIC was available the picture is more nuanced: 28% of respondents indicated they would still use the MIC, but a similar percentage of respondents said they would prefer not to use it (20%).

Chart 18: Would you use the MIC?



One interviewee felt that if there was no other option but to use the MIC, investors would make an investment only where there is certainty that the investment will be otherwise clearly profitable. If there was no clear economic return and the MIC were the only option available, investors could refrain from investing in the country in question. The same interviewee felt the introduction of the MIC would reduce the likelihood of a number of investments.

Most interviewees expressed the concern that the MIC would eliminate the ability of parties to select the arbitrators, which they consider to be one of the most important features of the current ISDS system. Only two interviewees favoured the MIC, with one interviewee suggesting the MIC might offer

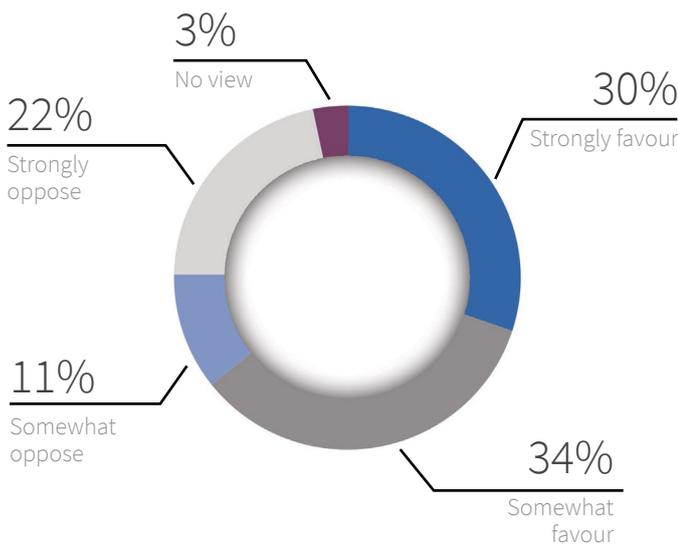
more efficient procedures, particularly if it can eliminate unnecessary delays in the constitution of tribunals. The same interviewee said that there should be some safeguards to ensure that the judges sitting on the MIC would not be subject to any political pressure. The same interviewee added that the introduction of the MIC might also address the perception that arbitral tribunals are investor friendly: states tend not to perceive existing arbitral institutions in a neutral way and that a multilateral court might be better perceived. The same two interviewees also felt that the multilateral court could be more efficient and speed up the dispute resolution process, with more standard procedures being followed and a quicker appointment process. They suggested that appropriate safeguards concerning the impartiality and neutrality of the judges should be in place.

Proposed areas for reform

7. Dispute prevention and the use of alternative dispute resolution

Mediation is increasingly thought about as a helpful mechanism to resolve, mitigate or prevent disputes. Respondents were asked whether they would welcome the introduction of a mandatory requirement to go through mediation before commencing arbitration proceedings. Respondents were given five options: 'strongly favour', 'somewhat favour', 'no view', 'somewhat oppose', 'strongly oppose'. Overall respondents considered the introduction of such requirement favourably (63%), with 34% of respondents 'somewhat favouring' and 30% of respondents 'strongly favouring' the proposal.

Chart 19: Views on mandatory mediation prior to arbitration



A mandatory mediation phase could undermine the position of investors and not encourage fruitful discussions.



Mediation is better suited than formal dispute resolution mechanisms to achieve the parties' commercial or business objectives as it has less of a negative impact on the parties' relationship.

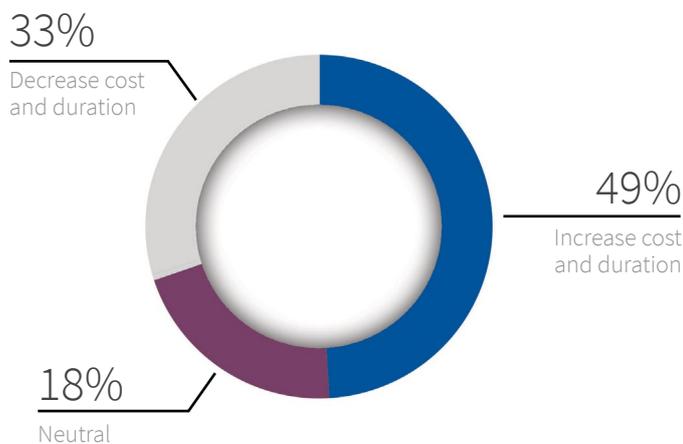
Proposed areas for reform

7. Dispute prevention and the use of alternative dispute resolution (continued)

The interviews allowed us to explore how investors might perceive the mediation of investment disputes. An interviewee expressed the view that mediation was not appropriate for all investment disputes and should therefore be available on a voluntary basis to the parties. This point was echoed by interviewees generally who said that mediation should not be forced upon the parties. Other comments made by interviewees were that:

- mediation is better suited than formal dispute resolution mechanisms to achieve the parties' commercial or business objectives as it has less of a negative impact on the parties' relationship;
- the commencement of formal proceedings and the institution of an arbitral tribunal can be used as leverage by the investor to get settlement discussions started with the state; and
- a mandatory mediation phase could undermine the position of investors and not encourage fruitful discussions.
- Finally, it was stated that mandatory mediation would constitute an unnecessary step for the parties towards the resolution of their dispute which would potentially lead to an increase in time and cost. In this respect respondents were asked what impact mandatory mediation would have on the cost and duration of ISDS proceedings on a scale from "0" (substantially reduce cost and duration) to "10" (substantially increase cost and duration). Respondents believed that the introduction of mandatory mediation would lead to an increase on costs, with the majority of responses ranging between 6-10 (49%). This finding was confirmed by interviewees, who expressed their concerns over the introduction of mandatory mediation with respect to the potential increase of time and costs.

Chart 20: Impact of mandatory mediation on cost and duration of ISDS



8. Binding treaty interpretation by states

If states issued treaty wording interpretations that are binding on ISDS arbitrators, would it affect investors' confidence in the ISDS system? Respondents were asked to rate the proposal from "0" (substantially undermine confidence) to "10" (substantially improve confidence). Just under half of the respondents indicated that the proposal if introduced would

undermine their confidence in the ISDS system (with 48% responses ranging between 0-4). 38% of respondents believe on the other hand that binding treaty wording interpretations issued by states would improve their confidence in the ISDS system (with ratings between 6 and 10).

Appendices

Methodology

The research for this study was conducted from November to December 2019 by Caroline Croft and Giammarco Rao, Research Fellows in International Arbitration, School of International Arbitration, Queen Mary University of London, together with Professor Loukas Mistelis, Clive M Schmitthoff Professor of Transnational Commercial Law and Arbitration and Professor Stavros Brekoulakis, Director of the School of International Arbitration, Queen Mary University of London. The other academic members of the School of International Arbitration have provided generous support through feedback on the questionnaire design.

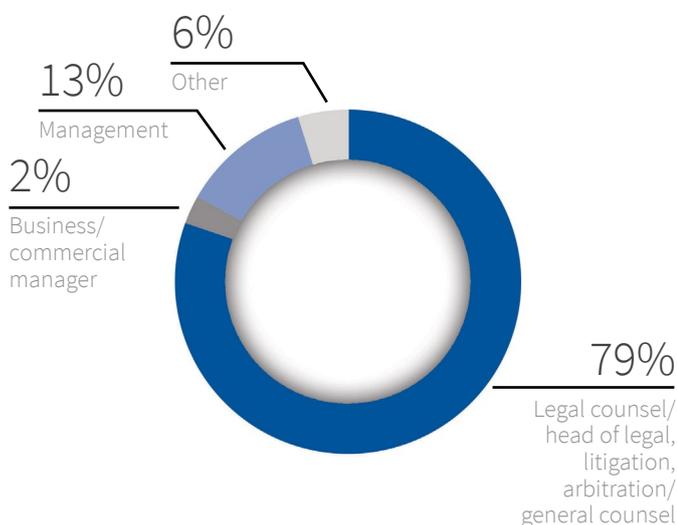
An external focus group comprised of senior in-house counsel, arbitrators and academics provided valuable feedback on the draft questionnaire.

The primary aim of this study was to identify the views of investors, as expressed by their in-house counsel and/or management representatives. This encompassed a number of other objectives, namely to:

- evaluate the use and effectiveness of the current arbitration system for the resolution of disputes between investors and states (the 'ISDS' system);
- evaluate the impact of potential reforms to the current 'ISDS' system;
- identify further ways or areas for reform; and
- challenge perceptions.

The study was divided in two phases: the first quantitative and the second qualitative.

Chart 21: Respondent's role



Phase 1: an online questionnaire of 52 questions was completed by 86 respondents between 28 November 2019 and 31 December 2019. Of 315 responses received, 86 came from eligible respondents. The survey sought the views of in-house counsel or management representatives of organisations that invest internationally. The respondent group consisted of legal counsel, heads of legal or disputes departments (79%), management representatives (13%) and business and commercial managers (2%). 5% were categorised as "other". Responses from respondents not falling within those categories have not been included in our final report.

Phase 2: 9 telephone interviews were conducted between 23 December 2019 and 16 January 2020. Interviews were based on a set of guideline questions and varied from 20 to 45 minutes. Interviewees were drawn from a group of respondents who expressed their willingness to participate in an interview. The qualitative information was used to provide context to the quantitative questionnaire data, to contextualise and explain the findings, and to cast further light on particular issues raised by the survey.

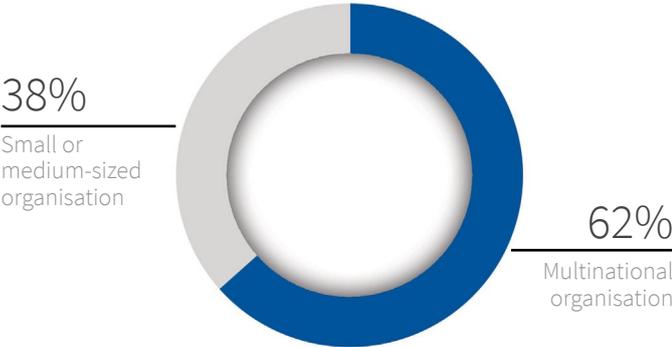
Respondent group

The data collected for this survey is based on answers received from corporate counsel and management representatives of organisations investing internationally. Ultimately, it is investors that are the beneficiaries and users of the investment dispute regime and, for this reason, this study explores the views and perceptions of those organisations, not the views of the external counsel representing them. Our respondent group comprised a majority (79%) of corporate counsel (with functions varying from that of legal counsel, Head of Legal / Disputes to General Counsel), a sizeable number (13%) of management representatives and a smaller proportion of business or commercial managers and other functions (7%).

A reference to 'respondents' in the report refers to those respondents who answered that particular question. The individual percentages have been rounded up or down to the nearer percentage point.

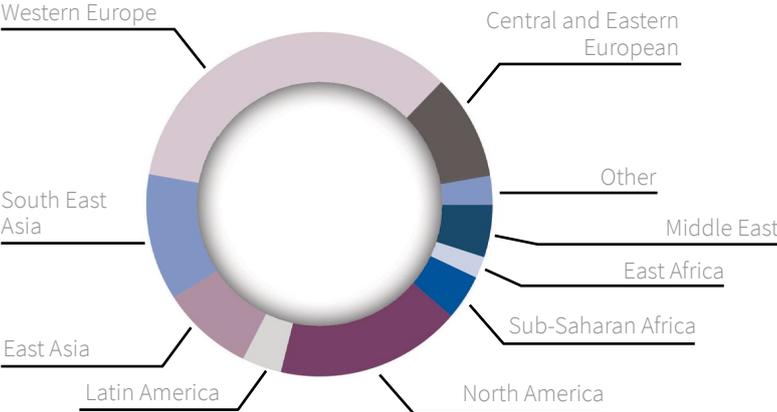
Methodology (continued)

Chart 22 - Q3: Nature of respondents



A large proportion of respondents (56%) work in organisations that invest in more than ten countries outside the parent’s company’s home country. The data collected in this survey reflect not only the positions and views of multinational organisations (62%), but also those of small or medium-sized organisations (38%). Our respondent group also show geographical diversity, with respondents based across all regions of the world.

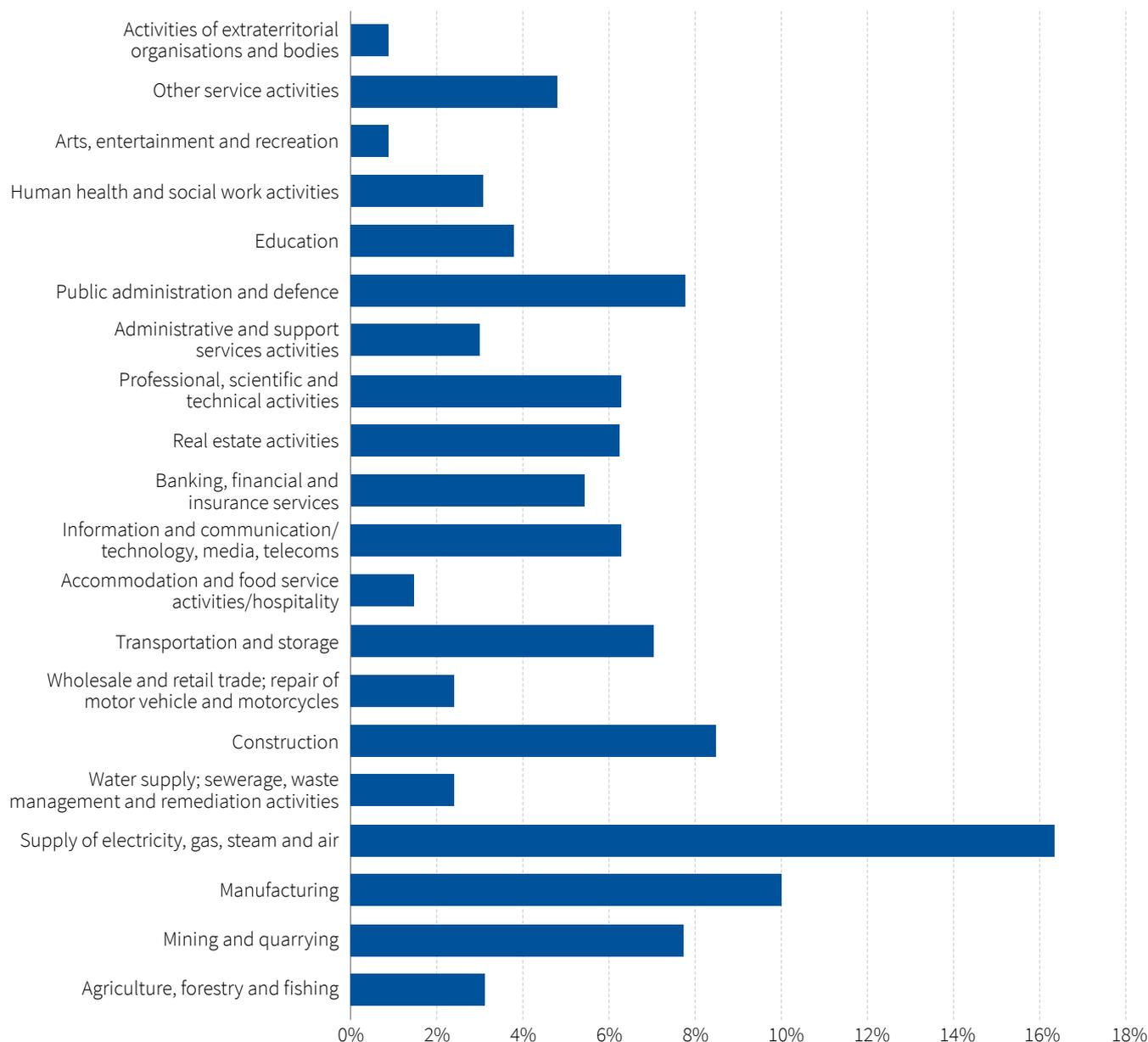
Chart 24: Regions of operation



Methodology (continued)

A large portfolio of industry sectors are represented, including energy and electricity (39%), manufacturing (24%), and construction sectors (20%).

Chart 25: Industries covered by respondents



Experience of ISDS

Respondents were asked about the number of investments disputes in which their organisation had been involved in the last ten years. The majority of respondents (67%) reported having experienced investment disputes. A third of respondents reported their organisation had been involved in over 7 disputes, another third said it had been involved in less than 7 disputes, with a third said they had not been involved in any investment disputes in the last ten years (33%).

School of International Arbitration, Queen Mary University of London

It is 35 years since the School of International Arbitration (the “School”) was established under the auspices of the Centre for Commercial Law Studies at Queen Mary University of London.

Its aim was, and still is today, to promote advanced teaching and produce excellent research in the area of international arbitration and international dispute resolution generally. To achieve these objectives, the School offers a wide range of international arbitration courses including specialist LLM modules, postgraduate diplomas, professional training and one of the largest specialist PhD programmes in the world. Today, the School is widely acknowledged as the world’s leading postgraduate teaching and research centre on international arbitration.

Since its establishment, more than 3,000 students from more than 100 countries have graduated from the School, and more than 30 PhD students have successfully completed their doctoral studies. Many of our graduates are now successfully practising arbitration around the world as advocates, in-house counsel, academics and arbitrators. Others serve governments, international organisations, including UNCITRAL and the World Bank, or work for major arbitration institutions.

From one academic member at the outset, the School now has a range of full teaching professors, readers and senior lecturers, a strong network of part-time and visiting academic

members, and campuses in London and Paris. Although the School is physically located in the centre of legal London, our faculty delivers courses all over the world and we offer distance learning diplomas in international dispute resolution, in addition to our London-based programmes. Apart from its academic staff, the School involves high-profile practitioners in its teaching programmes. This adds crucial practical experience to academic knowledge and analysis.

Further, the School has close links with major arbitration institutions and international organisations working in the area of arbitration. It also offers tailored consulting services and advice to governments and non-governmental agencies that wish to develop their knowledge of arbitration, as well as training for lawyers in private practice, in-house counsel, judges, arbitrators and mediators.

The strength of the School lies in the quality and diversity of its students and the desire of the School’s staff to shape our students’ academic and professional development. However, the work of the School extends well beyond the classroom and plays a leading role in the evolution of arbitration as an academic subject. Arbitration is a dynamic and adaptable process and so is the School in its profile and outlook.

For further information, please visit the School’s website: www.arbitration.qmul.ac.uk.

Corporate Counsel International Arbitration Group

The CCIAG was founded in 2004 and was registered as an Association in France in 2009. Its membership comprises lawyers with a particular interest in alternative dispute resolution mechanism employed in-house in companies. With a diverse, international membership working in a broad range of investment sectors, the CCIAG is well placed to express its members’ views on the topics under consideration. It has become known as the ‘voice of the users’ in international arbitration, and its advocacy now includes the topic of ISDS as well. As an accredited NGO to UNCITRAL, the CCIAG participates in the Working Group deliberations as an observer and in that capacity has been following the proposed reforms

to ISDS with interest. The need for data regarding investor perceptions of the current system and potential reforms became apparent in that context, and the CCIAG is particularly grateful to Queen Mary University of London for agreeing to undertake this exercise. The contributions of Professors Stavros Brekoulakis and Loukas Mistelis have been key in this respect, together with the significant work undertaken by Caroline Croft and Giammarco Rao who are the primary architects of the survey and prepared the report.

Acknowledgements

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We would also like to thank those who helped disseminating the questionnaire including the International Institute for Conflict Prevention & Resolution (CPR), the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ICSID), the Law Society of Scotland, the editors of OGEMID/TDM, the Hong Kong International Arbitration Centre (HKIAC), the Energy Charter Secretariat, the Centre for Effective Dispute Resolution (CEDR), the Stockholm Chamber of Commerce (SCC), the editors of Kluwer Arbitration Blog, Dr Crina Baltag and Philippe de Robert-Hautequère. Their support in reaching out to investors was significant.

We would also like to thank our internal and external focus group for feedback on the questionnaire and methodology.

Most importantly, we would like to thank all the respondents who generously gave their time in completing the questionnaire and being interviewed.



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