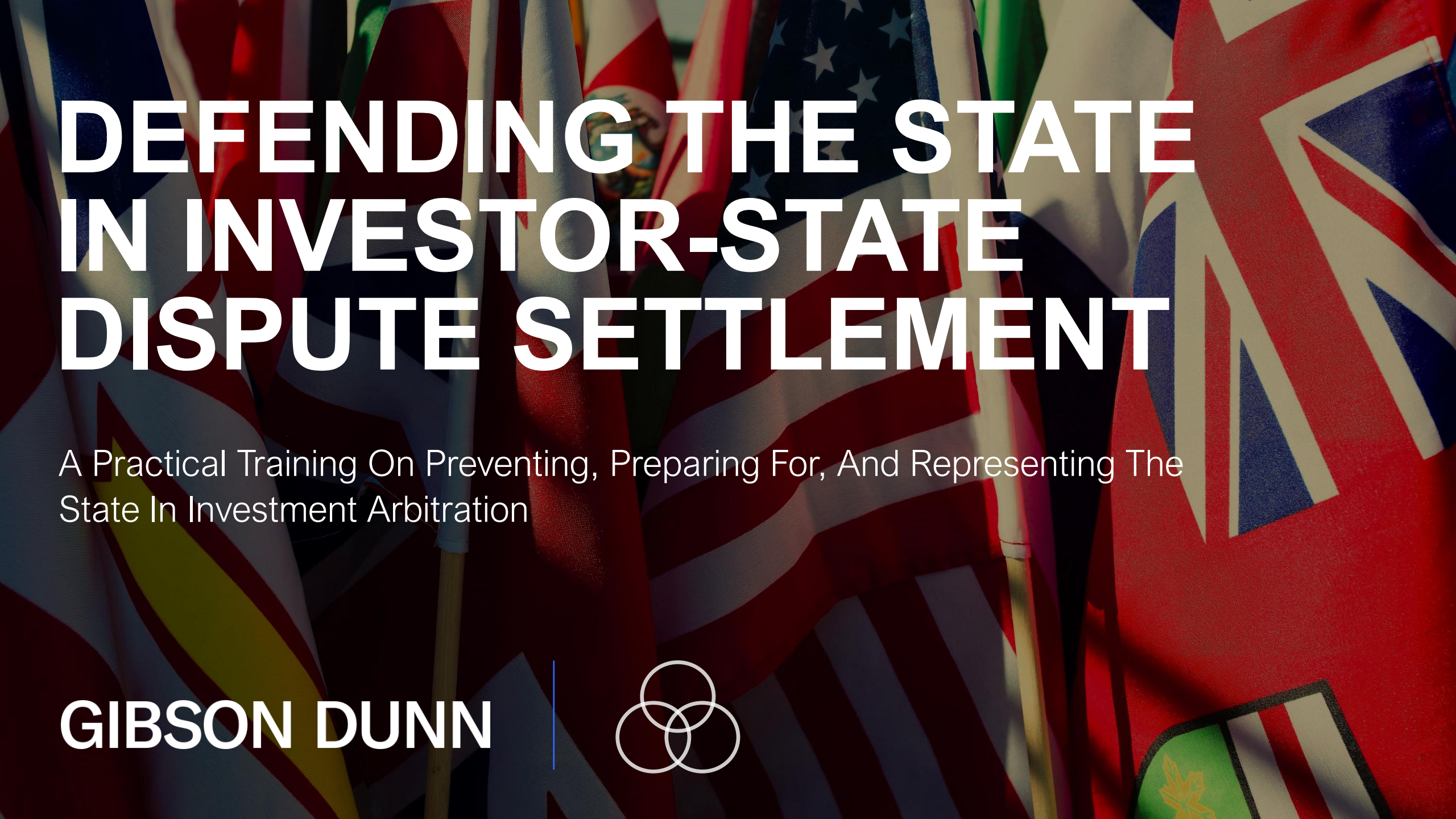


DEFENDING THE STATE IN INVESTOR-STATE DISPUTE SETTLEMENT

A Practical Training On Preventing, Preparing For, And Representing The State In Investment Arbitration

GIBSON DUNN

WHAT THIS TRAINING COVERS



01

ISDS in Context

The system, the recent caseload, and the three roles the State plays at once.



02

Preventing Disputes

Spotting investment-treaty risk early and building the capacity to avoid claims.



03

Representing the State

The twelve-step defense lifecycle, from choosing counsel to post-award.

ISDS IN CONTEXT

THE SYSTEM, THE CASELOAD, AND THE ROLES THE STATE MUST PLAY

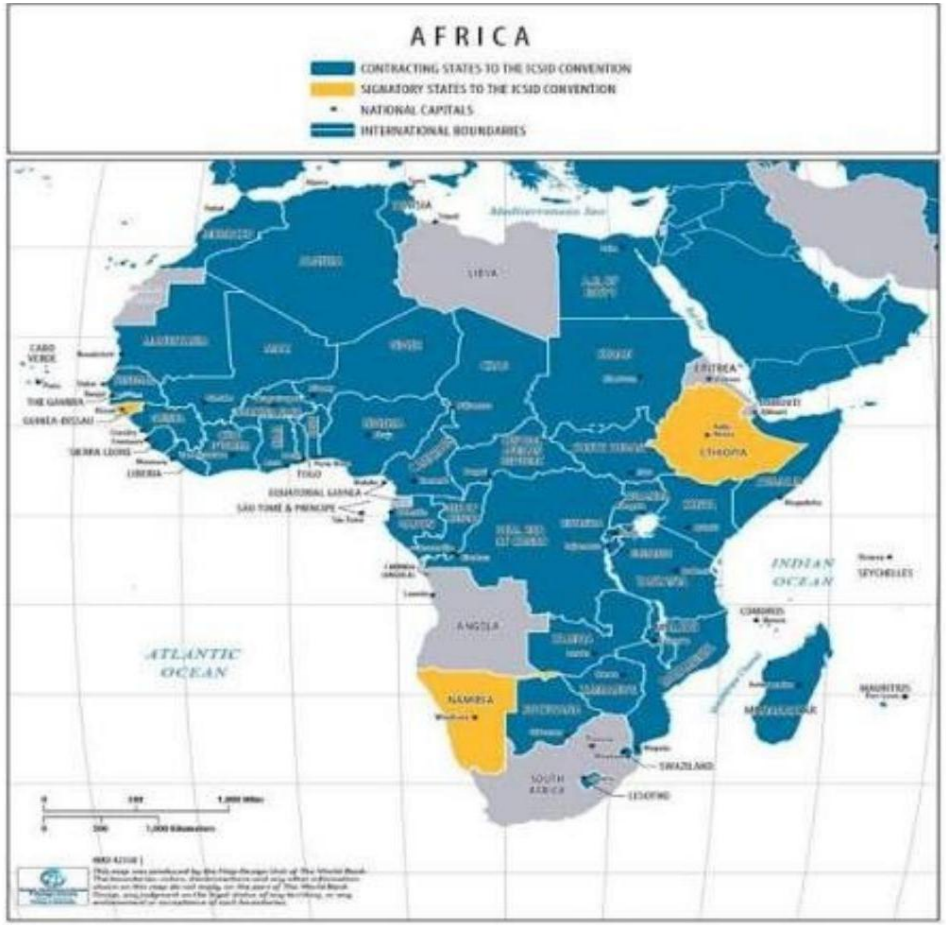


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01

THE ICSID SYSTEM

ICSID CONTRACTING AND SIGNATORY STATES IN AFRICA



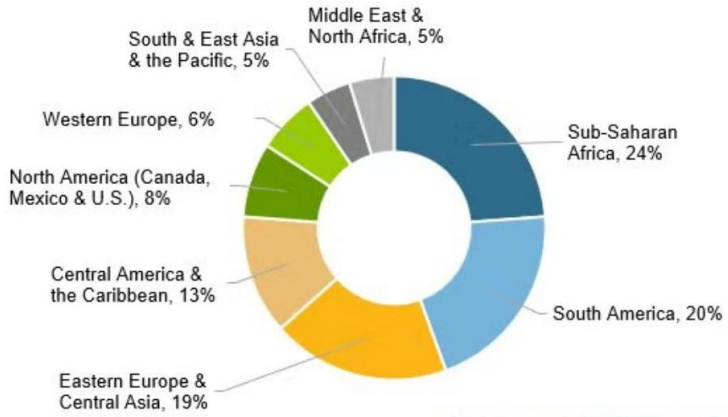
Most investment arbitration runs through the ICSID Convention.

- Contracting States have ratified the Convention and are bound by it, including its self-contained enforcement regime.
- Signatory States have signed but not yet ratified, so they are not yet bound.
- Across Africa, participation is broad, with only a handful of States still outside the system.
- Whether a State has consented to ICSID jurisdiction shapes where, and how, a claim against it can proceed.

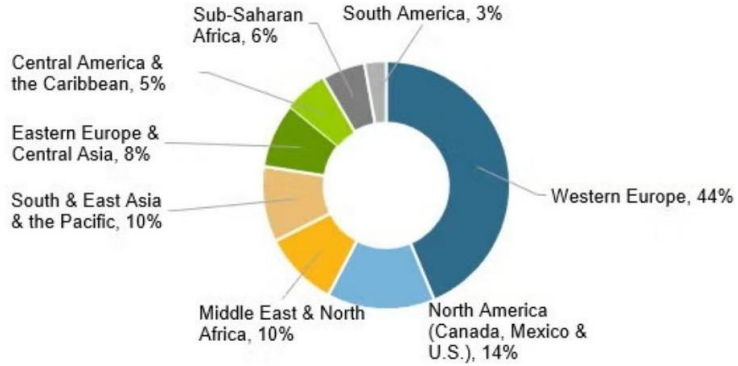
THE CASELOAD

WHERE CASES COME FROM: DISTRIBUTION BY JURISDICTION

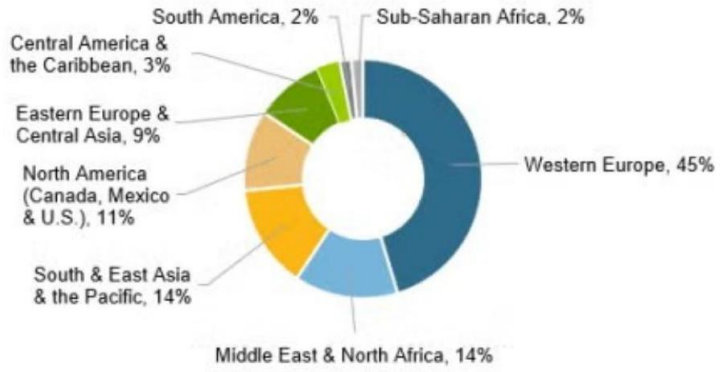
Distribution of ICSID Cases Registered in 2025, by State Party Involved



Distribution of ICSID Cases Registered in 2025, by Investor Party Involved



Distribution of ICSID Cases Registered in FY2026, by Investor Party Involved

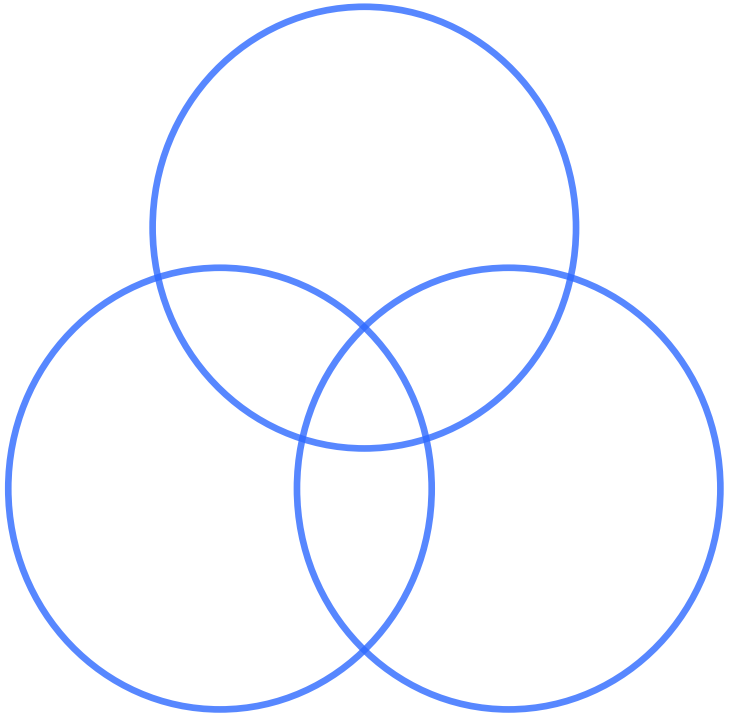


A global docket.

- Recent ICSID caseload, shown by the State party involved and by the investor's home region.
- Claimant investors are concentrated in Western Europe, which accounts for close to half of cases.
- Respondent States span every region, so no State should assume it is beyond reach.

THE STATE'S POSITION

THE ISDS "TRINITY": THREE ROLES AT ONCE



In ISDS, a State wears three hats at the same time.

Lawgiver

It writes the treaties and sets the rules of the system.

Respondent

It defends its own measures when an investor brings a claim.

Protector

It champions its own investors operating abroad.

THE STATE'S POSITION

THREE ROLES, THREE SETS OF INTERESTS

Lawgiver

INTEREST
Transparency, legitimacy, the rule of law, and consistent, correct treaty interpretation.

OBLIGATIONS
Owed primarily to other States.

Respondent

INTEREST
Protecting regulatory power and public-welfare measures, and keeping the process accepted by local constituencies.

OBLIGATIONS
Owed to investors, other States, and its own population.

Protector

INTEREST
A depoliticised dispute and an efficient, neutral forum for its investors abroad.

OBLIGATIONS
Owed primarily to domestic constituencies.

THE PROCESS

ANATOMY OF AN INVESTMENT ARBITRATION

Four phases, from first assessment to the award and beyond.

01

Preparation

- Assess the case
- Respond to the request for arbitration

02

Constitution

- Select arbitrators
- Constitute the tribunal
- First session / procedural hearing

03

Merits

- Written submissions
- Hearing(s)

04

Award & After

- The award
- Pre-award and post-award activity

PREVENTING DISPUTES

THE CHEAPEST ARBITRATION IS THE ONE YOU NEVER HAVE



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02

SPOT RISK EARLY

HOW TO PREVENT DISPUTES

Before acting, ask three questions

01 Is it a foreign investor?

02 Is it a foreign investment?

03 Will our action affect the investment or the investor?

If yes, act early

- Seek legal advice at the outset.
- Create a government-wide listserv and discussion board.
- Ask internal or external counsel for sector-by-sector updates.
- Designate a point of contact for investment protection and dispute prevention.
- Record your reasons and policy rationale, and keep a press and crisis plan ready.

BE READY BEFORE A CLAIM

BUILDING THE CAPACITY TO AVOID ARBITRATION

Readiness is institutional, not improvised.

Standard operating procedures

Route notices of intent and of arbitration (NOIs and NOAs) quickly to the responsible office.

Clear authority

Laws, regulations, and practices so the right office can represent the State.

Counsel on demand

The ability to designate qualified government or outside counsel without delay.

Adequate funding

Resources to pay for counsel, experts, and the tribunal.

THE HARD PART

THE CORE CHALLENGE: COORDINATION AND TIME

- The ministry that must coordinate the State's defense is usually not the ministry whose action caused the dispute.
- The defending ministry often knows nothing of the dispute or the underlying facts.
- Critical documents, and the witnesses who hold them, can be hard to reach across government.

Time is not on your side: claimants arrive prepared, and the State must catch up fast.

Many ministries

Scattered facts

The clock

WORK SMART

CONTROLLING COST AND RISK SYSTEMICALLY

Manage cost

- Consider establishing an international litigation fund.
- Even with outside counsel, keep cost down by handling work in-house where you can:
  - reviewing documents,
  - identifying and interviewing witnesses,
  - drafting memoranda, and researching legal and factual issues.

Use systemic controls

- Draft treaties carefully, ex ante, to narrow exposure.
- Issue joint interpretations with treaty partners.
- Make non-disputing party submissions in others' cases.

REPRESENTING THE STATE

THE DEFENSE LIFECYCLE



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THE DEFENSE LIFECYCLE

01 Designate counsel or trusted advisers

02 Constitute the tribunal

03 Assess the claim

04 Designate the lead State agency and secure funds

05 Preliminary objections

06 First procedural hearing

07 Provisional measures

08 09 Written and oral submissions

10 Non-disputing parties

11 Post-hearing submissions

12 Post-award



DESIGNATING COUNSEL

WHY THE STATE IS A UNIQUE CLIENT

Representing a State is not like representing a company.

- It is governed by public international law and sits outside the national courts.
- Public policy is on the line: regulatory authority, health, public welfare, and the environment.
- Disputes are usually public and scrutinised in real time, with civil society and industry watching.
- Claims are often for very large sums of money.
- Every pleading counts as State practice and must be carefully vetted.
- Several interests must be protected at once: regulatory and sovereign power, and the climate for foreign investment.

DESIGNATING COUNSEL

MODELS FOR SELECTING COUNSEL

Pre-vetted lists	*China, India*
Ad hoc RFPs	*Turkey, Thailand, Peru*
Single-source “go-to” advisers	*Czech Republic, Turkmenistan*
Blended in-house model	*Mexico, Colombia*
Fully in-house	*United States, Canada, Argentina, Spain*

Claimants are ready on day one. Choose counsel who grasp the responsibility of defending a sovereign, or be ready to get up to speed fast.

CONSTITUTING THE TRIBUNAL

- A State often has very little time to learn the case well enough to challenge the claimant's nominee; ICSID rules require that challenges be prompt.
- Weigh credibility carefully, and use letters and inquiries to supplement an arbitrator's disclosures.
- The State's own appointment must also be made quickly, often within 30 to 90 days.

30 TO 90 DAYS

a typical window to study the case and appoint

ASSESSING THE CLAIM

Two things to do immediately.

Early quantum assessment

Size the State's exposure at the outset so strategy and settlement can be judged against a realistic number.

Early meeting of relevant agencies

Convene the agencies that hold the facts and the stake, so the defense starts from a common understanding.

DESIGNATE AND EMPOWER A LEAD STATE AGENCY

Set it up

- Avoid inter-ministerial dysfunction in what is a whole-of-government effort.
- Formally designate a lead agency or group to guide the defense.
- Work out responsibilities with counsel.
- Give it authority to coordinate, direct, and recommend how disputes are prevented and managed.

Standing functions

- Advise agencies, including regional and local bodies, on treaty obligations.
- Support or lead treaty negotiations.
- Gather records and build institutional memory.
- Be the interlocutor for aggrieved investors and facilitate settlement.
- Collect evidence across agencies, and lead the defense when a dispute arises.

PRELIMINARY OBJECTIONS: ENDING A CLAIM EARLY

Three ways to bring an ICSID claim to an early end.

1

Screening on registration

The ICSID Secretariat declines to register where a dispute is manifestly outside the Centre's jurisdiction.

2

Manifest lack of merit

A showing that the claim manifestly cannot be granted by the tribunal.

3

Jurisdiction and competence

Objections to jurisdiction or competence, raised no later than the counter-memorial deadline.

Some treaties require the parties first to try consultation and negotiation, sometimes including non-binding third-party procedures.

THE FIRST PROCEDURAL HEARING

What gets settled early

- Soon after it is constituted, the tribunal fixes procedure with the parties.
- It settles the quorum, the language or languages, and how the record is kept.
- It sets what evidence and written statements each side will file, and by when.
- It applies the parties' own procedural agreements.

Key battlegrounds

- Bifurcation or trifurcation: ICSID and UNCITRAL rules let tribunals decide jurisdiction first, and States often request it here.
- Document production: States may need to withhold documents on security grounds, or struggle to obtain them from agencies and officials.
- Also on the table: place of arbitration, language, confidentiality, non-disputing party submissions, third-party participation, and the pleading schedule.

PROVISIONAL MEASURES

Either party may seek interim relief while the case runs.

Security for costs

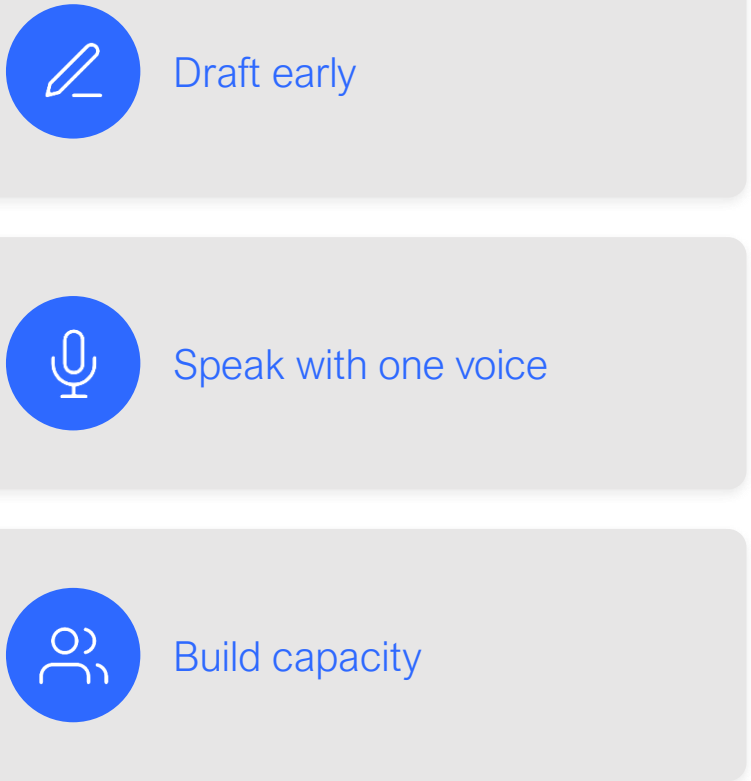
States often seek it where a claimant is behind on fees, is third-party funded, or may be hard to recover from if the State wins.

Restraining statements

A State may seek an order barring false or inflammatory statements that could harm the investment climate while the claim is pending.

WRITTEN AND ORAL SUBMISSIONS

- Draft early, and draw on institutional memory.
- Pleadings are increasingly public, which is often a good thing; decide how much transparency to build into the treaty itself.
- Relevant decision-makers and agencies should attend the hearings, and government officials should speak.
- Build capacity: prepare scripts and practise taking questions.



NON-DISPUTING PARTY SUBMISSIONS

- A system of control over how a treaty is interpreted.
- Useful teaching for other agencies, even when the State is not itself the respondent.
- Different from a joint interpretation (for example, under NAFTA, or the Czech Republic and the Netherlands).
- The United States, Canada, and Mexico have dozens of publicly available non-disputing party submissions.
- Mind the consultations they require, and the staffing they take.

POST-HEARING SUBMISSIONS

A final round that is easy to underestimate.

Plan for the extra cost

Post-hearing submissions are an additional expense that should be budgeted from the start.

Cost submissions

States may value the time of government counsel at a billable rate when claiming costs.

POST-AWARD

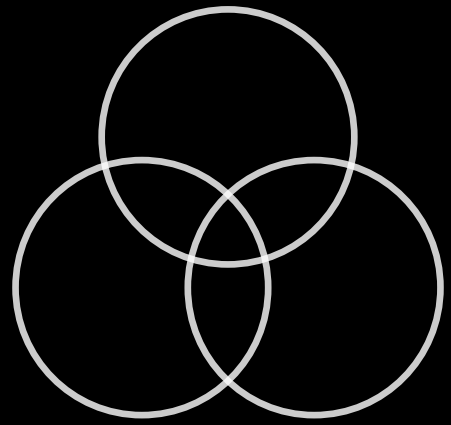
The case is not over when the award lands.

- Have a plan
- Have a press plan
- Ask for a heads-up before it issues
- Know your judgment fund
- Build in time for redactions

IN SUMMARY

KEY TAKEAWAYS

1. In ISDS, the State plays three roles at once: lawgiver, respondent, and protector.
2. The cheapest arbitration is the one you prevent: screen early and build readiness.
3. Designate a lead agency and empower it before a claim ever lands.
4. Move fast on counsel, the tribunal, and early objections, because claimants start ready.
5. Keep institutional memory; it wins the next case as much as this one.



THANK YOU

Christopher Harris KC & Patrick W. Pearsall

International Arbitration

GIBSON DUNN

This presentation is for training and general information only and is not legal advice.