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# Columbia Center on Sustainable Investment

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## Advocates Say ISDS Is Necessary Because Domestic Courts Are ‘Inadequate,’ But Claims and Decisions Don’t Reveal Systemic Failings

Maria Rocha, Martin Dietrich Brauch, and Tehtena Mebratu-Tsegaye<sup>1</sup>

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### 1 Introduction

Proponents of including investor–state dispute settlement (ISDS) provisions in treaties, contracts, and even national laws argue that ISDS is necessary because domestic courts are “inadequate.”<sup>2</sup> Without this mechanism, foreign investors would be dependent on domestic courts and administrative mechanisms, which, proponents claim, are often inefficient, slow, biased, corrupt, and lacking in international law expertise,<sup>3</sup> especially in developing countries. As one insight to analyze the “inadequate courts” argument, CCSI has examined treaty-based ISDS cases in which investors complained of domestic court proceedings or decisions, including the specific complaints and the tribunals’ analysis of those claims.

As of July 31, 2020, UNCTAD’s Investment Dispute Settlement database listed 1061 known ISDS cases (707 concluded, 347 pending, 7 with unknown status).<sup>4</sup> At that cut-off date, based on publicly available information—which is limited, particularly on pending cases—77 of the concluded cases and 43 of the pending cases relate or apparently relate to judicial proceedings or decisions. Accordingly, about 11% of known ISDS cases relate or seem to relate to domestic courts. Section 2 details the methodological approach used to identify court-related cases.

In the relatively small number of ISDS cases challenging court proceedings or decisions, investors were mostly unsuccessful. Arbitral tribunals have found that there were few (if any) deficiencies in domestic courts, with most awards in favor of respondent states (28) and many others rejecting the investors’ court-related claims; tribunals found that the conduct of the respondent states’ courts gave rise to a

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<sup>2</sup> See, e.g., Gabrielle Kaufmann-Kohler and Michele Potesta, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options*, European Yearbook of International Economic Law (2020), 20, [https://ik.com/wp-content/uploads/2020/07/2020\\_Book\\_Investor-StateDisputeSettlement.pdf](https://ik.com/wp-content/uploads/2020/07/2020_Book_Investor-StateDisputeSettlement.pdf).

<sup>3</sup> Ibid.

<sup>4</sup> “Investment Dispute Settlement Navigator,” Investment Policy Hub, UNCTAD, December 31, 2020, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

treaty breach in 12 cases. Section 3 presents statistical findings on the outcomes of the 45 concluded court-related ISDS cases for which an award on the merits is publicly available.

This analysis also shows that foreign investors are using ISDS to challenge domestic court proceedings and decisions even when there is no compelling evidence of bias, corruption, or other intentional or negligent misconduct by the courts. The claims related to domestic judicial systems include (1) challenges to court processes or decisions without exhausting local remedies, (2) requests for arbitral tribunals to redo or reinterpret unfavorable domestic court decisions, and (3) claims of undue delay when proceedings are ongoing in overburdened judiciaries. While in many cases, ISDS tribunals have rejected those claims or their own competence to entertain them, other tribunals have acted as supranational appellate bodies. This fuels critiques that ISDS undermines the role of domestic courts, weakens them over the long term, and creates parallel and unequal systems of law, undermining the rule of law. Section 4 discusses these uses of ISDS, preceding the conclusions and recommendations in Section 5.

## 2 Methodology

Court-related ISDS cases are those concerning claims related to judicial proceedings or decisions, based on both domestic and international law violations. In most cases, there are allegations based on international law, such as breach of fair and equitable treatment (FET), denial of justice, and indirect expropriation. Sometimes the alleged breach is based on courts' alleged violations of domestic laws.<sup>5</sup>

To identify court-related cases initiated between 1990 and mid-2014, the database of 584 cases prepared by Zoe Phillips Williams for her [Ph.D. dissertation](#) was used.<sup>6</sup> Based on a review of information and documents regarding arbitration proceedings available on various databases,<sup>7</sup> Williams found that 84 cases (including concluded and pending ones) challenged the decision of a domestic court case.

In addition, CCSI analyzed 61 other cases initiated between 1987 and 2016; those cases were not selected based on the above filters but were categorized as potentially involving the judicial branch based on certain keywords or were mentioned in arbitral awards or academic articles as containing references to domestic courts.<sup>8</sup>

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<sup>5</sup> For instance, in *Al Warraq v. Indonesia* the claimant alleged a denial of justice due to the claimant's trial and criminal conviction in absentia, as well as the violation of the laws in force in Indonesia, referring to the violation of the claimant's basic rights. (*Hesham T. M. Al Warraq v. Republic of Indonesia*, Final Award, December 15, 2014, paras. 600 and 649, <https://www.italaw.com/cases/1527>). Similarly, in *EBO Investment and others v. Latvia* the claimant alleged a failure to provide judicial due process, together with a denial of justice. (*Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, February 28, 2020, paras. 223 and 373, <https://www.italaw.com/cases/8031>).

<sup>6</sup> Zoe Phillips Williams, "Risky Business or Risky Politics: What Explains Investor-State Disputes?" (PhD dissertation, Hertie School of Governance, 2016), accessed November 2021, [https://opus4.kobv.de/opus4-hsog/frontdoor/deliver/index/docId/2369/file/Dissertation\\_Williams\\_Zoe.pdf](https://opus4.kobv.de/opus4-hsog/frontdoor/deliver/index/docId/2369/file/Dissertation_Williams_Zoe.pdf).

<sup>7</sup> [UNCTAD's Investment Dispute Settlement Navigator](#), [ICSID](#), [italaw](#), and [IAREporter](#).

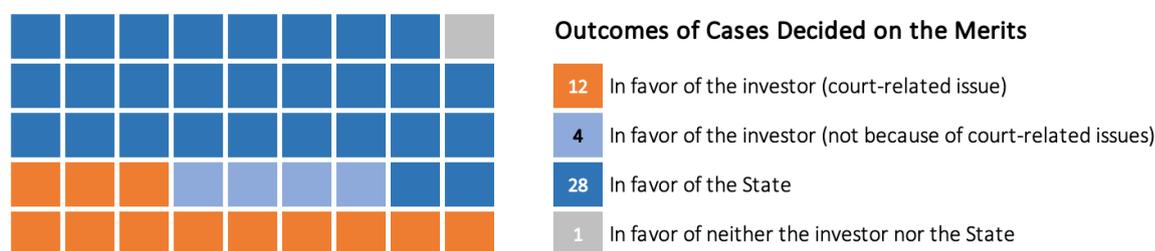
<sup>8</sup> Keywords searched include "court," "judicial," "judiciary," "judge," "judgment," and "litigation." Certain aspects of the proceedings and several awards are confidential, so the information reviewed is not exhaustive. The main sources used were UNCTAD's Investment Dispute Settlement Navigator, [italaw](#), and the ICSID website.

Finally, CCSI analyzed all 97 ISDS cases initiated between 2016 and July 31, 2020 for which information on alleged breaches is available on the [UNCTAD website](#). Among those, 46 mentioned domestic courts.

Accordingly, CCSI identified a total of 77 cases concluded between 1990 and 2020 as relevant. Of those 77 concluded cases, the 45 cases for which an award on the merits is publicly available were examined more closely;<sup>9</sup> Section 3 below zooms into the statistics.

### 3 Statistics on Court-Related ISDS Cases with a Public Award on the Merits

In the relatively small number of ISDS cases with a final award on the merits in which investors used ISDS to challenge domestic court “inadequacies” (45), tribunals found in favor of respondent states in most (28),<sup>10</sup> and in favor of neither disputing party in 1.<sup>11</sup> Of the remaining pro-investor awards, 4 were based on non-judicial breaches and 12 found in favor of the investor based on court-related issues.<sup>12,13</sup>



<sup>9</sup> This analysis left aside concluded cases that, though possibly relevant, were dismissed on jurisdictional grounds, settled, or discontinued, or in which the final award was not made public.

We found [Strabag v. Libya](#) to be relevant because, in the context of a jurisdictional objection raised by the Libyan state, the investor and the tribunal expressed their views on why Libyan courts might not be adequate to resolve the dispute. (*Strabag SE v. State of Libya*, ICSID Case No. ARB(AF)/15/1, Award, June 29, 2020, para. 208, <https://www.italaw.com/cases/8447>). However, the investor’s claims in the case were not related to any measures taken by the Libyan court system; rather, they complained of broader failures of the Libyan state. Therefore, we did not include this case in the statistics and analysis, considering that none of the allegations pertains to any perceived inadequacies or flaws of the court system.

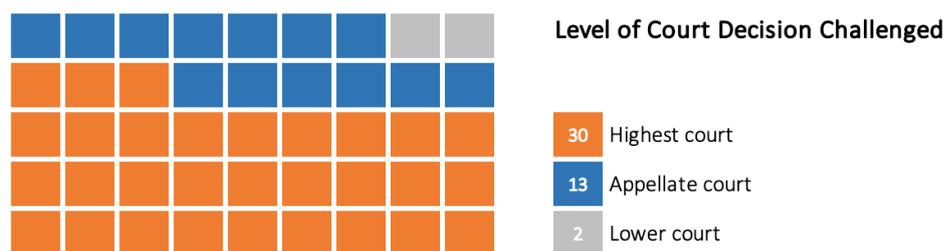
<sup>10</sup> Awards in favor of the state: [A.M.F. Aircraftleasing v. Czechia](#), [Alghanim v. Jordan](#), [Amto v. Ukraine](#), [Anglia v. Czechia](#), [Bosh v. Ukraine](#), [EBO Invest and others v. Latvia](#), [Eli Lilly v. Canada](#), [Frontier v. Czechia](#), [GEA v. Ukraine](#), [Griffin v. Poland](#), [H&H v. Egypt](#), [Helnan v. Egypt](#), [Jan de Nul and Dredging International v. Egypt](#), [Krederi v. Ukraine](#), [Lidercón v. Peru](#), [Liman Caspian Oil v. Kazakhstan](#), [Loewen v. USA](#), [Marfin v. Cyprus](#), [Mondev v. USA](#), [Nelson v. Mexico](#), [Oostergetel v. Slovakia](#), [Pantehniki v. Albania](#), [Philip Morris v. Uruguay](#), [Plama v. Bulgaria](#), [Roussalis v. Romania](#), [Tokios Tokelés v. Ukraine](#), [Vöcklinghaus v. Czechia](#), and [Waste Management v. Mexico \(II\)](#).

<sup>11</sup> Award neither in favor of the state nor the investor: [Al Warraq v. Indonesia](#).

<sup>12</sup> Awards in favor of the investor, breach not related to domestic court actions: [Arif v. Moldova](#), [Gavazzi v. Romania](#), [Olin v. Libya](#), and [Swisslion v. Macedonia](#).

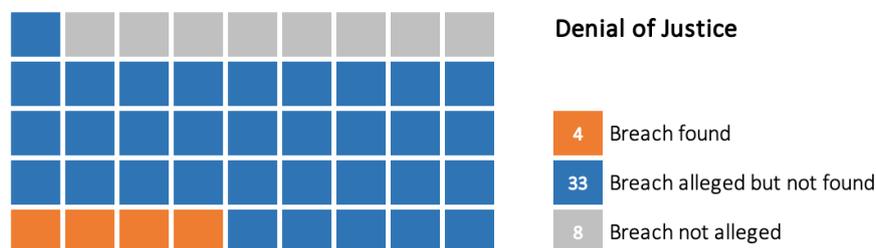
<sup>13</sup> Awards in favor of the investor based on domestic court actions: [ATA Construction v. Jordan](#), [Awdi v. Romania](#), [Chevron and TexPet v. Ecuador \(I\)](#), [Flughafen Zürich v. Venezuela](#), [Karkey Karadeniz v. Pakistan](#), [Manchester Securities v. Poland](#), [Rumeli v. Kazakhstan](#), [Saipem v. Bangladesh](#), [Sistem v. Kyrgyzstan](#), [Tatneft v. Ukraine](#), [White Industries v. India](#), and [Dan Cake v. Hungary](#). In *Dan Cake*, comments are only based on the [Decision on Jurisdiction and Liability](#) dated August 24, 2015, as the Award dated November 21, 2017 and the Decision on Revision dated February 25, 2020 are not public.

While most of investors’ judicial-related claims challenge decisions from the highest court (30), one-third of the cases concerned decisions by appellate (13) or lower courts (2).<sup>14</sup>



ISDS cases have often been brought against respondent states with strong adherence to the rule of law. In 21 cases (almost half of our sample) respondent states’ judicial systems are in the top half of Rule of Law rankings with a positive perception; 13 cases are against countries ranking in the top quartile of Rule of Law rankings.<sup>15</sup> Also, from our sample, ISDS has been used to resolve 17 disputes against a total of 10 Western democracies,<sup>16</sup> presumed to have strong property rights and sophisticated legal systems.<sup>17</sup>

Investors claimed a **denial of justice** in 37 of the 45 cases.<sup>18</sup> In the vast majority of cases (33), the tribunals considered that the threshold for denial of justice was not met. Tribunals rejected the claims on various grounds, including that there was insufficient evidence of a due process violation, that the concerns as to the judicial propriety of the outcome were unjustified, that instances of mere misapplication of domestic law did not violate due process, and that the investor failed to exhaust local remedies.<sup>19</sup> The evidence does not support the argument that investors need or turn to ISDS because they are unable to get justice before domestic courts.



<sup>14</sup> In 30 cases, the decision being challenged was from a supreme court or a high court. In 13 cases, the decision was from an appellate court. And in 2 cases, the decision was from a lower court.

<sup>15</sup> “WJP Rule of Law Index,” World Justice Project (WJP), 2021, <https://www.worldjusticeproject.org/rule-of-law-index/global>.

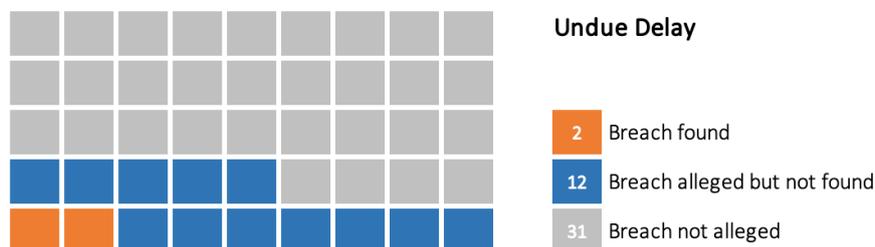
<sup>16</sup> Bulgaria, Canada, Cyprus, Czechia, Hungary, Latvia, Poland, Romania, Slovakia, and the United States of America.

<sup>17</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, para. 162, <http://www.italaw.com/cases/632>.

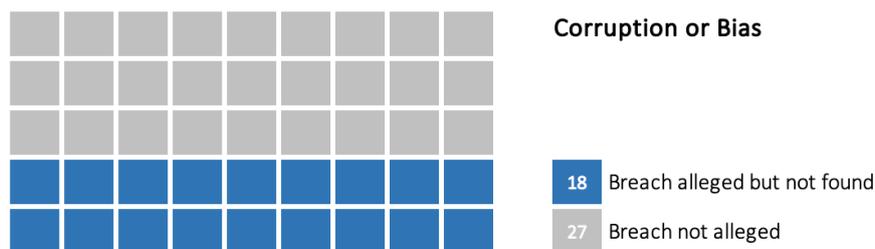
<sup>18</sup> Denial of justice found in: *Al Warraq v. Indonesia*, *Dan Cake v. Hungary*, *Flughafen Zürich v. Venezuela*, and *Manchester Securities v. Poland*.

<sup>19</sup> References to rejection of denial of justice claim: *Alghanim v. Jordan*, *Arif v. Moldova*, *Awdi v. Romania*, *EBO Invest and others v. Latvia*, *Frontier v. Czechia*, *GEA v. Ukraine*, *Liman Caspian Oil v. Kazakhstan*, *Mondev v. USA*, *Olin v. Libya*, *Oostergetel v. Slovakia*, and *Spyridon Roussalis v. Romania*.

In 14 cases,<sup>20</sup> investors brought claims based on **undue delay**. In 12 of those disputes, the tribunal found no breaches. In *Roussalis v. Romania*, for instance, the tribunal found no undue delay as it “did not exceed the threshold of reasonableness”;<sup>21</sup> and in *H&H v. Egypt*, the tribunal considered that the delay of the court was not a basis for denial of justice because “neither the Treaty nor international law establishes fixed time limits.”<sup>22</sup>



In 18 cases,<sup>23</sup> the investors claimed that domestic courts were **corrupt or biased**. All 18 of these claims failed. The tribunal in *Liman Caspian Oil v. Kazakhstan* confirmed that inferences of corruption because of possible irregularities in the treatment of the evidence by local courts do not meet the burden of proof for corruption.<sup>24</sup> The *EBO Invest v. Latvia* tribunal decided that the investor did not prove that the court proceedings “were tainted by bias, discriminatory behavior or any other impropriety.”<sup>25</sup> And in *Oostergetel v. Slovakia*, the tribunal stated that “the burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.”<sup>26</sup>



<sup>20</sup> Alleged undue delay: *A.M.F. Aircraftleasing v. Czechia*, *Amto v. Ukraine*, *Anglia v. Czechia*, *Chevron and TexPet v. Ecuador (I)*, *Frontier v. Czechia*, *H&H v. Egypt*, *Jan de Nul and Dredging International v. Egypt*, *Krederi v. Ukraine*, *Marfin v. Cyprus*, *Olin v. Libya*, *Oostergetel v. Slovakia*, *Plama v. Bulgaria*, *Roussalis v. Romania*, and *White Industries v. India*.

<sup>21</sup> *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 7, 2011, paras. 603–604, <https://www.italaw.com/cases/927>.

<sup>22</sup> *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB 09/15, Award, May 6, 2014, para. 405, <https://www.italaw.com/cases/1460>.

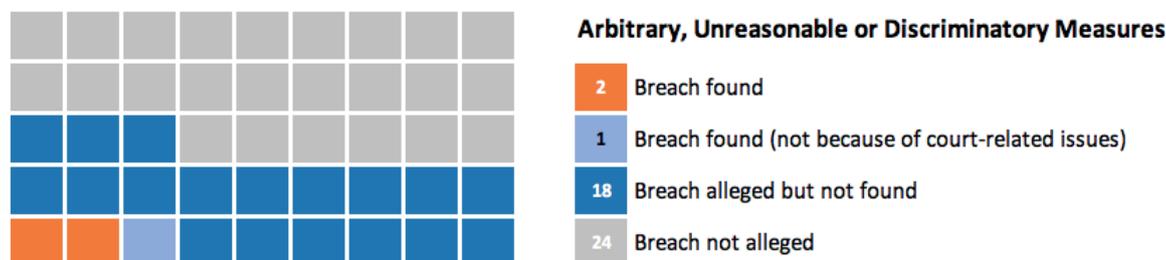
<sup>23</sup> Alleged corruption or bias: *Arif v. Moldova*, *Awdi v. Romania*, *Chevron and TexPet v. Ecuador (I)*, *EBO Invest and others v. Latvia*, *Flughafen Zürich v. Venezuela*, *Helnan v. Egypt*, *Jan de Nul and Dredging International v. Egypt*, *Liman Caspian Oil v. Kazakhstan*, *Lidercon v. Peru*, *Loewen v. USA*, *Olin v. Libya*, *Oostergetel v. Slovakia*, *Roussalis v. Romania*, *Rumeli v. Kazakhstan*, *Swisslion v. Macedonia*, *Tatneft v. Ukraine*, *Tokios Tokelés v. Ukraine*, and *Waste Management v. Mexico (II)*.

<sup>24</sup> *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award dated June 22, 2010 made pursuant to Rule 48(4) of the ICSID Arbitration Rules of 2006, June 22, 2010, paras. 422 and 424, <https://www.italaw.com/cases/1977>.

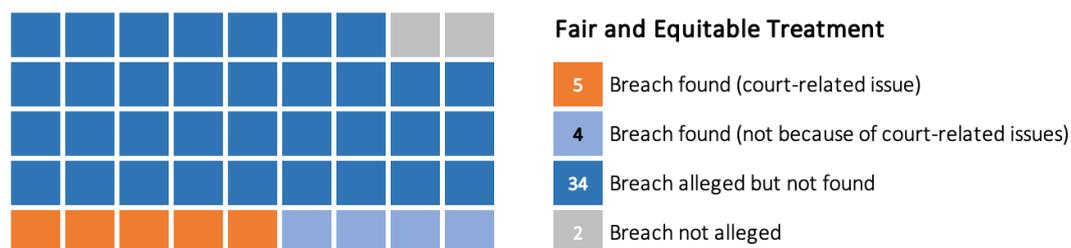
<sup>25</sup> *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, Award, February 28, 2020, ICSID Case No. ARB/16/38, para. 483, <https://www.italaw.com/cases/8031>.

<sup>26</sup> *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, April 23, 2012, para. 296, <https://www.italaw.com/cases/1222>.

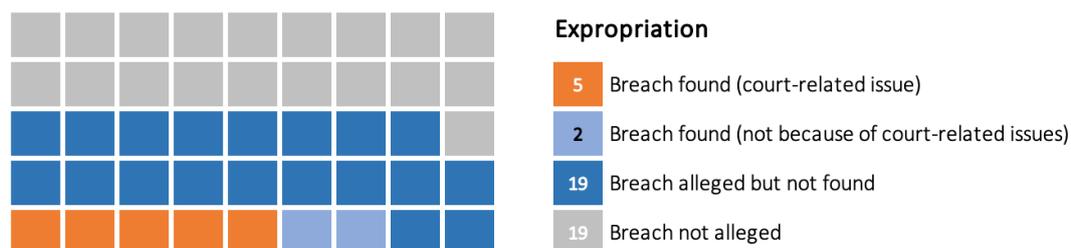
In 21 cases, investors brought claims based on **arbitrary, unreasonable, or discriminatory measures** by domestic courts, but failed in 18 of them. In [GEA v. Ukraine](#), for example, the tribunal found “no reason to believe that the courts of Ukraine were applying a discriminatory law,” finding only that “the Ukrainian courts came to a conclusion different to that which GEA had hoped.”<sup>27</sup> Tribunals only found state responsibility for those breaches in 3 of those cases, of which only 2 as a result from domestic court actions.<sup>28</sup>



The most common court-related claim brought by the investors is breach of **fair and equitable treatment (FET)**, which was alleged in 43 out of the 45 cases. FET was often alleged alongside other allegations of breach, as described above. It was also the breach most commonly found by tribunals, in 9 of the 45 cases. Yet in only 5 of those 9 cases, an FET breach was found due to domestic court actions.<sup>29</sup>



Investors alleged **expropriation** of their investments in 26 cases; tribunals found this breach in 5 cases due to the acts of domestic courts.<sup>30</sup>



<sup>27</sup> *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, March 31, 2011, para. 236, <https://www.italaw.com/cases/478>.

<sup>28</sup> Arbitrary, unreasonable, or discriminatory measures found in: [Dan Cake v. Hungary](#), and [Manchester Securities v. Poland](#).

<sup>29</sup> Breach of fair and equitable treatment found in: [Al Warrag v. Indonesia](#), [Awdi v. Romania](#), [Dan Cake v. Hungary](#), [Manchester Securities v. Poland](#), and [Tatneft v. Ukraine](#).

<sup>30</sup> Expropriation found in: [Flughafen Zürich v. Venezuela](#), [Karkey Karadeniz v. Pakistan](#), [Saipem v. Bangladesh](#), [Sistem v. Kyrgyzstan](#), and [Rumeli v. Kazakhstan](#).

Therefore, ISDS tribunals have rarely found breaches caused by domestic courts, such as a denial of justice; an arbitrary, unreasonable, or discriminatory measure; undue delay; expropriation; or a breach of FET. Put another way, in most of the 45 awards reviewed, tribunals did not find deficiencies in domestic court processes and decisions. The number of awards in favor of investors based on alleged judicial inefficiencies fades into even greater insignificance when one considers that these 45 cases were the limited set of cases in which investors were even alleging that the domestic processes were inadequate, corrupt, or biased, out of the more than 1,000 known ISDS cases.

## 4 Examining ISDS Claims Related to Domestic Court Decisions and Processes

Beyond the finding that most ISDS tribunals deciding court-related cases disagree with the “inadequate courts” argument, this analysis has evidenced uses of ISDS to challenge domestic court processes and decisions in ways that hinder, rather than advance, the rule of law in host states. This section discusses three sets of such claims: (1) court-related claims without prior exhaustion of local remedies, (2) claims seeking the reinterpretation of unfavorable domestic court decisions as if ISDS were a supranational appellate body, and (3) claims of undue delay in domestic court proceedings.

### 4.1 Court-Related ISDS Claims Without Prior Exhaustion of Local Remedies

The statistical analysis above notes that one-third of the concluded court-related ISDS cases analyzed challenged decisions by domestic appellate or lower courts. In international investment law, the mainstream interpretation is that the customary international law [requirement to exhaust local remedies](#) is waived unless expressly required by the treaty.<sup>31</sup> However, the fact that investors use ISDS to challenge lower and appellate court decisions is even more problematic, as appellate mechanisms and processes are specifically designed and empowered to correct errors of lower courts.

For example, the [Sistem v. Kyrgyzstan](#) tribunal analyzed a Kyrgyz district court decision determining that the investor’s share purchase contract was void, leading the claimant to lose all of the ownership rights it had in the hotel in which it had invested. The investor resorted to ISDS rather than appealing the district court decision. The ISDS tribunal found that the court decision amounted to an unlawful expropriation of property as no compensation had been paid,<sup>32</sup> consisting in a deprivation of property “just as surely as if the State had expropriated it by decree.”<sup>33</sup> The tribunal therefore determined that the host state’s judiciary expropriated property even though the highest authority within the host state’s judiciary never had an opportunity to pronounce itself on the matter, applying its own domestic law and available remedies.

Yet as some ISDS tribunals themselves have acknowledged, the misapplication of domestic law is not in and of itself a breach of treaty obligations; errors in the interpretation or application of domestic law do not necessarily constitute an international wrong, and there are often domestic remedies to correct them. Evidence of this approach includes the [Frontier v. Czechia](#) decision, where the tribunal

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<sup>31</sup> Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD Best Practices Series (Winnipeg: International Institute for Sustainable Development [IISD], 2017), <https://www.iisd.org/sites/default/files/publications/best-practices-exhaustion-local-remedies-law-investment-en.pdf>.

<sup>32</sup> *Sistem Mühendislik İn aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, September 9, 2009, para. 119, <https://www.italaw.com/cases/1506>.

<sup>33</sup> *Sistem v. Kyrgyz Republic*, para. 118.

recognized that “even if there was any procedural unfairness in the decision-making of the courts, ... the availability of full rights of appeal ... satisfactorily eliminated any procedural imperfections in the process which occurred in the lower courts.”<sup>34</sup>

The initiation of court-related ISDS claims without prior exhaustion of domestic remedies leads to disputes being taken prematurely to the international level. To ensure that the state is afforded “an opportunity to redress [an alleged violation of international law] by its own means, within the framework of its own domestic legal system,”<sup>35</sup> as indicated by the International Court of Justice in the *Interhandel* case, investors should be required to exhaust remedies within domestic legal systems to correct any alleged deficiencies in court decisions and processes before launching international arbitration. In addition to allowing correction of errors (likely at a lower cost than the cost of arbitration), exhaustion enables domestic courts to develop factual records; it enables them to hear from the disputing parties (as not all of those disputing parties will necessarily or even likely be able to participate in ISDS proceedings); and it enables them to more fully opine on, develop, and elaborate on substantive and procedural aspects of domestic law (which may have natural lacunae or be ripe for refinement or evolution).

#### 4.2 ISDS Cases Seeking Reinterpretation of Unfavorable Domestic Court Decisions

Rather than ensuring investors’ due process in local courts, ISDS instead has served as a privileged means of challenging unfavorable domestic court decisions or processes. In many cases, investors have resorted to ISDS as if it were a review instance, or a supranational appellate body, to oppose domestic court decisions or to challenge or seek the reinterpretation of domestic law as applied by a court.

For example, the tribunal in *Dan Cake v. Hungary* concluded that domestic court decisions declining to convene a composition hearing and imposing unjustified procedural obstacles resulted in denial of justice. The tribunal first recognized that its task was not to “determine whether it agrees, or disagrees, with the Metropolitan Court of Budapest as to whether the items required were indeed necessary. The Tribunal is not a court of appeal.”<sup>36</sup> Even so, the tribunal proceeded to analyze one by one the requirements established by the court and determined that “the decision ... was rendered in flagrant violation of the Bankruptcy Act and that it purported to condition the mandatory convening of the hearing upon several requirements, all of which were unnecessary.”<sup>37</sup> Though agreeing that the court had the power to impose additional necessary requirements, the tribunal’s denial of justice finding results from the tribunal’s different interpretation than that of the high court as to whether the requirements were, in fact, necessary and appropriate.

In *Rumeli v. Kazakhstan*, the investor challenged a domestic court process that had culminated in the Kazakh Supreme Court affirming the compulsory redemption of the claimants’ shares in a

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<sup>34</sup> *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, November 12, 2010, para. 410, <https://www.italaw.com/cases/459>.

<sup>35</sup> *Interhandel* (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, at 27 (Mar. 21), <https://www.icj-cij.org/public/files/case-related/34/034-19590321-JUD-01-00-EN.pdf>.

<sup>36</sup> *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, August 24, 2015, para. 117, <https://www.italaw.com/cases/1937>.

<sup>37</sup> *Dan Cake v. Hungary*, para. 142.

telecommunications company. Describing it as “a case of ‘creeping’ expropriation,”<sup>38</sup> the tribunal held that the domestic court system’s valuation of the claimants’ shares was “manifestly and grossly inadequate”<sup>39</sup> and, further, that it was “beyond doubt that expropriation was the intended consequence of the court orders for compulsory redemption of Claimants’ shares.”<sup>40</sup>

Finally, in the *Awdi v. Romania* case, the investor challenged a 2005 Romanian Supreme Court’s decision mandating that the claimants return their investment—a historic house called “Casa Bucur”—to the original owners, without compensation. Awdi claimed that the court decision constituted expropriation and a breach of FET. Romania alleged that the legal regime at the time was complex, and court decisions were divergent.<sup>41</sup> Similarly, a UN country profile noted that many titles were being contested in court, as there was insufficient information of previous titles as private land was transferred to the public domain and most of the registers lost.<sup>42</sup> The ISDS tribunal rejected the expropriation claim, but determined the court decision breached the claimants’ legitimate expectation to receive the price agreed for the purchase of the property, in breach of FET. In the same case, the investor also challenged a 2008 decision by the Romanian Constitutional Court declaring the unconstitutionality of Law No. 442, which had allowed the investor to negotiate land concessions for a separate investment in news kiosks. Here, the ISDS tribunal again found no expropriation, denial of justice, or arbitrary or discriminatory treatment, but again decided that the court decision frustrated legitimate expectations on which the investor relied when making the investment. With respect to both court decisions, the ISDS tribunal effectively gave the investor a chance to revise Romanian courts’ decision against it.

As the very limited number of successful judicial-related claims indicate, many ISDS tribunals have recognized that a mere disagreement with the reasoning of a domestic court does not allow an arbitral tribunal to consider that the domestic court “administered justice in a seriously inadequate way.”<sup>43</sup> ISDS tribunals are not meant to be assessing the conformity of domestic court decisions with domestic law,<sup>44</sup> or to “second-guess the decisions made by domestic courts or to act as a court of appeals.”<sup>45</sup> However, as evidenced by the cases discussed above, some tribunals—including among the limited number of successful investor claims—find both the jurisdiction and mandate to revise domestic decisions that are not deficient but simply unfavorable to investors. This use of ISDS undermines the lawful decisions of domestic courts and the proper functioning of domestic judicial systems.

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<sup>38</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, para. 708, <https://www.italaw.com/cases/942>.

<sup>39</sup> *Rumeli v. Kazakhstan*, para. 706.

<sup>40</sup> *Rumeli v. Kazakhstan*, para. 707.

<sup>41</sup> *Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, March 2, 2015, para. 427, <https://www.italaw.com/cases/101>.

<sup>42</sup> *Awdi v. Romania*, para. 428.

<sup>43</sup> *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020, para. 376, <https://www.italaw.com/cases/4414>.

<sup>44</sup> *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, para. 264, <https://www.italaw.com/cases/1516>.

<sup>45</sup> *Nelson v. Mexico*, para. 377.

### 4.3 ISDS Claims of Undue Delay in Domestic Court Proceedings

As noted above, in 12 of the 14 cases in which investors brought claims based on undue delay, the ISDS tribunals found no breaches by domestic courts in this regard. Yet, the 2 cases in which the investors obtained favorable decisions illustrate how ISDS can and does in practice work against improving the rule of law in domestic court systems.

In *Chevron and TexPet v. Ecuador (I)*, the respondent argued that a generalized backlog in the Ecuadorian courts explained and excused the delays. However, the tribunal held that the delays were excessively long to be excused and that court congestion could not serve as an absolute defense.<sup>46</sup>

In *White Industries v. India*, the tribunal considered that it was relevant “when examining the behavior of the courts, to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary.”<sup>47</sup> It concluded that the delay of the Indian Supreme Court was unsatisfactory in terms of efficient administration of justice, but did not constitute a denial of justice. Similarly, the tribunal found no breach of the claimant’s expectations regarding timely enforcement of the award because the claimant “either knew or ought to have known at the time it entered into the Contract that the domestic court structure in India was overburdened.”<sup>48</sup> Despite these ponderations, the tribunal concluded that:

The Indian judicial system’s inability to deal with White’s jurisdictional claim in over nine years, and the Supreme Court’s inability to hear White’s jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India’s ... obligation of providing White with “effective means” of asserting claims and enforcing rights.<sup>49</sup>

In both cases, the developing country respondents drew the ISDS tribunals’ attention to their under-resourced judicial systems, the backlog of cases, and the states’ active attempts to improve the situation through judicial reforms. Yet, ultimately, the tribunals gave greater weight to the investors’ privileged protections under international investment law and arbitration than to the respondents’ challenges and good-faith efforts to improve court systems for the benefit of all their potential users, whether domestic or foreign.

In addition, the often high expenditures by states in arbitration costs in ISDS cases, rather than being invested in general judicial reform, serve the interests of individual ISDS users and arbitrators in singular investment cases at the potential expense of a broader range of stakeholders—including foreign investors—who depend on domestic legal systems’ qualified and salaried judges for a suite of matters. In *Chevron I*, for example, Ecuador’s contribution toward tribunal costs amounted to €897,270.50.<sup>50</sup>

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<sup>46</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877, Partial Award on the Merits, March 30, 2010, para. 264, <https://www.italaw.com/cases/251>.

<sup>47</sup> *White Industries Australia Limited v. The Republic of India*, Final Award, November 30, 2011, para. 10.4.18, <https://www.italaw.com/cases/1169>.

<sup>48</sup> *White Industries v. India*, para. 10.3.14.

<sup>49</sup> *White Industries v. India*, para. 11.4.19.

<sup>50</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877, Final Award, August 31, 2011, para. 373, <https://www.italaw.com/cases/251>.

When accepted by tribunals, undue delay claims drain public budgets and reduce the amounts that governments can spend on investing in their courts. They also create an incentive for countries to institute special legal tracks for foreign investors, a response that creates tensions with efforts to ensure equal treatment under the law. Even assuming that there may be “inadequacies” in domestic courts and their proceedings, resource constraints are likely at the root of any such “inadequacies.” As the examples above demonstrate, however, ISDS is not the solution: it depletes state resources, diverting them away from improvements to judicial systems. The solution lies, not in ISDS, but in mechanisms to channel additional resources to domestic judiciaries.

## 5 Conclusion

This analysis of court-related ISDS cases reveals that investors are alleging inadequacies of local courts in only a minority of all ISDS cases. Of those claims, most have been dismissed; and, of the successful claims, some of the tribunals have found in favor of the investor because of the outcome of the domestic case even without a finding of lack of due process.

As noted above, as of July 31, 2020, there were 43 pending cases that appear to challenge domestic court proceedings and decisions. Even more notably, investors continue to use ISDS to circumvent domestic judicial systems altogether and to pursue a dispute settlement mechanism unconstrained by domestic rules and procedures or, indeed, by domestic law.

To the extent that domestic judicial systems are under-resourced or over-burdened, international mechanisms should seek to strengthen domestic judicial mechanisms, rather than proffering a privileged dispute resolution mechanism that allows foreign investors to bypass domestic courts or second guess their judgments, undermining their legitimacy and ability to develop the law over time. Strong domestic court systems are important for *all* stakeholders in a country, including but not limited to foreign investors. Including ISDS in treaties diverts host states’ attention and resources from further [strengthening domestic legal systems](#) to ensure access to justice for all.<sup>51</sup>

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<sup>51</sup> Lise Johnson, Jesse Coleman, Brooke Güven, and Lisa Sachs, “Alternatives to Investor-State Dispute Settlement” (CCSI Working Paper 2019, New York: CCSI, April 2019), <https://ccsi.columbia.edu/sites/default/files/content/pics/Alternatives-to-ISDS-11-April-2019.pdf>.