British Institute of International and Comparative Law

Economic Crimes in Investor-State Disputes

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Outline

- Economic crimes in investor-state disputes
- The standard of review
- Raising economic crimes when parties are silent
- Issues of jurisdiction and admissibility

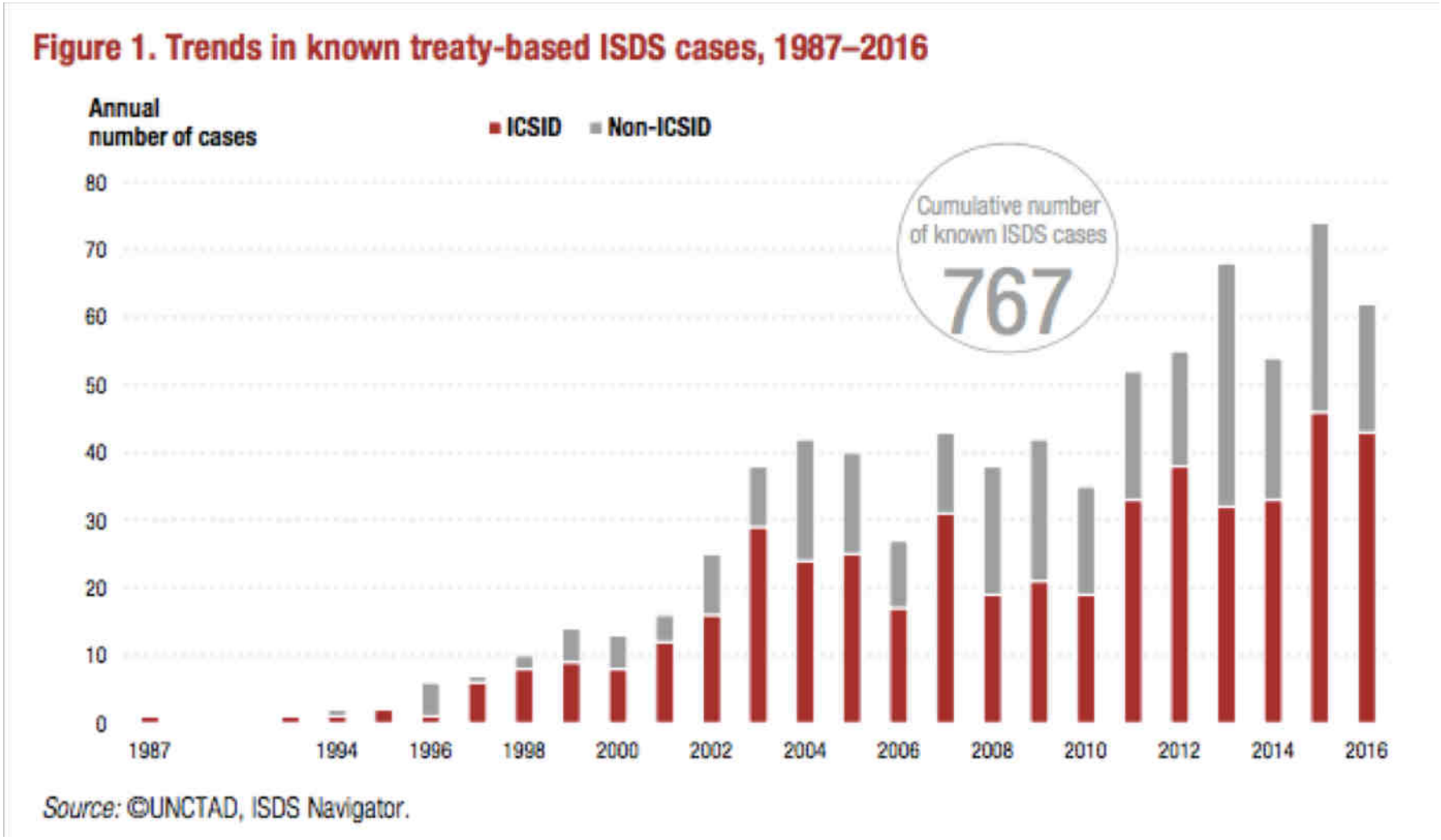
Economic Crimes in Investor-State Disputes

- **Investor-State disputes** – private investor is suing the foreign state on the basis of bilateral or multilateral treaties.
- When economic crimes are alleged in investor-state disputes, not only the State is a party to arbitration but it also **regulates**, **enforces laws**, **investigates** and **adjudicates** crimes on its territory.
- Different varieties of economic crimes which could surface in investor-state disputes include: **bribery**, **tax evasion**, various types of **fraud** such as customs, bank, accounting and securities fraud, and other types of misconduct.

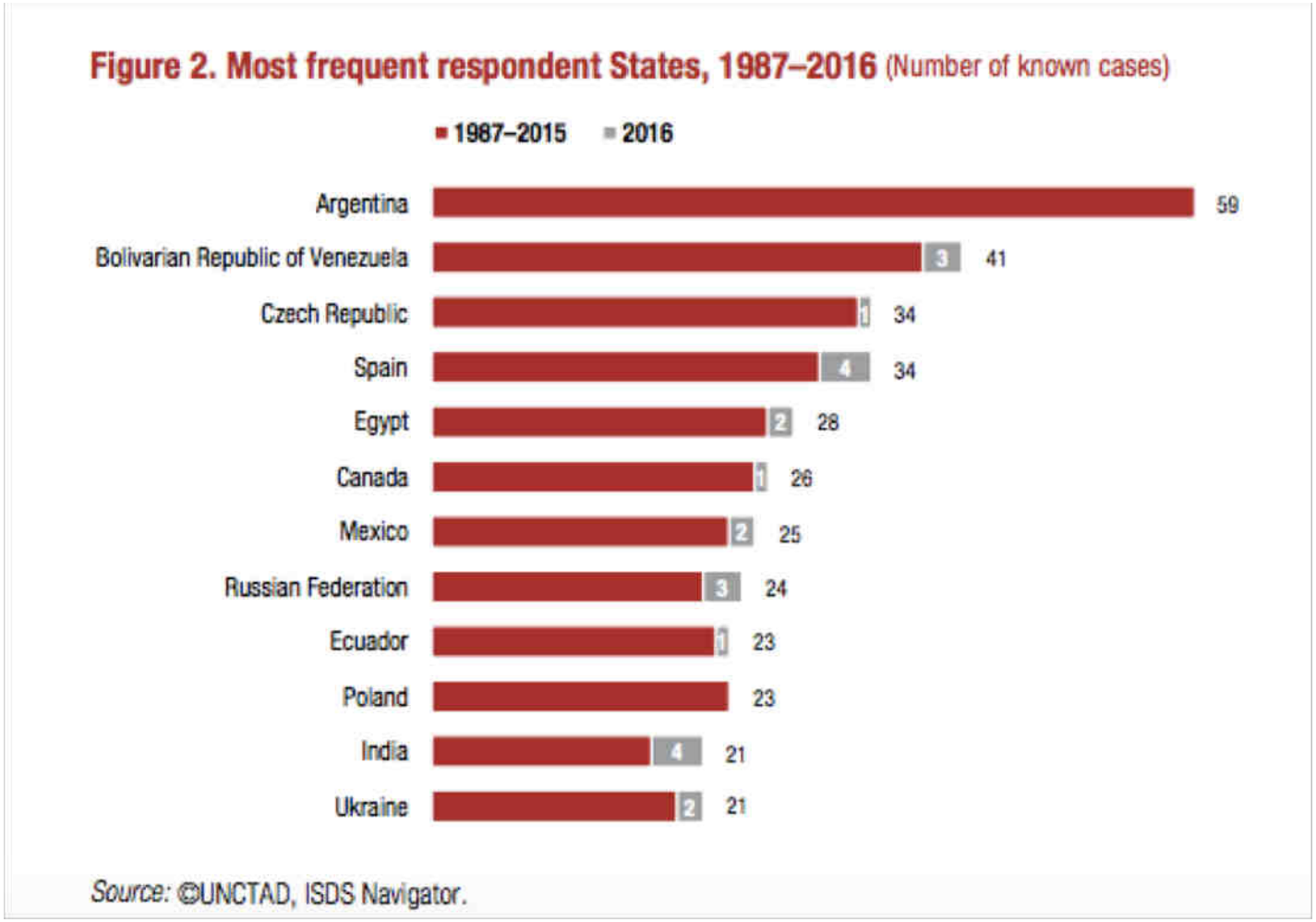
Economic Crimes in Investor-State Disputes

- It is not a normal task of **investor-state tribunals to decide on criminal liability** issues: the ICSID Convention & investment treaties do not regulate these matters.
- Tribunals do not have the **necessary powers and resources** to conduct independent criminal investigations.
- **International law does not protect investors from criminal prosecution**, which remains a sovereign power of the stated, but if the prosecution may breach international law standards.
- Criminal proceedings related to economic crimes could amount to **indirect or creeping expropriation**, **denial of justice** or **breach of the fair and equitable treatment** standard.

Growth of Investor-State Disputes

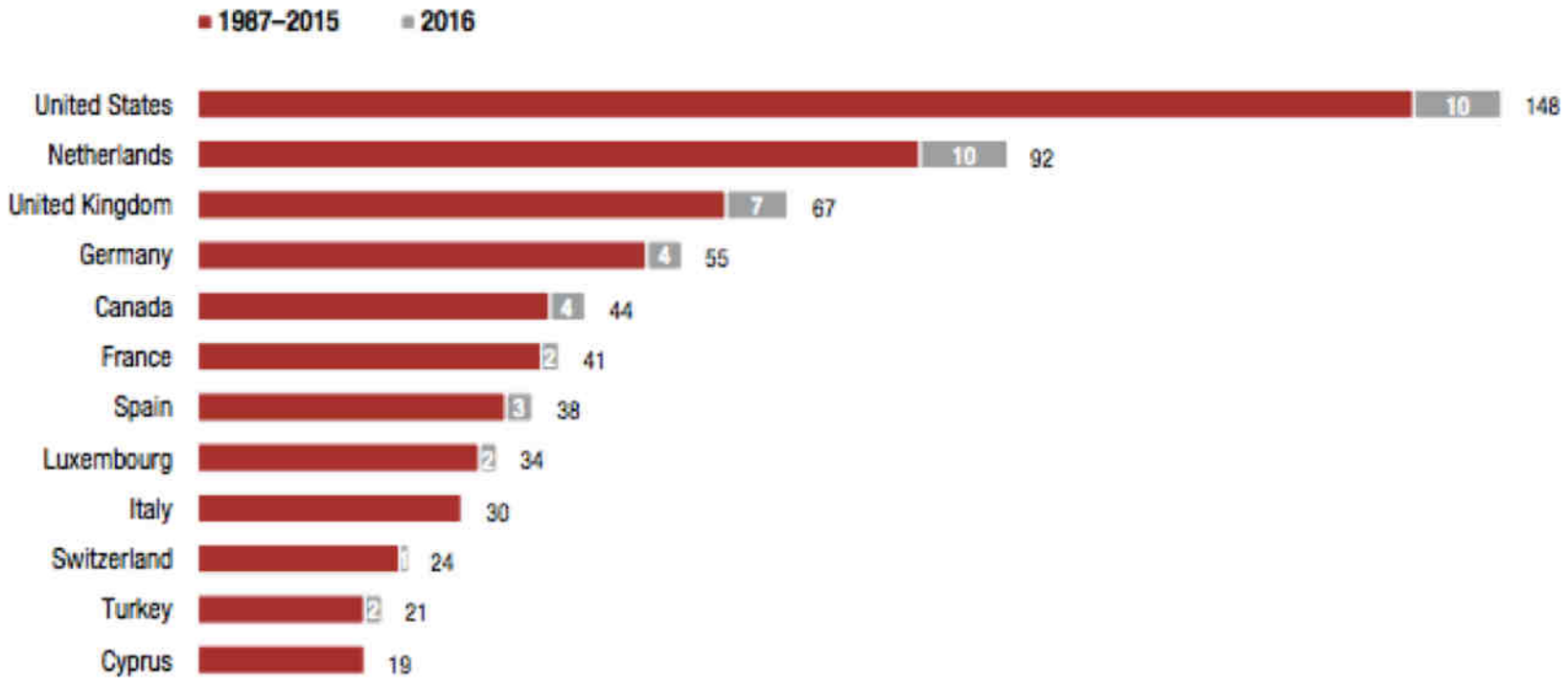


Most frequent respondents



Most frequent states of claimants

Figure 3. Most frequent home States of claimants, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

The standard of review

- The standards of review may vary from **full deference**, where the substantive determinations of the decision-makers are not questioned, to **no deference**, which amounts to a new revision, where the reviewing body reprocesses and revaluates the evidence, and takes the decision anew.
- In *Myers v. Canada*, the tribunal confirmed it did not have **"an open-ended mandate** to second-guess government decision-making'.
- In other case, tribunal concluded the arbitrators **are not superior regulators** and they do not substitute their judgment for that of national bodies applying national laws.

Should tribunals raise and investigate allegations of economic crimes on their own motion?

- The arbitrators **have a duty to render an enforceable award** may overlook the possibility of corruption and face having the award challenged based on public policy violations.
- However, raising the issues of corruption *sua sponte* as a matter of international public policy may also lead to **allegations that the tribunal went beyond its mandate** and challenges of the award under international and national regulations.
- The tribunals need to think of persuasive arguments to justify their *sua sponte* actions.

Should tribunals raise and investigate allegations of economic crimes on their own motion?

- *World Duty Free v Kenya* the tribunal made findings of corruption on its own motion, although **the claimant itself submitted** the necessary facts to establish corruption.
- In *Metal-Tech v. Uzbekistan* the corruption allegation was not part of **the respondent state's submissions**.
- Some tribunals **prefer not to engage** in what they consider purely domestic, general law disputes. (*Amco Asia v. Indonesia).*

Petty, Grand and Political Corruption

- **Petty corruption -** low- and mid-level public officials in their interactions with ordinary citizens, who often are trying to access basic goods or services.
- **Grand corruption** involves acts committed at a high level of government that distort policies or the central functioning of the state, enabling leaders to benefit at the expense of the public good.
- **Political corruption i**s a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth. It is not surprising that a number of investor-state disputes involved allegations of grant corruption or political corruption.

Standard of Review

- In most investor-state disputes, the tribunals did not find States to be liable when the investor alleged improper use of criminal proceedings.
- In *Tokios Tokelés v. Ukraine*, no **denial of justice** in a situation when criminal charges for tax evasion were discontinued and then twice revived, remained pending three years after the event, even though the tribunal was unable to rule out that the charges were aimed to put pressure on the investor to settle an expensive arbitration.
- **Suspicion of money laundering** could suffice to justify interlocutory measures to thoroughly investigate the allegedly suspicious activities.
- Tribunals seem to follow the logic that should **not "set itself up as a court of final review over criminal justice system of host States".** Instead, after reviewing individual allegations tribunals usually review "**the totality of alleged conduct"** to see whether they follow a certain underlying pattern or purpose rather than being "a scattered collection of disjointed harms".

Conclusions

- The most challenging aspect of interaction between investor-state tribunals arises when tribunals **deny admissibility** and **jurisdiction on the basis of allegations economic crimes**
- **Clarifying the standard of review** would help to have more certainty with legal remedies and sanctions adequate
- Appropriate review and more references to global standards may mitigate some elements of the frequently asserted **‘‘legitimacy crisis’’** of, and ‘‘backlash’’ against, investment arbitration’
- This will be covered in my next presentation at the 2 pm panel.