



British Institute of
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Investments Subject to Screening



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The Emerging Law of Investment Control in Europe: Screening, Sanctions and Subsidies
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Definition of foreign investors and investments to be protected

- Definition of foreign investors and investments to be protected
- Criteria in international investment treaties
- Criteria in decisions of arbitration tribunals
- Criteria in national legislation
- Recent reforms
- Possible approaches to identifying foreign investors
- Empirical evidence from investor-state tribunals

Direct and portfolio investments

Direct investments	Portfolio investments
<ul style="list-style-type: none">• Transfer of funds• Long-term projects• Participation by the investor in management of a project• Business risk• Example: buying an oil refinery to actively run it	<ul style="list-style-type: none">• Transfer of funds• Long-term or short-term investment• No participation in management of a project• Investment risk• Example: buying shares or bonds of an oil refinery to passively earn regular income

Subjects of FDI screening: “foreign investors”

Member State	Definition	Member State	Definition
AT	non-EU/EEA/Switzerland	LT	non-EU/NATO/EFTA/OECD
CZ	non-EU	LV	do not distinguish domestic and foreign investors
DE	non-EU/EFTA	MT	non-EU
DK	War materials: non-national; Continental shelf: do not distinguish domestic and foreign investors	NL	do not distinguish domestic and foreign investors
ES	non-EU/EFTA	PL	non-EU/EEA/OECD
FI	non-EU/EFTA	PT	non-EU/EEA
FR	non-national/national who is not domiciled in France within the meaning of French General Tax Code	RO	do not distinguish domestic and foreign investors
HU	non-EU/EEA/Switzerland	SI	non-national
IT	non-EU	UK	do not distinguish domestic and foreign investors

Criteria in international investment treaties

Regulators face three specific challenges because of claims brought by:

(i) mailbox companies

(ii) foreign entities controlled by an entity in the host State

(iii) entities that own the investment and are specifically set up in anticipation of a claim (“urgent restructuring”).

Report of ICSID Executive Directors

“No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre.”

Criteria in international investment agreements

Approaches to the definition of the term "investor"

- The incorporation approach
- Control-based approach
- Location-based approach
- Integrated approaches

Criteria in international investment agreements

- The mailbox company problem
- Carrying out "significant business activities":
 - The nature of the organization
 - Organization employees
 - Physical presence
 - Effective control

Criteria in decisions of arbitration tribunals

The Salini test provides:

- (1) contribution of money or assets
- (2) a certain duration
- (3) element of risk
- (4) contribution to the economic development of the host state

Criteria in decisions of arbitration tribunals

Criteria for effective control:

- Ability to effectively make and implement key business decisions of the enterprise
- Participation in the day-to-day management of the organization
- Access to know-how

Criteria in decisions of arbitration tribunals

Criteria for material business activities

- The place where the board of directors meets and the availability of board minutes
- Permanent physical presence
- Availability of permanent staff
- Active ownership of shares in subsidiaries

Other questions

- Violation of contractual obligations as a violation of international law
- Umbrella clauses
- Investment disputes involving legal entities that are directly or indirectly owned by the state

Criteria in national legislation

- Separate legal regime for foreign investors or treat them as domestic investors?
- Combination in determining foreign investors the place of registration and the criterion of control
- Investment disputes related to issues of public law and the right to regulate

Recent reforms

Various states are trying

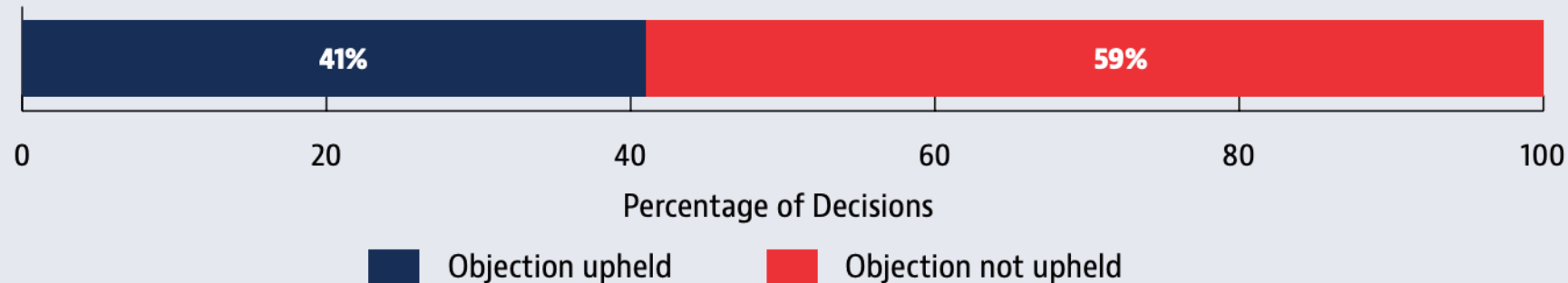
- balance their right to regulation with the need to protect investor rights with the need to optimize the dispute resolution system
- narrow the definition of foreign investment for arbitration purposes
- narrow the range of substantive protections in international treaties
- limit dispute resolution provisions through arbitration to only determining the amount of compensation due
- avoid the system of investor-state arbitration
- impose additional restrictions related to national security

Territorial nexus and jurisdictional overlap

- Regulation by the host state
- Regulation by the home state (including exteterritorial)
- Jurisdiction of domestic courts in the host state
- Jurisdiction of domestic courts in the home state
- Jurisdiction of international tribunals

Objections based on definition of investment

Chart 28: Definition of investment – success rate of objection

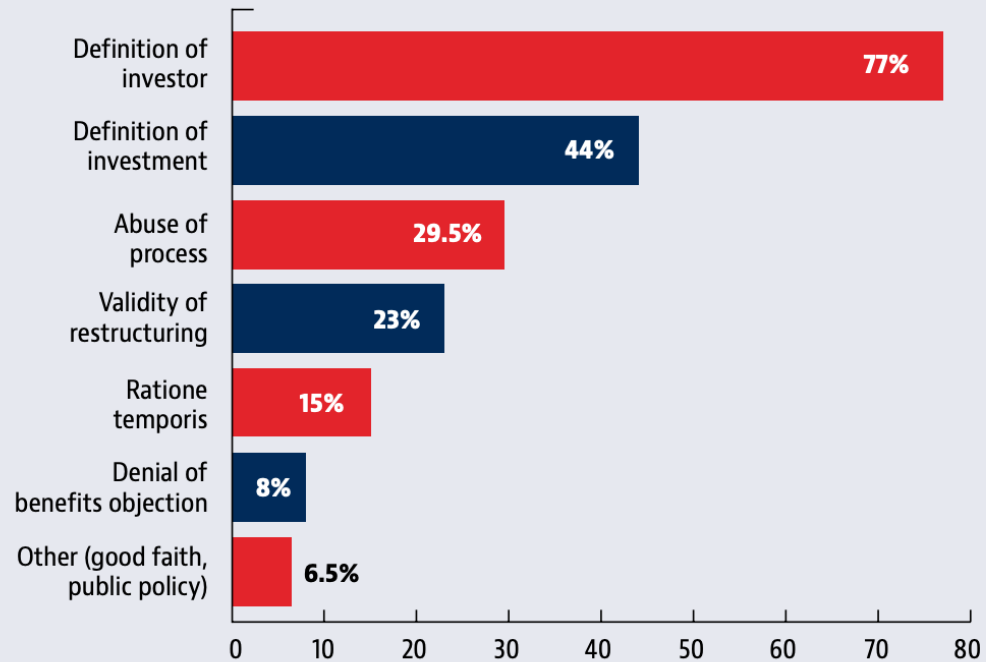


Based on 27 analysed decisions

[Empirical Study: Corporate Restructuring and Investment Treaty Protections](#), BII/CL/Baker McKenzie (2020)

Corporate restructuring objectives in ISDS

Chart 26: Most commonly raised objections to corporate restructuring by respondent states

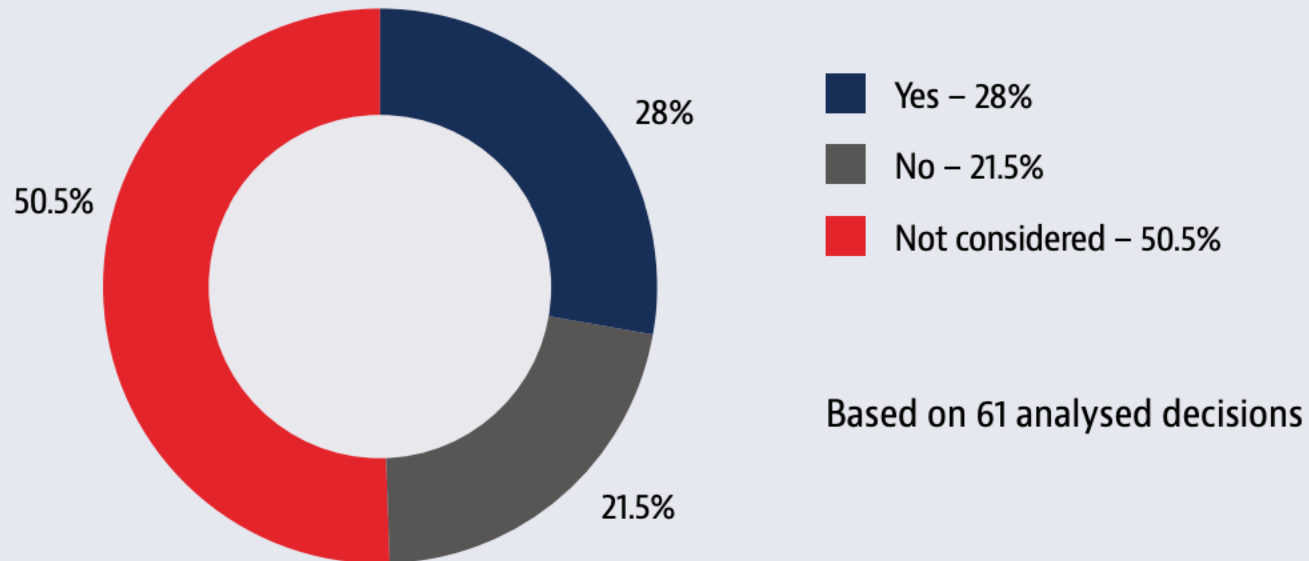


Based on 61 analysed decisions

[Empirical Study: Corporate Restructuring and Investment Treaty Protections](#),
BIICL/Baker McKenzie (2020)

Conducting a genuine economic activity

Chart 40: Was any economic activity performed or genuinely intended by the post-restructuring investor? – tribunals' findings



[Empirical Study: Corporate Restructuring and Investment Treaty Protections](#),
BIICL/Baker McKenzie (2020)

Possible approaches to identifying foreign investors and resolving disputes

Option 1: Not to create additional benefits and special dispute resolution procedures for foreign investors

Option 2: Define foreign investors according to the criterion of formal incorporation

Option 3. Identify foreign investors on the basis of an integrated approach, taking into account the implementation of real commercial activities and being under the control of a foreign investor (ultimate controlling party)



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