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IBA Subcommittee on Investment Treaty Arbitration

Report on the Subcommittee's Investment Treaty Arbitration survey

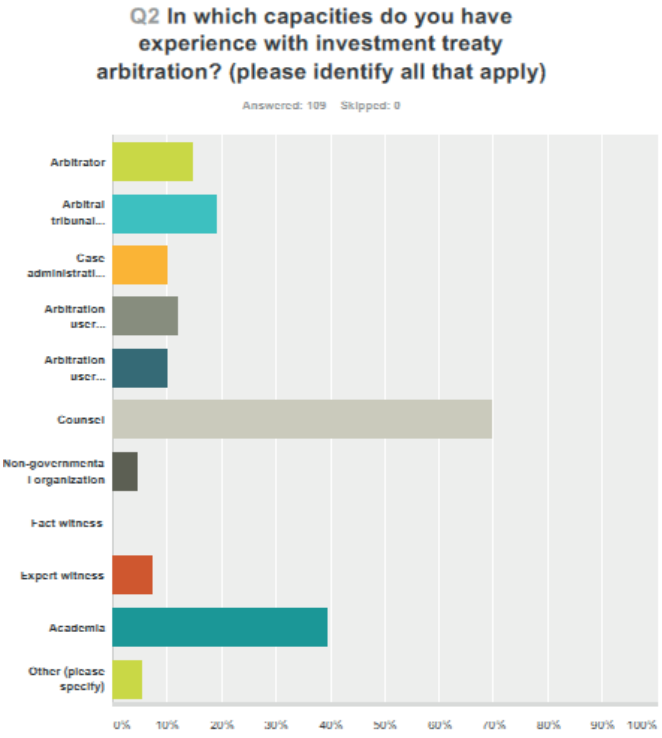
May 2016

Introduction

In 2014 the Subcommittee decided to examine the apparent increase in criticism levelled at investment treaty arbitration and the extent to which such criticism was justified and warranted reform.[1] To inform its work, the Subcommittee, with the input of a core advisory committee consisting of members offering a variety of perspectives on investment treaty arbitration,[2] developed a survey questionnaire to gather information and views based on users' practical experience of the system (eg, states, investors, institutions, and practitioners) and the views of its observers (eg, academics and non-governmental organisations).

The survey questionnaire consisted of 51 questions on a range of topics frequently raised in discussions on system reform. In response to the survey, the Subcommittee received input from 109 individuals from a variety of jurisdictions across the globe.

The survey respondents have a variety of experiences in investment arbitration that includes roles as arbitrator, tribunal secretary, case administrator, arbitration user, counsel, and expert witness, as well as in non-governmental organisations and academia.[3]



Nearly 80 per cent of respondents had experience in one capacity or another of ICSID arbitration; over 70 per cent indicated experience with investment treaty arbitrations under the UNCITRAL Arbitration Rules; and between 15-30 per cent stated that they had experience in investment treaty arbitrations under each of the ICSID Additional Facility Rules, the ICC Rules, and the SCC Rules.

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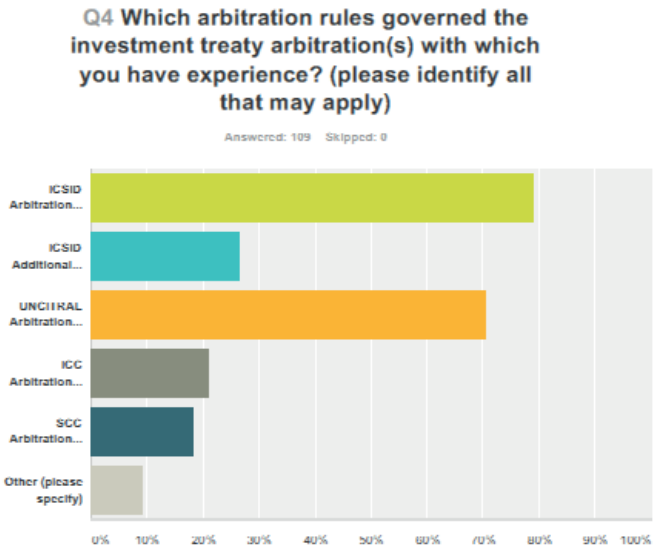
1 The members of the Subcommittee are listed at the end of this report. They include government officials, representatives of arbitral institutions, corporate counsel, arbitrators, and arbitration counsel.

2 The members of the Core Advisory Committee are listed at the end of this report. Their comments were processed with the assistance of Ben Love, Manish Aggarwal, Noradele Radjai, Swee Yen Koh, and Angeline Welsh.

3 Note that none of these identifiers was exclusive of the other – eg, survey takers could record experience as both counsel and arbitrator.



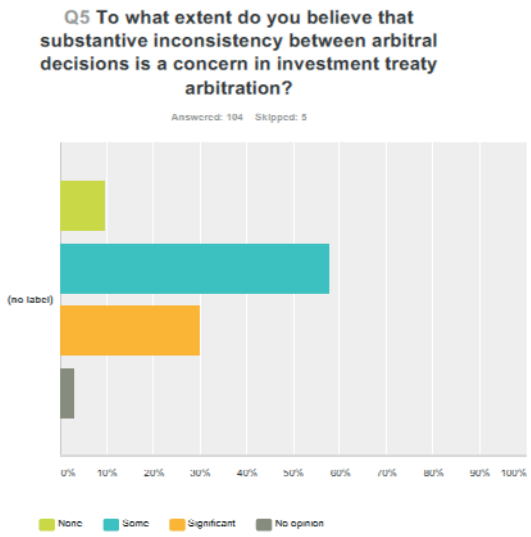
Despite the diversity in the background of those who responded to the questionnaire, it is clear that a response base of 109 participants does not constitute a critical mass for statistical purposes. Moreover, survey respondents with experience as arbitrator, tribunal secretary, case administrator, arbitration user, and expert witness each represented less than ten per cent of those who answered the questionnaire.

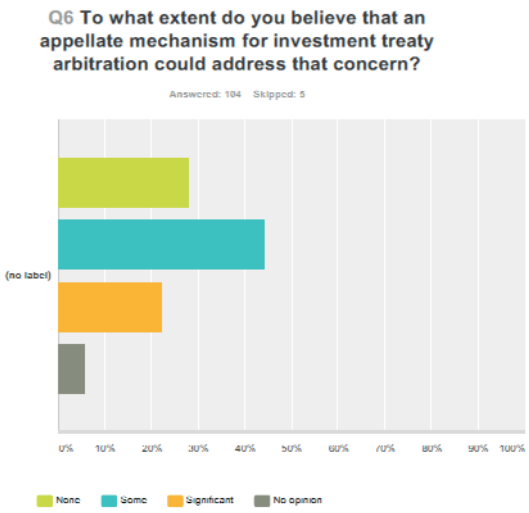
Notwithstanding these limitations, the responses to the questionnaire provide a useful reference point for areas identified by stakeholders as in need of reform.

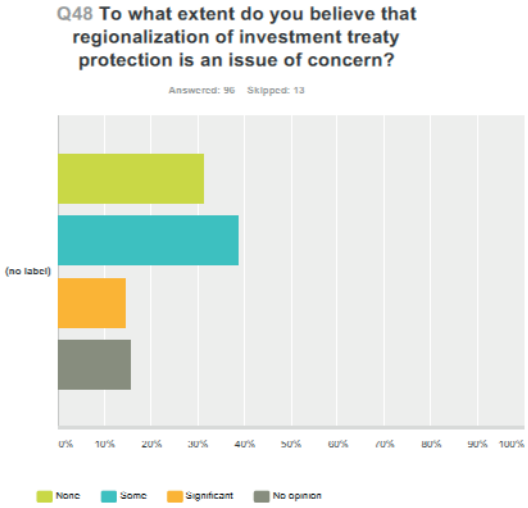
A Substantive protections and regionalisation

Concerns about substantive inconsistency in the application of treaty standards in arbitral decisions have long plagued investment treaty arbitration. Some states have adopted official interpretive positions on treaty standards; publicised model investment treaties; and, more recently, pursued regionalisation of investment treaty standards. Prominent examples of the latter are the investment treaty chapters in the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). Both instruments demonstrate a desire by the state parties to circumscribe more closely and with more limited scope for interpretation some of the key substantive investment protections. The TPP would also establish a Commission with the power to issue interpretations of the treaty's provisions, which TPP tribunals would then be bound to apply. The TTIP, for its part, is subject to a proposal by the EU to establish a permanent investment court that would take the place of arbitral appointments by parties and institutions. Such a measure would, one might expect, ensure a greater level of consistency so far as the application of that treaty's standards are concerned.

A majority of survey respondents considered that substantive inconsistency was a concern but indicated that an appellate mechanism or increased state participation in multilateral treaties might address that concern. A majority of respondents also expressed concern about the regionalisation of investment treaty protection.



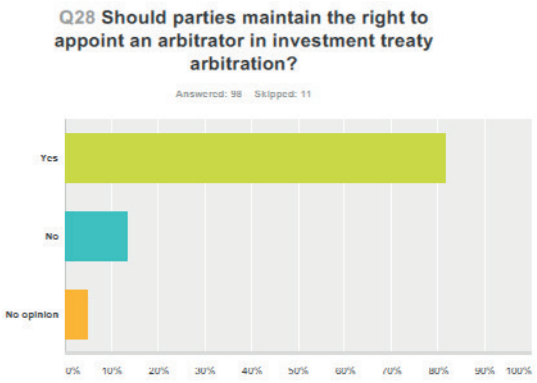




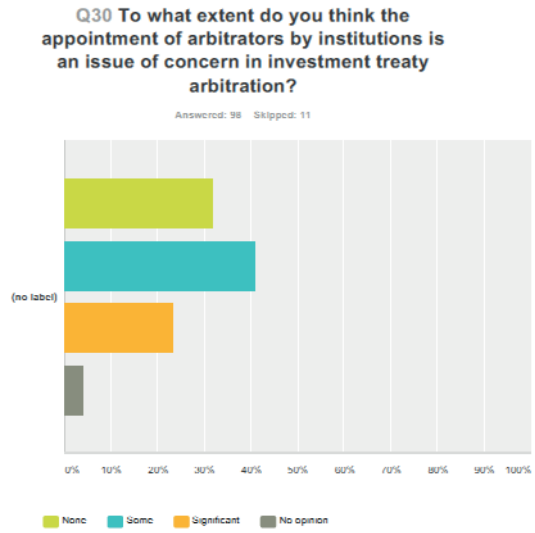
B Arbitrator appointments, disclosure and challenges

The responses to the questionnaire reflect stakeholders' concerns with the process of appointments and challenges of arbitrators, as well as disclosures by arbitrators of circumstances relevant to their independence and impartiality.

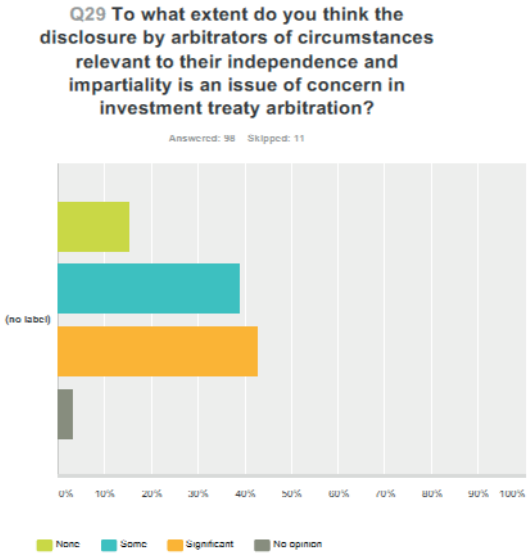
- A large majority of the respondents considered that parties should retain the right to appoint arbitrators:

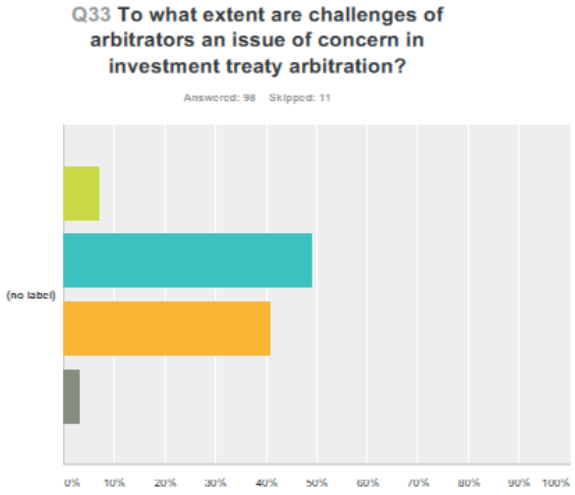


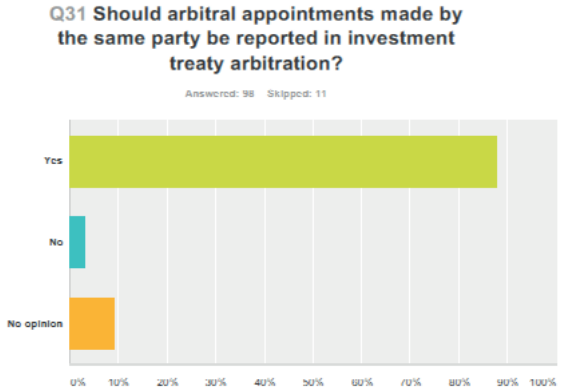
- while a majority of respondents expressed some concern about the appointment of arbitrators by institutions:

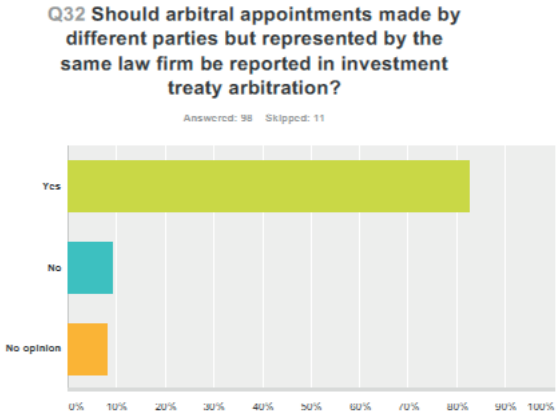


- A majority of respondents considered that the disclosure process and arbitrator challenges are issues of particular concern. The responses overwhelmingly reflected the view that all appointments made by the same party or the same counsel should be disclosed.

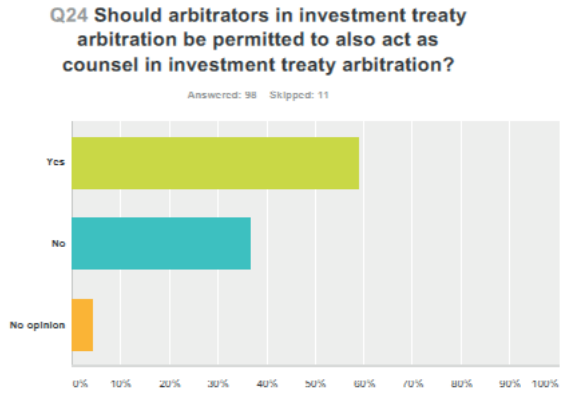


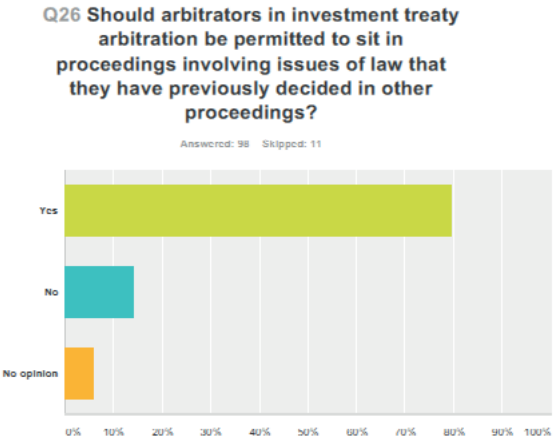


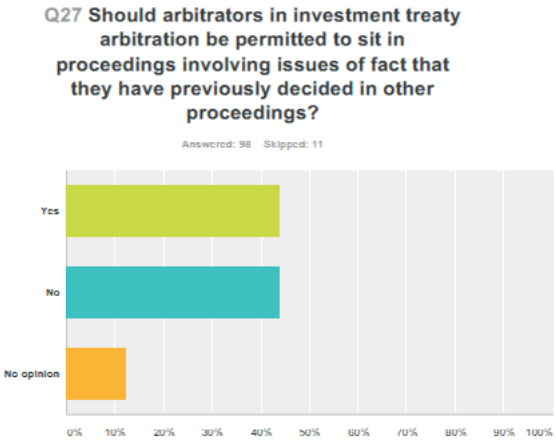




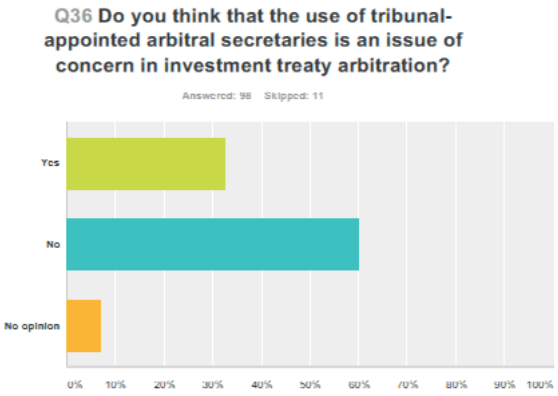
- A majority of the respondents considered that arbitrators should also be able to act as counsel or legal experts, and sit in proceedings involving *legal issues* they have previously decided. However, the respondents were evenly divided in relation to the question of arbitrators being permitted to sit in proceedings involving *factual issues* they have previously decided in other proceedings.



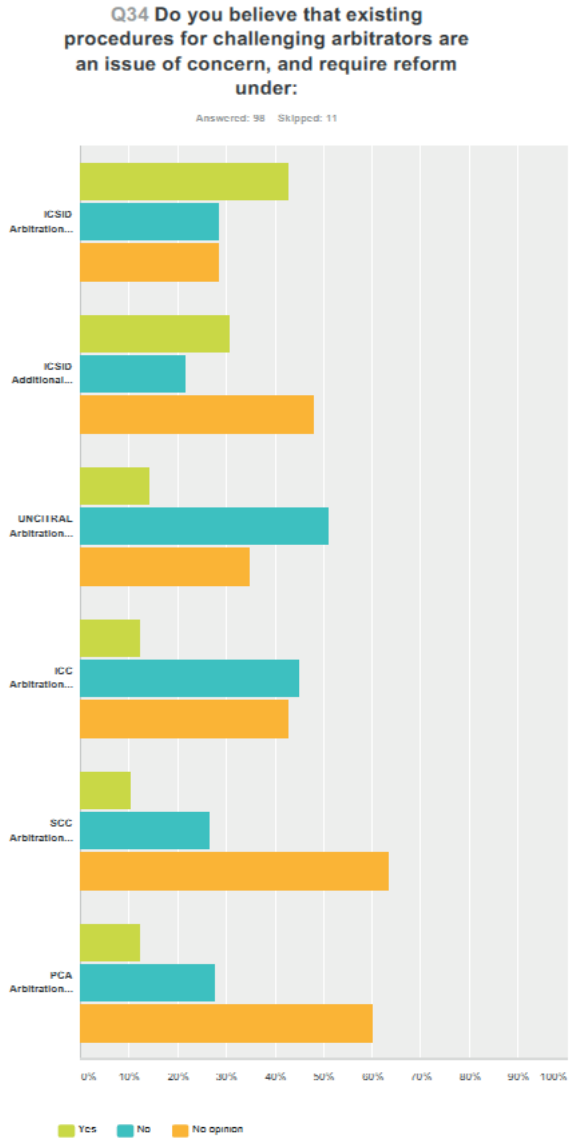




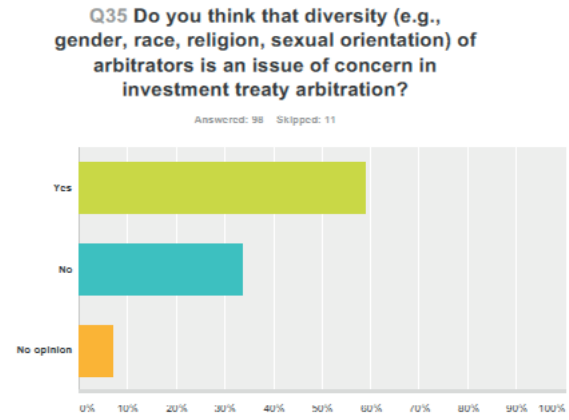
- A majority of the respondents considered that the use of tribunal-appointed arbitral secretaries is not an issue of concern in investment treaty arbitration.



- A large percentage of the respondents specifically identified the procedures for challenging arbitrators in ICSID and ICSID Additional Facility arbitrations as in need of reform. The challenge procedures under other arbitration rules (such as the UNCITRAL Arbitration Rules, the SCC Arbitration Rules and the ICC Arbitration Rules) were generally not identified as areas where reform is needed.



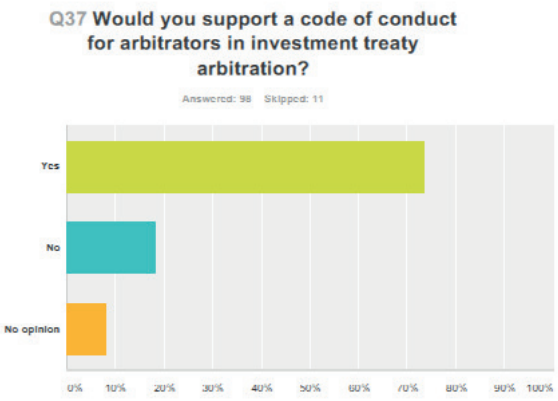
- A large majority of respondents also considered the diversity (eg, gender, race, religion, sexual orientation) of arbitrators as an issue of concern in investment treaty arbitration.

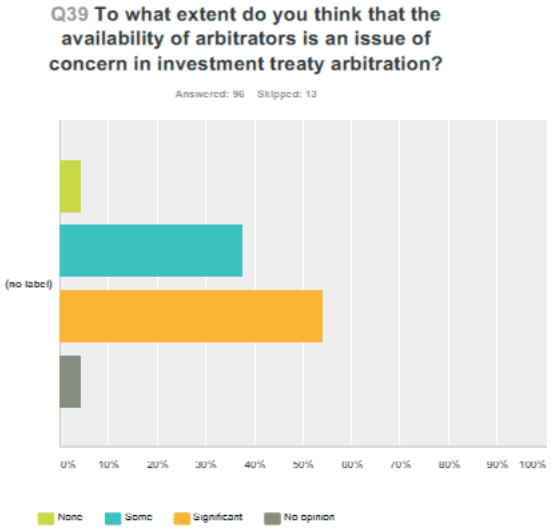


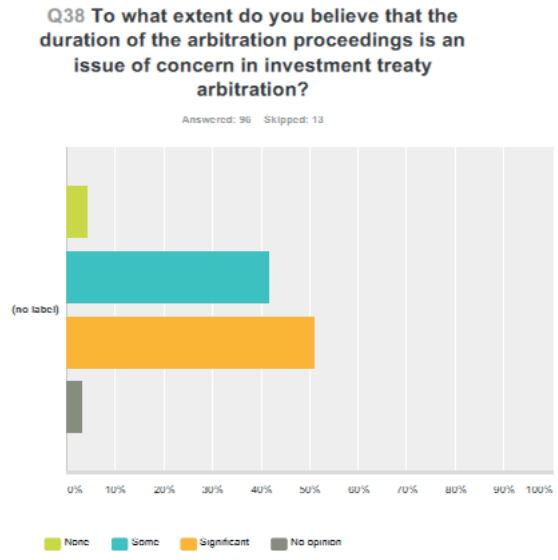
C Arbitrator conduct and the efficiency of proceedings

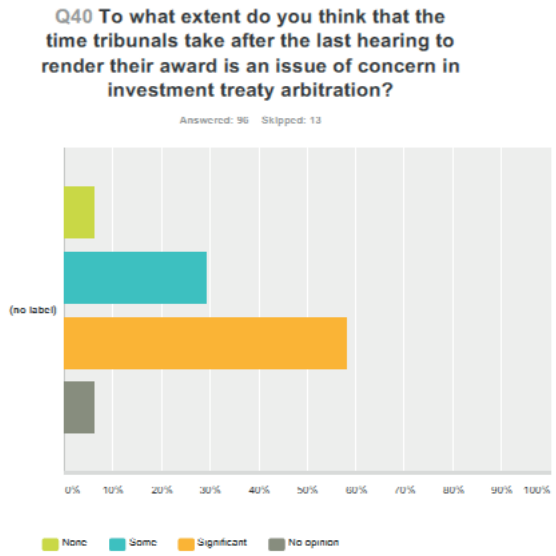
There is a widespread perception that investment treaty proceedings are becoming increasingly lengthy and procedurally complex, and often unwieldy in scope. This has resulted in calls for the introduction of standards to ensure arbitrator availability and to incentivise arbitrators to conclude

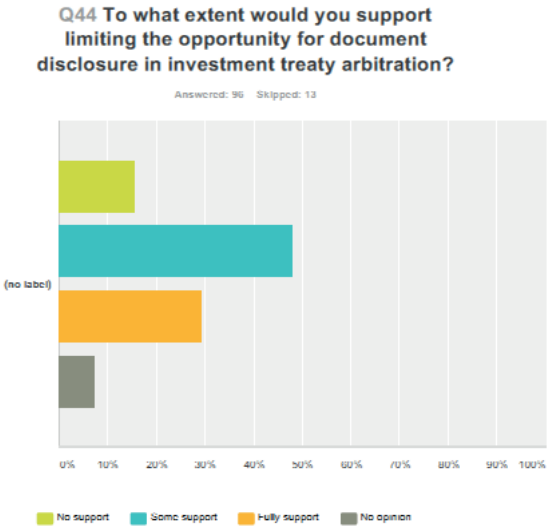
proceedings and render awards more efficiently. A majority of the survey responses appeared to reflect this view, expressing concern about the availability of arbitrators, the increasing complexity of document disclosure procedures, the duration of proceedings, and the time investment treaty arbitration tribunals take to render awards. In addition, a significant majority of respondents favoured the adoption of a code of conduct for arbitrators in investment treaty arbitration.





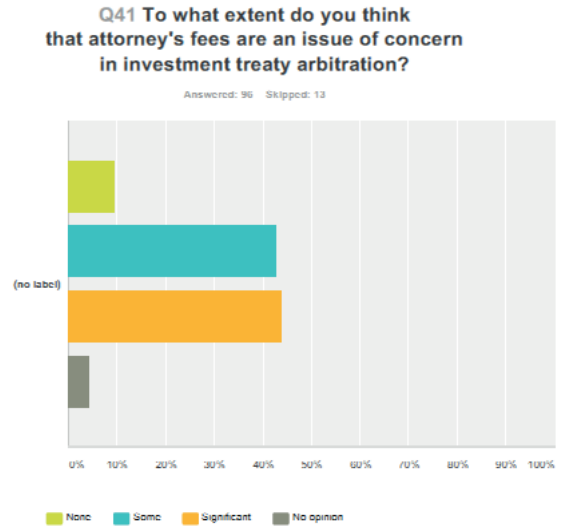


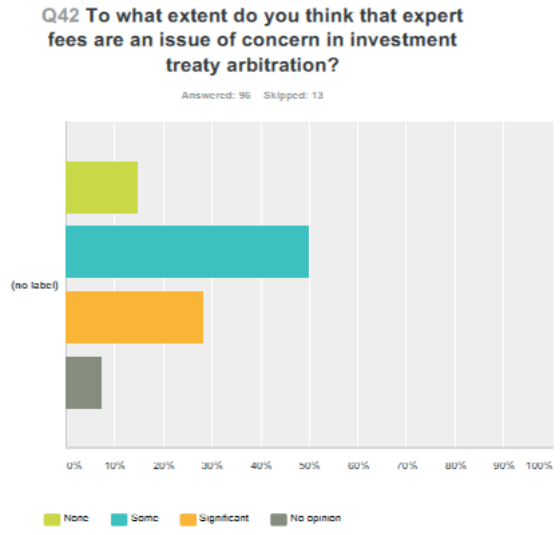


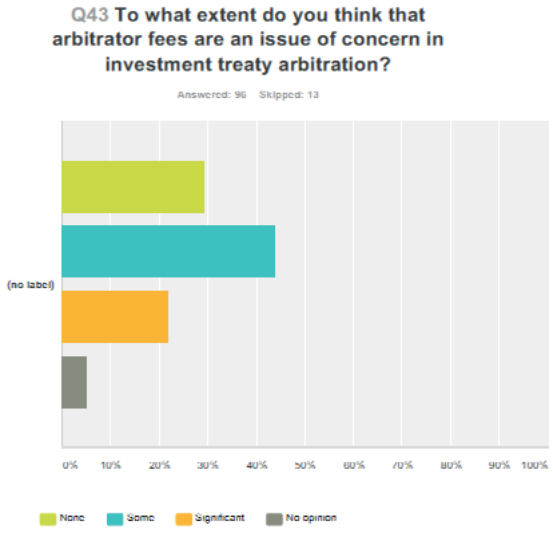


D Arbitration costs

The costs of arbitration have been a concern for many years now and investment treaty arbitration is no exception. The majority of responses identified attorney fees as a significant concern, while experts' and arbitrators' fees also registered as an issue of concern to respondents.



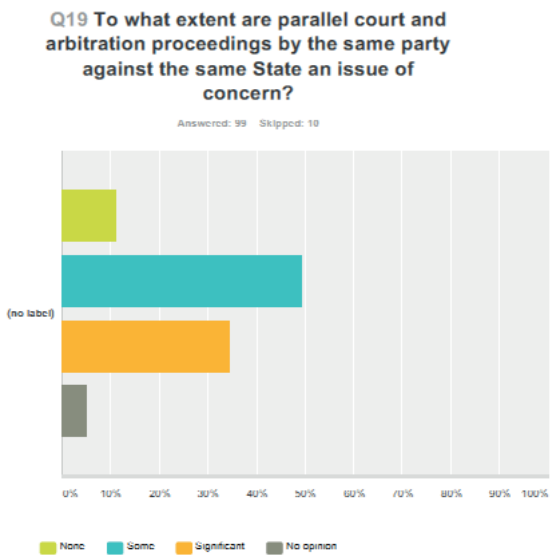


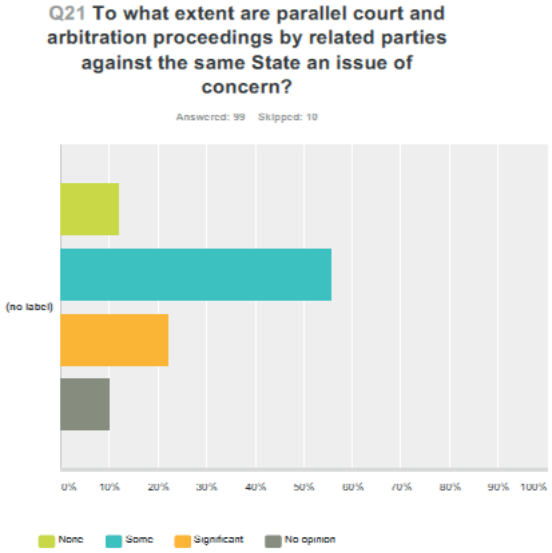


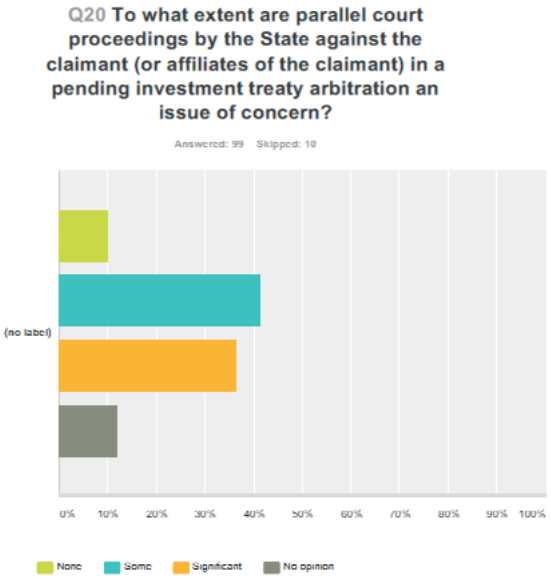
E Parallel and collective proceedings

The apparently increasing incidence of parallel proceedings has been identified as an area of concern. While parties do in some cases resolve the complications arising from parallel proceedings on an ad hoc basis, it's more common for investment treaty arbitrations to continue in parallel with related court proceedings, commercial or even other investment treaty arbitrations. The arbitrators are left to resolve the myriad issues arising from the lack of coordination between investment treaties and the mechanisms through which investment treaty disputes are adjudicated. Similarly, a relatively recent phenomenon of multiple investors bringing their claims collectively against a host state in a single arbitration proceeding has also generated lively debate.

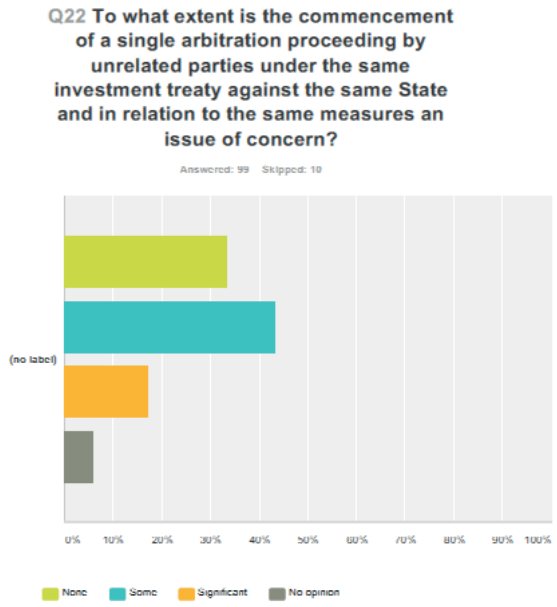
The responses to the questionnaire reflected these concerns. A majority of respondents expressed some concern about parallel court and arbitration proceedings by the same party or related parties against the same state, and parallel court proceedings by the state against the claimant (or affiliates of the claimant).

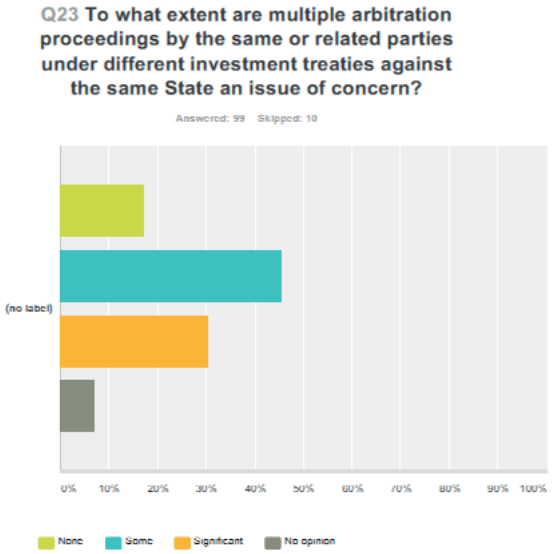






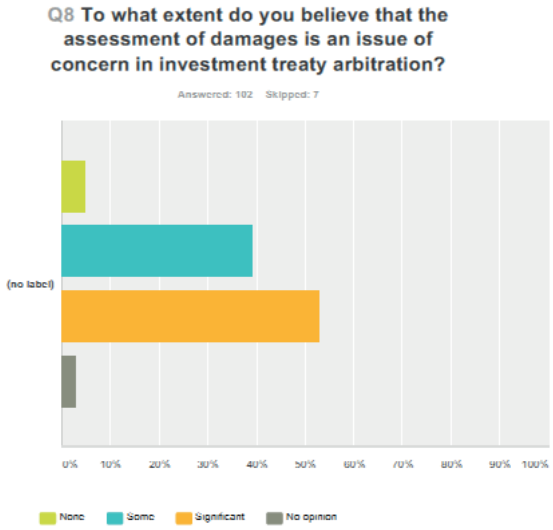
A majority of respondents also expressed some concern with both unrelated parties commencing a single arbitration proceeding under the same investment treaty against the same state and in relation to the same measures, and multiple arbitrations proceedings by the same or related parties under different investment treaties against the same state.

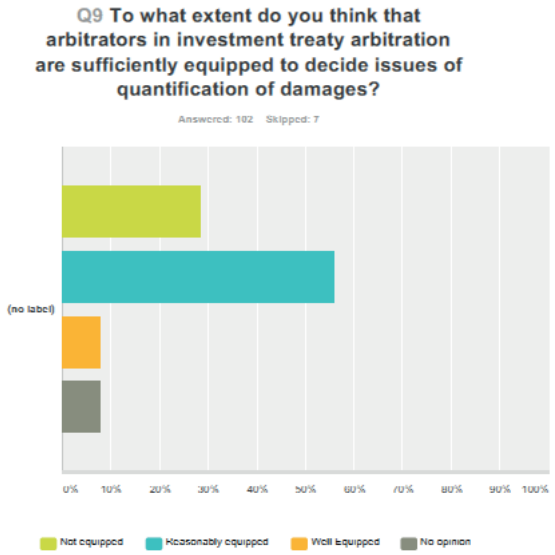


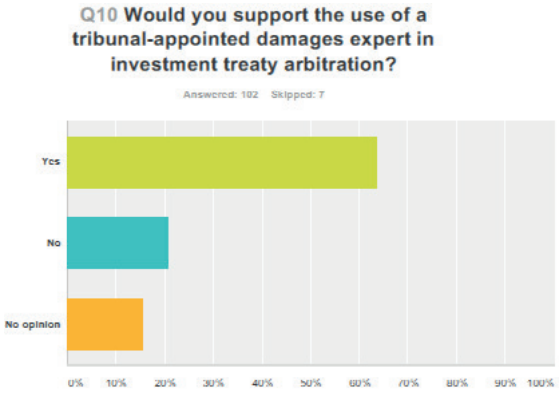


F Assessment of damages

Most respondents expressed significant concern about the assessment of damages in investment treaty arbitration. While a majority considered that arbitrators in investment treaty arbitration proceedings are reasonably equipped to decide issues of the quantification of damages for treaty breaches, a large majority of respondents indicated that they would support the use of a tribunal-appointed damages expert.



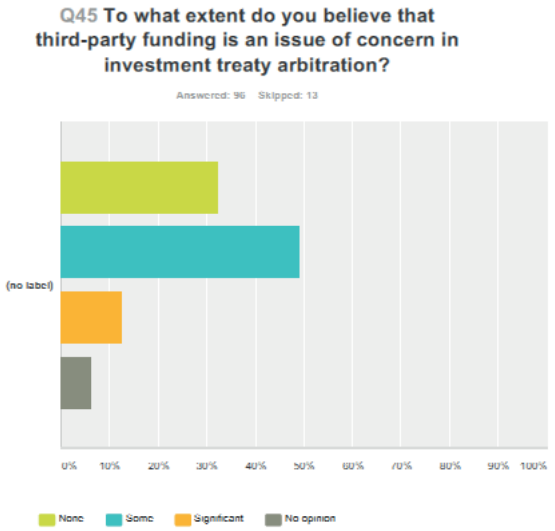


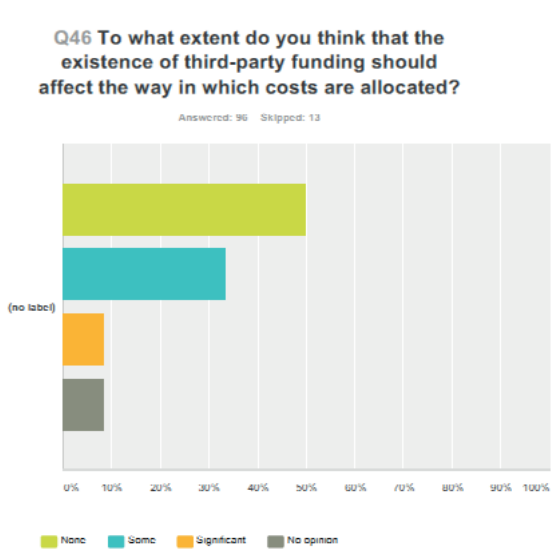


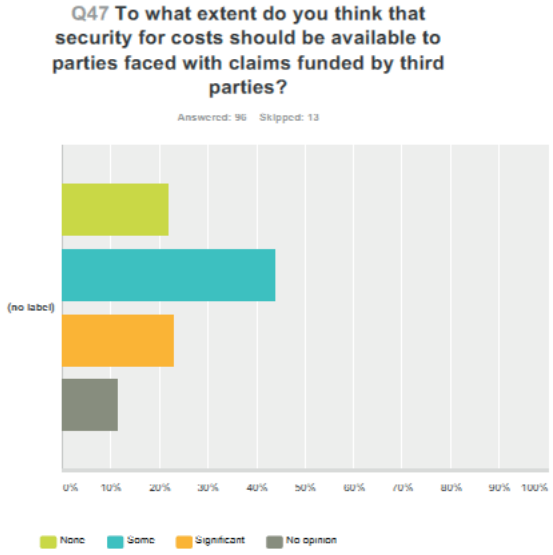
G Third-party financing

The issues arising out of increased litigation funding in investment treaty arbitration are only beginning to take shape. Chief among these are questions as to whether, and if so how, the existence of such funding should affect the allocation of costs and the availability of security for costs paid by the party receiving funding. At least one respondent state has reportedly also recently taken criminal action against a third-party funder and its client recipient of the funding.

The majority of respondents to the questionnaire expressed a level of concern about third-party funding. While the majority of respondents considered that the existence of third-party funding should not affect the way in which costs are allocated, the majority also considered that security for costs should be available to parties faced with claims funded by third parties.



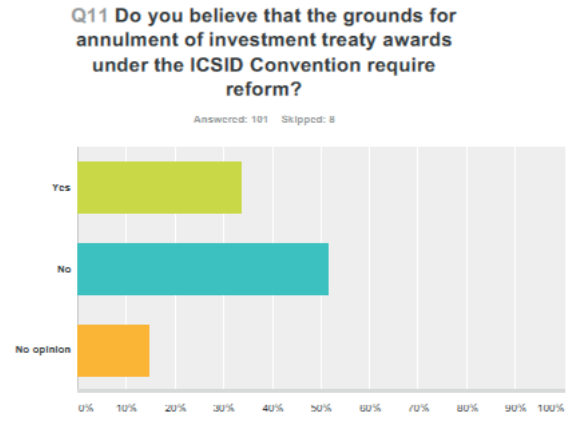


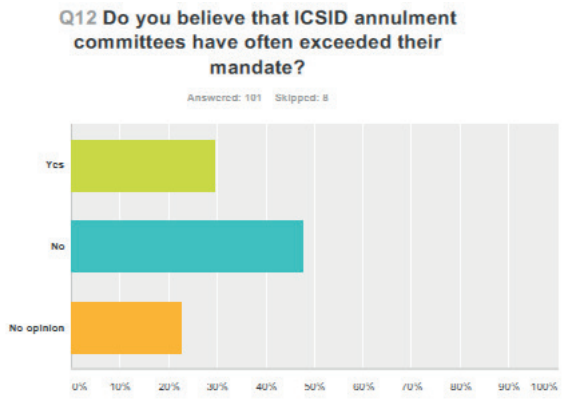


H Standards for annulment or setting aside awards

The standards for annulment or setting aside awards have always provided a fertile source of discussion. In investment arbitration in particular, the standards of ICSID annulment have been the subject of intense scrutiny, most recently resulting in the ICSID Secretariat publishing a background paper on annulment in 2011.

In this regard, a majority of respondents considered that the grounds for annulment of investment treaty awards under the ICSID Convention did not require reform, and that it is not a frequent occurrence for ICSID annulment committees and national courts hearing applications for the setting aside or recognition of investment treaty awards to exceed their mandate.



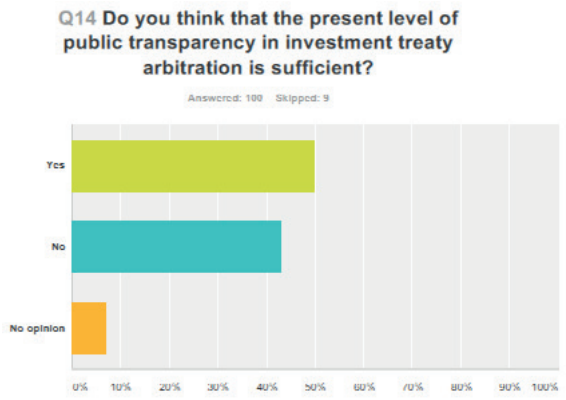


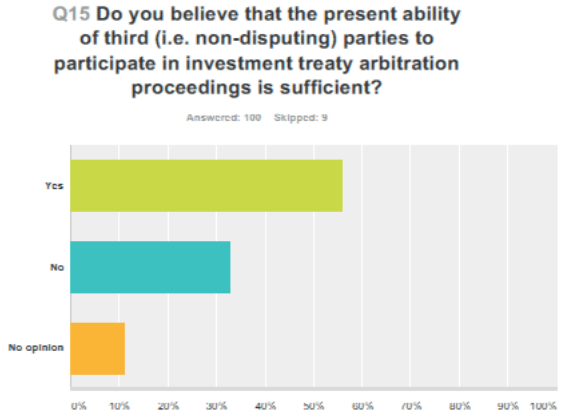
I Transparency

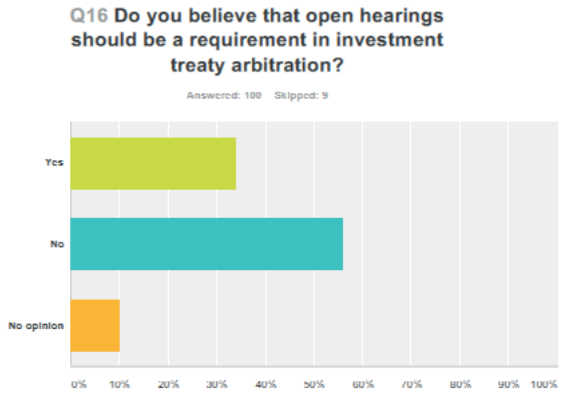
Critics of investment treaty arbitration have called for increased public access to hearings and materials produced in arbitrations, third-party participation through 'amicus' briefs or otherwise, and for mandatory publication of all investment treaty awards.

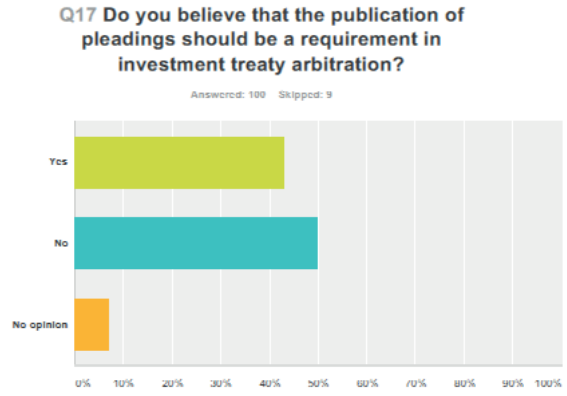
Half of all respondents considered that the present levels of transparency and accessibility in investment treaty arbitration are sufficient, with less than half calling for greater levels. A majority

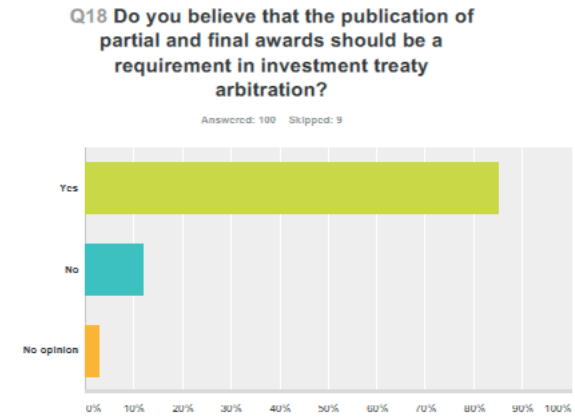
of respondents considered the present ability of third (ie, non-disputing) parties to participate in investment treaty arbitration proceedings to be sufficient, and that open hearings or publication of pleadings should not be a requirement in such proceedings. A large majority considered that publication of partial and final awards should be a requirement in investment treaty arbitration.









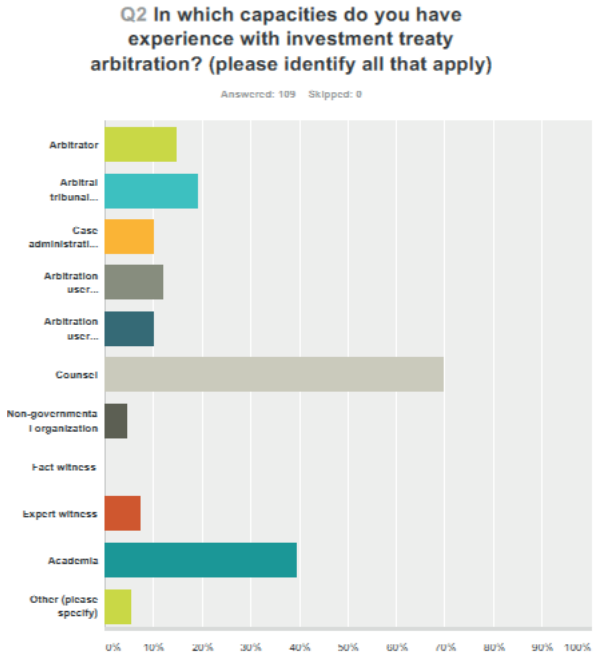


Members of the Subcommittee on Investment Treaty Arbitration

Member	Affiliation
Gaetan Verhoosel	Three Crowns
Ben Love	Freshfields Bruckhaus Deringer
Manish Aggarwal	Three Crowns
Meg Kinnear	International Centre for Settlement of Investment Disputes
Carlos José Valderrama	Republic of Peru
Richard Happ	Luther
J Christopher Thomas QC	National University of Singapore
Eugene Silva	ExxonMobil
Guarav Sharma	Shell
Ignacio Suarez Anzorena	Clifford Chance
Jean Kalicki	Arnold & Porter
Martin Valasek	Norton Rose Fulbright
Mariam Gotsiridze	Georgia Ministry of Justice
Oscar Garibaldi	Independent Arbitrator
Sarah Grimmer	Permanent Court of Arbitration
Shane Spelliscy	Canadian Government
Suzana Blades	ConocoPhillips

Members of the Core Advisory Group

Member	Affiliation
Zachary Douglas	Matrix Chambers
Andrea Bjorklund	McGill University
Wenhua Shan	Senior Fellow at Lauterpacht Centre
Prabhash Ranjan	South Asian University
Joost Pauwelyn	Graduate Institute of International and Development Studies
Stephen Schill	University of Amsterdam
Susan Franck	Washington and Lee University
Marie Talasova	Czech Republic
Sylvie Tabet	Canadian Government
Howard Mann	International Institute for Sustainable Development
Lorenzo Cotula	International Institute for Environmental Development
Anna-Joubin Bret	Independent Arbitrator
Katia Yannaca-Small	Shearman & Sterling
Bart Legum	Dentons
Toby Landau	Essex Court Chambers
Melida Hodgson	Foley Hoag
Eduardo Zuleta	Gómez Pinzón Zuleta
Gabrielle Kaufmann-Kohler	Levy Kaufmann-Kohler
Stanimir Alexandrov	Sidley Austin
Ahmed Sadek El-Kosheri	Kosheri Rashed & Riad


Q2 In which capacities do you have experience with investment treaty arbitration? (please identify all that apply)
Answered: 109 Skipped: 0
Arbitrator
Arbitral tribunal...
Case administrati...
Arbitration user...
Arbitration user...
Counsel
Non-governmenta l organization
Fact witness
Expert witness
Academia
Other (please specify)
0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%