



UiO • **PluriCourts** – The Legitimacy of the International Judiciary
University of Oslo

PITAD – building a general applicability ISDS database for researchers

Paris Workshop, February 22-23, 2016

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**PLURI
COURTS**

Established by
the Research Council
of Norway

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Centre of
Excellence

Need a general applicability database?

- More than 600 scholarly articles on the «legitimacy crisis» of ISDS – the need for a grounded debate
- PluriCourts as host to the database
- Added values?
 - The focus on the research community – promoting empirically based research
 - A hub for project based data – the possibility of «add-ons»
 - Comprehensiveness
 - Quality control of existing databases

Making data available to researchers

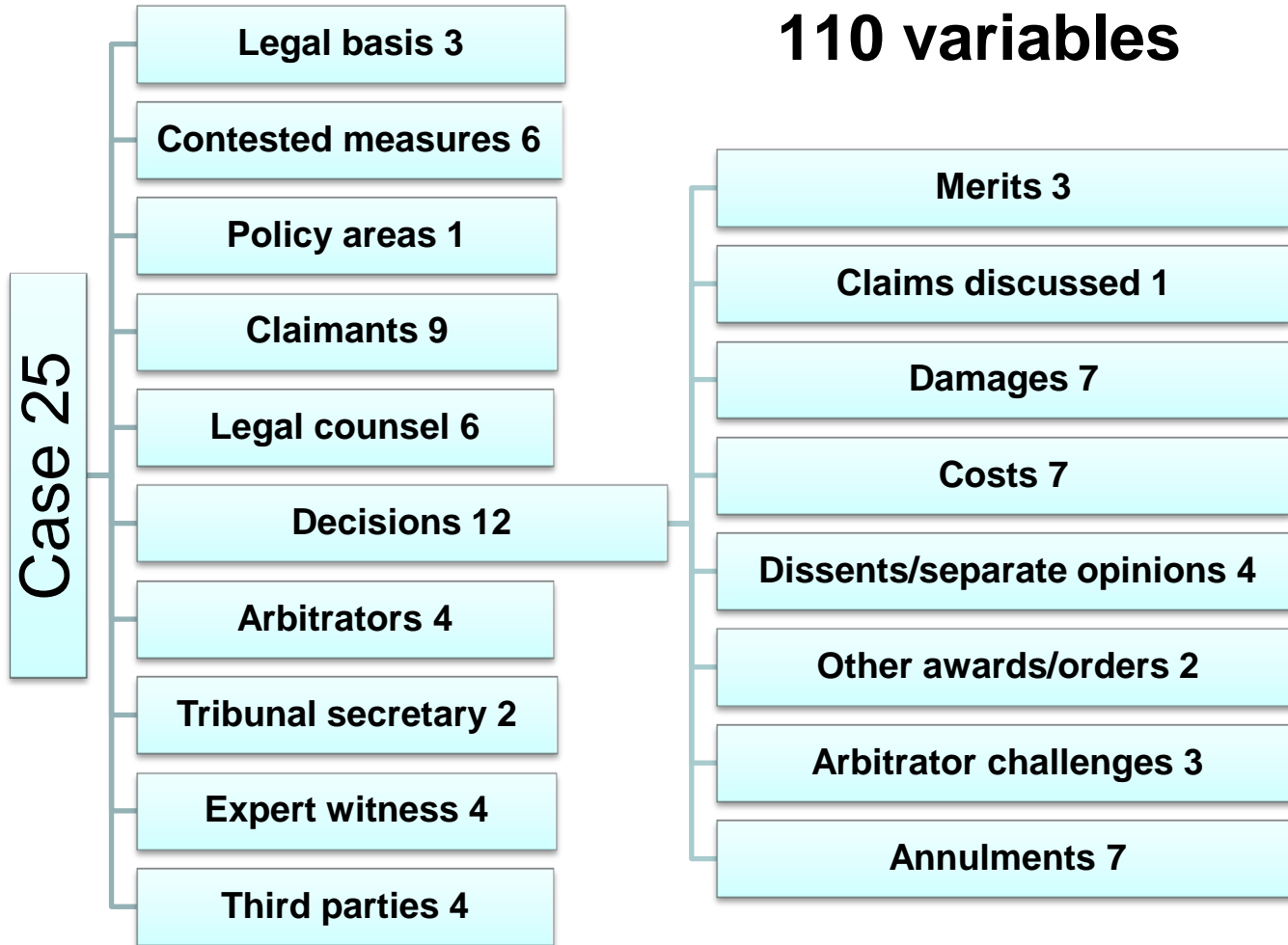
- Adequacy of the platform chosen – «Microsoft Access»
- Direct access to data, access upon request or both?
- Conditional access to the data?
- How to promote the database?
 - Book project on empirical aspects of the legitimacy of ISDS
 - Linking up with ITALAW and UNCTAD?

How to add data from other researchers

- Feed-back mechanisms
- Request data back from those who access our data
- Challenges regarding «feed-in» databases
 - The problem of completeness
 - The problem of quality control
- Preliminary ideas for feed-in databases
 - Investment treaties, state characteristics, arbitrators, law firms/lawyers, investors, NGOs
- Correction of errors in the database

Basic limitations

- Investment treaty arbitration
- Information available in the decisions
 - Cases where information is incomplete
- State – state arbitration?
- Case law from international, regional and bilateral courts?
- Cases from claims commissions?
- Cases from international financial institution (WB Inspection Panel)?
- Commercial arbitration?



Down the rabbit hole: depth of coding (1/5)

- Additional details discovered during the case-input process
- Not clear how to allocate resources when there are no particular research questions
- Hard choices: we give a basic indication of an interesting issue, in order to create a **structure for future research**

Down the rabbit hole: depth of coding (2/5)

Example. **Set-aside and enforcement procedures**

- Non-ICSID universe: proceedings in domestic courts can be traced
- They can be extensive and involve several jurisdictions (e.g. Sedelmayer, Yukos)
- Current solution: Tickbox “Enforcement” and brief reflection in the Notes field – for both enforcement and set-aside
- Should we elaborate more on this?

Down the rabbit hole: depth of coding (3/5)

Example. Claimant corporate structure

- Investment structuring and chains of companies
- Tribunals often describe in details in order to establish jurisdiction
- Current solution: Field Parent company, Parent nationality, free Notes field.
- Should the whole chain be reflected? How?

Down the rabbit hole: depth of coding (4/5)

Example. Legal counsel

- Frontpage of the decision provides with main responsible lawyers
- Hearings: up to 25 people from each side
- Should we reflect everybody? Paralegal today – partner and arbitrator tomorrow (within the same 10-year long investment case)

Down the rabbit hole: depth of coding (5/5)

Example. **Experts and witnesses**

- Big cases involve many
- Current categories: Experts of international law; Experts of host state law; Unknown
- Time challenge: Identify the expert or reflect as Unknown

Conclusion: During case-input, we search for an optimal balance between sufficient reflection of details and efficient coding. All entries can be further updated and clarified.

Two examples of current studies

- **Large N study on state characteristics as predictors of outcome**
- **Medium N study on cases involving an environmental component**

What state characteristics might be determinants for predicting outcomes in investment treaty arbitration?

Why would particular state characteristics be able to predict outcome?

- Development indicators
- Rule of law indicators
- Democracy indicators
- Governance indicators

Merits - Economic Development and ICRG

	(1)	(2)	(3)	(4)
	Baseline	Model 1	Model 2	Model 3
In(GDP per Capita)	0.418*** (0.144)	0.499*** (0.168)	0.517*** (0.184)	0.466*** (0.181)
Corruption (t-1)		-0.170 (0.214)		
Bureaucratic Quality (t-1)			-0.170 (0.236)	
Investment Profile (t-1)				-0.0202 (0.0866)
Latin America	-0.821** (0.341)	-1.039*** (0.362)	-0.989*** (0.358)	-1.021*** (0.371)
Extractive Industries	0.700** (0.347)	0.924** (0.379)	0.934** (0.378)	0.951** (0.376)
US Investor	-0.705** (0.324)	-0.566 (0.348)	-0.572* (0.348)	-0.578* (0.347)
Constant	-2.724** (1.139)	-2.969** (1.212)	-3.162** (1.254)	-2.947** (1.219)
Observations	194	176	176	176
Pseudo R^2	0.073	0.091	0.091	0.089

Standard errors in parentheses

* $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$

Categorizing cases with an environmental component

- What constitutes an environmental dispute in investment treaty arbitration?
- Core of the concern is domestic measures to protect environment and environmental health
- Thus, we exclude:
 - Other human rights issues, including right to access water and sanitation (although can come under a broader public interest analysis)
 - Mere relation of investment to the environment but no challenge to an environmental measure

The environmental cases (**NAFTA**)

- | | | | |
|-----|-----------------------------|-----|-----------------------------|
| 1. | Saar Papier v Poland | 19. | Commerce v El Salvador |
| 2. | Ethyl Corp v Canada | 20. | Dow AgroSciences v Canada |
| 3. | Santa Elena v Costa Rica | 21. | William Greiner v Canada |
| 4. | Metalclad v Mexico | 22. | Paushok v Mongolia |
| 5. | Maffezini v Spain | 23. | Nepolsky v Czech Republic |
| 6. | SD Myers v Canada | 24. | Vito Gallo v Canada |
| 7. | Tecmed v Mexico | 25. | Un glaube v Costa Rica |
| 8. | MTD Equity v Chile | 26. | St Mary's v Canada |
| 9. | Empresa Lucchetti v Peru | 27. | Bogdanov v Moldova |
| 10. | Methanex v US | 28. | Abengoa v Mexico |
| 11. | Bayview Irrigation v Mexico | 29. | McKenzie v Vietnam |
| 12. | Eduardo Vieira v Chile | 30. | Perneco v Ecuador |
| 13. | Parkerings v Lithuania | 31. | Gold Reserve v Venezuela |
| 14. | Canadian Cattlemen v Canada | 32. | Renee Levy v Peru |
| 15. | Plama v Bulgaria | 33. | Bilcon of Delaware v Canada |
| 16. | Glamis Gold v US | 34. | Quiborax v Bolivia |
| 17. | Chemtura v Canada | 35. | Al-Tamimi v Oman |
| 18. | Vattenfall v Germany | 36. | Charanne v Spain |

The environmental cases (**regulatory quality**)

- | | | | |
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The environmental cases (wins, loses, settles)

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The environmental cases (legislative measure)

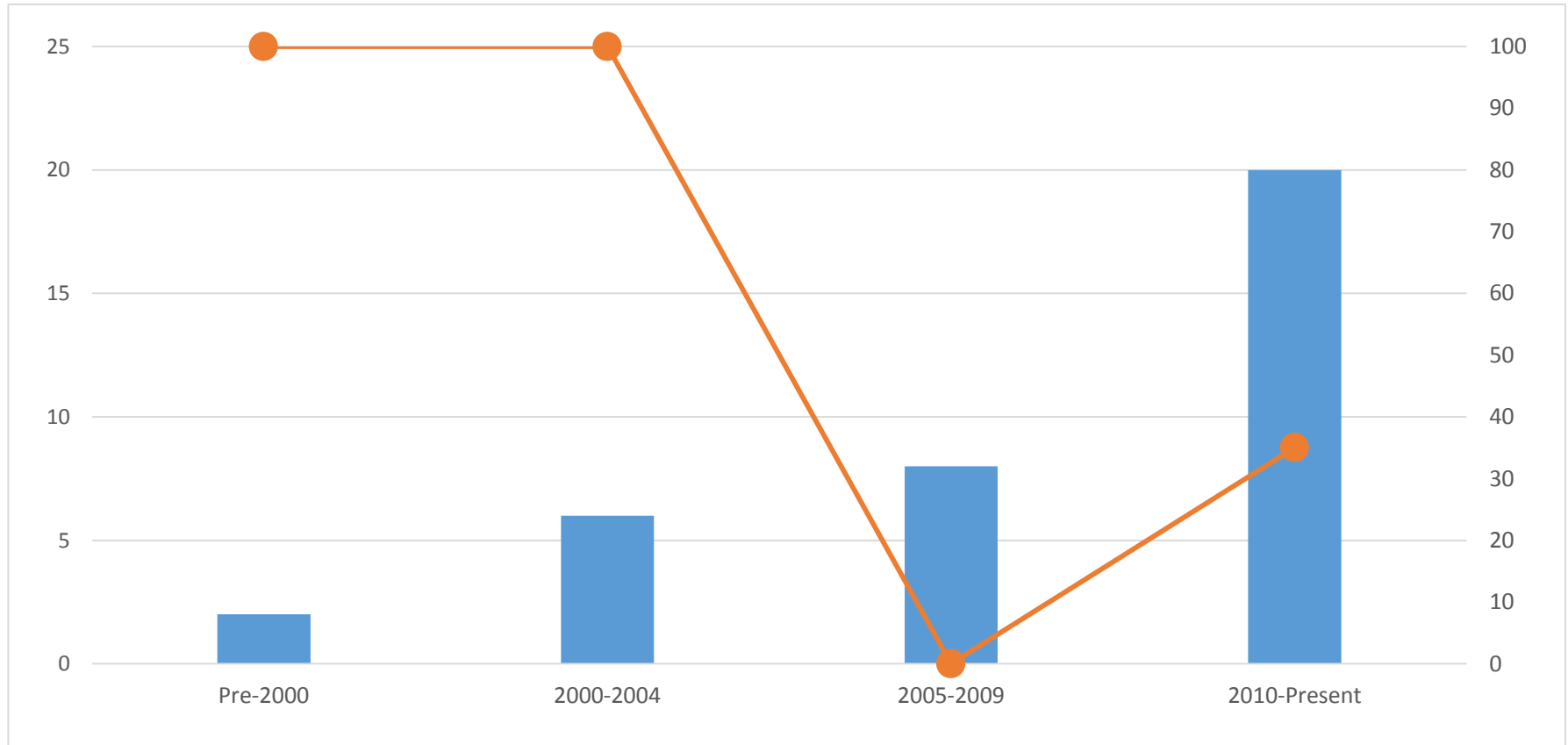
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The environmental cases (repeat arbitrators x2, x3, x4, x6)

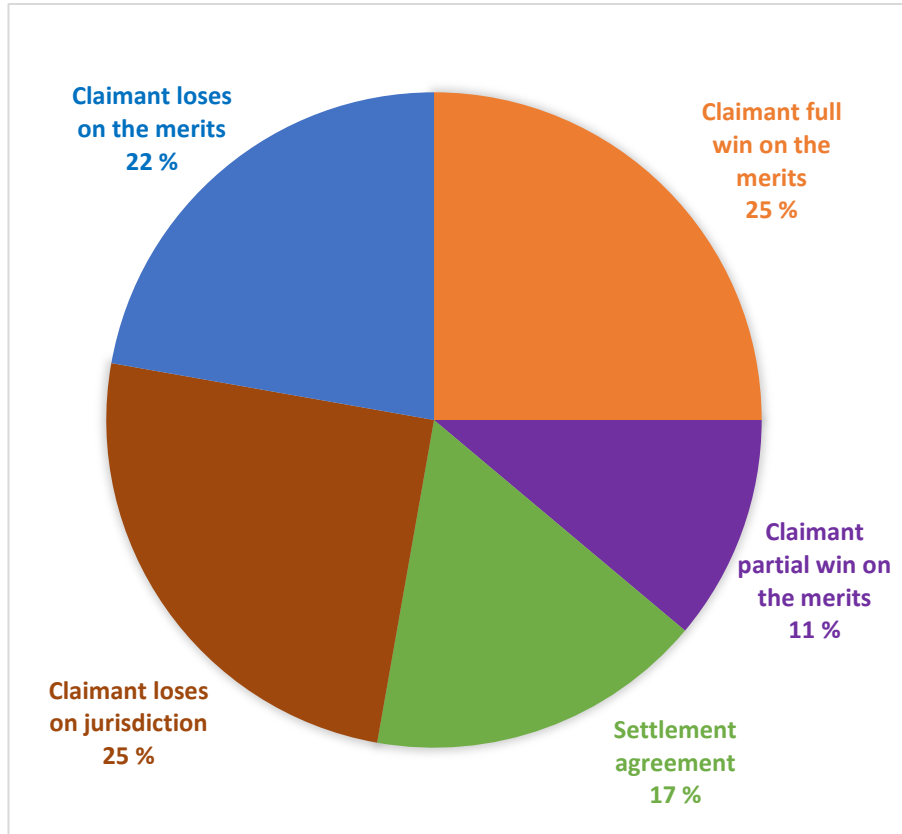
- | | | | |
|-----|-----------------------------------|-----|-----------------------------------|
| 1. | Karrer, Szurski, Ahrens | 19. | van den Berg, Naon, Thomas |
| 2. | Bockstiegel, Brower, Lalonde | 20. | Unknown |
| 3. | Fortier, Lauterpacht, Weil | 21. | Unknown |
| 4. | Lauterpacht, Civilette, Siqueros | 22. | Lalonde, Noan, Stern |
| 5. | Vicuna, Buergenthal, Wolf | 23. | Unknown |
| 6. | Hunter, Schwartz, Chiasson | 24. | Fernández-Armesto, Levy, Castel |
| 7. | Naon, Rozas, Avila | 25. | Kessler, Berman, Cremedes |
| 8. | Sureda, Lalonde, Oreamuno | 26. | Pryles, Stewart, Stern |
| 9. | Buergenthal, Cremedes, Paulson | 27. | Sjovall |
| 10. | Veeder, Reisman, Rowley | 28. | Mourre, Fernandez-Armesto, Twomey |
| 11. | Lowe, Meese, Gomez-Palacio | 29. | Kaplan, Mclachlan, Gotanda |
| 12. | von Wobeser, Reisman, Zalduendo | 30. | Tomka, Kaplan, Thomas |
| 13. | Levy, Lalonde, Lew | 31. | Bernardini, Williams, Dupuy |
| 14. | Bockstiegel, Low, Bacchus | 32. | Kaufmann-Kohler, Zueleta, Vinuesa |
| 15. | Salans, van den Berg, Veeder | 33. | Simma, Schwartz, McRae |
| 16. | Young, Caron, Hubbard | 34. | Kaufmann-Kohler, Lalonde, Stern |
| 17. | Kaufmann-Kohler, Crawford, Brower | 35. | Williams, Brower, Thomas |
| 18. | Lalonde, Berman, Kaufmann-Kohler | 36. | Mourre, Tawil, von Wobeser |

Concluded Cases

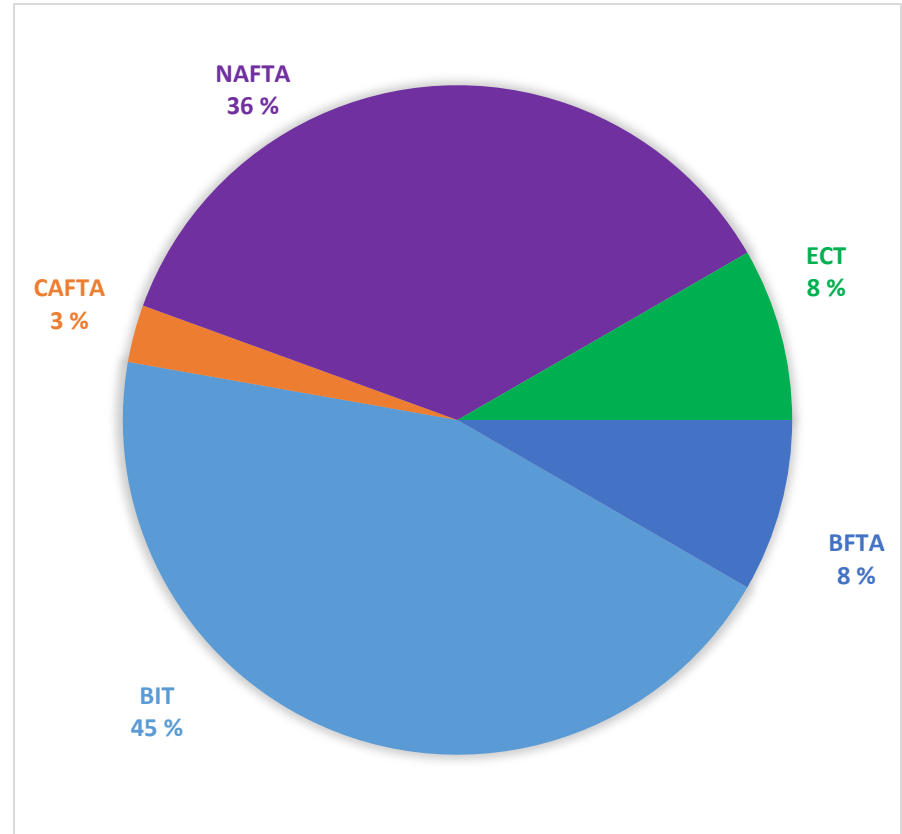
Win Ratio



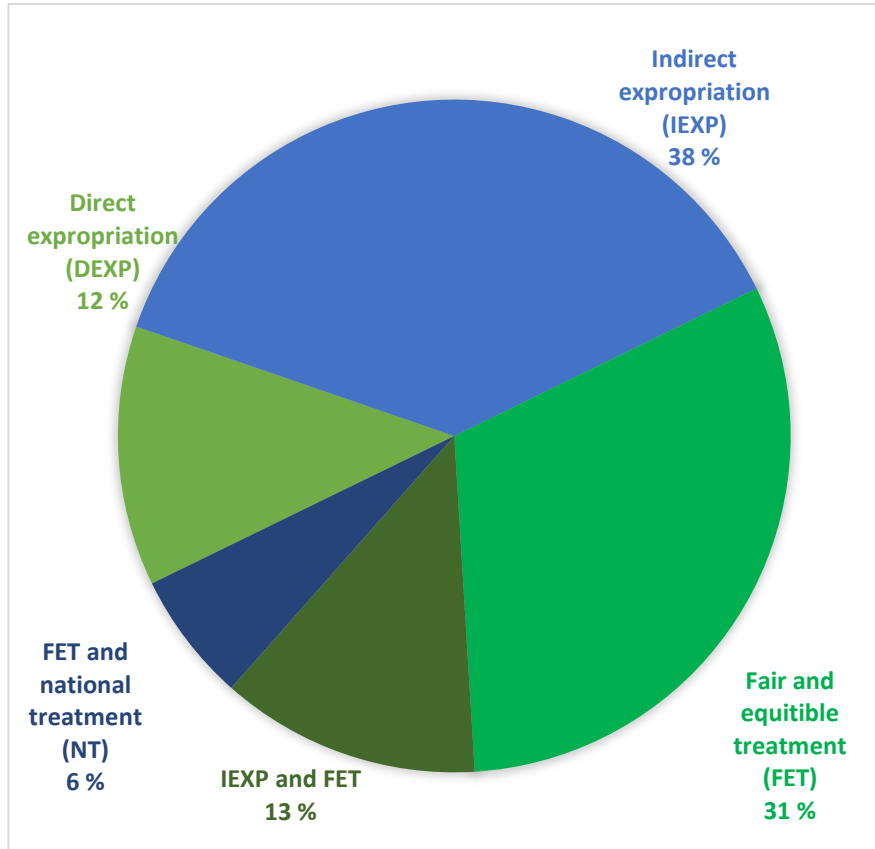
All Cases – Outcome



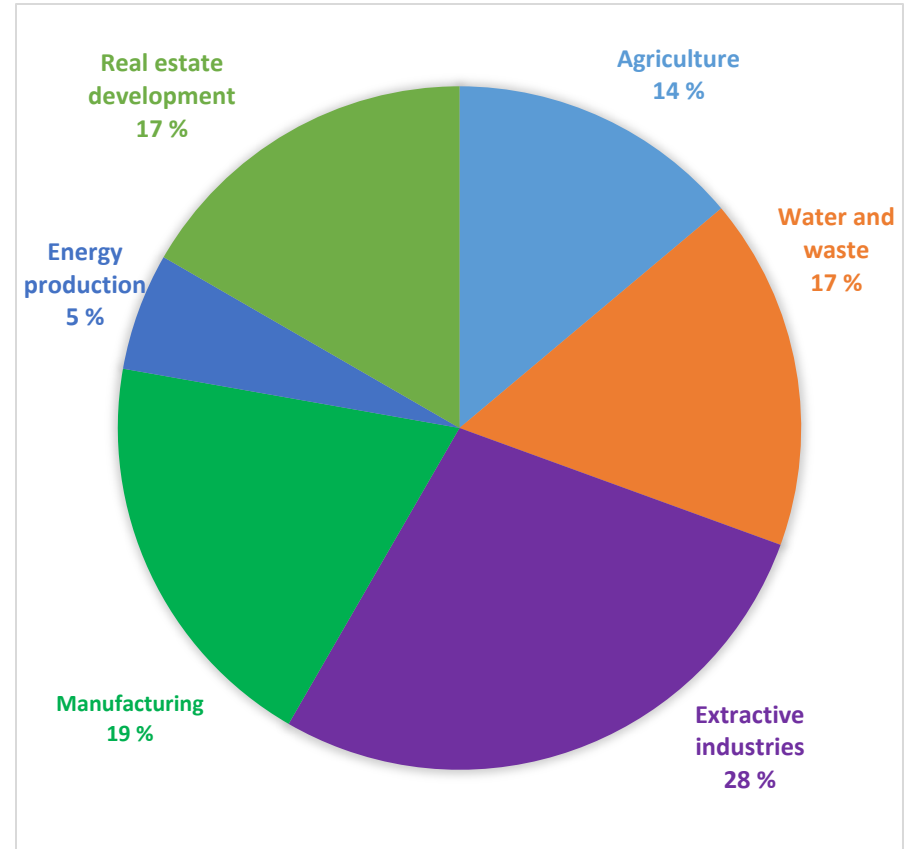
All Cases – Legal Instrument



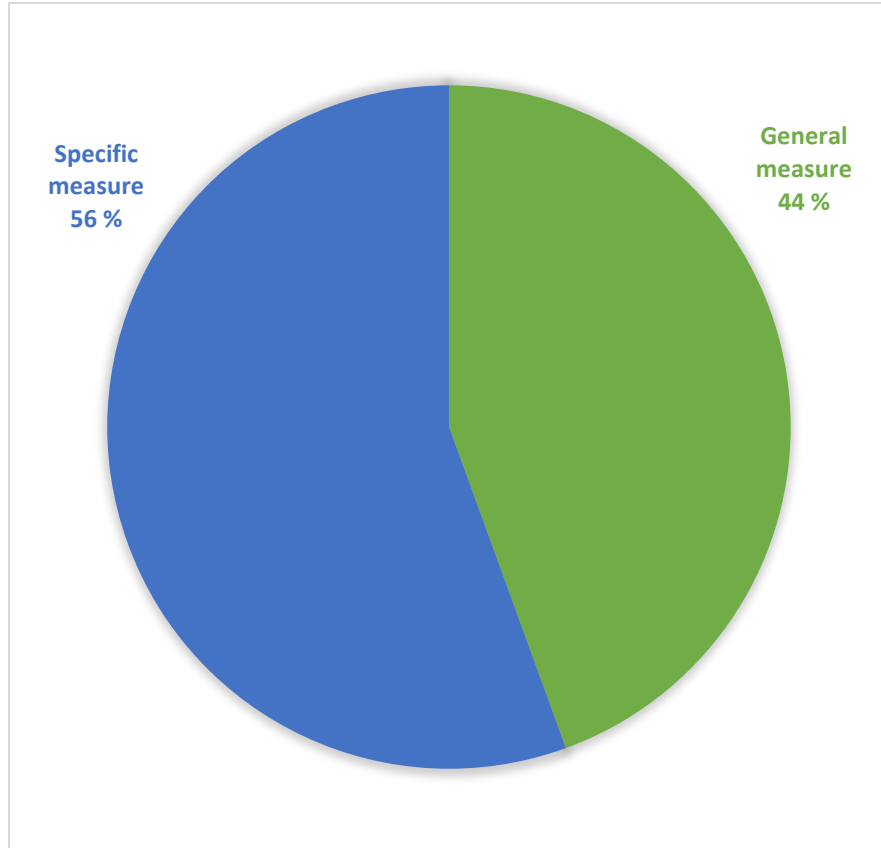
Winning Cases – Violation Found



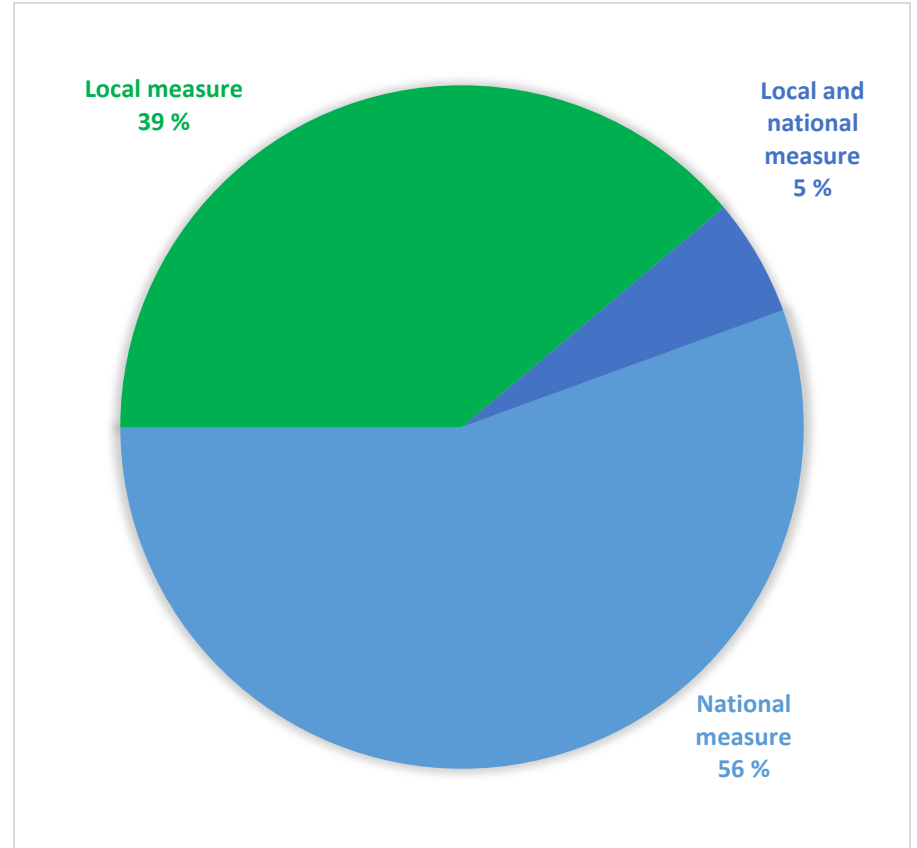
All Cases – Economic Sector



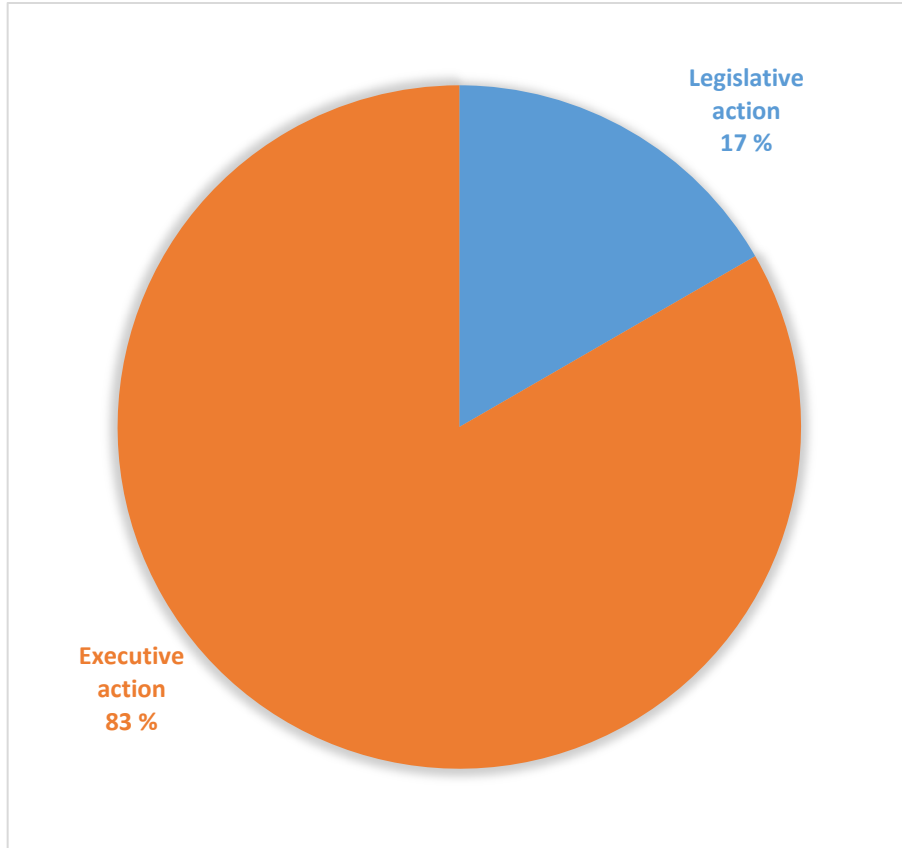
General or Specific Measure



Local or National Measure



Type of Governmental Measure



Outcome Based on Environmental Measure

