



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

Investment Treaty Arbitration Involving an Environmental Component

The Greening of Investment Treaty Arbitration?

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PLURI
COURTS

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Excellence

- **Environmental policies as a basis for claims**
 - For investors
 - For states
- **Environmental policies as a defense**
 - State defenses
 - Claims based on domestic measures relating to environmental protection
- **Does investment treaty arbitration compel tribunals to favor investment protection over environmental protection?**

Questions/Puzzles

- **Do these cases relate to a domestic environmental policy?**
- **Relationship to climate policies (mutual support versus conflict)**
- **Good versus bad regulatory chill**
- **Substance versus process in domestic law**
- **Regulation versus legislation**
- **The problem of monetary remedies for treaty violations**
- **Distinctions between developing and developed economies**
- **Relationship to other adjudicative fora**
- **Emerging treaty language (carve-outs, exceptions, interpretations)**

Defining cases involving an environmental component

- How to categorize environmental cases
 - **Subject-matter**
 - **Domestic environmental measures**
 - **Process versus substance**
 - **Laws versus regulation versus administrative decisions**
 - **Denial of justice**
 - **Sword versus shield**
 - **Did the case turn on the challenged environmental measure**

Environmental policies as a basis for the claim

Rise in the number of renewable energy cases (**46 cases**)

- **Spain** (PV and thermal solar, **29 cases**, all ECT, 24 ICSID, 1 Ad hoc, 4 SCC)
- **Italy** (all PV solar, **5 cases**, all ECT, 4 ICSID, 1 SCC)
- **Czech Republic** (all PV solar, **7 cases**, all ECT, all PCA)
- **Bulgaria** (PV solar, **2 cases**, ICSID, relate to who pays solar subsidy)
- **Lithuania** (PV solar, **1 case**)
- **Canada** (both wind, **2 cases**, NAFTA)

- ***Charanne v Spain*** (Award, 21 January 2016, Mourre, Tawil, Von Wobeser)
- ***Mesa Power v Canada*** (Award, 24 March 2016, Kaufmann-Kohler, Brower, Landau)

Claims based on state's failure to enforce its own environmental rules

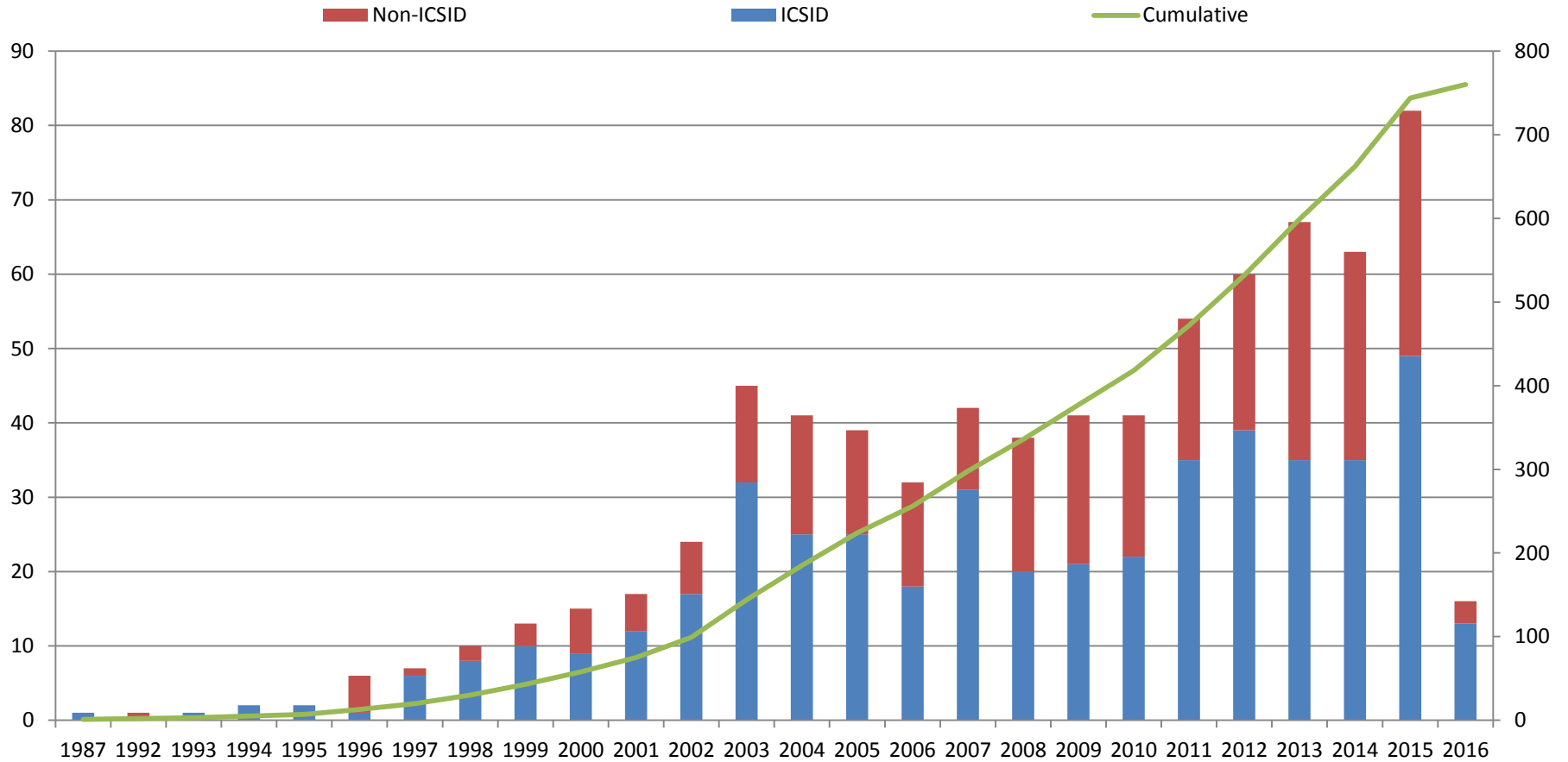
- *Allard v Barbados* (Griffith, Newcombe, Reisman)
- *Zelena v Serbia* (Simma, Bockstiegel, Lowe)
- *Bilcon v Canada?* (Simma, Schwartz, McRae)

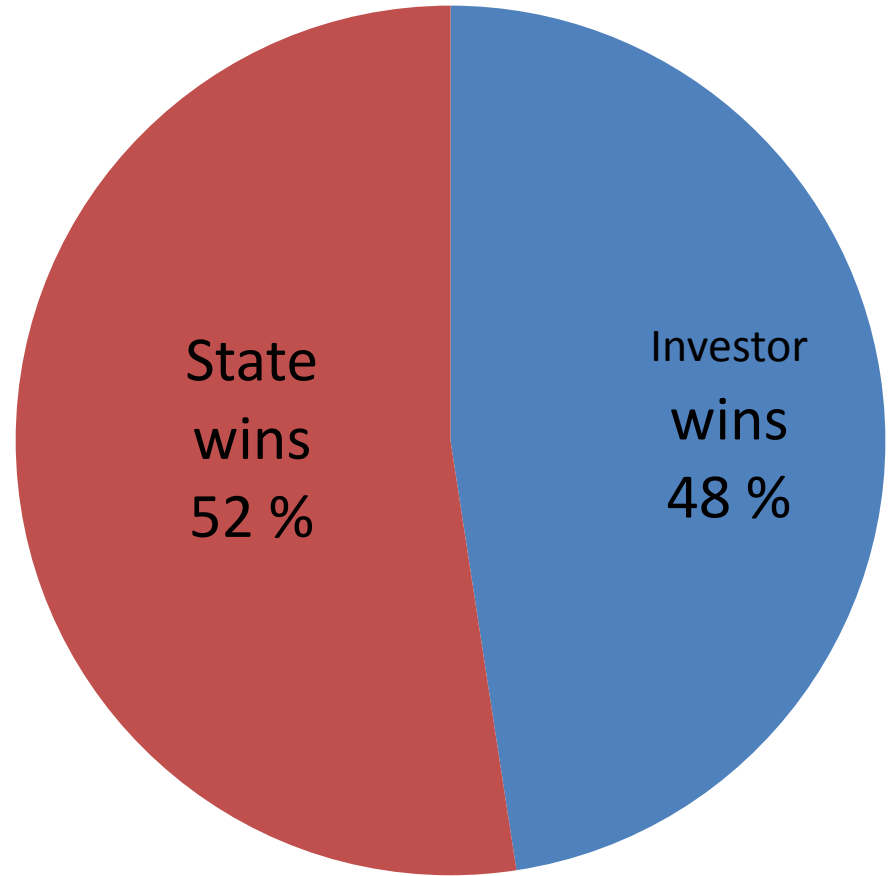
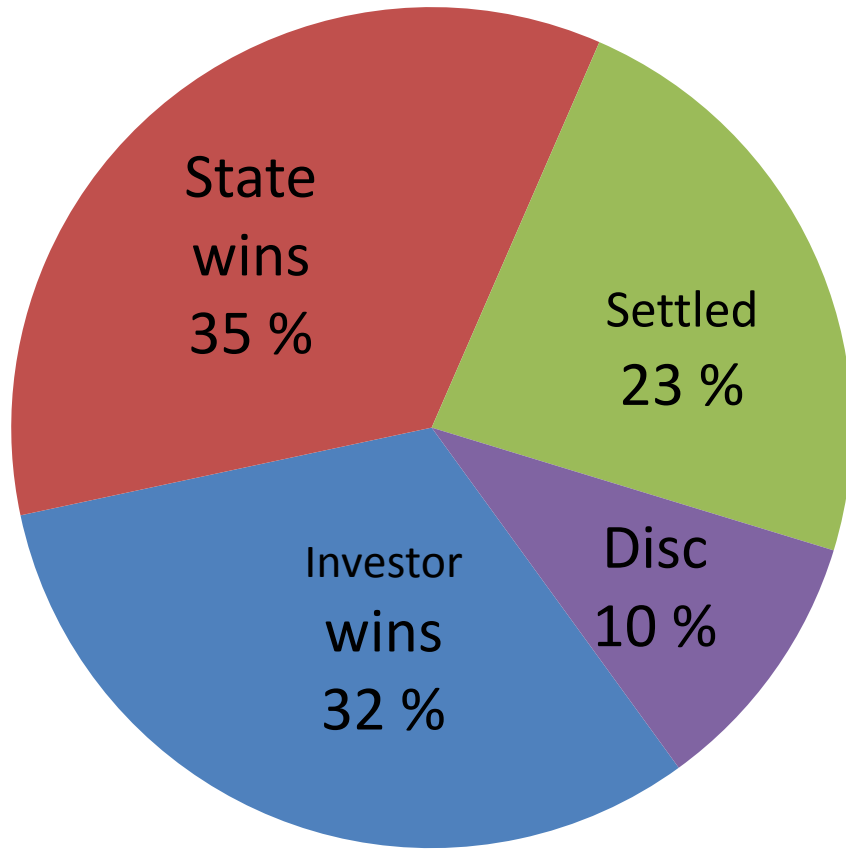
Future cases

- *Spence v Costa Rica* (Bethlehem, Kantor, Vinuesa)
- *Ballantine v Dominican Republic* (Burnett)
- *Griffin v Poland* (Kaufmann-Kohler, Williams, Sands)
- *Besserglik v Mozambique* (Khan, Fortier, Von Wobeser)
- *Aven v Costa Rica* (Siqueiros, Baker, Nikken)
- *Albaniabeg Ambient v Albania* (Caron, Townsend, Hoffmann)
- *Renco v Peru* (Moser, Fortier, Landau)
- *Mercer v Canada* (Veeder, Vicuna, Douglas)
- *Gabriel Resources v Romania* (Alexandrov, Douglas)
- *Infito Gold v Costa Rica* (Kaufmann-Kohler, Hanotiau, Stern)
- *Lone Pine v Canada* (Veeder, Haigh, Stern)
- *Van Riet v Croatia* (Bockstiegel, Fadlallah, Landau)
- *Gavrilovic v Croatia* (Pryles, Alexandrov, Thomas)
- *Vattenfall II v Germany* (Van Den Berg, Brower, Lowe)
- *Chevron II v Ecuador* (Veeder, Naon, Lowe)
- *Baggerwerken v Philippines* (Tercier, Alexandrov, Thomas)
- *Almas v Poland* (Crawford, Mestad, Reinsich)

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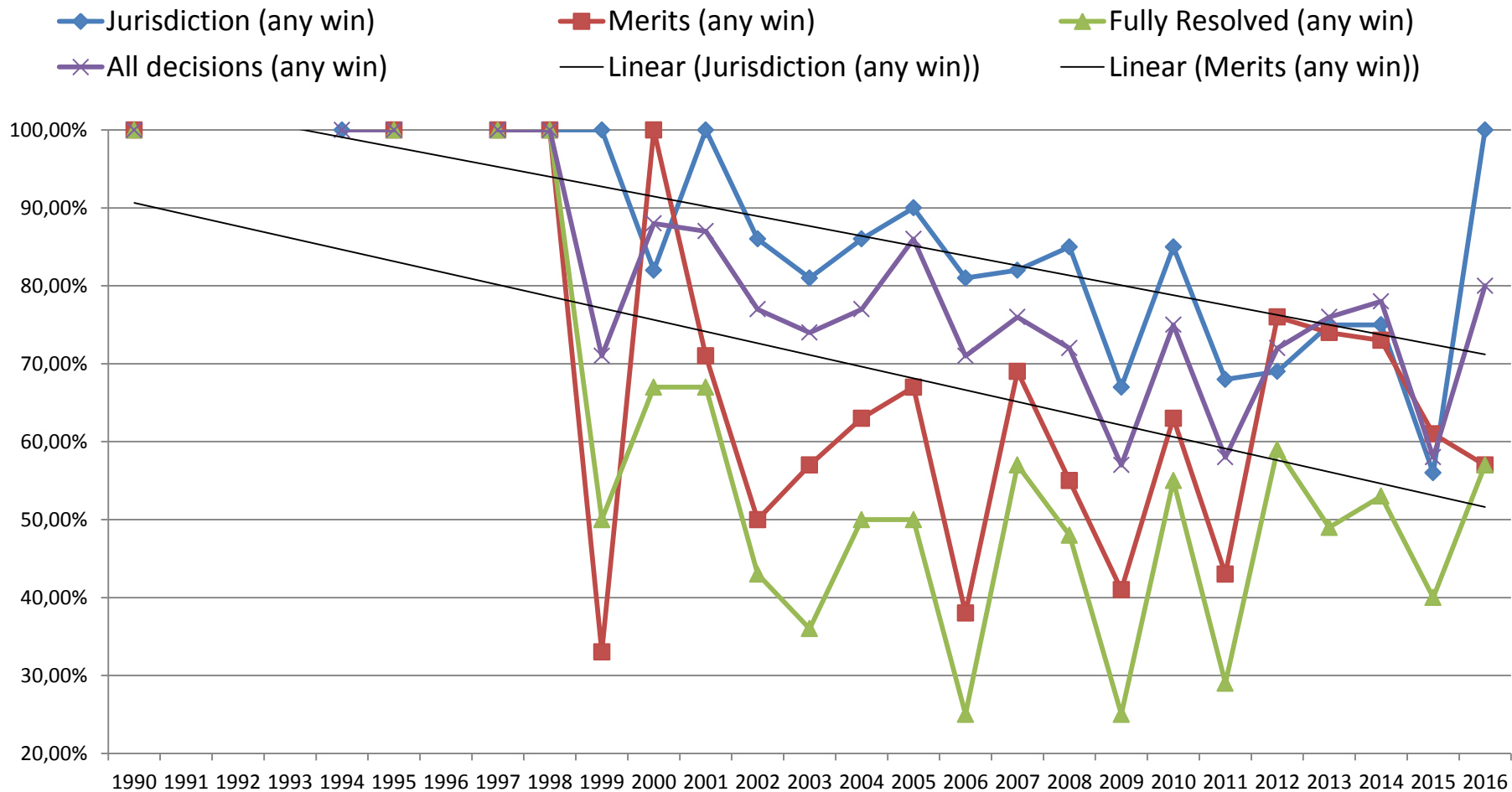
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The environmental cases (wins) (loses) (settles)

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

The environmental cases (NAFTA)

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| 1. | Saar Papier v Poland | 19. | Commerce v El Salvador |
| 2. | Ethyl Corp v Canada | 20. | Dow AgroSciences v Canada |
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The environmental cases (dismissed on jurisdiction)

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The environmental cases (regulatory quality)

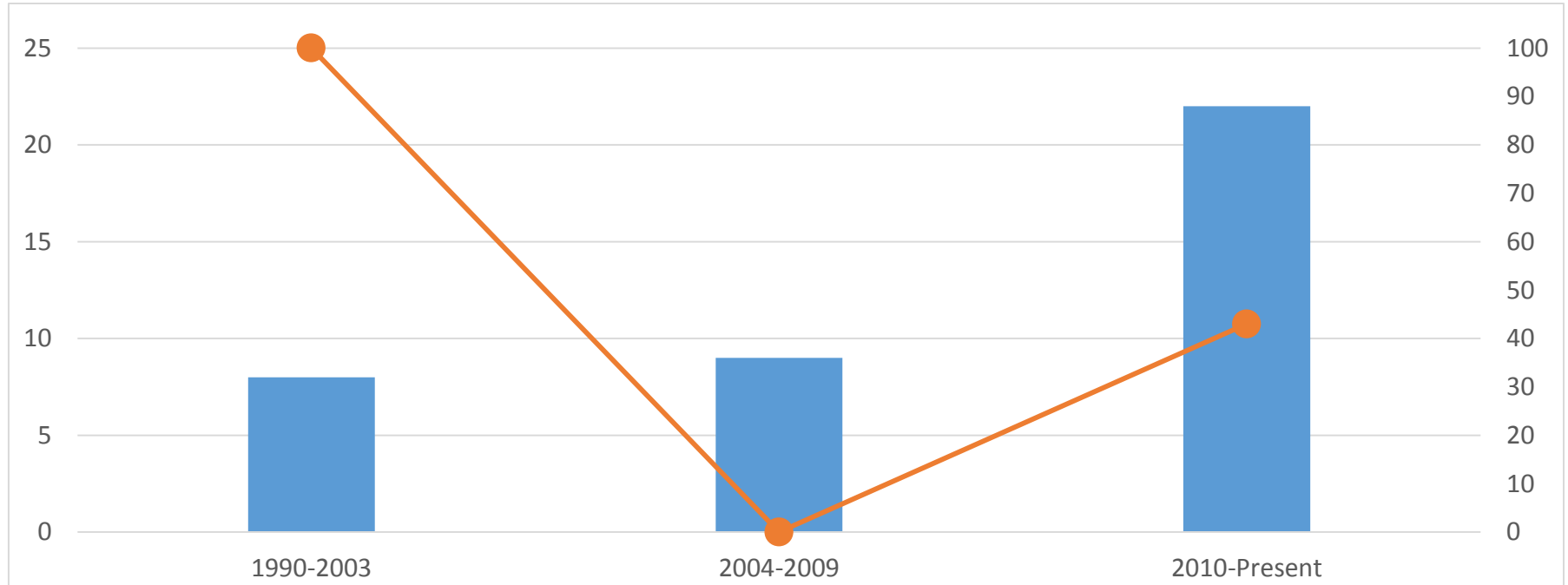
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The environmental cases (legislative measure)

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Concluded cases

Win/loss ratio in %



After 2003, claimant-investors are between 30% and 50% as likely to win over the baseline period (1990-2003)

Environment in ISDS

- The «trade – environment» discourse inspired an «investment – environment» discourse
- The timing of the investment – environment discourse
- The engagement of environmental NGOs
- The conduct of environmental and sustainability impact assessments
 - With a focus on regulatory impact

Do environmental policy measures need special attention?

- High degree of deference in environmental legislation
- High degree of decision-making by local authorities
- Decision-making in situations of significant uncertainty
- Policy adjustment to new knowledge
- The need for technological innovation
- Experimenting with new policy measures
- The importance of natural resources for developing countries' economies

Is ISDS sufficiently sensitive to environmental issues?

- The empirical evidence still raises some questions
 - The issue of cost allocation between investors and public authorities – a «revival» of the polluter pays principle?
 - The increasing environmental urgency – needs for policy reform
- Changing treaty practice – how will tribunals react?
 - Will they become more sensitive to the treaties' wording?
- «In the shadow of ISDS» – how is ISDS used in negotiations between investors and host countries?