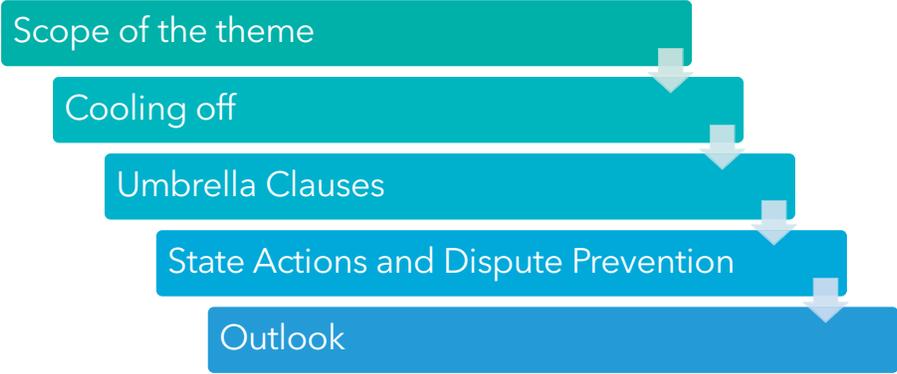


# PROTECTING YOUR INVESTMENT: WHEN A CONTRACTUAL DISPUTE COULD NOT BE COOLED-OFF

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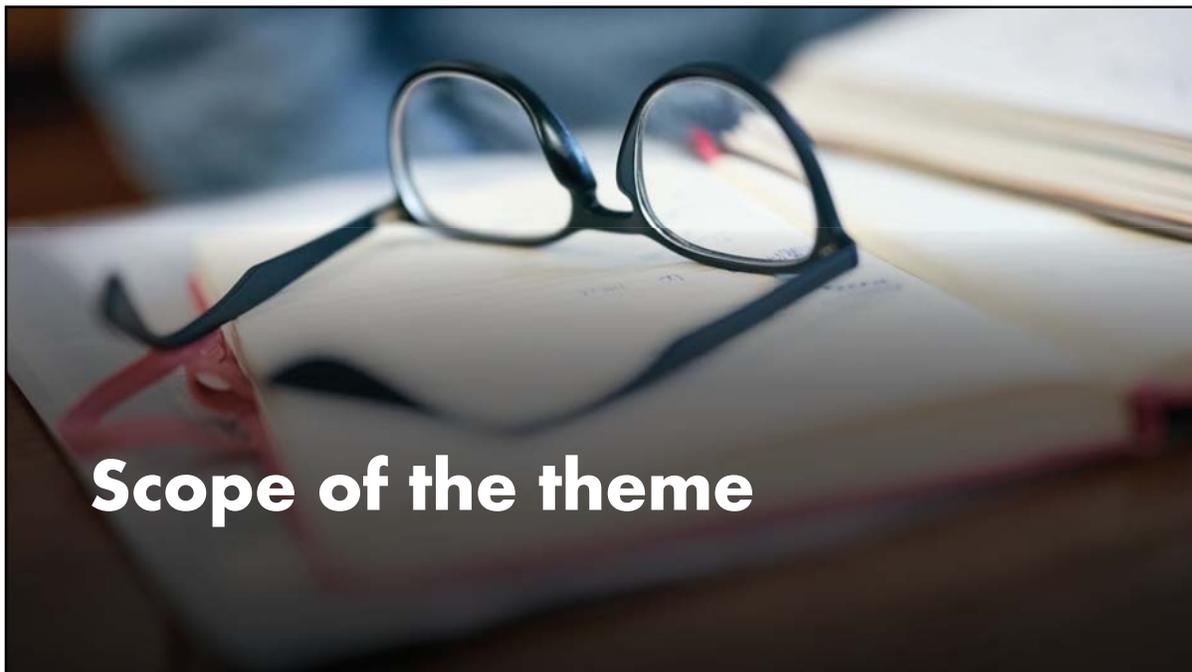
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## Outline



- Scope of the theme
- Cooling off
- Umbrella Clauses
- State Actions and Dispute Prevention
- Outlook

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**When and how can contractual claims be converted to investment claims?**

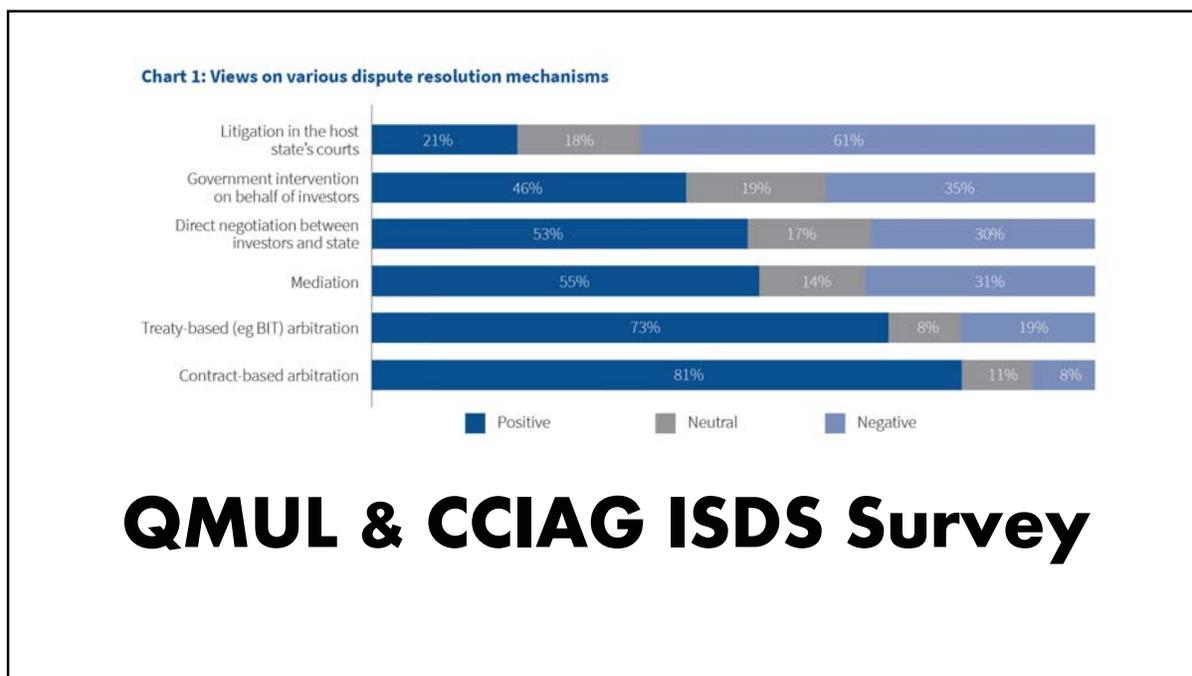
- Exhaustion of local remedies
- Lack of judicial protection / denial of justice
- Inability to enforce a commercial award
- Specific agreement for ISDS in commercial contract
- Umbrella clauses

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## When and how can contractual claims be converted to investment claims?

- Broad definition of investment (And need for duration)
- Loewen v USA
- Saipem v Bangladesh
- White Industries v India
- QMUL / CCIAG 2020 ISDS Survey

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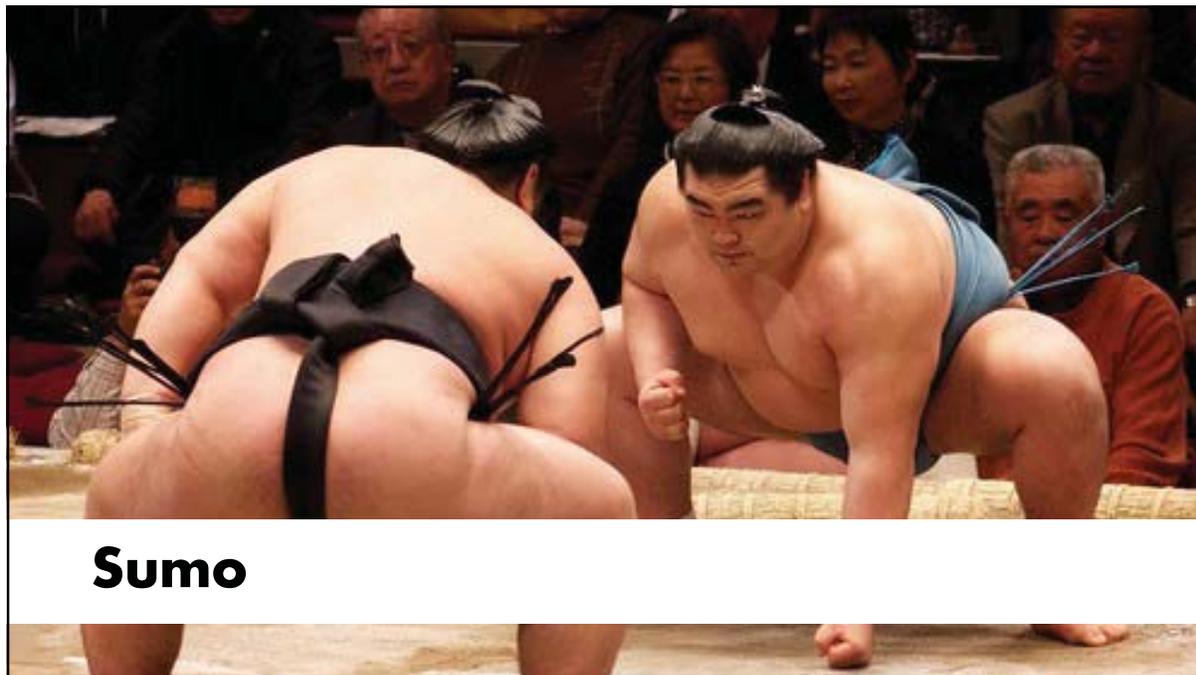


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**Cooling Off**

- + Typically, a treaty provision affecting the admissibility of claims
- + An opportunity to appreciate each other's case (admittedly with limited data exchange)
- + Sumo posturing or genuine invitation to assess risk and explore settlement?

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## Sumo

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## Umbrella Clauses

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## Umbrella clauses

- + Provision in a treaty which provides that the Contracting parties undertake to observe any obligations they have entered into with regard to investments
- + Example Article 10(1) Energy Charter Treaty
  - "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."

### STATISTICS

- + **Invoked in 156 cases**
- + Breach Found in 19 Cases
- + Success Rate 12.2 %

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## Umbrella clauses

- + Historically, suggested as a means of providing internationalized dispute settlement procedures for all types of contracts/concessions
- + Does not automatically elevate a contract breach to a treaty breach without 'something more'
- + Issue of forum selection clauses
- + Attribution will also often be at issue

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## Umbrella clauses

- + "A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT." (Vivendi annulment decision para 95)
- + "...Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement" (SGS v Philippines Para. 128)

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## State Actions and Dispute Prevention

Communication is critical

Specially designated state agencies can assess the risk of disputes

Sometimes state actions are merely a matter of calculated risk (eg Spanish feed-in tariffs)

Dispute avoidance and prevention is a matter of good governance

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## Outlook

States are assuming risks on the basis of sovereignty

It is critical to maintain a business-friendly regulatory regime and environment

Settlement is not a matter of weakness but a way of moving forward

Investment disputes are inevitable so it is critical to be prepared for them

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## Thank you

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