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ARTICLE

The Debate on Treaty-Based Investor–State Dispute Settlement: Empirical Evidence (1987–2017) and Policy Implications

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Abstract—Over the last decade, Investor-State Dispute Settlement (ISDS) has been the most controversial issue in international investment law and policy. This paper is not intended to take sides with any position on the multiple dimensions of the ISDS debate. Instead, this note only attempts to examine and summarize the empirical evidence available which may be useful to foster a more factual and objective discussion on this controversial topic. To achieve this objective, this note will empirically assess the use of ISDS between 1987 and 2017 by focusing on eight key questions: (i) the number of ISDS disputes; (ii) the most commonly used arbitration rules, venues and arbitrators; (iii) the features of the parties involved in disputes -both investors and States; (iv) the investment protection guarantees most frequently invoked by investors and the most frequently recognized by tribunals; (v) the economic sectors in which ISDS tends to concentrate, (vi) the outcomes of the disputes, (vii) the performance of the ISDS procedures in terms of time and cost, and (viii) the frequency of ISDS relative to State-to-State investment dispute settlement. This evidence summarized in this paper shows that ISDS is a manifestation of deeper and more complex political economy in the relationship between foreign investors and host States. The debate on ISDS has deviated the attention from a more critical issue. That is, the significant number of cancellations or total withdrawal of investment projects in developing countries and economies in transition that never reach ISDS, and yet entail the same type of grievances that IIAs are supposed to prevent. This finding suggests that in practice, in many countries the principles and disciplines included in IIAs are not being fully implemented nor mainstreamed within regular administrative action at different levels of government.

I. INTRODUCTION

Most international investment agreements (IIAs) enable investors to enforce investment protection guarantees directly against host States, through international arbitration. This mechanism, known as investor–State dispute settlement (ISDS), has been the most controversial issue in international investment law and policy over the last three decades.

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The controversy has gravitated around two issues that, albeit related, are distinct and yet are often lumped together. One the one hand, there is the debate about the 'private right of action'.[2] That is, the mere possibility for a foreign investor to submit a claim directly to an international tribunal to seek redress for an alleged violation of its rights under an IIA.[3] On the other hand, there is a different debate that does not challenge the basic notion of the private right of action. This discussion rather focuses on which is the most effective venue and procedures that investors should follow when directly seeking redress in international investment disputes. Recently, a number of countries have opted to complement or replace one type of ISDS (arbitration) with another (an international investment court) on the ground that such instance will make ISDS more transparent, predictable, consistent and protect against perceptions of potential conflicts of interest between legal practitioners representing a party in a dispute in one case and subsequently acting as arbitrators in another.[4] Within this context, the United Nations Commission on International Trade Law (UNCITRAL) has established a working group with a broad mandate to explore possible reform to the existing ISDS regime.[5]

This article is not about the debate as to whether one type of ISDS may be a better policy choice over another. Instead, given that it is the private right of action that really defines the essence of ISDS, and it is this issue that has triggered the more fundamental challenges to the legitimacy of investor–State adjudication,[6] this article will focus only on this dimension of the ISDS debate.

The controversy about the private right of action through ISDS has generated rivers of ink in the investment literature.[7] While some scholars argue that ISDS is basically an instrument that over-empowers big multinational companies to the detriment of developing States facing economic hardship,[8] others assert that, without ISDS, investors would be left vulnerable not only to opportunistic behavior by host States, but also to the political discretion of their own home

[2] There are many ways to provide a 'private right of action' to investors and enable them directly to invoke ISDS. Investors may be able to invoke arbitration pursuant to domestic investment legislation of the host State—if the applicable law does provide for it—, or as part of a contract between investors and governments that may include an arbitration clause. In this article, 'ISDS' will be used to refer only to 'treaty-based' claims: that is, disputes invoked by IIAs.

[3] Until IIAs began to include ISDS in the late 1960s, disputes between foreign investors and host States had to be settled though 'diplomatic protection'. Given that, at the time, investors did not have a 'private right of action' and, thus, no direct access to international dispute resolution, they had to convince their home governments to sponsor their claims and invoke international State-to-State dispute settlement to seek redress for any damages caused to their investments overseas.

[4] Emily Osmanski, 'Investor-State Dispute Settlement: Is There a Better Alternative?' (2018) 43 Brooklyn J Intl L 639 https://brooklynworks.brooklaw.edu/bjil/vol43/iss2/13/; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007). The latter strand of the discussion has led some countries, in particular those in the European Union, to advocate for the establishment of an international investment court, basically pursuing the same logic of investor–State arbitration, but, contrary to the latter, having a permanent set of experts appointed by States conforming tribunals—instead of having both parties to the dispute appoint their own arbitrators—and establishing an appeal mechanism to revise the decisions of the first instance, as opposed to arbitration that is final and has only very specific remedies.

[5] See: 2017 to present: Investor-State Dispute Settlement Reform, UNCITRAL Working Group III Documents <http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html>

[6] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L. Rev. 1521.

[7] For an overview of the debate, please refer to the works referred to in the notes to this article.

[8] Muthucumaraswamy Sornarajah, 'International Investment Law as Development Law: The Obsolescence of a Fraudulent System' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law* (Springer 2016); Kaushal (2009).

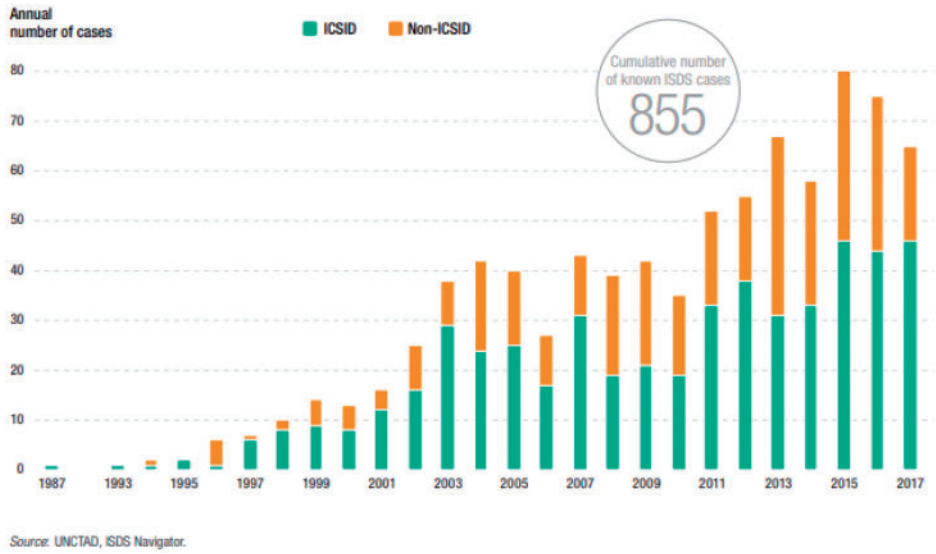


Figure 1. Treaty-based ISDS: 1987-2017

States as to whether to espouse their claims for international redress.[9] Further, the debate on ISDS has also gravitated around the question whether ISDS should apply to investors only when investing in developing countries with weak governance, and not to developed economies with a strong rule of law tradition.

The purpose of this article is not to take sides with either position on the multiple dimensions of the ISDS debate. Instead, this note only attempts to examine and summarize the available empirical evidence, which may be useful to foster a more factual and objective discussion on this controversial topic. To achieve this objective, this article will empirically assess the use of ISDS between 1987 and 2017[10] by focusing on eight key questions: (i) the number of ISDS disputes; (ii) where the ISDS activity takes place; (iii) the features of the parties involved in disputes (both investors and States); (iv) the investment protection guarantees most frequently invoked by investors and those most frequently recognized by tribunals; (v) the economic sectors in which ISDS tends to concentrate; (vi) the outcomes of the disputes; (vii) the performance of the ISDS procedures in terms of time and cost; and (viii) the frequency of ISDS relative to State-to-State investment dispute settlement.

The methodology used to prepare this article combines a review of the most widely recognized and recent literature focused on the empirical analysis on ISDS[11], and complements it with specific firm-level data of each known treaty-based ISDS dispute

[9] Fredrik Erixon, 'The "Repsol Case" Against Argentina: Lessons for Investment Protection Policy', European Center for International Political Economy (ECIPE 2014) http://ecipe.org/publications/repsol-case-against-argentina-lessons-investment-protection-policy/; Jeremy Fleming 'Economist: "ISDS Disconnect between Rhetoric and Reality"', Euractiv.com, December 11, 2014 <https://www.euractiv.com/section/trade-society/interview/economist-isds-disconnect-between-rhetoric-and-reality/>.

[10] Although the means to invoke ISDS has existed since the mid-1960s, it was not until 1987 that the first treaty-based ISDS case was submitted: *Asian Agricultural Products Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3 <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/87/3>.

[11] List of research included in notes to this article.

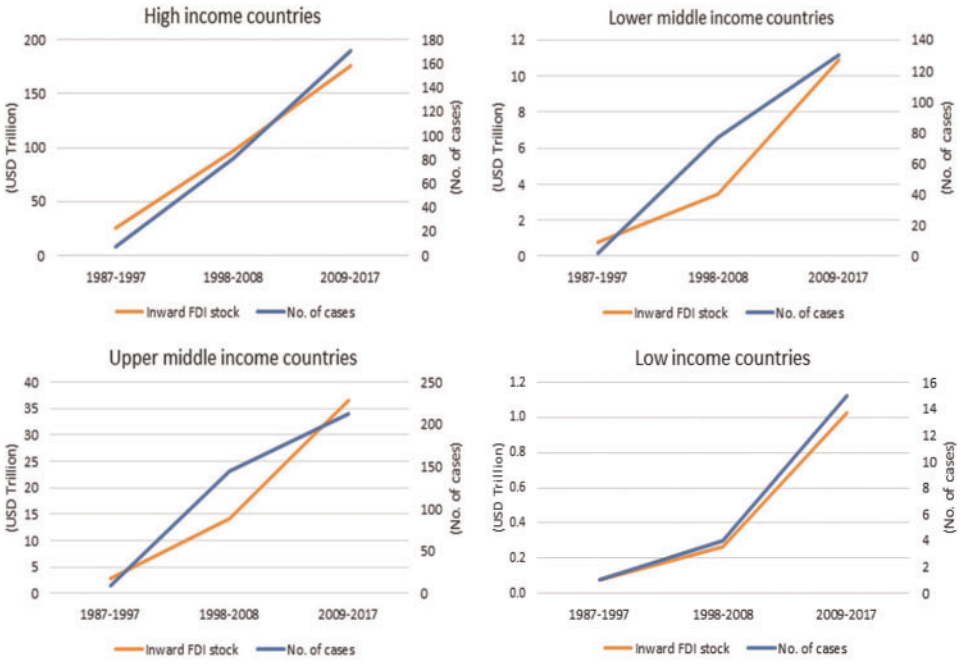


Figure 2. 1987-2017: Growth of inward FDI stock and ISDS claims filed by country income category

available through the United Nations Conference on Trade and Development (UNCTAD)[12] and International Centre for Settlement of Investment Disputes (ICSID)[13] databases.

In addition to this introduction, this article contains two additional sections. In the second section, specific subheadings address each of the key questions referred to above. Section III includes some conclusions and policy implications.

II. ISDS 1987–2017: EMPIRICAL FINDINGS

A. *The Number of ISDS Cases: Are There Too Many?*

Based on UNCTAD data, between 1987 and 2017 there were 855 known treaty-based ISDS disputes. This figure represents an average of 30 ISDS claims submitted every year during the period. However, as Figure 1 clearly illustrates, the escalation in the number of claims really occurred after the late 1990s, once the number of IIAs entering into force also began to increase.[14] Thus, a

[12] UNCTAD Investment Dispute Settlement Navigator Database <http://investmentpolicyhub.unctad.org/ISDS>.
[13] ICSID Cases Database <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.
[14] Although the first bilateral investment treaty (BIT) was signed in 1959 between Germany and Pakistan, the first BIT including ISDS was not signed until a decade later between Indonesia and the Netherlands. Further, during the 1960s and until the 1980s, most developing countries refrained from becoming parties to BITs. The boom in the negotiation of BITs and IIAs in general only occurred during the 1990s, after significant structural adjustment reforms leading to market-oriented economies took place in most of the developing countries and economies in transition. Today, the current cumulative number of IIAs is more than 3300; Andrew Newcombe and Lluís

focus only over the last decade elevates the average annual number of ISDS claims to 55.

More than 800 disputes in 30 years clearly appears to be an important number. However, a different picture seems to appear when this is placed in context. Different criteria can guide such assessment.

One is to compare the number of ISDS claims with the expansion of foreign direct investment (FDI) stock over the same period.[15] Empirical studies[16] have argued that ISDS claims are directly proportional to FDI stock, given that most of the investment is covered by treaty protection. Figure 2 graphically compares the increase in FDI stock with the increase in the number of ISDS cases across countries, classified by different income categories based on World Bank Group (WBG) criteria.[17] There seems to be a positive correlation between the increase in FDI stock and the increase in ISDS in all income categories between 1987 and 2017. However, the ratios vary among different income categories of countries. The higher the income category, the higher the FDI stock received and, thus, the lower the weight of an ISDS case relative to FDI. Further, ratios tend to vary significantly when comparing the total number of ISDS claims filed versus the total number of disputes lost relative to inward FDI stock. As governments tend to win many cases, the amount of FDI stock received is significantly higher relative to the number of cases lost by States.

In the case of high-income countries, for every ISDS claim filed during the period, US$1,153 billion of inward FDI stock was received, while the ratio is US$10,661 billion of inward FDI stock per ISDS case lost. In the case of upper middle-income countries, for each ISDS claim filed, countries received US$145 billion, while for each case lost the ratio increased to US$693 billion per ISDS case lost. For lower middle-income countries the ratio was US$79 billion per ISDS claim filed and US$398 billion per claim lost, while for low-income countries the ratio was US$69 billion of inward FDI stock per case, increasing to US$171 billion of inward FDI stock per case lost.

ISDS cases can also be placed in context by comparing their number with the amount of new FDI projects over a similar period. In this regard, based on fDi Markets data[18] on investment projects announced between 2003 and 2017—which is the period for which data is available—when comparing the number of new greenfield FDI projects announced with the number of new ISDS cases over the same period, it turns out that the number of investors invoking ISDS may represent around 0.4 percent of the total.

Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009). Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press 2010).

[15] Based on WBG data, FDI net inflows increased from US$128.227 billion in 1987 to US$2,436 trillion in 2016 <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>.

[16] Scott Miller and Gregory Hicks, 'Investor-State Dispute Settlement: A Reality Check' (Center for Strategic and International Studies 2015) <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf>.

[17] For the 2017 fiscal year, low-income economies were defined as those with a Gross National Income (GNI) per capita, calculated using theWorld Bank Atlas method, of US$1,025 or less in 2015; lower middle-income economies were those with a GNI per capita between US$1,026 and US$4,035; upper middle-income economies were those with a GNI per capita between $4,036 and US$12,475; high-income economies were those with a GNI per capita of US$12,476 or more <https://data.worldbank.org/products/wdi-maps>.

[18] fDI markets cross border investment monitor database <https://www.fdimarkets.com/>.

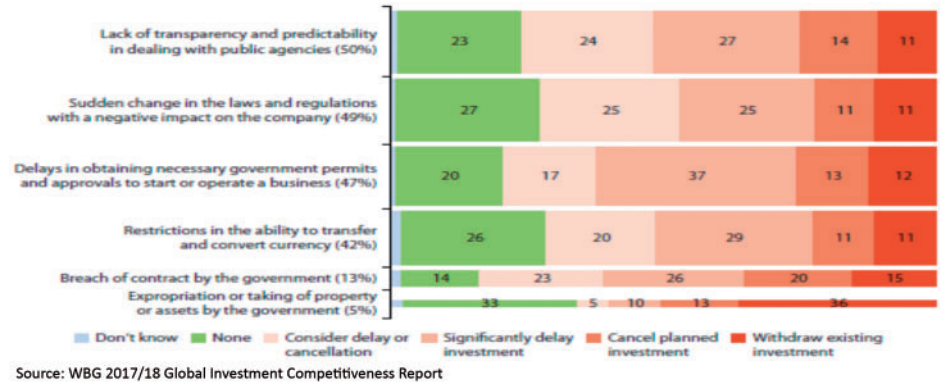


Figure 3. Investors Reactions to Political Risk Derived from Government Conduct

A third approach—to place the number of ISDS claims in context—would be to compare that caseload with those of other international economic institutions providing international dispute settlement. However, the nature of the parties to the dispute in the case of ISDS—involving an investor on the one hand and a government on the other—makes it difficult properly to compare ISDS dynamics with other disputes entailing different parties to the dispute. Having taken note of that caveat, as an example, during its first 10 years of operation, the World Trade Organization (WTO) dispute settlement system, which is exclusively reserved for State-to-State disputes, had 518 disputes,[19] representing a similar annual average number of claims as ISDS over the last decade. On the other hand, disputes arising between individual investors—either private or State-Owned Enterprises(SOEs)—brought to arbitration at the International Chamber of Commerce (ICC) were more than 900 in 2016 alone, and more than 800 in 2017, of which only four were ISDS. From this vantage point, the number of ISDS cases seems to be similar to that of the WTO and significantly lower—in fact approximately the equivalent of an annual caseload—when observing investor-to-investor disputes at the ICC.

The total number of ISDS disputes occurring between 1987 and 2017 can also be placed in context by comparing these figures with the total number of investors who have opted to cancel their investment expansion plans or totally withdraw their investments because of grievances such as those addressed by ISDS. This approach answers the question of how often investors invoke ISDS when they see their investments negatively affected. As shown in Figure 3, it seems that only a very minor fraction of investors seriously affected by undesirable government behavior invoke ISDS. A series of surveys undertaken by the WBG over the last decade have consistently shown that around 25 percent of investors who have already invested in developing countries have either cancelled their investment expansion plans or totally withdrawn their investments due to government measures failing in at least four types of issues: (i) arbitrary and sudden regulatory changes and lack of transparency of public agencies; (ii) breach of contracts; (iii) expropriation; and (iv) problems related to transfers and currency convertibility.[20]

[19] WTO (2018) Data available at: <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

[20] World Bank Group, 2017/2018 Global Investment Competitiveness (GIC) Report p 35; MIGA, World Investment and Political Risk, Reports (2010, 2011, 2012 and 2013). Recent literature shows that in some specific

It is revealing that the four categories of political risk causing high rates of investment lost (Figure 3) coincide with the core IIA investment protection guarantees that ISDS is supposed to enforce.[21] This datum suggests that, if only half of the investors cancelling or withdrawing investment projects as a result of government action over the last 30 years had opted to seek redress through ISDS, the number of disputes could have been many times higher than the actual number of claims submitted to ISDS over the period.

Having most foreign investors cancelling investment plans, or withdrawing their investments, and yet abstaining from invoking ISDS, raises many questions. Further research would be needed to elucidate in detail the factors explaining why so few cases are brought relative to the potential number of episodes.[22] However, as this article will discuss in Section G., empirical data already shows that ISDS proceedings are not cheap or fast, and tend not to support the arguments or amounts for compensations sought by foreign investors. Within this context, it is understandable that private sector representatives have stated that, 'investment disputes are (from an investor's standpoint) expensive to file, time-consuming and difficult to win. Add to these drawbacks the risk of alienating the host government, and it's not surprising that in a world of ever-growing international investment, ISDS appears to be used by investors as a last resort'.[23]

B. Where Does the ISDS Take Place? Arbitration Rules, Venues and Arbitrators

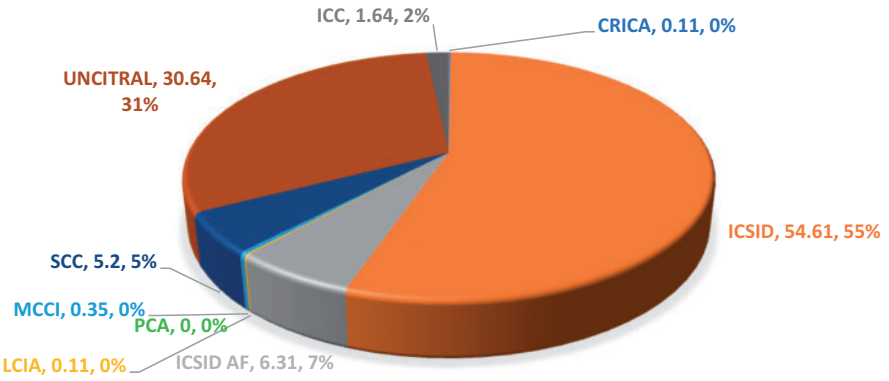
ISDS has traditionally taken the form of investor–State arbitration. This mode of dispute resolution offers the parties more control over the proceedings than would be available through the court system. Thus, it is up to the disputing parties to decide on procedural aspects such as whether to submit their dispute to one or more persons—a sole arbitrator or a tribunal—who in turn must be selected by agreement of the parties. To expedite the process, most IIAs regulate key aspects of the arbitration process, but in principle the parties always retain the control to appoint the arbitrators. IIAs also provide many alternative rules and venues in which arbitration can be submitted. The States express their advance consent and procedural preferences when negotiating the IIA and the investors express their consent to arbitration when submitting the dispute, in which case they also accept the procedural provisions included in the applicable IIA, which often provide

circumstances, a number investors opt to remain in the host country even after submitting a claim to ISDS. Rachel L Wellhausen, *International Investment Law and Foreign Direct Reinvestment* (forthcoming) Intl Organization, available at http://www.rwellhausen.com/uploads/6/9/0/0/6900193/wellhausen_io_final_manuscript.pdf

[21] The core investment protection guarantees included in IIAs are: non-discrimination (national treatment and most favoured nation (MFN)), fair and equitable treatment/minimum standard of treatment, protection against unlawful expropriation and free transfers of payments related to investments. These obligations apply to all government conduct, including performance under contracts. In addition, a significant number of IIAs include 'umbrella clauses' by which a violation of a specific contract per se also becomes a violation of the IIA, and thus subject to treaty-based ISDS. For further detail on clauses on IIAs, see Roberto Echandi and Ana Joubin-Bret. 2006*Bilateral Investment Treaties, 1995-2006: Trends in investment rulemaking* (United Nations 2006) <http://unctad.org/en/docs/iteiia20065_en.pdf>.

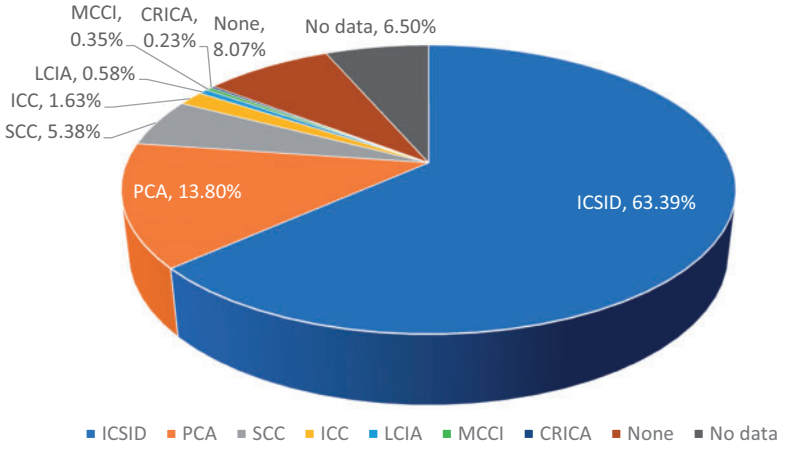
[22] For a more detailed explanation of the characteristics and political economy of grievances between investors and States before dispute escalation, see Roberto Echandi, *Enabling long term investments for development* (World Bank, forthcoming).

[23] Scott Miller and Gregory Hicks, "Investor-State Dispute Settlement: A Reality Check", Center for Strategic & International Studies (2015). Available at <https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf>.



Source: UNCTAD data

Figure 4. Treaty-based ISDS 1987–2017: Distribution of known cases by applicable arbitration rules (in percentages)



Source: UNCTAD data

Figure 5. Treaty-based ISDS 1987-2017: Administering Institution (in percentages)

investors with a choice of various arbitration rules, venues and arbitrator nomination procedures.

As far as arbitration rules are concerned, most IIAs provide investors with the possibility of choosing among multiple alternatives pre-identified in the treaties. The choices available range from institutional arbitration, such as ICSID,[24] to *ad*

[24] ICSID is the only institutional arbitration forum specially designed to address legal disputes arising between a national of a member State and the government of another State. It is denominated as institutional arbitration because it offers the parties to the dispute not only a centre that already has pre-agreed rules of procedure, practices and logistical arrangements to carry out arbitration processes , but because the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966)) includes a self-contained legal regime providing a series of remedies against arbitration awards in case the parties consider key guarantees have been ignored during the process, and also makes the final award binding and subject to execution in all parties signatories of the ICSID Convention. If only one

hoc arbitration using the ICSID facility rules, the UNCITRAL model arbitration rules,[25] the arbitration rules of theICC, located in Paris,[26] or the Stockholm Chamber of Commerce (SCC) among others. As shown in Figure 4, between 1987 and 2017, more than half of all treaty-based ISDS disputes were submitted under the ICSID Convention, with an additional 6 percent under the ICSID Additional Facility. Roughly a third have been governed by the UNCITRAL arbitration rules, and only around 15 percent by other available arbitration rules such as those of the ICC and SCC, the London Court of International Arbitration (LCIA),[27] the Moscow Chamber of Commerce and Industry (MCCI), the Cairo Regional Center for International Commercial Arbitration (CRICA) or the Permanent Court of Arbitration at The Hague, Netherlands (PCA).[28]

Different arbitration centers can provide logistical support services to arbitration proceedings. Thus, even if an investor opts to submit a dispute under the UNCITRAL arbitration rules, given that UNCITRAL does not have an arbitration center, any institution—such as ICSID, the LCIA or the PCA—may serve as a venue for the arbitration process. This explains why ICSID appears to have a higher share of cases than disputes submitted under the ICSID Convention or ICSID Additional Facility. With 63 percent, ICSID is the main forum of choice for ISDS, followed by the PCA with 13.8 percent. Interestingly, based on UNCTAD data, 8 percent of the cases—which is higher than the percentages of many arbitration centers—are conducted as *ad hoc* arbitrations and are not submitted to any arbitration center, meaning that the parties to the dispute opt to manage the arbitration themselves.

In addition to the rules and venue for arbitration, almost all existing IIAs allow parties to the dispute to select the arbitrator(s) that will adjudicate the dispute. The parties can opt to have a sole arbitrator -in which case both will have to agree on the nomination—or to have a tribunal consisting of three arbitrators. Most IIAs allow the investor to appoint one arbitrator, and the host State to appoint another. The arbitrators then select the third, who often is called to preside. When the parties cannot agree, IIAs also provide for an appointing authority to assume that role.

The appointment of arbitrators has been a point of contention in ISDS. It has been argued that the existing model does not prevent a 'revolving door' effect under which attorneys advising the parties may later become arbitrators, or vice versa. Further, it has been argued that the group of experts serving as arbitrators is small, having become a 'clique', closed to newcomers. In this regard, it must be recognized that the parties to the dispute—both governments and investors—have

country—either the host country or the home country of the investor, but not both—is a signatory of the ICSID Convention, then the investor still has the choice to submit the dispute to the ICSID Additional Facility, which also has additional rules of procedure and practices, but the awards of which will not have the same legal effect. In this case, an award will have to be recognized and executed either under the New York Convention on Recognition and Enforcement of International Awards, signed in New York in 1958, and if a country is not a member of such convention, then that award may only be recognized and enforced according to term provided in that country's domestic legislation.

[25] UNCITRAL Arbitration Rules (1976, as revised in 2010).

[26] ICC Arbitration Rules 2017.

[27] LCIA Arbitration Rules 2014.

[28] PCA Arbitration Rules 2012.

Table 1. Treaty-based ISDS 1987–2017: Distribution of Caseload Among Arbitrators based on available data

Frequency of cases per arbitrator	No. of arbitrators in this category	No. of available 'slots' taken	% of total available 'slots' taken
> 5	401	659	28%
6 to 10	41	305	13%
11 to 20	36	539	23%
21 to 30	12	303	13%
31 to 50	10	367	15%
50+	3	195	8%
Total	503	2,368	100%

Source: UNCTAD data

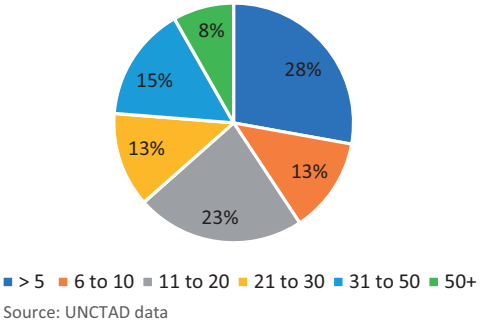
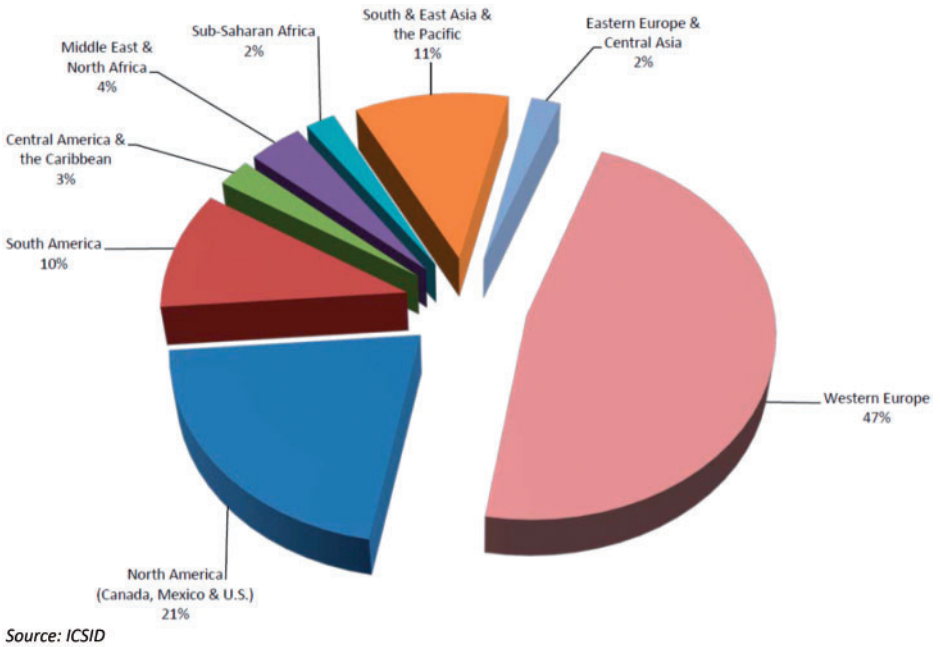


Figure 6. Frequency of appointment of arbitrators (% of available slots)

strong incentives to reappoint experts whose positions, styles and even ideologies are predictable and well known to them. Further, appointing experienced arbitrators may have an important effect of persuading the other members of the tribunal and, thus, may play a key role in their internal deliberations *in camera*. Thus, one might think that, in their efforts towards promoting a more predictable outcome, both parties to ISDS may generate dynamics that may lead to a concentration of appointments in a relatively small number of people. Although empirical evidence tends to corroborate such hypothesis, data also shows an increasing number of experts becoming arbitrators.

Empirical evidence shows that, in fact, there is a small number of arbitrators who may have generated an important degree of confidence in both States and investors—or other arbitrators who may have appointed them as presidents of the tribunal—and, as a result, they have been appointed many times. However, data also shows that such a group has not prevented a significant number of new arbitrators—more than 400 —to be appointed, nor has it captured a significant share of the total arbitration appointments. Table 1 and Figure 6 show a breakdown of the different categories of arbitrators selected, based on the number of cases in which they have been appointed in an original arbitration proceeding, as opposed to an ICSID annulment proceeding. The table shows that, of the 766



Source: ICSID

* The classification of the geographic regions above is based on the World Bank's regional system, available at http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK:180619~theSitePK:136917,00.html, and also includes World Bank donor countries. The chart reflects appointments made to Tribunals and *ad hoc* Committees constituted until December 31, 2017.

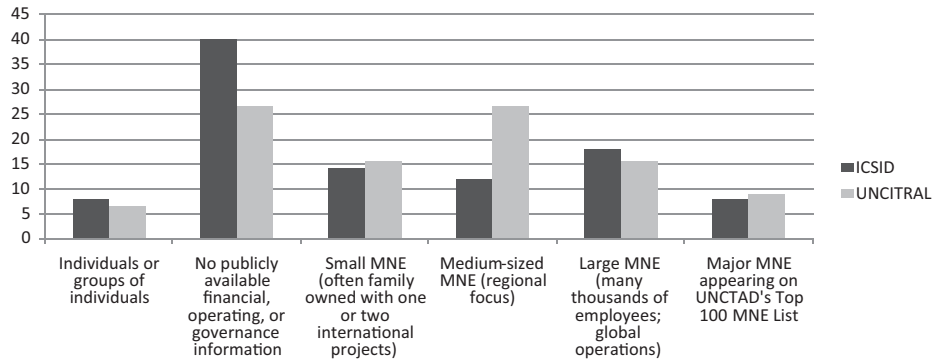
Figure 7. Arbitrators, Conciliators and ad hoc Committee Members Appointed in Cased Registered under ICSID: Distribution of Appointments by Geographic Region*

cases for which complete data is available at UNCTAD, in only 10 was a sole arbitrator appointed, leaving the rest of the ISDS disputes to be decided by a tribunal of three arbitrators, representing a total of 2,368 slots available.

Data shows that, during the 1987–2017 period, three experts were appointed as arbitrators more than 50 times. However, they took 195 of the slots available, representing 8 percent of the total. The rest of the arbitration appointments have been distributed among other categories, with two categories gathering the majority. First, there is the category of 'newcomers', which is the most numerous group, with 401 arbitrators who have been appointed between one and five times and comprising almost a third of the total number of available appointments. Secondly, there are those arbitrators who have been appointed between 11 and 20 times over the period. This is a significantly smaller group than the latter, comprising 36 individuals. However, they have taken less than a quarter of the slots available.

As far as nationality of arbitrators is concerned, and focusing on ICSID cases only, the data shows a wide spread of nationalities of arbitrators[29] coming from all different regions of the world. However, around half of all arbitrators are nationals from western Europe, making them the most frequently appointed.

[29] This data includes the 10 conciliation cases that took place during the 1987–2017 period under study.



Source: OECD 2012/2013

Figure 8. Types of Investor that are claimants in 50 ICSID and 45 UNCITRAL cases (for the ICSID and UNCITRAL cases, characteristics of investor-claimants; percentage of cases)

C. *Parties Involved in ISDS: What Types of Investors and Which Governments Tend to Be More Frequently Involved in Disputes?*

(i) *Who are the investors invoking ISDS?*

From a methodological point of view, in a globalized world it is extremely difficult precisely to assess the size or nationality of investors. Corporate structures, in both developed and developing countries alike, tend to entail subsidiaries and branch offices in one or more countries, and each may be constituted or organized under different countries or jurisdictions. Thus, available data describing investors—including the figures below—should be read with this caveat in mind.

Investors invoking ISDS over the 1987–2017 period comprise a wide variety of sizes and countries of origin, including individual investors and small and medium companies coming from more than 70 different countries, many of them from lower- and middle- income economies. First, in terms of the size of investors invoking ISDS, an Organisation for Economic Co-operation and Development (OECD) study found that, up until 2012, one third of all cases were submitted by small and family-owned businesseswith only one or two international operations. Roughly half were medium and relatively larger enterprises, and only 8 percent of claimants were multinational enterprises (MNEs) ranked by UNCTAD in the top 100 MNEs by size. Among United States claimants who submitted ISDS claims to ICSID, Miller and Hicks (2015)[30] and Franck (2011)[31] found that more than 50 percent of the total were individuals or enterprises with fewer than 500 employees, designating them as 'small and medium-sized enterprises' (SMEs) according to the US Small Business Administration.

Secondly, observing the type of investors by nationality, the evidence shows that investors invoking ISDS come from a wide variety of countries, both industrial and

[30] Miller and Hicks (n 16).
[31] Susan D Franck (2011) 'The ICSID Effect? Considering Potential Variations in Arbitration Awards' (Social Science Research Network 2011) <https://papers.ssrn.com/abstract=1842164>.

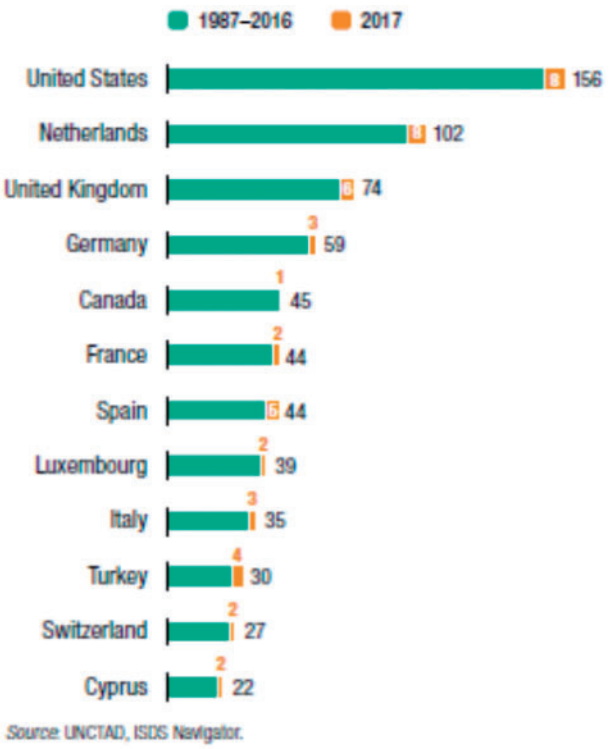


Figure 9. Treaty- based ISDS: Most Frequent Nationality of Investor-claimants

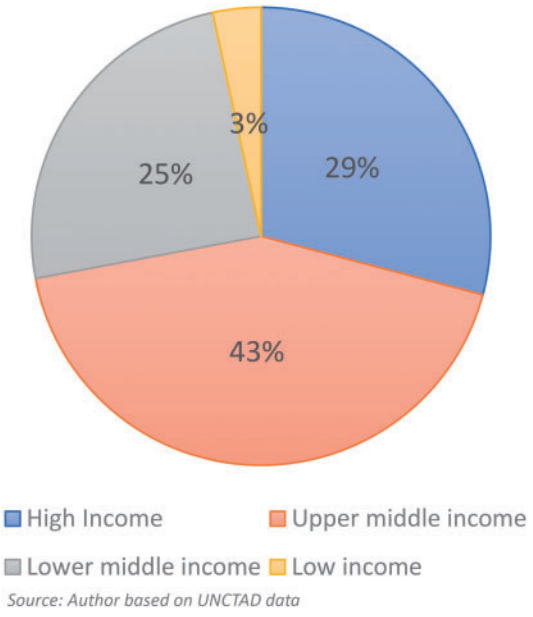


Figure 10. Treaty-based ISDS 1987-2017: Respondents' classified by income level

Figure 11. Treaty-based ISDS: Most Frequent Respondent States 1987-2017

developing economies, comprising at least 73 different nationalities. Interestingly, investors from more than 20 lower- and middle-income countries have acted as claimants in at least one ISDS case. In the lower- to middle-income category, Ukraine, Jordan, India and Egypt are the most frequently arising nationalities, with 11, seven, five and three cases submitted to ISDS respectively.[32] In the upper- to middle-income category, with 30 cases, Turkish investors seem to be the most active, followed by Russian, Mauritian, Chinese, Kazakhs and Panamanians, with 16, eight, seven, five and five respectively. It is also worth noting that Argentine, Lebanese, Malaysian and South African investors have invoked ISDS at least three times over this period.[33]

Despite this variety of nationalities, the 15 nationalities invoking ISDS most frequently are present in more than 80 percent of arbitrations.[34] Figure 9 shows the overall most frequent origin of the nationality of the claimants. However, as stated before, asserting the effective nationality of legal entities invoking ISDS is not straightforward, as claims may be submitted by corporations established under the laws of one country—which is the most common criterion to ascribe nationality to an enterprise—but be effectively controlled by investors from other countries.

(ii) *Which countries are facing and losing ISDS?*

Turning attention to the countries acting as defendants during the 1987–2017 period, ISDS seems to have been a geographically widespread phenomenon. Over the last 30 years, more than 100 countries around the world have been exposed to

[32] Author's calculation, based on UNCTAD ISDS database.
[33] ibid.
[34] Rachel L Wellhausen, 'Recent Trends in Investor–State Dispute Settlement' (2016) 7(1) J Intl Dispute Settlement 117–35 <https://doi.org/10.1093/jnlids/idv038>.

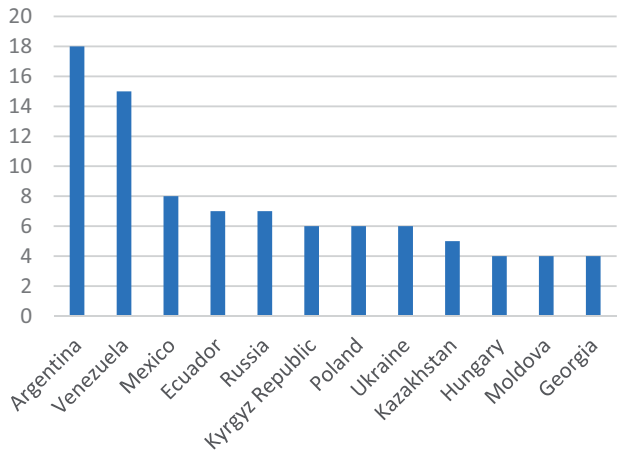


Figure 12. Treaty-based ISDS 1987-2017: Top 12 countries by absolute number of cases lost

ISDS claims at least once.[35] However, as Figure 10 illustrates, there has been a very limited number of disputes against low-income countries. With only 3 percent of the total, low-income countries are almost left out of the ISDS pie. As explained in Section II.A, the fact that low-income countries have received only a fraction of total inward FDI stock over the period may partially explain this trend. In any case, as they comprise 72 percent of the total disputes submitted to arbitration, the evidence shows that ISDS is really a story about upper middle-income and high-income economies and, secondly, about lower middle-income countries.

Figure 11 shows the States most frequently acting as respondents between 1987 and 2017. Consistent with the previous finding, among the list of 12 countries with the highest number of ISDS claims, there is not a single low-income country.

Some empirical studies[36] have found that weak governance, understood as corruption and lack of rule of law—using the Worldwide Governance Indicators (WGI) Rule of Law index[37]—has a statistically significant relation with investment arbitration claims. Clearly, this does not mean that every country subject to ISDS has weak governance or is affected by corrupt practices. Rather, this finding illustrates the point that weak governance and rule of law may have been a contributing factor in a number of cases.

Figures 11 and 12 clearly challenge the notion that only developing countries, or those with weak legal institutions, may face ISDS. For example, Spain, the Czech Republic, Canada and Poland are not developing countries; neither have they negative ratings in the WGI Rule of Law or Transparency indices. And yet, despite the high cost, time and unpredictable outcome of an ISDS dispute, many foreign

[35] Data shows that ISDS defendants over the period come from all regions in the world: 39 governments from Europe, 24 from North, Central and South America, 32 from Sub-Saharan Africa, 17 from Asia and 11 from the Middle East and North Africa (ibid).

[36] Cédric Dupont, Thomas Shultz and Merih Angin, 'Political Risk and Investment Arbitration: An Empirical Study', (2016) 7(1) J Intl Dispute Settlement 136–60.

[37] The WGI are a set of composite indicators covering six dimensions of governance for over 200 countries over the two decades from 1996 to 2017: Voice and Accountability; Political Stability and Absence of Violence/Terrorism; Government Effectiveness; Regulatory Quality; Rule of Law; and Control of Corruption <http://info.worldbank.org/governance/wgi/#home>.

Table 2. Top 10 Countries with Highest Rates of Treaty-based ISDS cases lost

Country	% losses	Rule of law index **(-2.5 to 2.5)**	Credendo [38]Expropriation Risk Rating (1-7)
Kyrgyz Republic	60	-1.10	5
Russia	58.3	-0.80	5
Venezuela	48.4	-2.18	7
Ecuador	46.7	-0.69	6
Kazakhstan	45.5	-0.42	4
Ukraine	42.9	-0.77	4
Mexico	42.1	-0.50	2
Argentina	38.3	-0.35	4

Source: Author based on UNCTAD, WGI and Credendo Data

investors still opt for ISDS to resolve their disputes with these governments. This fact is important to note, as, given the backlash against ISDS in many developed countries, many have started to argue that ISDS should not apply to countries with strong rule of law. The trend shown by Figures 11 and 12 may be explained by a key consideration: In many developed countries—especially those with Anglo-Saxon legal traditions—domestic tribunals are legally unable to apply IIAs directly to address investment disputes. Indeed, any international agreements, including IIAs, are based on international law, and often do not form part of the domestic legal system. As a result, they cannot be invoked before domestic tribunals, which are the ones competent to rule on disputes based on national law. Foreign investors can easily read and become familiar with the limited number of investment protection standards included in IIAs. However, it is not always easy for an alien to become familiar with the degree of protection granted by the national laws of a host country, which are often written in a foreign language, and are often not easy to identify within a widespread body of domestic laws, regulations and jurisprudence that may unilaterally change from time to time. Thus, ISDS may not only be an issue of foreign investors' confidence in the domestic institutions of the host country; it may also relate to the need for entrepreneurs to reduce the inherent risk of their international businesses transactions. The whole point of international law—and not only IIAs—is to provide greater certainty and predictability to international affairs, including, in this case, investments.

If a clear causal relation between the rule of law and transparency indexes cannot be found between the countries that are subject to ISDS, a clearer picture tends to emerge when shifting the observation to the number of disputes that are lost by governments. Figure 12 shows the top 12 countries with the highest

[38] Credendo is a private company that provides risk analytical services, including political risk ratings, to international investors and the public. The definition of the 'expropriation risk' used by this agency'encompasses all discriminatory measures taken by a host government which deprive the investor of its investment without any adequate compensation; for the purpose of analyzing the expropriation risk, events of embargo, change of (legal) regime and denial of justice are included. In order to assess the expropriation risk Credendo not only assesses the risk attached to expropriation as such, but also the functioning of legal institutions in the host country and the probability of a negative change in attitude towards foreign investments' <https://www.credendo.com/rating-explanation#riskofexpropriation>.

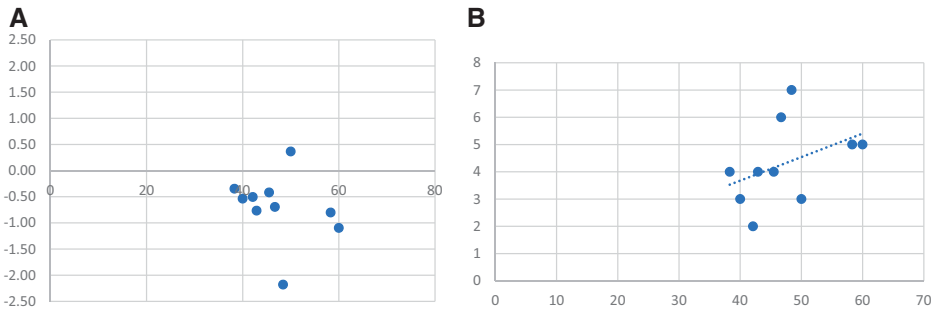


Figure 13. Treaty-based ISDS 1987-2017: Co-relation between countries with higher number of ISDS cases lost and governance and expropriation risk indicators. A. Countries with higher number and percentages of ISDS cases lost 1987-2017: Corelation between % of cases lost and WGI Rule of Law Index. B. Countries with higher number and percentages of ISDS cases lost 1987-2017: Corelation betwen % of cases lost and Credendo Expropriation Risk Index

absolute number of adverse ISDS awards between 1987 and 2017. The ranking comprises countries that have lost at least four cases over the period.

Only three out of the countries included in Figure 12 have positive ratings on the WGI Rule of Law index—Poland, Hungary and Georgia. Keeping this same sample of countries, some interesting trends emerge after observing the list of the top 10 countries based on the highest percentages of cases lost relative to their total ISDS caseload.

First, all countries in this 'top 10' list have lost at least one third of the total ISDS disputes in which they have been involved. Secondly, within this group success rates vary significantly. Argentina ranks at the top of the absolute number of adverse awards. However, as shown in Table 2, the Argentine government has only lost 38 percent of ISDS cases brought against it. Instead, having lost 60 percent of the total cases, the government of the Kyrgyz Republic tops the list, followed by Russia, Venezuela and Ecuador, as the countries with a higher number and percentage of adverse ISDS awards in this sample.[39]

Thirdly, as shown by Figure 13, there seems to be a co-relation between countries that lose the majority of their ISDS cases and that have negative WGI Rule of Law ratings. Fourthly, using as an illustration one of the few publicly available political risk ratings developed by specialized private firms, a similar correlation seems to emerge between these groups of countries and higher political risk ratings.

Observing geographic patterns, and based on the region classification of the WBG, data shows that the number of ISDS disputes tend to concentrate in two different regions of the world: Latin America (LAC) and Eastern Europe and Central Asia (ECA). Indeed, taken together, these two regions comprise more than 55 percent of the total ISDS cases submitted to ICSID over the period.[40]

[39] The sample comprises countries that, during the period, have been involved in at least four ISDS disputes. A handful of countries have lost 100% of the cases in which they have been involved. However, most of them have had only one ISDS claim concluded over the period, so the figure cannot represent any trend. The only country involved in at least three disputes which has also lost 100% of them is Zimbabwe.

[40] ICSID Caseload Statistics 2018-1 <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf>.

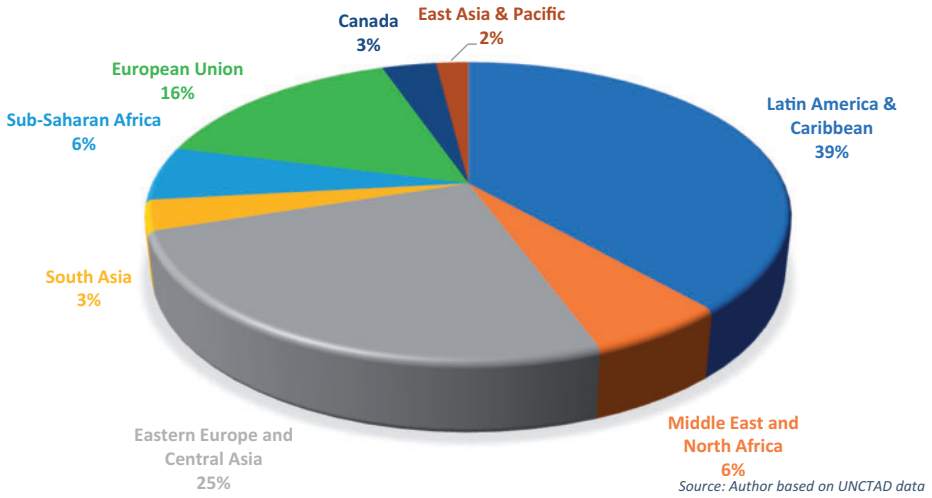


Figure 14. Treaty-based ISDS Awards 1987-2017: Adverse Awards By Region (in percentages of world total and based on WGB Region Classification)

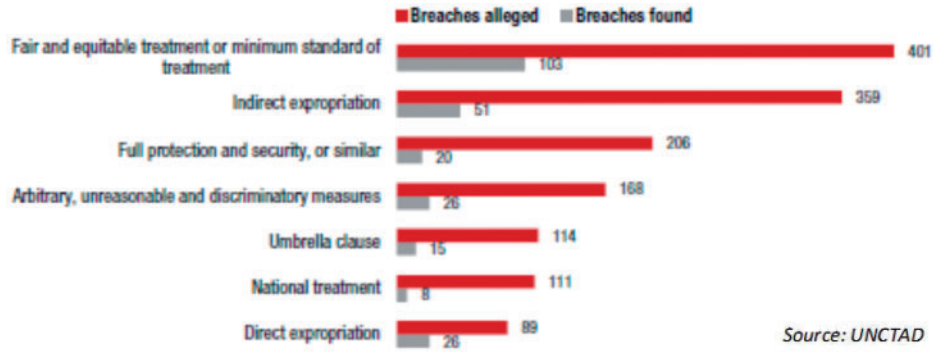


Figure 15. Treaty-based ISDS 1987-July 2017 Breaches most frequently alleged and found

Further, as shown by Figure 14, these two regions are also where governments tend to lose more ISDS disputes.

Interestingly, countries in both LAC and ECA regions have one important historical precedent in common. Until the mid-1980s, they all had political regimes that implemented heavily State-led economic intervention. Additionally, both regions are rich in natural resources and countries in both regions also undertook important privatization programs during the 1980s and 1990s, often including utilities and other heavily regulated services. Significant amounts of FDI flowed into those economic sectors. Although these economies undertook important market-oriented structural reforms in the late 1980s, a bureaucratic idiosyncrasy tilted towards heavy public regulation remains in many public agencies today. As will be explained in Section II.D, regulatory attitudes of public agencies may explain the origin of many grievances between States and private investors. Observing the issues that are more frequently argued and adjudicated

will shed further light in understanding the political economy of ISDS. The following section focuses on this specific point.

D. Understanding the Content of the ISDS: What Are the Disputes About?

As Figure 15 shows, indirect expropriation, arbitrary and discriminatory measures, together with breach of contract—as evidenced by umbrella clause claims—appear to be the most common sources of contention in ISDS. However, it is worth noting that the breaches found most frequently in ISDS proceedings are violations of the 'fair and equitable treatment' (FET) or 'minimum standard of treatment' standards.

This is an important finding, as this commitment included in IIAs imposes on States not an obligation of result, but rather an obligation of conduct. This standard asks that government action be transparent, coherent, proportional and consistent with investors' legitimate expectations that governments will comply with their commitments given in writing.[41] In addition to the political economy factors, which are explained below, a variable that may also explain the high number of claims based on FET grounds is the vague and diverse wording used in this standard of protection in IIAs negotiated during the early 1990s. The use of vague wording in an international agreement has the effect of granting a significant degree of discretion to tribunals when interpreting treaty clauses. With many thousands of IIAs using similar—yet different—wording, combined with many arbitrators with different legal cultures and ideologies interpreting those texts, it is not surprising that interpretations of the FET standard have not always been precise or consistent in international law jurisprudence. This has generated a degree of uncertainty among governments and investors alike, and has likely contributed to a higher number of disputes.[42]

An important empirical finding complementing the data shown above is that around 70 percent of ISDS claims have involved measures adopted by sub-national or sector-specific regulatory agencies.[43] This fact is key to understanding the trend shown in Figure 15 as well as the political economy of investor–State disputes.

States are intricate and multilayered organizations, comprising many internal factions and stakeholders. Often it is assumed that the public administration is effectively controlled by presidents or prime ministers. Yet, in practice, reality is much more complex.

[41] The minimum standard of treatment, which originated in customary international law, also comprises the full protection and security protection standard, which mandates governments to exert 'due diligence' in their efforts to protect foreign investors' physical property in situations of civil unrest (Peter Munchlinski 'Fair and Equitable Treatment' (UNCTAD 2012) http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf>).

[42] 'Historically, international investment agreements contained short and general clauses of fair and equitable treatment, which were formulated either as free-standing provisions with a reference to general international law, or to the international minimum standard of customary international law. Especially since the first decade of the 21st century, drafting approaches to fair and equitable treatment became increasingly diverse and generated complex and elaborate clauses seeking to address the different elements of the norm that have developed over time. The drafting approaches reflect the long-standing controversies with regard to fair and equitable treatment and the question of whether this concept is to be constructed in accordance with the international minimum standard or as an independent and self-contained standard possibly exceeding customary international law. Both concepts have remained vague and have created difficulties in the interpretation of fair and equitable treatment, which due to its general character became a prominent cause of action in investor–State arbitration proceedings.'

(Roland Klager, *Fair and Equitable Treatment in International Investment Agreements* (Oxford Bibliographies 2017)). <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0158.xml>.

[43] Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (n 6). UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration UNCTAD Series on International Investment Policies for Development* (2010) United Nations.

Given their broad scope of application, norms and disciplines of IIAs may touch upon a plethora of policy matters that are handled by multiple governmental agencies, operating at different jurisdictional levels, and even in multi-State contexts in countries with federal systems of government. Public agencies do not always have the same policy priorities. Further, not all agencies are even aware of the existence of IIAs or have among their top priorities acting in compliance with such treaties or domestic investment protection laws.[44] Contrary to this messy reality, IIAs, as do any other international agreements, operate under the assumption that States are a single entity—regardless of its internal administrative complexity. The States are the subjects under international law. Therefore, governments as whole are the ones accountable for complying with their international obligations.[45]

In this sense, evidence suggests that IIAs in general, and ISDS, generate pressure for States to ensure a minimum level of coherence in the behavior of their multiple agencies towards international investors. The fact that data shows that most of the measures generating ISDS disputes have been taken by subnational or autonomous regulatory authorities shows that difficulty ensuring this minimum level of policy coherence is a challenge for many governments. This point is further developed in Section II.E, which examines the empirical evidence on the sectors most frequently involved in ISDS. Such data also sheds further light on the political economy dynamics at the root of disputes between States and foreign investors.

E. Are Certain Economic Sectors More Susceptible to ISDS?

Examining the economic sectors in which ISDS occurs most frequently reveals a clear political economy pattern. Empirical data clearly shows that, although ISDS has taken place in a wide range of areas, many of the disputes tend to arise in economic sectors characterized by high levels of State intervention. Figure 16[46] allows us to discern three baskets of sectors that seem particularly prone to ISDS. First, there are natural resource industries, such as extractives—oil, gas and minin –and agriculture, fishing and forestry. Secondly, there are services that many countries consider to be of 'public interest' and that are thus subject to close State supervision, such as utilities—water and electricity distribution—and other highly regulated services such as telecommunications, transportation and, to a lesser degree, financial services. A third area in which ISDS tends to occur most frequently is alsoservices, in which public/private partnerships (PPPs) are typical, such as construction, and power and transport infrastructure.

In the case of natural resource-seeking FDI, it is important to note that, historically, these have been politically sensitive sectors due to the fact that foreign investors are exploiting natural resources that are part of the national patrimony,

[44] At least on paper, the principles of transparency, proportionality, due process of law and the sanctity of contracts are also incorporated in most domestic legal frameworks worldwide (S Cassese and others, *Global Administrative Law: the Casebook* (3rd edn, IRPA 2012)).

[45] Article 27 of the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) explicitly provides that a State 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty' <http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

[46] Although Figure 16 shows the sector distribution of the ISDS cases submitted to ICSID, the same pattern arises in cases submitted to ISDS under UNCITRAL rules. ICSID Caseload Statistics 2018–1, available at: <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202018-1(English).pdf>.

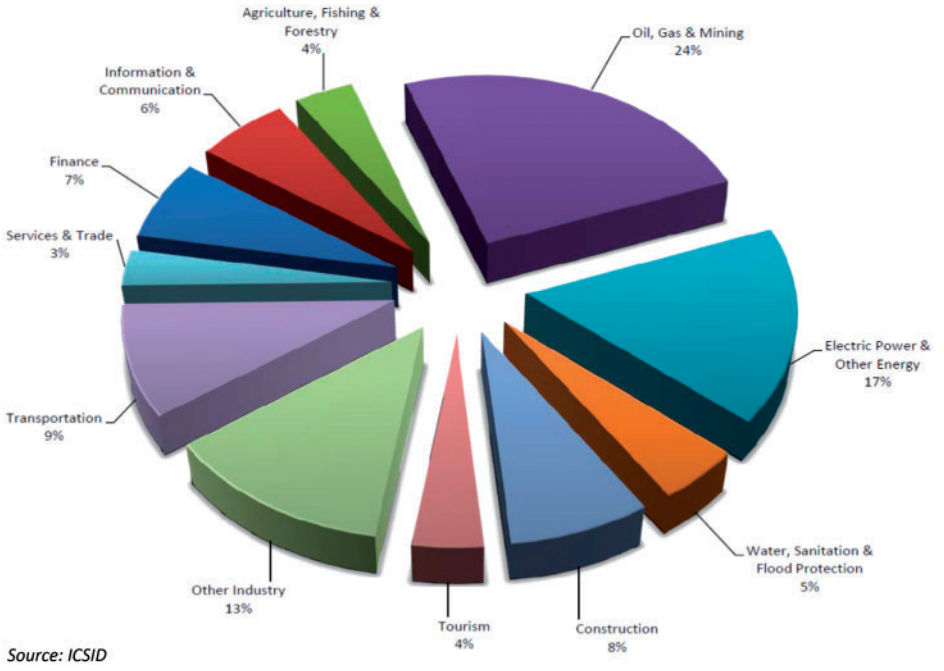


Figure 16. ICSID 1987-2017: cases by economic sector

and tend to be in geographically isolated areas. Such factors often raise environmental or social concerns for local communities.

Further, this type of investment also tends to raise the thorny political issue of the determination of what should be the fair distribution of the rents between investors exploiting a public asset, governments owning them, and local communities affected by their exploitation. These already complex dynamics are exacerbated by the fact that investment projects in these sectors entail significant sunk costs, which are recovered only in the long term. Thus, this type of investment tends to outlive governments, which tend to be elected for shorter terms. To make things even more complex, this type of project often entails exports of commodities with volatile prices that may in turn affect the share of the rents and expected rate of return of the original investment. All these factors generate a tension between, on the one hand, investors' interest in enjoying a long-term business environment that is predictable and stable over the long run and, on the other hand, the short-term interests of governments or local communities in adjusting—and often renegotiating—concession contracts to maximize rents affected by changing circumstances.

Similar political economy tensions exist with the other economic sectors in which ISDS tends to occur more frequently: highly regulated services and PPP projects. In these two types of FDI the opportunity cost of geographically moving FDI projects is extremely high. Further, as in the case of natural resource-seeking FDI, these types of investments often entail significant sunk costs, leading to profitability only in the long term, and thus clashing with the relative short-term attention span of publicly elected administrations. Thirdly, the fact that these sectors are highly regulated means that regulatory authorities' actions will likely

affect the economic profitability of private investments. Fourthly, in all these sectors the final price of the goods produced or services rendered may change over time. Such price changes may become political liabilities for publicly elected-governments. Politicians clearly understand that price increases for utilities, or tolls for the use of public infrastructure, often affect electoral polls. Thus, public agencies may be pressured to adjust the terms of service delivery originally agreed with or notified to investors. Last but not least, as PPPs are often subject to bidding, investors may artificially lower the estimation of the cost of their services to win the bidding, and then attempt to renegotiate the terms of the original contract, arguing changing of circumstances.

In sum, in all sectors with higher ISDS incidence, there are factors that in the short term may pressure governments to take advantage of opportunistic behavior, clashing with the need for stability and predictability of investors in the long term. The opposite may also happen. Investors may look to attempt to readjust the original economic balance of a contract, either because of an actual change in the regulatory or economic context in which the project was originally negotiated, or because they may be keen to adjust the economic balance of a bidding originally won due to artificially lower estimations. In the latter case, investors may be the ones assuming opportunistic behavior.

Economic-sector data shows another important trend that is very relevant for policy makers. Once the last two types of FDI are discounted from the pie chart shown in Figure 16, it becomes evident that export-oriented efficiency-seeking FDI, the main vehicle for integrating host countries in global value chains (GVCs), does not seem to generate much—if any—investor–State litigation. This may relate to the fact that prior to embarking on costly ISDS disputes, foreign investors may opt simply to leave the host country and move to a more predictable location, enabling them to undertake economic activity with the levels of efficiency and predictability that GVCs require.

F. *ISDS Outcomes: Who Wins and Who Loses the Disputes?*

Empirical evidence on outcomes challenges the view that ISDS is a tool favoring international investors' interests. Several empirical studies have examined the impartiality of tribunals when adjudicating investor–State disputes. Research by Franck,[47] Puig and Strezhnev,[48] Nunnenkamp[49] and Dupont, Schultz and Angin[50] converge in finding that ISDS cases are handled by unbiased tribunals.

Further, data shows not only that States tend to win the majority of the ISDS cases, but also that, in the minority of the cases won by investors, the compensation granted by tribunals tends to be only a small fraction of the amounts claimed by investors.

[47] Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration'. (Social Science Research Network 2009) <https://papers.ssrn.com/abstract=1406714>; Franck (n 31); and Susan D Franck and others, 'Inside the Arbitrator's Mind', (2017) 66(5) Emory L J 1115.

[48] Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28(3) European J Intl L 731–61 <https://doi.org/10.1093/ejil/chx058>.

[49] Peter Nunnenkamp, 'Biased Arbitrators and Tribunal Decisions Against Developing Countries: Stylized Facts on Investor-State Dispute Settlement: Facts on Investor-State Dispute Settlement' (2017) 29(6) J Intl Development <https://doi.org/10.1002/jid.3279>.

[50] Dupont, Schultz and Angin (n 36).

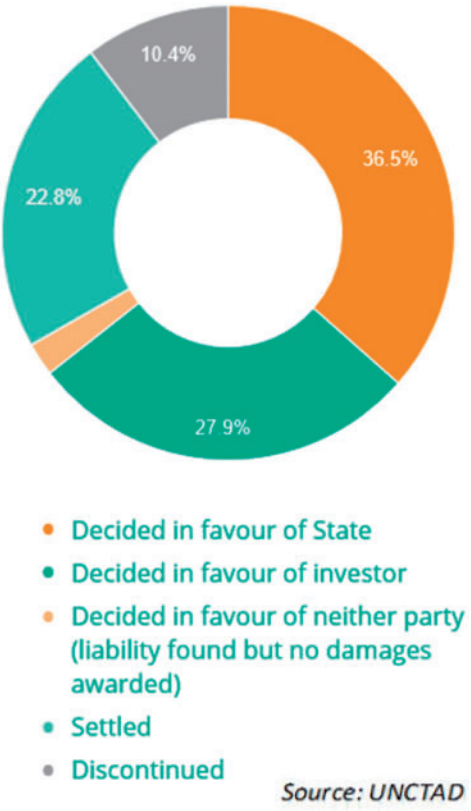


Figure 17. Treaty-based ISDS Outcomes: Results of concluded cases, 1987-2017

As shown in Figure 17, UNCTAD estimates that, by the end of 2017, out of the 548 concluded ISDS proceedings, 36.5 percent were decided in favor of the State—claims that were dismissed either on jurisdictional grounds or on the merits—while around 28 percent were decided in favor of the investor, with monetary compensation awarded. Further, around 23 percent of the disputes had been settled in advance of a ruling,[51] and in the remaining proceedings, the cases were either discontinued or the tribunal found a treaty breach but did not award monetary compensation.

When ISDS hits, however, it tends to hit hard. Between 1987 and 2017 there were five notably large disputes, all with awards of damages for US$1 billion or more.[52] These large awards inflate the mean value of awards of ISDS during the

[51] In a study conducted in 2012 on ISDS settlements at ICSID, Echandi and Kher showed that most of the settlements took place at very early stage—in fact, between the registration of the case and the constitution of the tribunal. This means that parties did not use ISDS to assess their chances of winning the dispute. Rather it suggests that the mere existence of an ISDS served as a pressure to bring parties to the negotiation table, and the cost of settling the dispute—in either economic or political terms—was significantly lower than allowing ISDS to conclude: Roberto Echandi and Priyanka Kher, 'Can International Investor–State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration' (2014) 29(1) ICSID Rev—FILJ 41 <https://doi.org/10.1093/icsidreview/sit034>.

[52] Wellhausen (n 34). These were, first, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, with an original award on damages of US$1.77 billion rendered on 5 October 2012 and later reduced by a partial annulment to around US$1 billion issued on 2 November

period to US$508 million. Empirical studies have found, however, that out of those proceedings in which public data was available and the investor had won the ruling, in half of the cases compensation awards were below US$16 million.[53] Despite these important sums, as previously stated, studies converge in showing that when a final award is granted in favor of the investor, it tends to grant less than 30 percent of the compensation claimed.[54] It has been pointed out that many domestic court systems also follow this trend.[55]

Empirical evidence tends to suggest that, as a rule-oriented adjudication mechanism, ISDS may be acting as a shield both to investors and to host countries in two different senses.[56] To investors, ISDS represents an instrument to enforce investment protection guarantees, by improving their leverage and using adjudication as a deterrent of bad regulatory policies by increasing the cost of undesirable government behavior.[57] To States, ISDS adjudicates disputes based on agreed legal substantive and procedural principles shield States from power-oriented diplomacy exerted by home States or even by powerful investors.[58]

G. *ISDS Performance in Terms of Time and Cost*

An area in which there seems to be consensus among the different stakeholders is that ISDS has turned out to be slower and much more expensive than originally envisaged.[59] ISDS has been described as 'heavy artillery',[60] the use of which entails not only significant economic but political and practical costs for investors and States alike.

The time that it takes for tribunals to solve a dispute varies significantly from case to case, but it is safe to say that ISDS is not fast. Over the last 30 years, the shortest arbitration proceeding has taken one year, while the longest has taken around 10 years. The average time for most of the ISDS proceedings is approximately four years.[61]

For States, the high costs are associated not only with the possibility of losing an award, but with the high cost of the arbitration procedures themselves. On both accounts, the experience over the last 30 years shows a wide variation in the costs

2015 and, secondly, *Venezuela Holdings BV and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, with an award of damages of US$1.6 billion rendered on 9 October 2014, which was partially reduced in annulment proceedings in a decision issued on 9 March 2017. In 2014, Russia was found liable in three arbitrations brought by previous owners of Yukos, an oil and gas company that was *de facto* expropriated through closure after bankruptcy once its chairman, in the opposition to President Putin's regime, was imprisoned. These arbitrations led to three awards of US$1.9 billion, US$8.2 billion and US$40 billion.

[53] Wellhausen (n 34).

[54] Puig and Strezhnev (n 48); Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (Social Science Research Network 2007) https://papers.ssrn.com/abstract=9692572007; Data from UNCTAD Investment Policy Hub (2017), available at: <https://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts>.

[55] Miller and Hicks (n 16).

[56] Cédric Dupont and Thomas Schultz, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2015) 25(4) Eur J Intl L 1147–68.

[57] Erixon (n 9).

[58] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press 1997); Frank (2009) (n 47).

[59] Jack Coe, 'Towards a complementary use of conciliation in investor–state disputes' in AW Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2009) 339; Jeswald Salacuse,'Is there a Better Way? Alternative Methods of Treaty-Based, Investor-state Dispute Resolution' (2007) 31(1) Fordham Intl L J 138.

[60] Dupont, Shultz and Angin (n 36).

[61] Author's calculation, based on UNCTAD and ICSID data.

Table 3. Average Costs of ISDS Proceedings for the Parties to the Dispute in Concluded Cases 2012–2017

	Investors	States
Mean	US$6,019,000	US$4,855,000
Median	US$3,375,000	US$2,793,000

Source: Campbell and Hodgson (2017)

among different cases, with a few large and complex disputes, as previously referred to, tending to inflate the total average of both awards and legal fees.[62]

As Table 3 illustrates, as far as arbitration costs are concerned, investors tend to face slightly higher costs than States. An empirical study[63] has suggested that this may relate to the fact that investors are the ones bearing the burden of proof of claims that are fact-intensive, coupled with the tendency for many governments to run cost-driven tender processes or defend with in-house counsel.

Studies have also determined that the largest component of ISDS cost proceedings is related to the fees and expenses incurred by each party for its legal counsel and experts. Gaukrodger and Gordon[64] estimatedthat the average of these fees and expenses amount to about 82 percent of the total costs of a case. Arbitrator fees average about 16 percent of costs, while the fees payable to organizations such as ICSID providing secretariat services are relatively low, amounting to about 2 percent of costs.

Gaukrodger and Gordon[65] also showed that in 56 percent of cases tribunals required each disputing party to bear their own costs. Just 10 percent of the cases have fully adjusted the costs, ordering the losing party to bear the costs of the dispute, while in 34 percent of cases tribunals have adjusted costs partially. However, recent empirical work by Franck, van Aaken, Freda, Guthrie and Rachlinski[66] found that arbitrators often make intuitive and impressionistic decisions rather than fully deliberate ones. Further, a recent survey by Puig and Strezhnev[67] focused on attitudes of arbitrators when allocating costs for ISDS proceedings, it was found that arbitrators are prone to a predisposition, tending to be more likely to grant poor respondent States reimbursement of their legal costs compared with wealthy States when the governments win the disputes.

As far as compliance is concerned, most countries tend to comply with ISDS awards within months after the decision is rendered. Until 2007, ICSID provisions on enforcement had been put to the test on only four occasions.[68] However, over

[62] For instance, in the Yukos case brought against the Russian government, the Claimants stated that their legal costs for representation exceeded US$80 million, and the cost of arbitration itself—including arbitrators' honoraria, fees for the institution providing secretariat services and other attendant costs, such as travel for witnesses, etc. — amounted to nearly 8.5 million euros (Dupont, Schulz and Angin (n 36)).

[63] Alastair Campbell and Matthew Hodgson, 'Damages and costs in investment treaty arbitration revisited' (2017) Global Arbitration Review <https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treaty-arbitration-revisited>.

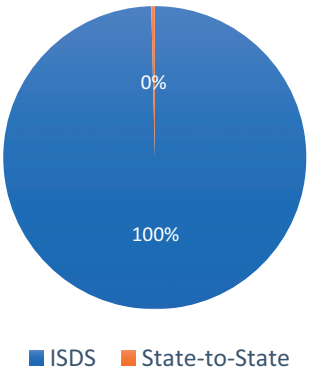
[64] David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (OECD 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207366>.

[65] ibid.

[66] Franck and others (n 47).

[67] Puig and Strezhnev (n 48).

[68] Antonio Parra, 'The Enforcement of ICSID Arbitral Awards' 24th Joint Colloquium on International Arbitration (2007), available at: <https://www.arbitration-icca.org/media/0/12144885278400/enforcement_of_icsid_awards.pdf>.



Source: Author based on UNCTAD and Trevino

Figure 18. IIAs: Types of Investment Disputes 1987-2017

the last decade, at least four countries have refused to comply with specific ISDS awards.[69] These events, however, have not become a trend. It has been pointed out that rather than not paying at all, governments seem to be paying late or paying part of the damages awarded.[70] ICSID has reported that the number of countries with known outstanding compliance issues awards declined from six to three.[71] Clearly, it seems that countries do pay attention to the potential reputational costs derived from ignoring rulings from an international tribunal.

The political costs of ISDS are even higher—both for States and for investors. Evidence suggests that many governments care about the potential impact that acting as a defendant in ISDS cases may have in tarnishing their reputation among prospective investors and political risk ratings.[72] Perceptions of investors are important. Political science empirical research has shown that States named in ISDS tend to receive less FDI[73] and can also face penalties in sovereign bond markets. Further, and as shown in Section II.C of this article, private agencies rating political risk take into consideration the same type of government conduct that ISDS aims to enforce.

H. *The Frequency of ISDS Relative to State-to-State Investment Dispute Settlement*

The debate on ISDS often tends to set aside the fact that IIAs include not just one but two distinct dispute settlement mechanisms. In addition to ISDS, most IIAs also include provisions on State-to-State arbitration. Such processes are avenues

[69] These were Russia, Zimbabwe, the Kyrgyz Republic and Thailand (Luke Peterson, 'How many states are not paying awards under investment treaties?' (2010) Investment Arbitration Reporter <https://www.iareporter.com/>)).

[70] Gaukrodger and Gordon (n 64).

[71] Remarks by Meg Kinnear at 'Why ICSID', Investment Treaty Forum conference, British Institute of International and Comparative Law, London, 3 November 2011, cited in Gaukrodger and Gordon (n 64).

[72] An empirical review (Echandi and Kher (n 51)) of ISDS settlements in ICSID found that 24% of the governments that had settled an ISDS case between 1987 and 2013 had only one dispute submitted against them and, among them, 53% opted to settle as early as possible, even before the tribunal had been constituted.

[73] Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 63(3) Intl Organization 401 <https://www.cambridge.org/core/journals/international-organization/article/contingent-credibility-the-impact-of-investment-treaty-violations-on-foreign-direct-investment/953CA304C2DE8694E33AFABEFCE2A7EB>.

for governments to elucidate any questions regarding the application or interpretation of investment treaties. However, this State-to-State arbitration is also a channel through which investors can invoke diplomatic protection of their home States and seek redress from unlawful action by host governments.

Although there have been hundreds of ISDS cases over the past 30 years, there have been only three known occasions on which a State party to an IIA has invoked State-to-State investment arbitration.[74] Two of these entailed matters regarding the interpretation of IIAs,[75] and only one entailed a case of diplomatic protection in which the government of Italy brought a case on behalf of a group of Italian investors and on its own behalf against the government of Cuba—a claim which was dismissed by the tribunal.[76]

Due to lack of available data, it is not possible to determine whether the total absence of State-to-State investment litigation stems from scant requests for protection by international investors to their own home governments. It may also be that such absence of disputes may respond to a restraint by home governments refraining from overcharging already complex State-to-State diplomatic agendas by sponsoring international disputes on behalf of their investors.[77] Very likely, the explanation is both. Indeed, the whole point of ISDS is to spare investors the hassle of convincing their government to espouse their claims and, by the same token, to spare governments the hassle of accepting or rejecting such requests. It is not possible to assess what would have been the counterfactual on the evolution of State-to-State investment dispute settlement had ISDS not existed. However, considering the important role that investment-related disputes have had on State-to-State diplomacy throughout history,[78] it could be argued that ISDS may have played a positive role in preventing escalation in the number of investment State-to-State disputes.

III. CONCLUSIONS AND POLICY IMPLICATIONS

The empirical evidence commented on in this article shows that the debate about the right to private action granted to international investors through ISDS has frequently been based more on ideological views than on facts. The literature reviewed and data analyzed in this article show that behind ISDS there is a complex and nuanced story.

First, regarding the number of treaty-based ISDS claims between 1987 and 2017, more than 800 disputes in 30 years may appear to be an important figure. However, a different picture emerges when this caseload is placed in context.

[74] Clovis J Trevino, 'State-to-State Investment Treaty Arbitration and the Interplay with Investor–State Arbitration Under the Same Treaty' (2014) 5(1) J Intl Dispute Settlement 199, 200.

[75] *Republic of Peru v Republic of Chile, State-to-State interpretation dispute*, arisen in the context of *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No ARB/03/4, Decision on Jurisdiction (7 February 2005), and *Republic of Ecuador v United States of America*, PCA Case No 2012-5 (2011).

[76] *Republic of Italy v Republic of Cuba, Ad hoc* Arbitration, Final Award (15 January 2008).

[77] Under customary international law, and most domestic legal systems, the home government of the affected investor enjoys full discretion as to whether to sponsor the claim of its citizens and submit a State-to-State claim, invoke diplomatic protection, and seek compensation for damages generated because of a violation of an IIA.

[78] Between 1805, when the United States intervened militarily for the first time to defend Americans' private economic interests, and 1965, when ISDS became legally possible through the ICSID Convention, the US government ordered its military forces to intervene in foreign countries 88 times—48% of all US foreign military interventions during this 160 year-long period—in the name of diplomatic protection of American citizens abroad. See Investment Policy: From 'Gunboat Diplomacy to BITs', Appendix 1 in Miller and Hicks (n 16)).

During the period, data shows a positive correlation between the increase in FDI stock and the increase in ISDS litigation activity. In the case of low- income countries, for each ISDS claim filed against a government during the period under study, the ratio of inward FDI stock received was US$69 billion. For lower middle-income countries this ratio was US$79 billion, for upper middle-income countries it was US$145 billion and for high-income countries it was US$1,153 billion. As governments tend to win many cases, the amount of FDI stock received for each ISDS claim lost by a government turns out to be significantly higher than the quoted ratios. Further, when comparing the number of ISDS cases with the amount of new greenfield FDI projects announced between 2003 and 2017 worldwide, it turns out that the number of investors invoking ISDS may represent around 0.4 percent of the total.

Considering the caveat that existing data may not always be totally accurate and precise, available records indicate that investors using ISDS during the last 30 years have varied, in terms of both their size and nationality. In terms of size, individuals, small family firms and medium sized enterprises—with fewer than 500 employees—seem to be the main users of ISDS, comprising around 60 percent of the claims. Big MNEs consisted of around 20 percent of the claims, while around 8 percent was submitted by the top 100 major MNEs. As far as nationality is concerned, investors invoking ISDS are diverse, coming from more than 70 developed and developing countries. Investors from OECD countries remain the most frequent users of ISDS. However, reflecting the rise in outward FDI from developing countries, investors from 'the South' are increasingly using ISDS to defend their interests, submitting around 15 percent of the claims over the period.

Further, contrary to many perceptions, with around 3 percent of the total ISDS caseload, low-income countries have not been the main target of ISDS. Rather, with more than 70 percent of the total disputes submitted over the period, ISDS has been a phenomenon concentrated in upper medium-income and high-income economies. Countries in Latin America, Eastern Europe and Central Asia not only tend to concentrate the larger set of cases but are also the regions in which governments have lost the most cases, in terms of both absolute numbers and share of total cases. This may relate to not only the significant amount of FDI that countries in these regions tend to attract, but alsothe *type* of FDI they tend to lure.

Economic-sector data shows that export-oriented efficiency-seeking FDI, the main vehicle for integrating host countries in GVCs, does not seem to generate much investor–State litigation. This may be due to the fact that, prior to embarking on costly ISDS disputes, foreign investors may simply opt to leave the host country and move to a more predictable location enabling them to undertake economic activity with the level of efficiency and predictability that GVC activity requires.

Comprising more than 70 percent of the total, litigation activity has been concentrated in economic sectors that are heavily regulated, such as natural resources and public interest services such as utilities and other services rendered under PPPs. It is precisely in these sectors that reaching coherent, coordinated and articulated policies and implementation may prove to be particularly challenging for governments. Not only due to sensitive nature of the areas, but also due to the multiplicity of specialized regulatory agencies involved. Within this context, it is not surprising that empirical research has found that actions by subnational or

specialized regulatory entities are the ones involved in at least 70 percent of the total ISDS disputes.

The type of conduct most frequently challenged through ISDS—and the violation found most frequently by tribunals— is the violation of the FET or Minimum Standard of Treatment. This trend may relate to the vague formulation of the standard that many of the IIAs negotiated in the 1990s used to have, leading to inconsistent jurisprudence and generating uncertainty among governments and investors alike. However, this trend also shows that, more than other political risk issues—like expropriations that used to be the most common contentious issue in investment law and policy in the 1960s—the way in which governments exert their regulatory powers is becoming increasingly relevant in the 21st century. ISDS trends support the idea that, in carrying out their functions, governments may not always behave in accordance with the principles of transparency, coherence, due process of law and proportionality mandated not only by their IIAs, but also by their own domestic laws and regulations. In this regard, it is not surprising that evidence shows a correlation between the countries that tend to lose a higher share of ISDS cases with negative rule of law ratings and high-risk grading by many private political risk-rating companies.

Evidence also suggests, however, that this problem often does not originate from the deliberate intention of public officials to disregard good regulatory governance principles. Instead, this pattern of behavior stems from the challenge that many governments have in ensuring in practice a coordinated implementation of their policies. Going beyond the laws and regulations of the books, in practice, it is not easy for governments to articulate a coherent, transparent and coordinated implementation of their investment policies and regulations in a context in which a multiplicity and multilayered web of regulatory bodies interacts with investors on an everyday basis. Ensuring efficient and coherent government action can be a challenge even for advanced economies with sophisticated institutions. Thus, it is not surprising that data also shows an increasing number of ISDS cases being brought against OECD countries, and brought based on the alleged violation of the FET or minimum standard of treatment.

Despite the pressure generated by ISDS on governments, evidence shows that a majority of the ISDS cases are won by the States rather than by investors. Further, even when investors win, they tend to recover only around one third of the damages claimed. This fact seems to support the view that, despite all its imperfections, ISDS may have contributed to the development of a rule-oriented regime for cross-border investments; albeit that it was far from perfect due to the patchy and non-organized framework of IIAs worldwide.

Empirical data also shows that when ISDS hits, it hits hard. One of the few areas of consensus in the investment literature is that ISDS has turned out to be slower and more expensive than originally envisaged. International litigation entails huge costs for both States and investors alike, not only in terms of legal fees and potential damages, but rather, and more importantly, severing the relationship between governments and investors.

Perhaps one of the findings with greater policy implications is that the number of ISDS disputes is just a symptom of a bigger problem that has mostly been ignored in the debate about the international investment regime. Indeed, evidence shows that most of the serious problems breaking investor–State relationships are

not being addressed through ISDS. Data shows that developing countries continuously lose around a quarter of the total investment that they have managed to attract. After starting to operate, investors subsequently opt to withdraw their investments because of undesirable conduct by public agencies. ISDS has attracted huge attention from academia and policy makers. However, the dynamics at the root of those disputes and, more importantly, the significant amount of investment that is lost as a result from grievances between investors and States that make the former cancel or totally withdraw investment projects, are practically absent from the investment policy debate.

Data also shows that the types of conduct causing investment withdrawals and cancellations coincide with the type of conduct that IIAs—and ISDS —purport to prevent. This raises the question whether the debate on ISDS has in fact diverted attention from a critical issue that stakeholders should consider when discussing the emerging international investment regime: how to implement IIAs on the ground effectively, so that their principles and disciplines are in practice mainstreamed within regular administrative action at different levels of government. Significant amounts of investment are being lost due to the lack of mechanisms enabling governments to track, monitor and enforce within their own public agencies, as a coherent implementation of national investment policies and regulations. Thus, designing and testing policies to achieve this objective would not only prevent the hemorrhage of investment currently affecting many developing countries, but prevent the unnecessary escalation of many conflicts that today are becoming full-blown international investment disputes.