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International Framework of Investment Law

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Outline

Investor-State Dispute Settlement (ISDS)

- Investor State Arbitration
- Transparency
- ISDS Facts and Figures
- ISDS Criticisms

IIAs: Typical Elements

- **Scope of Application**
  - Definition of covered “investments”
  - Definition of covered “investors”
  - Temporal scope
  - Territorial scope
- **Standards of Treatment**
  - Relative standards:
    - National Treatment (NT)
    - Most Favoured Nation Treatment (MFN)
  - Absolute standards:
    - International Minimum Standard of Treatment (IMS)
    - Fair and Equitable Treatment (FET)
    - Full Protection and Security (FPS)
- **Standards of Protection**
  - Protection against unlawful expropriation
  - Compensation in cases of strife
  - Transfers
  - Subrogation
  - Umbrella Clause
- **Dispute Settlement**
  - State to State
  - Investor – State Arbitration (ISDS)

Two main categories of IIAs:

•Bilateral Investment Treaties (BITs)

•Investment Chapters in Preferential Trade Agreements (PTAs)

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INVESTOR-STATE ARBITRATION

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Investor-state arbitration

- International arbitration is based on the consent of the parties
- Traditional form of investor-state arbitration is an arbitration clause in an investment contract, natural resource concession
- The doctrine of separability: the arbitration agreement is separable (i.e. distinct from the "main" contract
- Competence/competence: the tribunal has the jurisdiction to determine its own jurisdiction

Investor-state arbitration

- Arbitration agreement between foreign investor and the state arises arises three ways:
- Contract
- Domestic foreign investment law (FIL): "arbitration without privity"
- International investment agreement (IIA): "arbitration without privity"
  - Contractual analysis – offer and acceptance
  - Standing offer to arbitrate future investment disputes; accepted by the investor by submitting a notice of arbitration

Art. 9 Netherlands-Egypt BIT (1996)

Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party, at the choice of the national concerned, to

- the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.
- a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on international Trade Law
- the Regional Center for International Commercial Arbitration in Cairo
- the Court of Arbitration of the Paris International Chamber of Commerce.

ICSID – An exclusive remedy

Article 26: Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Investor-state arbitration

- State consent to arbitrate is cumulative: state may have consented to arbitrate in contract, in IIA and in FIL
- Tribunal may be able to consider breaches of different obligations (contractual, domestic law, IIA)
- Scope of jurisdiction in IIAs assuming consent to arbitrate
  - Over whom (*ratione personae* – is there a covered investor?)
  - Over what (*ratione materiae* – is there a covered investment?)
  - When (*ratione temporae* – did state conduct occur when IIA in force?)
  - Limits on consent (all types of disputes; local remedies?)

Jurisdiction and Admissibility in ISDS: Concepts

1. Arbitration under contractual arbitration agreements

2. Arbitration under investment treaties

3. Arbitration under host State's laws

Why Arbitration? :

- Dispute between a state and a foreign investor normally have to be settled by the host state's courts
- From the investor's perspective, this is not always an attractive solution
- What are the other options?

Why Arbitration?

- Better option for the investor: direct arbitration before an impartial tribunal
- Advantages for the host state:
  - Potentially attracts more investments
  - Shield itself from disadvantageous situations of diplomatic protection

- Disadvantages for the host state: Local courts have no jurisdiction and State has no control

Different kinds of Arbitrations

- Arbitration is based on the consent of the parties
- Consent bythe host State and the investor
- 3 specific types of consent:

  - A direct agreement between the parties
  - A provision in the national legislation of the host State
  - A provision in a treaty (multilateral, bilateral)

Direct agreement between the parties

- State contracts between :
  - A foreign company / individual
  - A State (or a State-owned company)

- Unique Characteristics of State Contracts
  - Unique asymmetry in bargaining power between parties
    - Distinguishing before and after contact is signed

Direct agreement between the parties

- Unique Characteristics of State contracts
  - It is not a treaty, nor a 'simple' contract: source of rights and obligations for both parties
  - Investor is a subject of international law with a limited international legal personality
  - Contain 3 clauses:
    - arbitration clause,
    - stabilization clause
    - applicable law clause

Direct agreement between the parties

- Applicable law clause: different options
  - Law of the state party to the contract
  - *tronc commun*
  - Law of any other state
  - Contractual terms
  - BIT
  - General principles of law, equity, *lex mercatoria*
  - International law

Direct agreement between the parties

- Stabilization clause

  - Effect: ‘freezing’ the law at the moment when contract is signed
  - Validity is controversial
  - New trends: renegotiation clauses instead

Host State's Domestic legislation

- General consent to arbitration, not linked to a specific foreign investor
- The investor consent to arbitration when starting proceedings

Arbitration clause in investment treaty

- Direct arbitration claim against a State before an international tribunal : exception to a general international law principle
- Past historical examples
- General consent to arbitration, not linked to a specific foreign investor
- The investor consent to arbitration when starting proceedings

Arbitration clause in BITs

- *AAPL v. Sri Lanka* (1990): arbitration "without privity": revolution: first time jurisdiction based on consent to arbitration found in a BIT
  - *AMT v. Zaire*
- + 3,000 BITs + 350 international agreements (including free trade agreements)
- Arbitration clause is found in almost all modern BITs
- + 600 arbitration known cases

Arbitration clause in multilateral treaties

- General consent to arbitration, not linked to a specific foreign investor
- Ex. NAFTA , Energy Charter Treaty
- No global international agreement dealing with substantive rights
- But dispute settlement mechanisms have developed :
  - Convention for the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 1965

Consequences of Consent given by parties (under ICSID)

- Host State cannot seek to stay the proceeding in national court or try to commence arbitration under different rules of arbitration (art. 26)

- Investor is prevented from using diplomatic protection when started arbitration under the Convention (Art. 27)

Procedural Aspects of Arbitration

- Proceedings are initiated by a request for arbitration filed to the Secretary-General of ICSID.
- Composition of tribunal
  - Number, appointment , competence
- Written and oral pleadings
- Jurisdiction/merits

Applicable law

- When the parties have chosen the law
  - Article 42 ICSID
  - State contracts
    - *Klöckner* v. *Cameroon*
  - Host State's law
    - *SPP v Egypt*
  - Under a BIT
- When the parties have not chosen the applicable law

Sources of law applied by tribunals

- Customary international law
  - State practice must be uniform, consistent , extensive and representative
  - *opinio juris* of States
  - The role of arbitral awards
  - Existing rules of custom
    - Minimum standard of treatment
    - Prohibition of expropriation without compensation
  - Continuing importance of custom today

Sources of law applied by tribunals

- Domestic laws of the host State
- General principles of law
- Arbitral awards (?)

Award

- Procedural aspects
- Remedies:
  - restitution, compensation, satisfaction
- Moral damages
- Calculation of compensation
- Interests, costs

Post Award remedies

- Interpretation, revision
- Annulment
  - Difference with appeal procedure
  - Grounds for annulment
    - Excess of power
    - Serious departure from a fundamental rule of procedure
    - Failure by a tribunal to state reasons in its award
- Recognition and enforcement of awards

ICSID – A self contained regime

- A dispute settlement forum – not a permanent tribunal
- Special rules for consent/tribunal jurisdiction under the ICSID Convention
- Arbitration is government by international law
- Awards not reviewable by domestic courts – there is an internal review mechanism that provides limited review for procedural errors "annulment"
- Enforcement of awards a treaty obligation - awards are enforceable in local courts

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TRANSPARENCY

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Transparency

- Access to information and publicity of awards
- Third party participation and *amicus curie* briefs
  - The traditional rule
  - *Suez v Argentina*
  - New ICSID Arbitration Rules

Transparency

Canada - Nigeria BIT (2014)

ARTICLE 12

Transparency

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting a matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.

2. To the extent possible, each Party shall:

   (a) publish in advance any measure referred to in paragraph 1 that it proposes to adopt; and

   (b) provide interested persons and the other Party a reasonable opportunity to comment on that proposed measure.

3. Upon request by a Party, the other Party shall provide information on a measure that may have an impact on a covered investment.

Transparency

- IIAs include transparency provisions, both directed to States (obligations to publish law and regulations), and directed to investors (e.g. treaty authorizes host States to collect information from investors about their corporate governance, or any other information, including for informational or statistical purposes). However, both types of obligations are not equally prevalent in the universe of investment agreements.

- Rationale behind these provisions is that the more readily available information on the laws affecting foreign investors, the easily will be for them to comply with it.

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Transparency

- Claims based on breach of transparency are rarely found with investment arbitration.

- *LG&E* v. *Argentina* Decision on Liability (2006), holds that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty should be capable of being readily known to all affected investors.

- *Champion* v. *Egypt* Award (2006) holds that the claimants did not prove that the State violated the principle of transparency under international law; the claimants were in a position to know beforehand all rules and regulations that would govern their investments for the respective cotton growing season to come.

Transparency – Multilateral Rules

- **UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (in effect 1 April 2014)**
  - Provide for transparency and accessibility to the public of information and main documents of treaty-based investor-State arbitration: Transparency Registry
  - Apply to disputes arising out of treaties concluded prior to 1 April 2014, only when Parties to the relevant treaty, or disputing parties, agree to their application.
  - Apply in relation to disputes arising out of treaties concluded on or after 1 April 2014 when investor-State arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree.
  - Also available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules, and in ad hoc proceedings.

Transparency – Multilateral Rules

- **United Nations Convention on Transparency in Treaty-based Investor-State Arbitration "Mauritius Convention on Transparency" (2014)**
  - Whether the arbitration is initiated under the UNCITRAL Arbitration Rules or not does not have any impact on the application of the Convention.
  - The general rule of application is stipulated in paragraph 1 (bilateral or multilateral application) and paragraph 2 refers to the application of the Rules on Transparency when only the respondent State (and not the State of the investor-claimant) is a party to the Convention (unilateral offer of application).
  - A Party to the Convention has the flexibility to formulate reservations, thereby excluding from the application of the Convention a specific investment treaty or a specific set of arbitration rules other than the UNCITRAL Arbitration Rules (negative-list approach).
  - But... Only Mauritius and Canada have ratified the convention

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ISDS: FACTS AND FIGURES

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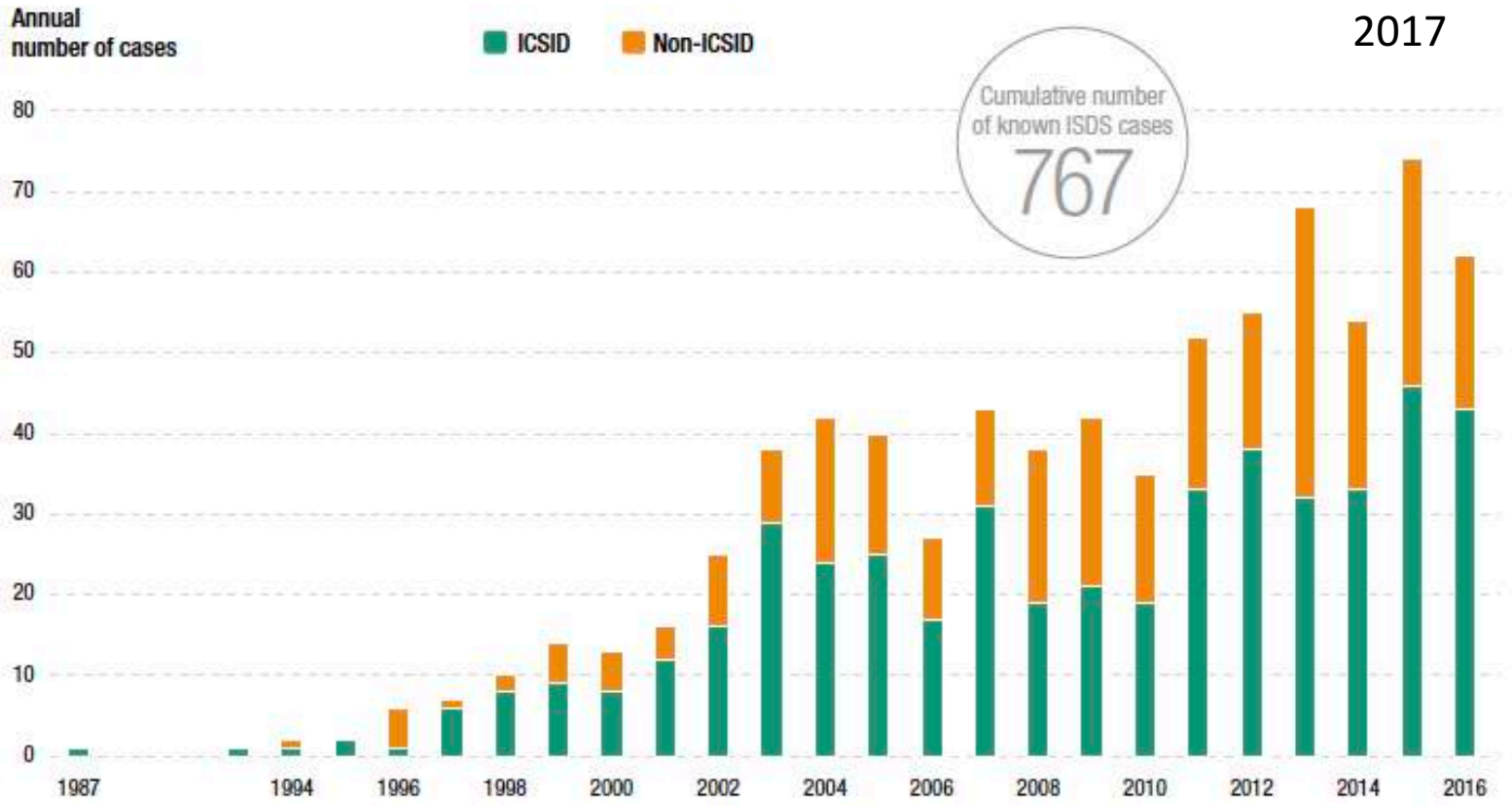
ISDS Facts and Figures

817 cases by September 2017

Figure III.12. | Trends in known treaty-based ISDS cases, 1987–2016



Source: ©UNCTAD, ISDS Navigator.

ISDS Facts and Figures

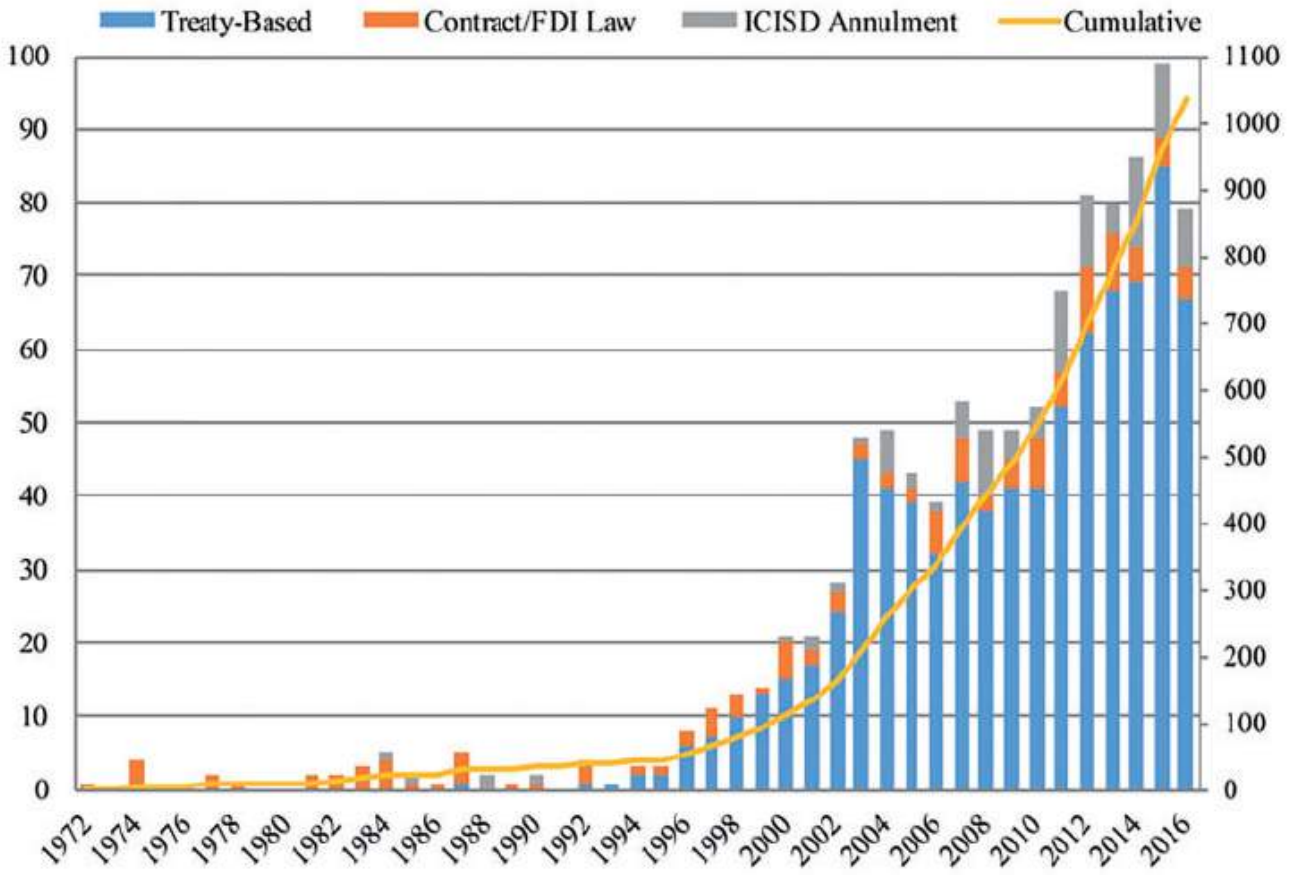


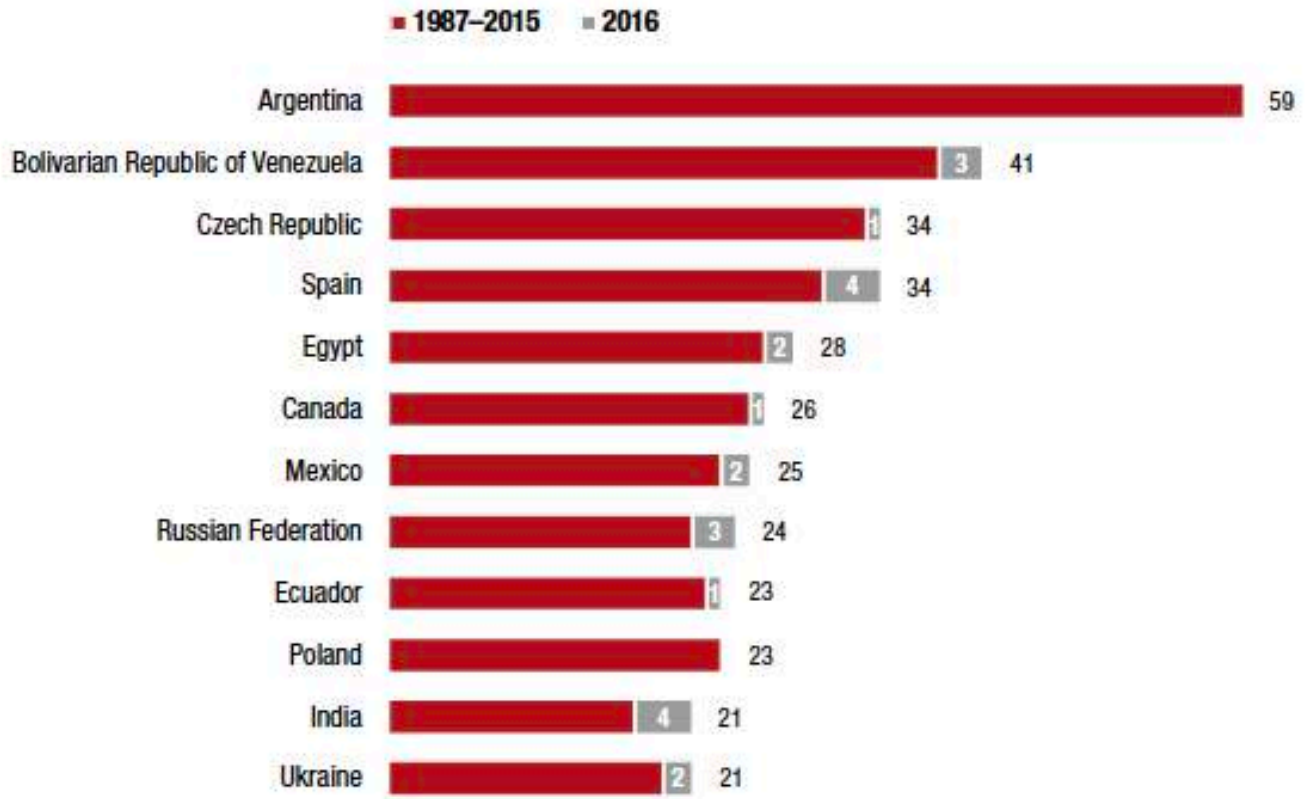
Figure 1. International investment arbitration cases registered by year (1987–2016).
PITAD, PluriCourts Investment Treaty Arbitration Database (PITAD) as of 1 January 2017; 831 cases in total through 1 January 2017.

The rise of IIA claims

- 69 claims filed in 2016, bringing number of publicly known claims to 817 (35 up to September 2017) – compare to 474 WTO and 300 GATT…
- 36,6% resolved in favour of state; 26,9% in the favour of investor; 23,5% settled
- ECT (102), NAFTA (59) and Argentine US BIT (21) most frequently invoked IIAs
- Argentina (60), Venezuela (36), Spain (36), Czech Republic (35), Egypt (29), Canada (26), Mexico (25) most frequent respondent states
- US (152), Netherlands (96), UK (69), Germany, (57) Canada (45) , Spain (43) and France (41) most frequent claimant home state of claimants
- 61% of cases filed with ICSID, 31% under UNCITRAL Arbitration Rules

Respondent States

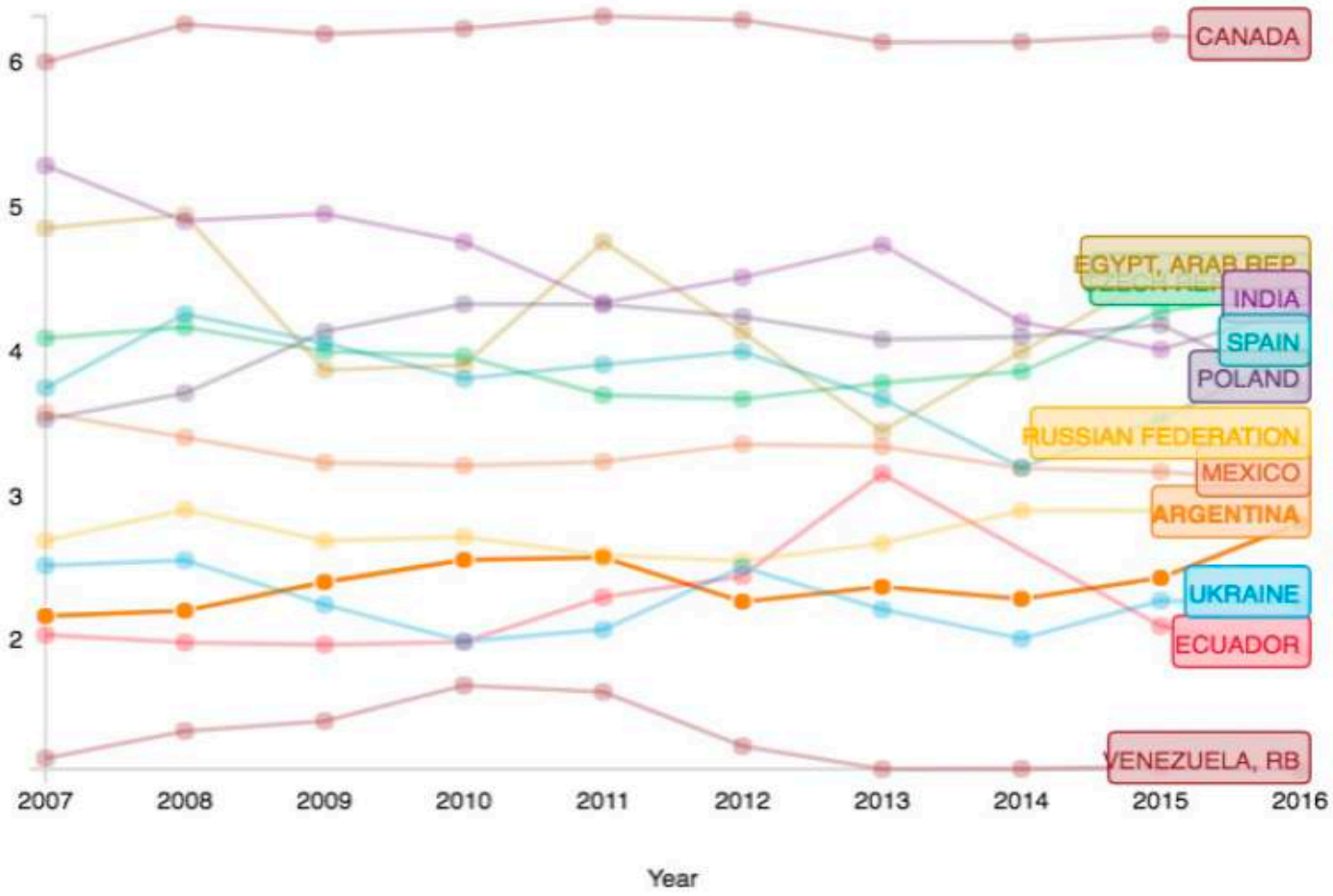
Figure 2. Most frequent respondent States, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Respondent States

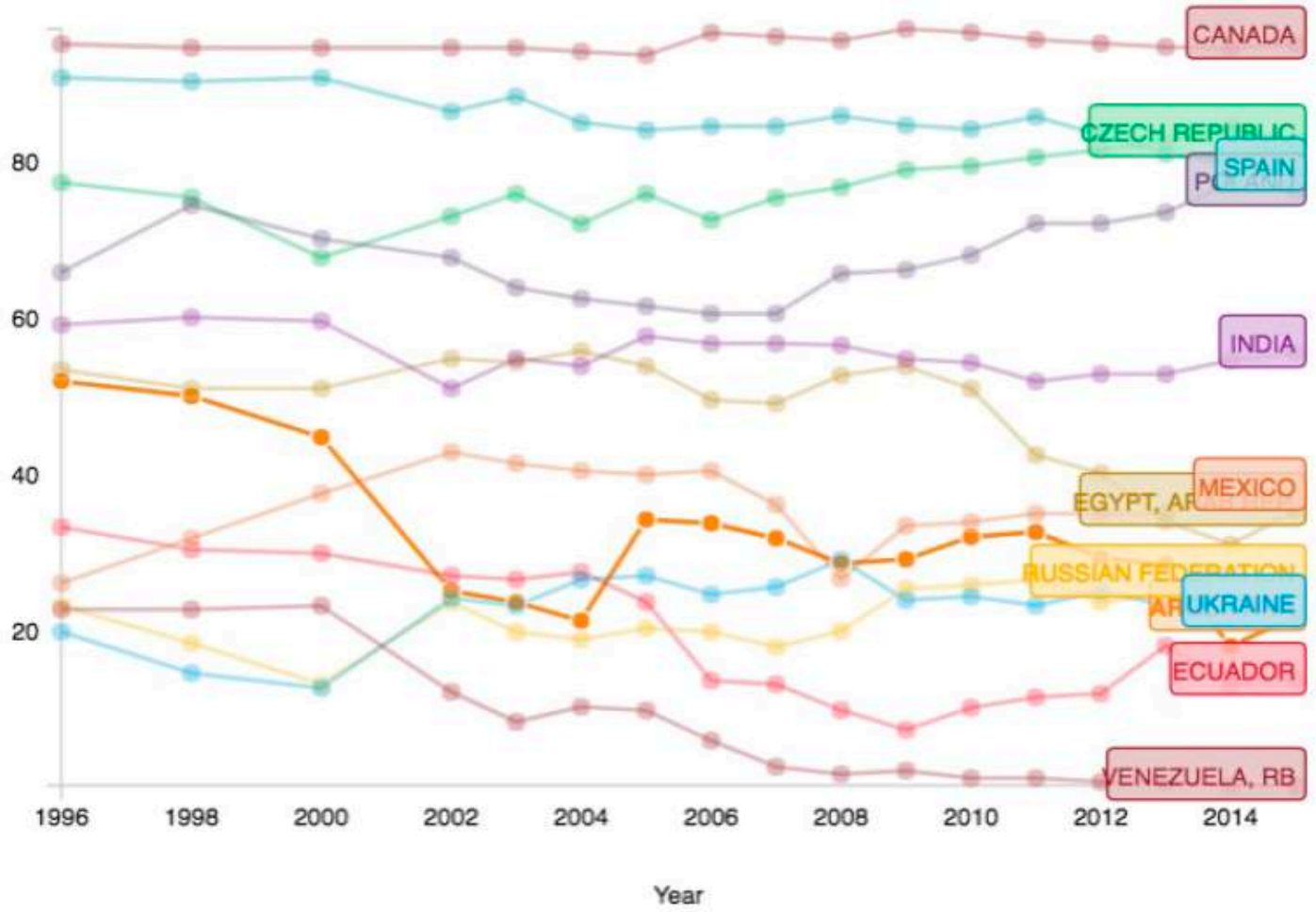
Judicial Independence, 1-7 (Best)



Source:
World Bank
TCData360

Respondent States

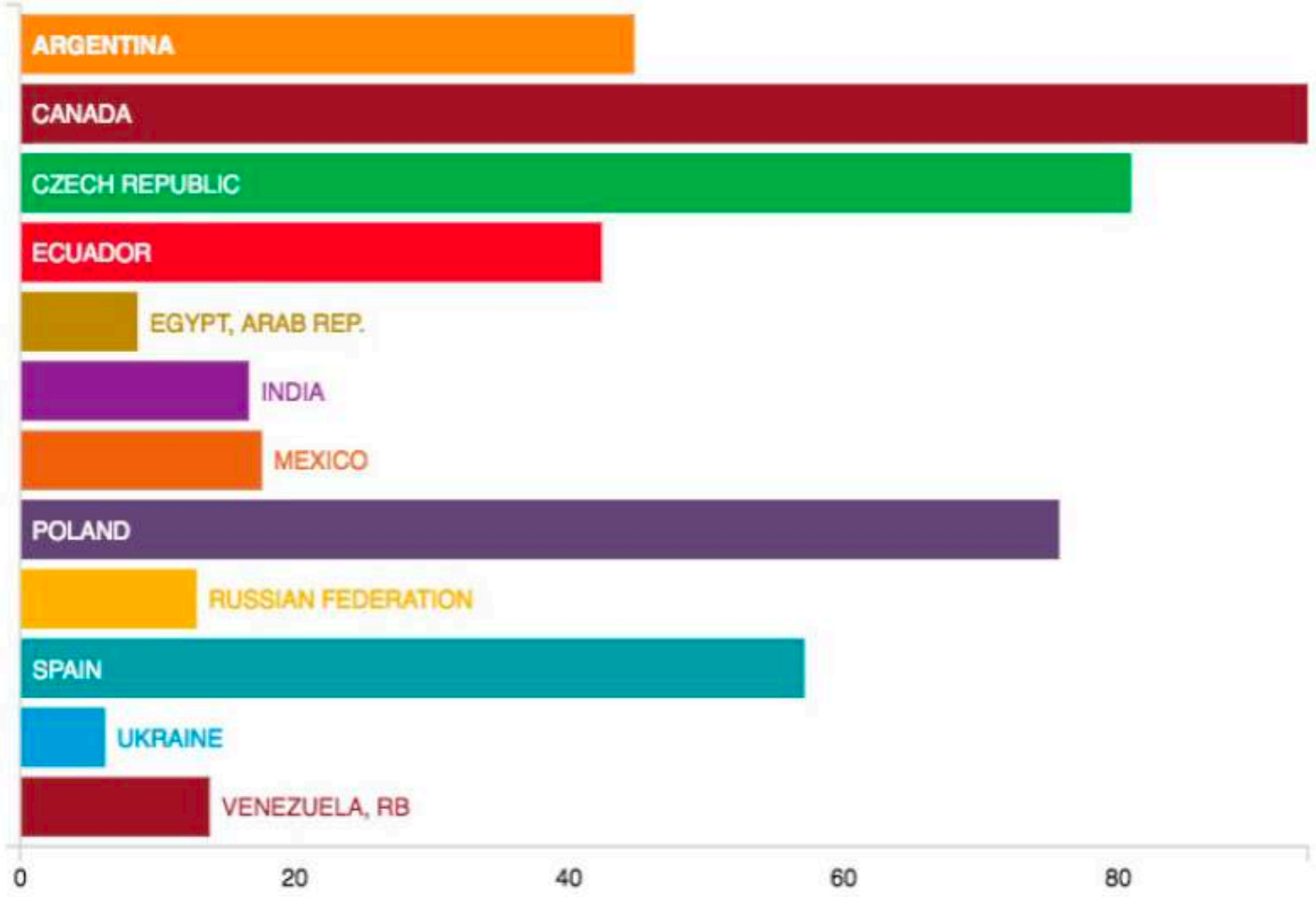
Rule of law score (-2.5 to 2.5) Percentile Rank



Source:
World Bank
TCData360

Respondent States

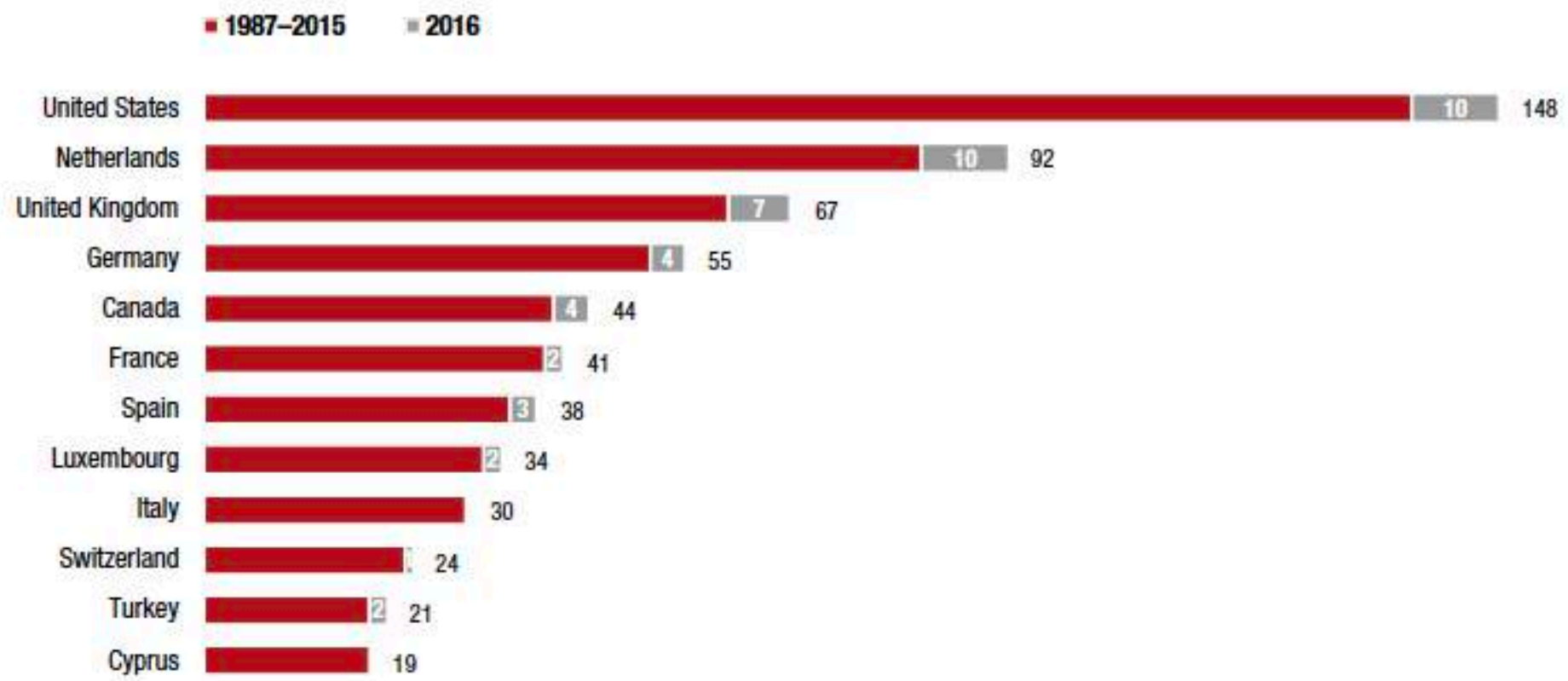
Political Stability Score (-2.5 To 2.5), Percentile Rank



Source:
World Bank
TCData360

Claimant's Nationality

Figure 3. Most frequent home States of claimants, 1987–2016 (Number of known cases)



Claimant's Nationality

- By the end of 2016, the overwhelming majority (80 %) of all ISDS claims were brought by investors from developed countries:
  - United States of America, 148 cases (19,2%)
  - European Union, 422 cases (55%) most frequently from:
    - Netherlands (92 cases)
    - United Kingdom (67 cases)
    - Germany (55 cases)
    - France (41 cases)
    - Spain (38 cases)
    - Luxembourg (34 cases)
    - Italy (30 cases)
    - Cyprus (19 cases)
    - Austria (17 cases)
    - Belgium (16 cases)
    - Greece (14 cases)
- Investors from EU and US have been the main users of the system responsible for over 75% of all ISDS claims
- Only Canada (44 cases), Switzerland (24 cases), Turkey (21 cases), and Russia (14 cases), count as other home States with a significant number of investment claims.

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Intra EU ISDS

- Intra-EU disputes accounted for about one quarter of investment arbitrations initiated in 2016, down from one third in the three preceding years.
- The overall number of known intra-EU investment arbitrations initiated by an investor from one EU member State against another member State was 147 by the end of 2016, approximately 19% of all known cases globally.
- These proceedings are initiated by an investor from one EU member State against another member State.
- The majority – 10 of 17 – were brought pursuant to the Energy Charter Treaty and the rest on the basis of intra-EU BITs.

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ISDS CRITICISMS

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ISDS and its critics

- What is the objective of IIAs: promote and protect foreign investment
  - Do they increase foreign investment?
  - Do they promote the rule of law/good governance?
  - Do they "depoliticize" investment disputes?
- Concerns with substantive protections: The right to regulate
- Concerns with process? Legitimacy of investor-state dispute settlement (ISDS) to resolve legal disputes regarding sovereign acts

Concerns with ISDS

- Arbitrators are private individuals with vested interest in system; not accountable judges with tenure providing independence and impartiality
- Arbitrator conflicts of interest are endemic
- Pro-investor bias in interpretation of jurisdiction and substantive protections
- Arbitration is traditionally private and confidential; closed to public and affected third parties
- Unilateral nature of ISDS – investors are the perpetual claimants
- Unilateral nature of IIA obligations - no obligations on investors

Concerns with ISDS

- No general requirement to exhaust local remedies: domestic courts do not have opportunity to interpret domestic law; exit from domestic court system has negative consequences for domestic rule of law
- A decentralized framework with no precedent: inconsistent reasoning and outcomes
- Regulatory chill – the threat of arbitration as a disincentive to regulate in the public interests
- Damages can be very large and have significant political and economic effects
- Awards are not reviewable for legal error
- Defending claims is very costly

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Questions?

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