Winning and Losing in Investor-State Dispute Settlement

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ABSTRACT

Investor-state dispute settlement (ISDS) exists at the intersection of sovereign powers and investors' rights. The proliferation of ISDS since 1990 has been dramatic as thousands of investment treaties paved the way for investors to bring claims against sovereign governments in arbitration. As tensions between investors' rights and sovereign power escalate, ISDS is a focal point in contentious debates about the future of global systems for trade and investment. ISDS embodies two opposing currents in international law: (i) the erosion of sovereignty that accompanied economic globalization, trade frameworks, and investment treaties following the Second World War and (ii) more recently, reassertions of sovereignty prompted by recent backlashes against the global economic order.

This project evaluates outcomes in the ISDS system in the context of these ongoing debates and controversies. Using the best available data, this Article contributes more detailed assessments of sovereign winners (home states of claimants) and sovereign losers (respondent states) in the ISDS system. This Article also considers the distribution of costs and benefits within the ISDS system and offers perspective to existing scholarship on ISDS. Questions related to the proportions and distribution of outcomes are fundamental to the real and perceived legitimacy of the ISDS system. Highly disparate outcomes may even help highlight systemic legitimacy problems and potential areas for reform.

INTRODUCTION

New stresses have raised serious doubts about the status quo of the international legal system.[1] Perhaps not since the Second World War has the global economic order faced such existential questions.[2] Important multilateral frameworks are collapsing or under pressure: the European Union after Brexit and the uncertain future of the North American Free Trade Agreement (NAFTA) are just two examples.[3] Behemoth trade deals such as the Trans-Pacific Partnership (TPP) the Transatlantic Trade and the Investment Partnership (T-TIP) are either dead or on life support. Since China's accession to the World Trade Organization (WTO) in 2001, international trade liberalization has stalled.[4] Now it may be in reverse.[5] While drawing conclusions about the new shape of the international landscape is a difficult task, there are increasingly observable trends that cast doubts on the trajectory and future of the modern global order.[6]

Over time, investor-state dispute settlement (ISDS) has embodied two opposing currents in international law: (i) the erosion of sovereignty that accompanied economic globalization, trade frameworks, and investment treaties following the Second World War[7] and (ii) more recently, the reassertion of sovereignty prompted by backlash against the global economic order.[8] ISDS has gone from a specialized, relatively anonymous area of international law to an inflammatory "blogosphere term" in less than two decades.[9] As a sign of the times, even popular media outlet *Buzzfeed* weighed in on ISDS in an extensive multi-part special investigative report.[10] Often a component in trade and investment treaties, ISDS provides investors with rights to bring claims directly against sovereigns in arbitration.[11] ISDS frequently—and controversially—pits sovereign powers to regulate against investors' rights.[12]

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[1] *See*, *e.g.*, Harlan Grant Cohen, *Multilateralism's Life Cycle*, 112 AM. J. INT'L L. 47 (2018).

[2] *See The Rules-Based System is in Grave Danger*, ECONOMIST (Mar. 8, 2018), https://www.economist.com/news/leaders/21738362-donald-trumps-tariffs-steel-and-aluminium-would-be-just-start-rules-based-system ("Not since its inception at the end of the second world war has the global trading system faced such danger.") [hereinafter ECONOMIST, *Grave Danger*].

[3] *See* Robin Niblett, *Liberalism in Retreat*, FOREIGN AFFAIRS (Jan./Feb. 2017).

[4] *See* Martin Wolf, *Davos 2018: The Liberal International Order is Sick*, FIN. TIMES (Jan. 23, 2018) https://www.ft.com/content/c45acec8-fd35-11e7-9b32-d7d59aace167.

[5] *See* ECONOMIST, *Grave Danger*, *supra* note 2.

[6] *See* Cohen, *supra* note 1, at 48.

[7] *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77 (2005) (addressing the sovereignty trade-offs for states that sign investment treaties).

[8] *See supra* notes 1–5 and accompanying text.

[9] Gary Clyde Hufbauer, *ISDS Controversy*, TRADE & INVESTMENT POLICY WATCH – PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (May 13, 2015, 10:00 AM), https://piie.com/blogs/trade-investment-policy-watch/isds-controversy ("Thanks to the battle over the [TPP], ISDS has now become a blogosphere term.").

[10] *Secrets of a Global Secret Court*, BUZZFEED https://www.buzzfeed.com/globalsupercourt (linking to several special reports about ISDS) (last visited April 25, 2018).

[11] *See* Salacuse & Sullivan, *supra* note 7, at 77.

[12] Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 63–67 (2011) (explaining controversies related to investment treaties); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365, 399 (2003) (discussing tensions between investor rights and host state interests).

ISDS is a flashpoint issue in the broader backlash against the global economic order.[13] Early on, opposition to ISDS was mostly limited to anti-globalization and environmentalist movements.[14] But backlash against ISDS has widened in recent years—ranging from high-profile treaty withdrawals in Latin America to trade strategy recalibrations in Australia, India, Indonesia, and South Africa.[15] Concerns over ISDS dogged the TPP[16] and temporarily derailed trade negotiations between Canada and the European Union.[17] Chapter 11, the investment chapter of NAFTA, has been a thorny issue in ongoing renegotiations.[18] Increasingly, challenges to ISDS are gaining momentum among wealthier FDI-exporting countries.[19] Meanwhile, as investors push the boundaries of the ISDS system, even more controversies are born.[20]

As investment treaties and disputes boom, scholarly work has explored the outcomes of the system.[21] Early empirical projects laid groundwork for quantifying trends in ISDS and evaluating fundamental issues emerging from investment treaty disputes.[22] More recently, empirical research has examined specific issues and emerging trends in ISDS,[23] including the question of legitimacy in ISDS.[24] Other empirical work offers valuable commentary and criticism

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[13] *See*, *e.g.*, William Mauldin, *Arbitration Provision Emerges as Flashpoint in NAFTA Overhaul*, WALL ST. J. (July 19, 2017), https://www.wsj.com/articles/arbitration-provision-emerges-as-flashpoint-in-nafta-overhaul-1500408335.

[14] *See*, *e.g.*, Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 AM. BUS. L.J. 475, 479 (2001) (referencing environmental opposition to NAFTA investor-state proceedings).

[15] *See*, *e.g.*, Kavaljit Singh & Burghard Ilge, Opinion, *India Overhauls Its Investment Treaty Regime*, FIN. TIMES; BEYONDBRICS, (July 15, 2016), https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc (describing India's recalibration of treaty practices in response to ISDS concerns). For a broader discussion of actions taken by sovereigns to limit ISDS risks, see *infra* Part I.E.

[16] *See*, *e.g.*, Elizabeth Warren, Opinion, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015) https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

[17] Jessica Murphy, *Why the Canada-EU Trade Saga is Far From Over*, BBC NEWS (Nov. 3, 2016), http://www.bbc.com/news/world-us-canada-37826855 (reporting on how ISDS became a stumbling block in trade negotiations).

[18] *See supra* note 13 and accompanying text.

[19] *See infra* notes 202–206 and accompanying text.

[20] *See*, *e.g.*, Stephen Park & Tim R Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement*, 50 VAND. J. TRANSNAT'L L. 1033 (2017) (analyzing the use of ISDS to enforce sovereign debt obligations).

[21] *See*, *e.g.*, Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 N.Y.U. J. INT'L L. & POLS. 935 (2005); Scott J. Shackelford, et al., *Using BITs to Protect Bytes: Promoting Cyber Peace by Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 AM. BUS. L.J. 1 (2015); Jeswald W. Salacuse, *Of Handcuffs and Signals: Investment Treaties and Capital Flows to Developing Countries*, 58 HARV. INT'L L.J. 127 (2017) [hereinafter Salacuse, *Handcuffs and Signals*].

[22] *See* Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007) [hereinafter Franck, *Evaluating Claims*]; *see also* Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008).

[23] Rachel L. Wellhausen, *Recent Trends in Investor–State Dispute Settlement*, 7 J. INT'L DISPUTE SETTLEMENT 117 (2016) [hereinafter Wellhausen, *Recent Trends*]; Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459 (2015).

[24] Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147 (2014); Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-The-Art*, 46 GEO. J. INT'L L. 363 (2015); Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, 55 VA.

of early empirical work interpreting ISDS data.[25] Throughout the body of scholarly work, disparities in the allocation of costs and benefits loom large in debates about the legitimacy of the ISDS system.[26] That issue is the focus of this Article.

This Article aims to contribute data, context, and analysis to ongoing debates about ISDS. In doing so, this Article focuses primarily on the distribution and impact of costs within the ISDS system. Building on existing empirical work on ISDS, this project updates certain aspects of the most comprehensive data set available.[27] This Article also aims to provide novel analysis and more detailed metrics towards understanding how sovereigns are winning and losing in the ISDS system with country-specific datasets that quantify costs and benefits for selected sovereigns. In doing so, this Article builds on and addresses existing scholarship about legitimacy concerns related to the lack of diversity among claimants,[28] systemic bias,[29] and the distribution of costs in the ISDS system.[30] Although ISDS data face certain limitations, critical observations and contributions to the existing empirical literature on ISDS are within reach.[31]

This Article proceeds as follows. Part I begins with an overview of the international legal environment for foreign direct investment and the foundations of the ISDS system, followed by an analysis of factors that determine the legitimacy of ISDS and drive backlash against ISDS. Part II describes the methodology and measurements involved in the empirical analysis for this Article. In Part III, the data collected for this Article are analyzed and key findings are explored. A discussion of the findings then explores the implications of how costs and benefits are distributed in the ISDS system.

I. FOUNDATIONS AND CONTROVERSY

As one of the most active areas of international law in the last fifty years, international investment treaties and investor-state disputes have boomed in recent decades—particularly since the beginning of the 1990s. As of 1990, approximately 500 investment treaties had been signed.[32] As of 2017, over 3,300 were signed.[33] Investor-state disputes have followed a similar trajectory.

J. INT'L L. 13 (2014) [hereinafter Franck, *Politics and Development*]; Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010).

[25] *See* Kevin P. Gallagher & Elen Shrestha, *Investment Treaty Arbitration and Developing Countries: A Re-Appraisal*, 12 J. WORLD INVESTMENT & TRADE 919 (2011) (expressing skepticism about Franck's analysis and conclusions); *see also* Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211, 254–55 (2012) (same).

[26] *See* Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 772 (2011) (defining the scope of costs in ISDS and highlighting systemic concerns about costs and liabilities) [hereinafter Franck, *Rationalizing Costs*]; Behn, *supra* note 24, at 265–70 (underscoring legitimacy concerns in ISDS); Gallagher & Shrestha, *supra* note 25, at 925 (raising legitimacy issues around the distribution and impact of ISDS costs).

[27] *See* Wellhausen, *Recent Trends*, *supra* note 23. Wellhausen's ISDS dataset contains cases through December 31, 2015 and is available at http://www.rwellhausen.com/data.html [hereinafter Wellhausen Dataset].

[28] *See*, *e.g.*, Behn, *supra* note 24.

[29] *See*, *e.g.*, Van Harten, supra note 25; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009).

[30] *See* Gallagher & Shrestha, *supra* note 25, at 926–27.

[31] *See infra* Part II.C (addressing limitations of ISDS data).

[32] The United Nations Conference on Trade and Development (UNCTAD) maintains a database of IIAs and model agreements. *See International Investment Agreements Navigator*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA (last visited April 27, 2018).

[33] Of those 3,300 signed investment treaties, about 2,671 are currently in force. *Id*.

ISDS was virtually nonexistent prior to 1990.[34] However, as of the beginning of 2018, there are over 900 cases. Annual case volumes have also trended upward. The ten-year average of cases per year from 2006 to 2015 was 49.[35] But more recently volumes climbed to eighty in 2015, seventy-five in 2016, and sixty-five in 2017.[36]

The 1990s investment treaty boom was accompanied by a boom in foreign investment flows, which quadrupled between 1990 and 2000.[37] Global flows of foreign direct investment in 2017 dropped by 16 percent from 2016 levels but still amounted to $1.52 trillion.[38] The relationship between investment treaties and cross-border investments is a widely debated question beyond the scope of this Article.[39] But there is little doubt that foreign investment is a key driver of international economic integration with important implications for development.[40] Also, given the wide proliferation of investment treaties and foreign investment volumes numbering in trillions, the scope of investment protections that are backed by ISDS is substantial.[41]

A. ISDS Fundamentals

ISDS enables foreign investors to sue sovereigns directly in arbitration—bypassing local courts—for investment treaty violations. The procedural mechanics of ISDS closely resemble commercial arbitration.[42] ISDS often involves the enforcement of private rights in matters of public interest.[43] Extractive industries, such as mining and hydrocarbons, have historically represented a large portion of ISDS activity.[44] Though extractives still represent a significant percentage of the overall ISDS caseload, an increasingly wider variety of industries are represented in ISDS activity.[45] By volume, the top industries for ISDS activity are manufacturing (13.2 percent), oil and gas (15.1 percent), services (17.8 percent), and utilities (22.6 percent).[46] In recent

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[34] UNCTAD also maintains a database of investment disputes. *Investment Dispute Settlement Navigator*, UNCTAD, http://investmentpolicyhub.unctad.org/ISDS (last visited April 27, 2018) [hereinafter *ISDS Navigator*].

[35] UNCTAD, *World Investment Report: Key Messages and Overview* 23 (2017) [hereinafter UNCTAD, *Key Messages*].

[36] *See ISDS Navigator Update: 850+ Known Cases by Year-End*, UNCTAD (Mar. 12, 2018) http://investmentpolicyhub.unctad.org/News/Hub/Home/1580.

[37] *See* UNCTAD, *World Investment Report: Overview* 2 (2005).

[38] UNCTAD, *Investment Trends Monitor* 1 (Jan. 2018) http://unctad.org/en/PublicationsLibrary/diaeia2018d1_en.pdf.

[39] Despite a number of studies, evidence that investment treaties have a meaningful impact on foreign investment flows is not conclusive. For a discussion of research on this issue, *see* Salacuse, *Handcuffs and Signals*, *supra* note 21, at 132; Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the Evidence*, INT'L INST. FOR SUSTAINABLE DEV., (2017), https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf.

[40] *Id*. at 134 (comparing and contrasting foreign direct investment and foreign portfolio investment).

[41] *See supra* notes 32–37 and accompanying text.

[42] UNCTAD, *Transparency: UNCTAD Series on Issues in International Investment Agreements II* 37 (2012) *available at* http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf [hereinafter, UNCTAD, *Transparency in IIAs*].

[43] *See* George Foster, *Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201 (2011); *see also infra* Part I.D.1 (addressing public-private tensions in the context of substantive legitimacy concerns).

[44] *See* Behn, *supra* note 24, at 389.

[45] *See* Wellhausen, *Recent Trends*, *supra* note 23, at 7 (observing that investors from a wide variety of industries are accessing ISDS).

[46] *Id*. at 6 (illustrating ISDS filings by industry).

years, disputes in services and trade sectors have increased considerably.[47] A particularly well-known and controversial case is outlined below to illustrate basic mechanics and fundamental issues in ISDS.

In 2004, Dr. Tabaré Vazquez, formerly an oncologist, was elected president of Uruguay. His administration made reducing tobacco consumption a major public health priority, implementing some of the most stringent tobacco regulations in the world.[48] These regulations soon became the subject of an ISDS claim in *Philip Morris v. Uruguay*.[49] Two regulations in particular were challenged by the claimants: (i) the 80/80 requirement that graphic health warning labels cover 80 percent of the front and back of the package[50] and (ii) the "single presentation requirement," which allowed only one variant of cigarette per brand family and effectively prohibited color-coded variants that indicate, for instance, light or menthol products.[51] The single presentation requirement eliminated seven of claimants' thirteen cigarette variants.[52]

In 2010, Philip Morris brought a $25.7 million ISDS claim against Uruguay, alleging that the tobacco regulations violated the Switzerland-Uruguay bilateral investment treaty.[53] Among the disputed legal issues were expropriation claims, denial of fair and equitable treatment, and the impairment of use and enjoyment of investments.[54] Ultimately, the tribunal ruled against the claimants.[55] In doing so, the tribunal concluded that the tobacco regulations were not expropriatory and fell within Uruguay's sovereign powers to police public health.[56]

Though unsuccessful for the claimants, *Philip Morris v. Uruguay* underscores a crucial issue in ISDS: tensions between the private rights of foreign investors versus sovereign regulatory powers in matters of public interest, such as health and welfare.[57] This tension is central in debates about the legitimacy and future of ISDS.[58] The public health implications of this case made *Philip Morris v. Uruguay* an especially high-profile dispute, attracting international attention and even third-party funding for Uruguay.[59]

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[47] Behn, *supra* note 24, at 390.

[48] *See* Duff Wilson, *Cigarette Giants in Global Fight on Tighter Rules*, N.Y. TIMES (Nov. 13, 2010), https://www.nytimes.com/2010/11/14/business/global/14smoke.html.

[49] *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016), [hereinafter *Philip Morris v. Uruguay*].

[50] *Id*. ¶ 13 (explaining policy aims of the 80/80 requirement).

[51] *Id*. (explaining Uruguay's policy logic behind single presentation requirement).

[52] *Id*. ¶¶ 144–45 (illustrating claimants' brand family products before and after the single presentation requirement came into force).

[53] After the first round of pleadings, the claim was reduced to approximately $22.2 million plus interest. *Id*. ¶ 12.

[54] Nicole D. Foster, *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, 110 AM. J. INT'L L. 774 (2016) (outlining the primary legal issues in the award).

[55] *Philip Morris v. Uruguay*, ¶ 590.

[56] *Id*. ¶ 291. For a discussion of the tribunal's reasoning, see Foster, *supra* note 54, at 776–79.

[57] *See* Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383 (2016) (exploring broader issues in international tobacco disputes).

[58] Gus Van Harten, et al., *Investment Provisions in Trade and Investment Treaties: The Need for Reform* GEGI EXCHANGE (2015), https://www.bu.edu/pardeeschool/files/2014/12/Investor-State-Disputes-Policy-Brief.pdf; *see also infra* Part I.D (outlining legitimacy issues in ISDS).

[59] *See*, *e.g.*, Kate Kelland, *Gates and Bloomberg Create $4 million Fund to Fight Big Tobacco*, REUTERS (Mar. 18, 2015, 4:20 PM), https://www.reuters.com/article/us-health-tobacco-fund/gates-and-bloomberg-create-4-million-fund-to-fight-big-tobacco-idUSKBN0ME24C20150318 (reporting on third-party funding for Uruguay's legal battle).

Another major issue highlighted by *Philip Morris v. Uruguay* is legal fees and tribunal costs.[60] At $27 million, aggregate legal fees and tribunal costs—about $16.9 million for Philip Morris and $10.3 million for Uruguay—exceeded the base value of the claim itself.[61] ISDS expenses also highlight broader problems with cost allocations and disparities in financial capacity.[62] For instance, when the claim was brought in 2010, Uruguay's gross domestic product (GDP) was dwarfed by Philip Morris' annual revenues.[63] For low-income countries defending ISDS cases, arbitration costs are especially considerable. Finally, it is worth noting that although *Philip Morris v. Uruguay* is illustrative and compelling, this case is also exceptional in some ways and does not necessarily represent an average ISDS case.

B. International Investment Law and ISDS

In addition to being quite new,[64] international investment law is quite decentralized and fragmented.[65] Investment law has boomed in the last thirty years—particularly since 1990—but lacks a centralized institutional framework like what the World Trade Organization (WTO) provides for international trade.[66] Instead, international investment law is a mosaic of thousands[67] of separate, freestanding international investment agreements (IIAs).[68] Fragmentation is in part due to the bilateral nature of most investment treaties, which are only occasionally multilateral and never comprehensively global.[69] Despite their fragmentation and diversity, in the aggregate, IIAs constitute something of an emerging global regime for international investment, with its own

[60] *See infra* Part II.A.2–3 (explaining the impact of legal fees and tribunal costs in ISDS).
[61] The $7 million in compensation for Uruguay's expenses ordered by the tribunal covered some but not all of Uruguay's expenses in the dispute. *Philip Morris v. Uruguay*, ¶ 590. Claimants quantified their expenses at approximately $16.9 million. Meanwhile, Uruguay quantified expenses at approximately $10.3 million. *Id*. ¶ 583.
[62] *See infra* Part II.A (broadly addressing issues related to costs and expenses in ISDS).
[63] *See* Wilson, *supra* note 48 (reporting that Uruguay's GDP was half the size of the Philip Morris' $66 billion in annual sales).
[64] Though the roots of modern treaties with investment provisions reach back to 1778, most international investment law has come into existence in recent decades. *See* Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 17–24 (2008) (tracing the emergence and evolution of investment treaty law); *see also supra* notes 32–36 (citing statistics on growth of investment treaty law since 1990).
[65] Fragmentation creates inconsistencies within investment law and makes comprehensive reform challenging. *See* UNCTAD, *Key Messages*, *supra* note 35, at 26 (discussing problems associated with fragmentation in investment law and reform efforts); *see also* Behn, *supra* note 24, at 413 (observing that issues like transparency in ISDS are more difficult to resolve due to the "decentralized and largely non-institutionalized structure of investment treaty arbitration").
[66] UNCTAD and ICSID perform some institutional functions but do not offer the comprehensive and organizational infrastructure that, for instance, the WTO provides for international trade. *See* Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT'L L. 335, 342–44 (2013).
[67] UNCTAD estimates that the total number of IIAs is 3,324 (2,957 BITs and 367other treaties with investment provisions). *See* UNCTAD, *supra* note 35, at 22.
[68] *See* UNCTAD, Investor-State Dispute Settlement: A Sequel 18 (UNCTAD Series on Issues in Int'l Inv. Agmts., 2013), http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.
[69] Investment treaties remain primarily bilateral and only occasionally multilateral. Almost 90 percent of IIAs are BITs. *See* UNCTAD, *Key Messages*, *supra* note 35, at 22; *see also* Dolzer & Schreuer, *supra* note 64, at 19 (characterizing investment regime as dominated by BITs and lacking a universal treaty).

architecture and enforcement processes.[70] Similarly, international investment law could be analogized to a body of international administrative law governing relationships between foreign investors and host states.[71]

After explosive growth initiated in the 1990s, the total number of IIAs reached 3,324 in 2017.[72] Treaties have become the fundamental source of international law on foreign investments.[73] While substantive content varies, the basic scope of investment treaties is fairly consistent: IIAs create reciprocal obligations among sovereigns on the treatment of foreign investments.[74] And provide enforcement mechanisms for these obligations, namely ISDS.[75] In a large-sample survey of IIAs, 96% were found to provide for ISDS to resolve foreign investment disputes.[76]

Thus, IIA obligations are two-fold: *substantive* and *procedural*. The *substantive* obligations for sovereigns include commitments to treat foreign investments in a fair and equitable manner.[77] Then, as an enforcement mechanism to the substantive treaty obligations, IIAs provide investors with *procedural* rights to use arbitration for claims, often in an independent forum such as ICSID.[78] As a result, foreign investors from one signatory country gain substantive protections as well as a procedural mechanism to enforce claims.

The vast majority—an estimated 2,957 out of 3,324 or about 89 percent—of IIAs are bilateral investment treaties (BITs).[79] As their name suggests, BITs establish bilateral investment commitments between two sovereigns.[80] For instance, in 1991, Argentina and the United States signed a BIT that came into force in 1994.[81] Like many BITs, the U.S.-Argentina BIT contains bilateral guarantees such as substantive commitments to provide "fair and equitable treatment" to foreign investments from the other signatory country.[82] In the event of an investment dispute, foreign investors—after a six-month "cooling off" period—have rights to take the dispute to ICSID

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[70] To what extent the body of international investment law constitutes a "regime" is subject to some debate. *Compare* Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 463–68 (2010) [hereinafter Salacuse, *Global Regime*] *with* Louis T. Wells, *The Emerging Global Regime for Investment: A Response*, 52 HARV. INT'L L.J. ONLINE 42 (2010).

[71] *See*, *e.g.*, Dolzer, *supra* note 21.

[72] *See supra* note 67 and accompanying text.

[73] Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155 (2007).

[74] Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 172 (2005).

[75] *Id*. at 174–75.

[76] *See* Joachim Pohl, Kekeletso Mashigo & Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 10 (OECD Working Papers on Int'l Inv., 2012/02, 2012), https://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf (finding that 96% of treaties in a sample of 1,660 IIAs contained ISDS provisions).

[77] Although the question of what constitutes fair and equitable treatment is fairly new, having only emerged since 2000, it is the most frequently invoked standard in ISDS today. *See* Dolzer & Schreuer, *supra* note 64, at 119–48 (tracing the evolution of fair and equitable treatment in international jurisprudence).

[78] *See* Pohl, Mashigo & Nohen, *supra* note 76 and accompanying text.

[79] *See* UNCTAD, *Key Messages*, *supra* note 35, at 22.

[80] *See* Vandevelde *supra* note 74, at 174-75 (describing the core obligations in IIAs). Multilateral investment agreements are less common than BITs but are an important source of disputes. *See*, *e.g.*, *infra* note 93 and accompanying text.

[81] Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993) [hereinafter U.S.-Argentina BIT].

[82] *See* U.S.-Argentina BIT, *supra* note 81, art. II (setting forth investment protection obligations); *see also* Vandevelde, *supra* note 74, at 172 (identifying common BIT provisions).

arbitration.[83] Breaches of fair and equitable treatment and indirect expropriation are the most frequently claimed areas.

But sovereigns retain some regulatory latitude even within BIT obligations. Sovereign respondents may invoke necessity arguments to defend or excuse BIT violations.[84] Necessity developed in customary international law but has since been codified in investment treaties.[85] For instance, the U.S.-Argentina BIT contains provisions allowing the state to take non-precluded measures that might otherwise violate other BIT obligations.[86] Generally speaking, non-precluded measures preserve sovereign prerogatives to manage security, public order, public health, and other exceptional circumstances.[87] But the scope of non-precluded measures varies across treaties and has evolved over time.[88] Perhaps not surprisingly, the scope of non-precluded measures is often vigorously contested in ISDS.[89]

Multilateral economic or trade agreements may also contain investment provisions with ISDS mechanisms.[90] While the ASEAN Comprehensive Investment Agreement[91] deals with investment alone, NAFTA[92] and the Energy Charter Treaty[93] address both trade and investment. In terms of sovereign obligations, investment treaties are generally much narrower in scope than trade agreements. For instance, the investment chapter of the NAFTA (Chapter 11) has provisions that resemble the content of a BIT, including fair and equitable treatment and provisions for ISDS.[94] But NAFTA also has other chapters that go far beyond the scope of a typical BIT, including trade regulation, market access, customs procedures, and intellectual property laws.[95]

C. Origins and Purpose of the ISDS System

Like many of the legal regimes and organizations that underpin the global economic order of today—including the Bretton Woods institutions—the modern international investment regime emerged after the Second World War.[96] The post-war era gave rise to dramatic changes in the

[83] *See* U.S.-Argentina BIT, *supra* note 81, art. VII(3).
[84] *See* Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296 (2015).
[85] *Id*. at 308–10 (reviewing the history of the necessity defense in customary international law).
[86] *See*, *e.g.*, U.S.-Argentina BIT, *supra* note 81, art. XI.
[87] *See* William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT'L L. 307, 312–13 (2008).
[88] *Id*. at 409 (emphasizing need for greater consistency and coherence in the application of NPM clauses by ISDS tribunals).
[89] *See id*. at 315 (discussing the importance of non-precluded measures in investment disputes).
[90] *See* Salacuse, *Handcuffs and Signals*, *supra* note 21, at 129.
[91] ASEAN Comprehensive Investment Agreement, Feb. 26, 2009, http://agreement.asean.org/media/download/20140119035519.pdf.
[92] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993), https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement.
[93] European Energy Charter Treaty, opened for signature Feb. 1, 1995, 34 I.L.M. 360, http://www.ena.lt/pdfai/Treaty.pdf.
[94] *See* Dhooge, *supra* note 14, at 482, n. 32 (comparing Chapter 11 with U.S. BITs).
[95] *Id*. at 480–81 (outlining the overall scope of NAFTA).
[96] The International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank) emerged from the Bretton Woods Conference in 1944. The General Agreement on Tariffs and Trade (GATT) was born in 1947 to establish interim trade measures pending negotiations for a more robust and comprehensive

international legal system. First, and most broadly, there was the rapid growth of multilateral trade and economic institutions.[97] Second, a decolonization movement reshaped trade and investment relationships between imperial powers and former colonies. Furthermore, and most specifically, a tide of resource nationalism in newly independent sovereigns underscored political risks in the new environment for international investment. In response to the new investment landscape, capital-exporting countries spearheaded the legal and institutional foundations of the modern IIA-ISDS system.

1. Decolonization and Resource Nationalism

Although the earliest treaty rules on foreign investment have roots in a commercial treaty between the United States and France in 1778, investment treaty law is quite new.[98] Germany initiated the modern era of investment treaties in 1959 by negotiating BITs with Pakistan and the Dominican Republic.[99] Other countries in Europe followed Germany's example.[100] Years later, the United States launched a BIT program in 1981.[101] Still, the vast majority of investment treaties—approximately 85 percent—came into existence after 1990.[102]

Geopolitical shifts—namely, decolonization and resource nationalism in newly independent sovereigns—reshaped the planet, including the landscape for international investment.[103] A few notable "growth spurts" in the number of sovereign nations worldwide in recent history include Latin American Independence movements,[104] decolonization of Africa and Asia following the Second World War,[105] and post-Soviet states following the dissolution of the Soviet Union.[106] Independence and decolonization in the Americas began with a series of Latin American revolutions in the 18th century. Over a century later, between 1945 and 1960, a wave of decolonization in Africa and Asia saw three-dozen states achieve autonomy or outright independence.[107] Worldwide, since the creation of the United Nations in 1945, over eighty former colonies have gained independence.[108]

International Trade Organization (ITO). Ultimately, the ITO failed to gain traction and the GATT remained the primary international trade framework until the World Trade Organization (WTO) was established in 1995.

[97] *Id*.

[98] *See* Dolzer & Schreuer, *supra* note 64, at 17–18 (explaining the early stages of investment treaty law).

[99] *See* Salacuse, *Global Regime*, *supra* note 70, at 433.

[100] *Id*. at 433, n. 32 (referencing BIT programs of certain European countries).

[101] Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT'L L. 373 (1985).

[102] *See supra* notes 32–33 and accompanying text.

[103] Prior to the First World War, about 70% of the world's population was subject to foreign rule. *See* Marion Mushkat, *The Process of Decolonization International Legal Aspects*, 2 U. BALT. L. REV. 16, 16–18 (1972).

[104] Robert H. Bates, John H. Coatsworth & Jeffrey G. Williamson, *Lost Decades: Postindependence Performance in Latin America & Africa*, 67 J. OF ECONOMIC HIST. 943 (2007).

[105] *Decolonization of Asia & Africa 1945-1960*, U.S. DEP'T OF STATE, https://history.state.gov/milestones/1945-1952/asia-and-africa. (last visited May 11, 2018).

[106] Prior to dissolution, the Soviet Union consisted of fifteen republics. Leon Aron, *Everything You Think You Know About the Collapse of the Soviet Union is Wrong*, FOREIGN POLICY (June 20, 2011, 1:58 AM), http://foreignpolicy.com/2011/06/20/everything-you-think-you-know-about-the-collapse-of-the-soviet-union-is-wrong/.

[107] *See* Bates, et al., *supra* note 104, at 3 (observing that Africa gained independence from European rule about a century and a half after Latin America).

[108] *The United Nations and Decolonization*, U.N., http://www.un.org/en/decolonization/history.shtml. (last visited May 11, 2018).

As new sovereigns entered the international system—particularly in the twentieth century—the legal and economic relationships between the Global North and the Global South underwent a seismic shift.[109] Rather than managing investments in territories or outright colonies of capital exporters, foreign investors were increasingly faced with managing assets within newly independent sovereigns.[110] In response to the new international investment landscape, the early era of BITs saw capital-exporting countries from Europe promoting BITs to protect the investments of nationals and domestic companies abroad.[111]

As the geopolitical landscape evolved, resource nationalism and expropriation risks in newly independent sovereigns became catalysts for the IIA-ISDS system. Mexico's bold oil nationalization of 1938 was a landmark expropriation event that made waves in the international community.[112] Efforts by developing countries to assert sovereignty—particularly over natural resources—accelerated after the Second World War. While other countries stopped short of sweeping nationalizations, instead opting for renegotiation and "creeping" expropriations to gain more control of their oil industries, most of these movements took place in the 1970s.[113] At the same time, developing countries increasingly questioned customary international laws on expropriation.[114] These efforts culminated in resolutions by the United Nations General Assembly[115] and organizations like the Organization of Petroleum Exporting Countries (OPEC).[116] Such developments underscored political risks in the new global environment, sparking BIT programs in capital exporting countries.[117]

Decades later, systemic North-South divides between capital exporters and capital importers persist. Capital flows from high-income countries still dwarf capital flows from the rest of the world. As illustrated in Exhibit 1 below, as of 2015, outflows of foreign direct investment

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[109] *See* Salacuse, *Global Regime*, *supra* note 70, at 433.

[110] Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis*, 30 NW. J. INT'L L. & BUS. 101, 103 (2010).

[111] *See* Salacuse, *Global Regime*, *supra* note 70, at 433 (noting BIT programs initiated by European to protect national interests abroad, particularly in former colonies); *see also* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 641–42 (observing that most early BITs were between developed and developing countries).

[112] *See* Tim R Samples, *A New Era for Energy in Mexico? The 2013–14 Energy Reform*, 50 TEX. INT'L L.J. 603, 621–22 (2016) (discussing the historical significance and international influence of the Mexican expropriation); *see also* Guzman, *supra* note 111, at 646 (describing Mexico's opposition to the Hull Rule as arguably "the strongest early objection").

[113] Iran expropriated foreign oil interests in 1951. *See* Farshad Ghodoosi, *Combatting Economic Sanctions: Investment Disputes in Times of Political Hostility, A Case Study of Iran*, 37 FORDHAM INT'L L.J. 1731, 1735–39 (2014) (recounting Iran's expropriation of the Anglo-Iranian Oil Company). A broader wave of oil nationalism in the 1970s included Libya, Nigeria, Saudi Arabia, and Venezuela. *See* Ernest E. Smith & John S. Dzienkowski, *A Fifty-Year Perspective on World Petroleum Arrangements*, 24 TEX. INT'L L.J. 13, 32 (1989).

[114] *See* Guzman, *supra* note 111, at 641 (discussing the movement against the "Hull Rule," which required prompt, adequate, and effective compensation for expropriations).

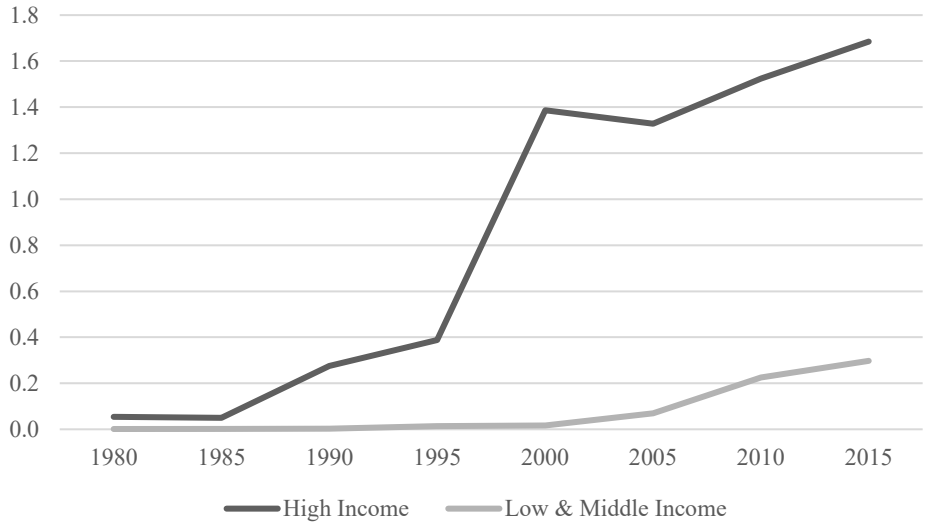
[115] The 1962 Resolution on Permanent Sovereignty over Natural Resources, Resolution 1803, expressed views of developing countries on expropriation. *See* G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962). In 1973, the Resolution on Permanent Sovereignty over Natural Resources, Resolution 3171, further consolidated and elaborated on expropriation perspectives from the developing world. *See* G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973).

[116] OPEC emboldened efforts by developing countries to extract better terms from multinational companies from developed countries. *See* Smith & Dzienkowski, *supra* note 113 at 31-32.

[117] BIT programs were sparked by the failure of efforts to construct a multilateral investment regime. *See* Wells, *supra* note 70, at 44–45.

from high-income countries was $1.685 trillion.[118] That year, low-income and middle-income countries combined accounted for $0.29 trillion with almost all of that amount coming from middle-income countries.[119] At just $.001 trillion in 2016, net outflows of foreign direct investment from low-income countries barely registers in comparison with aggregate global flows.[120]

Exhibit 1: Net FDI Outflows, 1980-2015 (in trillions USD)



Source: World Bank, World Development Indicators

Participation in the international investment system has diversified with the evolution of the world economy. Blocs of countries in the developing world—the "BRICS" and "MIST" countries in particular—now account for a meaningful share of the world economy and wield increasing political clout.[121] Although the Global North still dominates the list of countries with the most BITs, treaties between developing countries now account for over a quarter of all BITs in existence.[122] Including transition countries and developing countries, South-South BITs account for as much as 40% of aggregate BITs worldwide.[123] Even still, the nature of investment flows

[118] Graph of Foreign Direct Investment, Net Outflows, THE WORLD BANK GROUP, https://data.worldbank.org/indicator/BM.KLT.DINV.CD.WD?locations=XD-XO (last visited May 11, 2018) (illustrating net FDI outflows of high income countries versus low- and middle-income countries combined).
[119] *Id*.
[120] Expressed differently, the figure was $1.649 billion in 2010. Graph of Foreign Direct Investment, Net Outflows, THE WORLD BANK GROUP, https://data.worldbank.org/indicator/BM.KLT.DINV.CD.WD?locations=XM (last visited May 11, 2018) (illustrating net FDI outflows of low-income countries).
[121] The BRICS and MIST countries are quite powerful and well-developed in economic terms. BRIC countries include Brazil, Russia, India, China, and South Africa. MIST countries include Mexico, Indonesia, South Korea, and Turkey. *See*, *e.g.*, Daniel Mminele, The Role of BRICS in the Global Economy, Address at the Budesbank Regional Office in Düsseldorf, Germany (July, 7 2016) (transcript available at https://www.bis.org/review/r160720c.htm) (observing that the share of global GDP by the BRICS grew from 11 percent in 1990 to almost 30 percent in 2014).
[122] By 2004, BITs between developing countries accounted for around a quarter of total BITs. *See* UNCTAD, *Recent Developments in International Investment Agreements* (Aug. 30, 2005), http://unctad.org/en/docs/webiteiit20051_en.pdf.
[123] *See* Poulsen, *supra* note 110, at 101.

worldwide necessarily means that the IIA-ISDS system primarily protects investments from high-income countries.[124]

2. Institutional Foundations and Purpose

1965 was a landmark year for ISDS with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which established the International Centre for Settlement of Investment Disputes (ICSID), a forum for conciliation and arbitration of disputes between sovereigns and foreign investors.[125] Headquartered in Washington, D.C., ICSID is one of five organizations within the World Bank.[126] Although the ICSID Convention was eventually widely adopted, the movement faced resistance, especially in Latin America.[127] And some notable world powers never joined the ICSID system.[128] Though ICSID remains the primary forum for ISDS, investor-state arbitrations are also routinely held through *ad hoc* tribunals organized under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) and, though less frequently, at the Stockholm Chamber of Commerce.[129]

A number of positions could explain or justify the existence of the IIA-ISDS system. First is the idea that shielding foreign investors from unfair discrimination and political risk will facilitate foreign investment flows and foster international development.[130] Theoretically, de-politicizing foreign investment disputes should have benefits for both capital-importing countries (fostering a more attractive investment climate) and foreign investors (reducing political risk). However, a dependency view of this explanation is that powerful countries coerced developing countries to participate in a system that reinforces the economic advantages of wealthy capital exporters.[131]

Second, capital-importing countries may also have compelling reasons to participate in the international investment regime.[132] A fairly strong consensus exists behind the view that foreign investment—when responsibly managed by host governments—can help promote development.[133] Indeed, the ISDS system was promoted under the banner of economic development for the developing world. Also, BITs may have effects that strengthen economic ties

[124] *See supra* notes 118–120 and accompanying text.
[125] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].
[126] ICSID and the World Bank Group, https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx.
[127] Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 GA. J. INT'L & COMP. L. 47, 54 (2009) (describing opposition to ICSID that culminated in "El No de Tokyo").
[128] ICSID, List of Member States, https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx (last visited April 27, 2018).
[129] In Wellhausen's comprehensive data set, approximately 68 percent of ISDS cases were filed at ICSID. *See* Wellhausen, *Recent Trends*, *supra* note 23, at 5.
[130] *See*, *e.g.*, Franck & Wylie, *supra* note 23, at 470–72 (discussing the foundational purpose of the ISDS system).
[131] *See*, *e.g.*, Muna Ndulo, *Foreign Investment and Economic Development*, 11 CORNELL L. FORUM 6, 7–8 (1985) (discussing dependency theory perspectives on foreign investment).
[132] *See* Guzman, *supra* note 111, at 666–74 (evaluating explanations of participation in the IIA-ISDS system by developing countries).
[133] *See generally* OECD, Foreign Direct Investment for Development (2002) https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf.

among partner countries.[134] Less clear, however, is the relationship between IIAs-ISDS participation and foreign investment flows.[135] Compelling and conclusive evidence that investment treaties actually promote investment is lacking.[136] In addition to causal uncertainties, given the inherent reality of global investment flows, wealthy countries arguably have much more to gain from a system protecting investments.[137]

Third, there are diplomatic or political justifications for the ISDS system.[138] Removing investment disputes from the realm of politics and diplomacy was a foundational goal of ICSID.[139] ISDS aims to keep investment disputes away from diplomatic and political channels in a similar way that the WTO dispute resolution process aims to keep trade disputes from escalating into trade wars. By channeling disputes to arbitration and limiting claims to the involved parties, ISDS should avoid the escalation of investment disputes into diplomatic conflicts, economic sanctions, or military interventions.[140] Though infrequent, a number of historical examples involved military interventions to collect debts abroad.[141] Contemporary examples of diplomatic pressure also exist.[142] In a military or diplomatic conflict, developing countries will practically never hold an advantage vis-à-vis a capital exporting country.

Likewise, trade retaliation and economic sanctions are vastly more effective in the hands of powerful countries. Thus, in some ways, the rules and procedures of ISDS level the playing field by limiting the impact of outside factors, like military or economic power. Both sides have a chance to make a legal case. Viewed in historical context, the ISDS system could constitute a progressive step away from the era of "gunboat diplomacy" and coercion by powerful countries acting on behalf of foreign investors. Still, the outcomes of investment disputes and disparities in the allocation of costs and benefits remain key to evaluating the systemic legitimacy of ISDS.[143]

D. Legitimacy in ISDS

Multiple factors contribute to the controversial nature of ISDS and undermine the legitimacy of the system. This Article distills legitimacy concerns into four categories: *substantive*, *procedural*, *outcome-distributional*, and *national*. While normative assessments of these legitimacy debates are outside the scope of this Article, understanding legitimacy problems is essential to understanding the state of ISDS today. Furthermore, one of the primary aims of this Article—to enhance the understanding and measurement of outcome distributions in the ISDS system—is deeply connected to legitimacy.

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[134] Salacuse, *Handcuffs and Signals*, *supra* note 21, at 132 (reviewing research on the impact of investment treaties).
[135] *See supra* note 39 and accompanying text.
[136] *Id*.
[137] *See supra* notes 118–124 and accompanying text.
[138] The ISDS system has not completely alleviated this problem. *See* Wells, *supra* note 70, at 56, n. 55.
[139] Lowenfeld, *supra* note 127, at 53 (referencing statements by the World Bank's general counsel at consultative meetings prior to the adoption of the ICSID Convention).
[140] Historically, investment disputes have at times escalated into wider and more serious conflicts. The "gunboat" era offers vivid examples of military interventions arising from investment disputes. *See*, *e.g.*, Kris J. Mitchener & Marc D. Weidenmier, *Supersanctions and Sovereign Debt Repayment*, 29 J. INT'L MONEY & FIN. 19, 26–27 (2010).
[141] Faisal Z. Ahmed, Laura Alfaro & Noel Maurer, *Lawsuits and Empire: On the Enforcement of Sovereign Debt in Latin America*, 73 LAW & CONTEMP. PROBS. 39, 40–42 (2010); Lee C. Buchheit, *The Role of the Official Sector in Sovereign Debt Workouts*, 6 CHI. J. INT'L L. 333 (2005-2006).
[142] *See* Wells, *supra* note 70, at 56, n. 55.
[143] *See infra* Part III.B (addressing the distribution of costs and benefits in the ISDS system).

Many of the controversies and legitimacy concerns in the IIA-ISDS system boil down to tensions with sovereignty.[144] As one observation of Argentina's experience—as the most claimed against country in the system—goes, "the international investment regime is the enemy of the state."[145] Like international trade frameworks, ISDS can be domestically disruptive and sometimes creates its own opposition.[146] A notorious case or an avalanche of ISDS liabilities may galvanize domestic opposition.[147] But even in states where investors benefit a great deal from the system, preoccupation with sovereignty sacrifices can prompt backlash. The United States is a prime example. While never losing a single case ISDS, investors from the United States have racked up over $4.6 billion in awards through ISDS.[148] Yet prominent voices in the United States consider ISDS an unacceptable threat to sovereignty.[149]

As a result, legitimacy problems—both real and perceived—pose existential problems to the sustainability and future of the ISDS system. And these problems are more than theoretical. Backlash against ISDS has reached the highest levels in the international system. Reactions include treaty withdrawals, *ex post* anti-ISDS treaty strategies, cutting ISDS from treaties *ex ante*, official commissions to evaluate ISDS costs and exposure, and sovereigns going rogue to shirk repugnant ISDS obligations.[150] While this Article focuses primarily on the legitimacy implications of the distribution of costs and benefits within the ISDS system, a brief discussion of broader legitimacy concerns is necessary for context.

1. Substantive

ISDS often pits the rights of foreign investors against a sovereign's right to regulate its internal affairs—or, as some critics observe—directly against the interests of the people. Particularly notorious cases fuel criticisms that ISDS undermines democratic processes and institutions.[151] Critics point to cases that threaten domestic governance in health and public welfare, financial regulation, environmental policies, and labor and equality.[152] Additionally, when a political or economic crisis leads to a wave of investor claims, questions arise about whether ISDS infringes on sovereign capacities to manage an economic crisis.[153] A non-trivial

[144] *See* José Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 WORLD ARB. & MEDIATION REV. 491, 491–92 (2012).
[145] *Id*. at 492.
[146] Jennifer L. Tobin & Marc L. Busch, *A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 WORLD POLITICS 1, 5 (2010) (observing tendency of trade agreements to mobilize antitrade constituents); *infra* Part I.E (discussing domestic anti-ISDS mobilizations triggered by ISDS).
[147] *The Arbitration Game*, ECONOMIST (Oct. 11, 2014), https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration (referencing notorious cases in ISDS) [hereinafter ECONOMIST, *Arbitration Game*].
[148] *See* Annex 1 (illustrating data on ISDS wins and losses).
[149] Both sides of the United States political spectrum have expressed dissatisfaction with ISDS. *See*, *e.g.*, *supra* note 16.; Letter from Representative Daniel M. Donovan et. al, Members of Congress to Robert E. Lighthizer, U.S. Trade Representative (Oct. 11, 2017) *available at* https://www.citizen.org/system/files/case_documents/gop-on-isds.pdf.
[150] *See infra* Part I.E (discussing sovereign responses to ISDS outcomes).
[151] ECONOMIST, *Arbitration Game*, supra note 147 (reporting on unpopular cases in ISDS and increasing dissatisfaction among sovereigns).
[152] *See* Van Harten, et al., *supra* note 58, at 5 (highlighting cases that illustrate the potential of ISDS to interfere with public interest).
[153] The Argentine case offers a vivid illustration of the economic crisis management scenario. *See* Alvarez & Topalian, *supra* note 144, 501–02. More recently, the Arab Spring prompted similar questions. *See* James MacDonald & Dyfan

share of ISDS claims stem from financial crises.[154] For developing countries that are more vulnerable to episodes of crises, these questions are especially troublesome.

Innovation has contributed to substantive legitimacy concerns as well. Critics argue that ISDS has gone far beyond its intended purpose of protecting foreign investors from political risks. Investors have indeed identified soft spots in the system. The expansion of investment protection into unforeseen areas—far beyond simply providing adequate compensation for expropriation—has increased the scope of risks for sovereigns involved with participation in the IIA-ISDS system. Also, some claimants have engaged in treaty shopping, acquiring firms or forming entities in jurisdictions to exploit investment treaties. Treaty shopping is especially common under Dutch BITs.[155] In a majority of ISDS cases where the Netherlands is technically the investor's home state, the investor claimants are not Dutch—many do not even engage in substantial business activities in the Netherlands.[156] Third-party financing of ISDS claims has added another layer to these criticisms.[157]

The substantive law of investment treaties has raised legitimacy issues as well. For instance, many investment treaties contain definitions of investment that are overly broad and open-ended.[158] Naturally, the definition of investment has evolved with economic and technological development.[159] But many early generation BITs were negotiated before the boom in ISDS disputes, which more fully revealed the scope and consequences of investment treaty law.[160] Most investment treaties were negotiated and signed before jurisprudence revealed the potential consequences of the IIA-ISDS system. At the negotiation stage, developing countries may have underestimated the eventual reach of investment treaties.[161] As ISDS activity booms, backlash is fueled by conflict between investors' rights and sovereign prerogatives in key areas such as crisis management, health policy, and environmental regulation.[162]

Owen, *The Effects on Arbitration of the Arab Spring*, GLOBAL ARB. REV. (April 20, 2016) *available at* https://globalarbitrationreview.com/chapter/1036966/the-effects-on-arbitration-of-the-arab-spring (identifying the Arab Spring as one source of increasing ISDS claims against Middle Easter countries in recent years).

[154] *See* Wells, *supra* note 73, at 54–55 (asserting that a "large fraction of serious disputes" stem from currency crises, like those in Argentina and Southeast Asia, or commodity price swings).

[155] *See* Roos van Os & Roeline Knottnerus, *Dutch Bilateral Investment Treaties*, STICHTING ONDERZOEK MULTINATIONALE ONDERNEMINGEN (SOMO), (Oct. 2011) *available at* https://www.somo.nl/wp-content/uploads/2011/10/Dutch-Bilateral-Investment-Treaties.pdf.

[156] UNCTAD, *Treaty-Based Cases Brought Under Dutch IIAs: An Overview* 7 (June 30, 2015) *available at* http://investmentpolicyhub.unctad.org/Publications/Details/135 [hereinafter UNCTAD, *Cases Under Dutch IIAs*].

[157] Jomo Kwame Sundaram, *Dispute Settlement Becomes Speculative Financial Asset*, INTER PRESS SERVICE (Apr. 19, 2017), http://www.ipsnews.net/2017/04/dispute-settlement-becomes-speculative-financial-asset/ (discussing third-party financing of ISDS claims).

[158] Some definitions of investment are vague enough to capture ordinary commercial transactions (as opposed to a significant cross-border acquisition of property) with "investment" including "claims to money and claims under a contract having a financial value." *See* UNCTAD, *Scope and Definition* 9–10 (2011) *available at* http://unctad.org/en/Docs/diaeia20102_en.pdf (arguing for greater precision in the definition of investment).

[159] *See id*. at 7–11 (reviewing evolution in the meaning of investment over time).

[160] Wells, *supra* note 70, at 48 ("In the end, it appears that few host country negotiators fully understood the implications of the treaties they were signing.").

[161] Generally, wealthy countries arrived at negotiations with model treaties, more leverage, and other negotiating advantages vis-à-vis low-income countries. *See id*. at 47–48.

[162] *See* Van Harten, et al., *supra* note 58, at 4–5.

Finally, the substantive obligations of investment treaties are essentially one-way.[163] Sovereigns have obligations under IIAs but investors generally do not. Furthermore, a sovereign cannot "win" in ISDS.[164] Only investors can bring claims in ISDS. Sovereigns can only lose a lot, lose a little, or—at best—break even.[165] Although governments can, and increasingly do, prosecute corporations for misconduct through litigation and settlement agreements, that practice exists outside of ISDS and IIAs.[166] Furthermore, while corporate prosecution is well established in the United States and has spread to other wealthy countries, developing countries do not have the same leverage over corporations. As a result, for sovereigns that do not export capital, the perceived costs of ISDS can easily outweigh the perceived benefits.[167] That cost-benefit imbalance is especially unfavorable if policymakers view the IIA-ISDS system as inconsequential for investment flows.[168]

2. Procedural

The procedural nature of arbitration fuels criticisms that ISDS is "secretive" or, worse, that tribunals exist as undemocratic offshore courts against the will of the people.[169] Transparency is indeed uneven and at times outright inadequate, though not always to the extent that some critics allege.[170] Traditionally, investment treaties lacked transparency provisions and ISDS proceedings have been largely confidential.[171] Though many awards are ultimately published—especially for ICSID proceedings—settlements are rarely available publicly. Given that approximately one third of ISDS cases end in settlement, this void amounts to a major information gap.[172] Further, ISDS settlements frequently involve non-trivial amounts.[173] Finally, investor threats to bring claims

[163] While such treaties are bilateral or multilateral, they create binding obligations for the sovereign signatories—not for investors. *See*, *e.g.*, U.S.-Argentina BIT, *supra* note 81 and accompanying text.
[164] Even when sovereigns prevail in an investment dispute, a sovereign respondent may lose millions of dollars in unrecoverable legal fees and arbitration expenses in the process. *See infra* Part II.A.2–3 (discussing legal costs and tribunal costs in ISDS).
[165] ISDS is designed for investor claims against states, but there are rare exceptions where states have used ISDS to bring claims against investors. *See*, *e.g.*, ISDS Blog, *When States File Claims Against Investors in ISDS* (April 4, 2016), http://isdsblog.com/2016/04/04/when-states-file-claims-against-investors-in-isds/. From a sovereign perspective, losses as a respondent mean more than wins for home state investors. *See infra* Part III.A (characterizing the nature of "winning" and "losing" in ISDS).
[166] Gibson Dunn, *2017 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements* (Jan. 4, 2018), https://www.gibsondunn.com/wp-content/uploads/2018/01/2017-year-end-NPA-DPA-update.pdf (describing the proliferation of corporate prosecution practices from the United States to the United Kingdom and France).
[167] *See infra* notes 219–223 and accompanying text.
[168] *Id.*
[169] *See*, *e.g.*, Chris Hamby, *The Court That Rules the World*, BUZZFEED (Aug. 28, 2016, 9:00 AM) https://www.buzzfeed.com/chrishamby/super-court (reporting on the secretive nature of ISDS proceedings and outcomes).
[170] *Id*.
[171] *See* UNCTAD, *Transparency in IIAs*, *supra* note 42, at 36–37.
[172] *See* Wellhausen, *Recent Trends*, *supra* note 23, at 13.
[173] *See*, *e.g.*, Reuters Staff, *Argentina Gives France's Total Bonds in Settlement*, REUTERS (July 18, 2017, 1:36 PM), https://uk.reuters.com/article/uk-argentina-total-bonds/argentina-gives-frances-total-bonds-in-settlement-idUKKBN1A320V (reporting on settlement between Argentina and French oil company, Total SA, for $210 million in sovereign bonds); Allen & Overy, ARGENTINA SETTLES FIVE INVESTMENT TREATY AWARDS (Nov. 7, 2013),

against sovereigns and resulting negotiations is an area of ISDS with almost no transparency.[174] In the author's view, for an area of disputes involving such fundamentally public interests, transparency should be much better.

A general lack in the accountability of investment tribunals also contributes to perceptions of procedural illegitimacy. As a three-person panel without a rigorous appeals process, disputes that impact the lives of many are in the hands of the very few. The identity and motivations of arbitrators has raised some legitimacy concerns as well.[175] Prominent scholars have also considered the cultural aspects of dispute resolution, comparing WTO practices against ISDS practices.[176] Although mechanisms like the ICSID annulment proceedings have some corrective abilities, ISDS essentially lacks an appellate system. Likewise, ISDS provisions in traditional investment treaties did not provide for public access to hearings or non-party participation (e.g., through filing of *amicus* briefs) in arbitration proceedings.[177] Finally, procedural uncertainties related to costs are another problem. The allocation of legal fees and tribunal costs—substantial sources of costs in ISDS—is inconsistent, often fails to cite legal authority, and tends to happen at the end of a case, all of which contribute to reduced clarity and certainty.[178]

ISDS was originally modeled after commercial arbitration, where disputes are adjudicated privately with streamlined procedures.[179] That history partially explains transparency shortcomings in the ISDS system. But when private rights are adjudicated against questions of public interest—as they often are in ISDS—the need for transparency is vastly different. Efforts to improve transparency in IIAs and ISDS are underway. Some of the more recently designed model investment treaties address transparency concerns with provisions for public access and *amicus* filings.[180] Similarly, ISDS rules have been revised to enhance transparency.[181] Finally, resources like the UNCTAD Investment Policy hub contribute to transparency by compiling and organizing a great deal of ISDS information with a high level of accessibility.[182] Still, as transparency measures have only recently been gaining momentum, a great deal of ISDS activity remains unknown.

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http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx (describing major ICSID settlements worth $450 million, plus interest, by Argentina in 2013).

[174] *See* Gallagher & Shrestha, *supra* note 25, at 25 (quoting a veteran reporter on transparency deficiencies in ISDS).

[175] *See* Kapeliuk, *supra* note 24, at 61–63 (exploring legitimacy concerns related to arbitrator identity and tendencies); *see also* José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of Legal Fields*, 1 OÑATI SOCIO-LEG. SERIES 3 (2011).

[176] *Compare* Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761 (2015) *with* Robert Howse, *Venus, Mars, and Brussels: Legitimacy and Dispute Settlement Culture in Investment Law and WTO Law: A Response to Joost Pauwelyn*, 109 AM. J. INT'L L. UNBOUND 309 (2016).

[177] *See* UNCTAD, *Transparency in IIAs*, *supra* note 42, at 37.

[178] *See* Franck, *Rationalizing Costs*, *supra* note 26, at 777–79 (characterizing approaches to allocating legal fees and tribunal costs by ISDS tribunals).

[179] *See* UNCTAD, *Transparency in IIAs*, *supra* note 42, at 37.

[180] *Id*. at 41–43.

[181] ICSID Arbitration Rules have been reformed to correct some transparency deficiencies. *See id*. at 10, 43–45. UNCTAD is also promoting transparency in ISDS, including a reform of UNCITRAL Arbitration Rules, the second-most commonly used rules for ISDS after ICSID. *See* United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, GA Res. 69/116 (2014) http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[182] UNCTAD, *Investment Policy Hub*, http://investmentpolicyhub.unctad.org/ [last visited April 27, 2018].

3. Outcome-Distributional

Allegations that ISDS is a neo-colonial mechanism are fueled by perceptions that the system is regressive, funneling money from developing counties to investors from wealthy countries.[183] Indeed, the allocation of costs and benefits in the ISDS system is a fundamental concern.[184] Exacerbating these doubts is the lack of clarity surrounding the relationship between investment treaties and foreign investment flows.[185] A simple but fundamental question persists, especially among capital importers that are frequently sued—is ISDS worth it?

The distribution of claims is one indicator, as illustrated by Daniel Behn's sample of 147 cases from 2011 to 2014.[186] Among these cases, the home states of investor claimants in ISDS are overwhelmingly (89 percent) developed countries.[187] Meanwhile, claimants from other categories are scarce, with emerging economy countries (6 percent) and developing economies (5 percent) almost equally represented.[188] The identity of sovereign respondents was roughly the inverse. Developing countries (43 percent) and emerging market countries (43 percent) are the most sued participants in ISDS.[189] The remaining respondent volumes were allocated among developed countries (12 percent) and least developed countries (2 percent).[190]

Though frequently cited to illustrate ISDS burdens, case volumes alone only paint a small section of the ISDS picture.[191] Case volumes do not indicate how often investors win through awards or settlements. Behn's sample, for instance, suggests that developed state respondents lose (i.e., suffer adverse awards) less often than emerging economy and developing counties.[192] Nor do case volumes shed light on the bottom line of ISDS—the monetary value of the outcomes and other costs associated with ISDS activity.[193] The financial impact of ISDS outcomes is crucial for investors and sovereigns alike.

Finally—and, arguably, just as importantly—is the impact of losses incurred in relation to their economies and spending capacities.[194] For instance, the *CME* award for $270 million against the Czech Republic would have been proportionally equivalent to a $71 billion award against the United States.[195] Alternatively, the ISDS liabilities incurred by Ecuador Accordingly, this Article

[183] *See* Behn, *supra* note 24, at 366.
[184] Gallagher & Shrestha, *supra* note 25, at 923–24.
[185] *See supra* note 39 and accompanying text.
[186] This study relied on a sample of 147 ISDS cases, dividing countries into four categories: developed, emerging economy, developing, and least developed. *See* Behn, *supra* note 24, at 402–03.
[187] *Id*. at 402.
[188] There were no investor claimants from the least developed category. *Id*.
[189] *Id*. at 403.
[190] *Id*. at 403–04.
[191] UNCTAD, *Special Update on Investor-State Dispute Settlement: Facts and Figures* 3, IIA Issues Note (Nov. 2017) *available at* http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf [hereinafter UNCTAD, *Facts and Figures*].
[192] Behn, *supra* note 24, at 406.
[193] *See infra* Part II.A (addressing the measurement of ISDS outcomes).
[194] Gallagher & Shrestha, *supra* note 25, at 923–24 (arguing that the least developed countries are subject to disproportionate burdens in ISDS relative to their share of foreign investment and global BITs). For discussion and analysis of ISDS costs relative to spending capacities, see *infra* Part III.B–C.
[195] *See* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Paper 2012/03 (2012).

considers and calculates the outcomes of ISDS losses as a function of FDI inflows, GDP, and government spending.[196]

4. National

ISDS grants foreign firms advantages that domestic firms do not enjoy.[197] With substantive treaty protections and procedural rights to take a national government directly to arbitration, foreign investments enjoy enhanced rights under international investment law that domestic investments do not. This disparity is especially relevant when evaluating the political will—or lack thereof—behind ISDS. While multinational firms often have a vested interest in the IIA-ISDS system, domestic firms without significant multinational operations rarely have an incentive to defend ISDS. While the nature of ISDS has proven capable of generating major domestic controversies, many domestic constituencies do not have strong motives to defend ISDS.[198] Indeed, anti-ISDS campaigns and statements often include the domestic prejudice as a primary argument against the system.[199]

E. Controversy and Backlash Against ISDS

Enthusiasm for ISDS has waxed and waned over time. Initially, praise might have been more prevalent than criticism.[200] But the tide has arguably turned against ISDS as the reach and consequences of the system have come into view.[201] Backlash against ISDS is taking shape in an increasingly broad spectrum of countries.[202] Resistance to the international investment system is no longer limited to developing countries with losing records in ISDS. ISDS backlash can be observed even in developed capital-exporters like Canada,[203] Germany,[204] and Australia.[205] The United States—despite an overwhelmingly positive record in ISDS—has, curiously, turned against

[196] *See infra* Part III.B.
[197] *See* Van Harten, et al., *supra* note 58, at 4.
[198] *But see Secure U.S. Investment Overseas*, U.S. CHAMBER OF COMMERCE (Aug. 15, 2017, 8:00PM), https://www.uschamber.com/issue-brief/secure-us-investment-overseas (illustrating industry support for ISDS in the United States).
[199] *See*, *e.g.*, *id*.
[200] *See* Franck & Wylie, *supra* note 23, at 474–75 (describing support and praise for ISDS).
[201] *See id*. at 475–80 (describing discontent with ISDS).
[202] Frédéric G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements*, 11 SANTA CLARA J. INT'L L. 335, 356 (2013) (observing the "academic and political backlash" following a boom in BIT claims).
[203] Gus Van Harten et al., *Public Statement on the International Investment Regime* (Aug. 31, 2010), https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/.
[204] *Opinion on the Establishment of an Investment Tribunal in TTIP*, FRIENDS OF THE EARTH EUROP. https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf
[205] *See* Kyla Tienhaara & Patricia Ranald, *Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors*, INVESTMENT TREATY NEWS (July 12, 2011), http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/ (discussing Australia's movement away from ISDS).

ISDS during NAFTA negotiations.[206] While some countries turn away from ISDS amid negative outcomes or disproportionately high costs, others are opting out of ISDS out of concern for sovereignty.

Formal measures to limit ISDS exposure include a number of *ex ante* and *ex post* measures. The most direct and drastic *ex ante* strategy is to simply negotiate treaties without ISDS provisions or decline to sign and ratify the ICSID Convention. Brazil, for instance, never joined ICSID and has a long history of avoiding ISDS in international agreements.[207] Australia and the United States recently negotiated a free trade agreement that expressly excludes ISDS.[208] Among more moderate strategies are campaigns to improve the system by reforming ISDS rules.[209] Another approach is to revise investment treaties. By trimming the scope of investor protections or including public policy exceptions, sovereigns can—and have—reduced exposure to ISDS risks in more recent generations of investment treaties.[210]

Ex post measures include ICSID withdrawal or selectively terminating BITs. Bolivia, Ecuador, Venezuela have withdrawn from the ICSID Convention.[211] Russia withdrew as a party to the Energy Charter Treaty, likely in response to the $50 billion Yukos Oil case.[212] Argentina considered withdrawing from ICSID but ultimately did not.[213] Indonesia is reviewing its sixty BITs for ISDS risk, allowing many of them to lapse, in a sweeping treaty overhaul.[214] India's broad shift away from ISDS includes the termination of existing BITs.[215] Others like South Africa

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[206] *See*, *e.g.*, Josh Wingrove, *These Are Five Sticking Points to a New Nafta Deal*, BLOOMBERG (April 13, 2018 12:00 AM) https://www.bloomberg.com/news/articles/2018-01-25/canada-mexico-may-keep-nafta-dispute-resolution-out-u-s.

[207] Luke Eric Peterson, *Analysis: What Did Governments Agree (and Disagree) On at Recent UNCITRAL Meetings on Investor-State Dispute Settlement Reform*, INVESTMENT ARB. REPORTER (Jan. 4, 2018) https://www.iareporter.com/articles/analysis-what-did-governments-agree-and-disagree-on-at-recent-uncitral-meetings-on-investor-state-dispute-settlement-reform/ (quoting Brazilian representative position on "intrinsically flawed" nature of ISDS).

[208] *See* William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1 (2006) (analyzing the investment chapter of Australia-United States Free Trade Agreement, which provided for a state-state dispute resolution for investment claims instead of investor-state dispute resolution); *see also* Warren, *supra* note 16.

[209] *See* Peterson, *supra* note 207 (highlighting issues raised at UNCITRAL meetings on ISDS reform).

[210] Elisabeth Tuerk, *Reforming the IIA Regime: Are We Getting There? Lessons from Recent Treaty Practice*, INVESTMENT POLICY BLOG (Nov. 26, 2015) http://investmentpolicyhub.unctad.org/Blog/Index/46 (reviewing trends in the evolution of investment treaty terms).

[211] *See* William B. McElhiney, III, *Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the ICSID Convention*, 49 TEX. INT'L L.J. 601, 602 (2014).

[212] *See* Notes, *Arbitration Unbound: How the Yukos Oil Decision Yields Uncertainty for International-Investment Arbitration*, 95 TEX. L. REV. 101, 110 (2016).

[213] *See* McElhiney, *supra* note 211, at 602.

[214] *See* Leon E. Trakman & David Musayelyan, *The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration*, 31 ICSID REV. 194, 199–203 (2015) (discussing Indonesia's announcement of plans to allow BITs to expire in order to renegotiate them under a revised model investment treaty with modified investor-state arbitration provisions).

[215] *See* Singh & Ilge, *supra* note 15 (discussing India's moves towards terminating existing BITs or letting them lapse).

and Bolivia are also engaging in selective BIT terminations.[216] In the course of 2016, terminations of at least nineteen IIAs became effective.[217]

In addition to strategically terminated BITs,[218] Ecuador formed a commission—CAITISA, its acronym in Spanish—to evaluate the costs, benefits, and risks involved with participation in the IIA-ISDS system.[219] CAITISA tasked a group of experts, government officials, and other representatives from civil society with analyzing the impact of the IIA-ISDS system for Ecuador and offering policy recommendations.[220] The executive summary produced by CAITISA recommended BIT termination and cutting ISDS from treaty mechanisms across the board.[221] In doing so, the commission noted that the $13.4 billion in claims pending against Ecuador amount to over half the general budget for 2017.[222] The executive summary also cast doubt on the idea that Ecuador's participation in the IIA-ISDS system influenced foreign investment flows.[223]

II. METHODOLOGY AND EMPIRICAL ANALYSIS

This Part introduces the fundamental components of ISDS costs and the fundamental characteristics of these costs from the perspectives of respondent states and home states alike. Following that introduction, the process of selecting and gathering data is then explained. After identifying sources, the datasets underpinning the analysis in this Article are explained. The section that follows describes of the calculations that contextualize the ISDS outcomes by adjusting the numbers to compare with key economic metrics such as FDI inflows, GDP, and government spending. Finally, this Part concludes with an explanation of the limitations inherent in ISDS data.

A. Measuring Costs in ISDS

From a sovereign perspective, monetary costs or losses in ISDS consist of four primary inputs: *awards*, *settlements*, *legal fees*, and *tribunal or arbitration costs*. Awards, generally, are monetary damages that a tribunal may order a sovereign to pay an investor. ISDS awards typically consist of monetary damages plus interest.[224] Settlements take place outside of the arbitral process and also, typically, result in a money payment from the sovereign to the investor.[225] Although sovereigns may avoid legal fees and uncertainty through ISDS settlements, the fiscal impact of ISDS settlements can be substantial.[226]

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[216] *Id*.
[217] *See* UNCTAD, *Key Messages*, *supra* note 35, at 23.
[218] *See* Tom Jones, *Ecuador Bids Goodbye to BITs*, GLOBAL ARB. REV., (May 17, 2017) https://globalarbitrationreview.com/article/1141801/ecuador-bids-goodbye-to-bits.
[219] *Informe Ejecutivo*, COMISIÓN PARA LA AUDITORÍA INTEGRAL CIUDADANA DE LOS TRATADOS DE PROTECCIÓN RECÍPROCA DE INVERSIONES Y DEL SISTEMA DE ARBITRAJE INTERNACIONAL EN MATERIA DE INVERSIONES (CAITISA) (translation: *Executive Summary*, COMMISSION FOR A COMPLETE CITIZEN'S AUDIT OF BILATERAL INVESTMENT TREATIES AND THE INTERNATIONAL INVESTMENT ARBITRATION SYSTEM), http://caitisa.org/index.php/home/enlaces-de-interes (hereinafter CAITISA, *Executive Summary*).
[220] Jones, *supra* note 218.
[221] *Id*.
[222] *Id*.
[223] *Id*.
[224] *See* Gaukrodger & Gordon, *supra* note 195, at 24–25.
[225] *See supra* note 173 and accompanying text.
[226] *See* Annex 1 (illustrating settlement costs for selected sovereigns).

Legal fees incurred in defending claims in ISDS are non-trivial especially in larger, more complex cases.[227] Investors tend to have higher legal fees than states. Per ISDS case, average legal fees for claimants (investors) are about $7.41 million and about $5.18 million for respondents (states).[228] Exceptionally large and complex cases like *Yukos* skew the averages upward, but median costs are still significant.[229] Tribunal costs or arbitration costs—the costs associated with carrying out an arbitration and paying arbitrators—represent the smallest source of ISDS costs. Still, tribunal costs average around $1 million per case.[230]

1. Awards

Awards in international arbitration are the direct monetary damages outcome of arbitral proceedings. UNCTAD calculates that a successful claimant is awarded about $522 million on average.[231] According to the most recent UNCTAD estimates, approximately 27.9 percent of investor-state arbitrations end up becoming awards.[232] Success rates of course vary slightly with the sample of cases used. In a sample of outcomes from 1990 to 2014, Wellhausen calculated investor wins at 29.1 percent.[233] And in 2017, about 59 percent of ISDS cases were decided in favor of investors.[234] As with litigation, the difference between amounts claimed and amounts awarded can be substantial. According to some estimates, investors win an estimated 30-40 percent of their initial amounts claimed.[235] The most recent UNCTAD estimates place the number closer to 40 percent.[236]

2. Settlements

One of the least transparent areas of the ISDS system, settlement costs are particularly difficult to measure.[237] Similar to other areas of ISDS cost measurement—but perhaps even more so—data on ISDS settlements are likely to be substantially underestimated and poorly disclosed.[238] Though many settlements are not publicly disclosed, they represent an important portion of ISDS outcomes. The most recent UNCTAD data suggests that about 22.8 percent of ISDS claims end in

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[227] *See*, *e.g.*, supra note 61 and accompanying text (observing that the $27 million in legal fees and tribunal costs in *Philip Morris v. Uruguay* exceeded the base value of the claim itself).
[228] *See* Matthew Hodgson & Alastair Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited*, GLOBAL ARB. REV., (Dec. 14, 2017) *available at* http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf.
[229] In the same study, median legal fees were about $4.2 million for claimants and $3.38 million for respondents. *See id*.
[230] See
[231] *See* UNCTAD, *Facts and Figures*, *supra* note 191, at 1.
[232] *See* UNCTAD, *ISDS Navigator*, *supra* note 34 (illustrating aggregate outcomes of ISDS proceedings).
[233] *See* Wellhausen, Recent Trends, *supra* note 23, at 12.
[234] *See* UNCTAD, *Facts and Figures*, *supra* note 191, at 4.
[235] *See* Wellhausen, Recent Trends, *supra* note 23, at 19.
[236] *See* UNCTAD, *Facts and Figures*, *supra* note 191, at 1.
[237] Lise Johnson & Brooke Skartvedt Guven, *The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest*, INT'L INSTITUTE FOR SUSTAINABLE DEV. (Mar. 13, 2017), http://ccsi.columbia.edu/files/2017/03/ITN-The-Settlement-of-Investment-Disputes-Mar-13-2017.pdf.
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settlements.[239] Furthermore, some settlements occur even before an ISDS claim is filed, which makes public disclosure even less likely.

Even just considering publicly known deals, settlements are a non-trivial source of ISDS costs. Poland, for instance, has paid over $4 billion in ISDS settlements. Meanwhile, Argentina has paid over $6 billion and Venezuela has paid over $2.3 billion. A typical ISDS settlement resembles settlement agreements in other contexts where a transfer of monetary consideration or a behavioral modification is exchanged for the waiver of a legal claim. Where available, the country-specific datasets include settlement amounts in the overall win and loss tallies for the selected countries.

3. Legal Fees

Legal fees are also a non-trivial source of ISDS costs.[240] Though data was limited, one OECD survey suggested that legal fees in ISDS cases average over $8 million with more expensive cases exceeding $30 million.[241] Anecdotal evidence and other studies are consistent with the OECD data. A study by arbitration attorneys at Allen & Overy with a sample of 324 awards, found that the averages are approximately $7.4 million for claimants and $5.1 million for respondents per ISDS case.[242] Rules that place burdens of proof on claimants are probably part of the disparity.[243] Plus, some sovereigns may rely on in-house lawyers working at below market rates.[244] Likewise, estimates of costs associated with NAFTA Chapter 11 proceedings routinely exceed $5 million per case for a responding sovereign.[245]

Certain case studies shed further light on the issue of legal fees.[246] Canada, for instance, racked up approximately $95 million in legal fees as of 2018 in responding to claims that resulted in awards worth $219.4 million.[247] At one stage in the *Abaclat v. Argentina* dispute, the tribunal noted that claimants had spent $27 million on their case while Argentina had spent $12 million.[248] Legal fees and tribunal costs between 2003 and 2013 added another $156 million in ISDS costs

[239] *See* UNCTAD, *ISDS Navigator*, *supra* note 34.
[240] *See* Franck, *Rationalizing Costs*, *supra* note 26, at 777 (observing that costs represent a "key risk" in ISDS).
[241] *See* Gaukrodger & Gordon, *supra* note 195, at 17.
[242] Those estimates are for ISDS cases since 2013. *See* Hodgson & Campbell, *supra* note 228.
[243] Hodgson & Campbell, *supra* note 228.
[244] *See*, *e.g.*, *infra* note 247 and accompanying text.
[245] *See* Scott Sinclair, *Canada's Track Record Under NAFTA Chapter 11*, Canadian Centre for Policy Alternatives (Jan. 2018) *available at* https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf.
[246] This figure reflects the balance of "the value of legal staff devoted to case-work, disbursements, arbitration fees, and legal costs paid to Canada to investors" minus payments of Canada's legal fees by investors. *See id*. at 8.
[247] *See id*. The $95 million figure is conservative for two reasons. First, the amounts are not adjusted for inflation. Second, the fees incurred are often for work by the government's in-house lawyers, who have fee structures "substantially below the market rate". *See*, *e.g.*, Gov't of Canada, Submission on Costs, Windstream Energy, LLC v. Gov't of Canada (April 11, 2016) *available at* https://www.italaw.com/sites/default/files/case-documents/italaw7481_0.pdf (explaining legal costs and asserting that government lawyer rates "are substantially below the market rate").
[248] The *Abaclat* expense figures were current as of 2011. Argentina ultimately settled with the claimants in 2016 for $1.35 billion, an amount equal to 150 percent of the original principal amount of the bonds, plus an allowance for certain legal and administrative expenses. *See* Samples & Park, *supra* note 20, at 1053.

for Ecuador.[249] Peru, in defending just four arbitrations, spent $15.8 million.[250] South Korea has faced relatively few cases as a respondent, but had spent over $42 million defending investor claims as of 2016.[251]

Like other figures in ISDS, exact costs can be difficult to pin down. Legal fees, for instance, are likely only partial estimates of the actual costs for sovereigns in defending ISDS claims.[252] When available, legal costs quantify direct expenses in defending claims in arbitration such as fees paid to law firms to represent a sovereign in arbitration and the value of case work by a government's legal staff. But other indirect costs are also considerable and are usually unrecoverable.[253] For instance, the value of time spent by non-legal staff responding to claims escapes the legal fees metric. Likewise, the cost of vetting law and policy for potential treaty violations is not captured in legal fees. Finally, domestic proceedings and legal fees incurred by local and regional governments are not included in measurements of ISDS legal fees.

4. Tribunal Costs

Tribunal costs include the expenses associated with the arbitration process, such as fees paid to arbitrators.[254] Tribunal costs represent the smallest source of costs in ISDS for parties. However, these costs become significant in the aggregate for countries with high case volumes as respondents. Tribunal costs average about $1,042,000 for ICSID cases and $1,384,000 for UNCITRAL cases.[255] Similarly, the cost of administering a NAFTA Chapter 11 arbitration panel ranges from $1 million to $3 million, depending on the complexity of the case.[256]

B. Gathering and Selecting the Data

The data relied upon for the findings and analysis of this Article is two-fold. First, the project developed a *master dataset*, building on and updating a comprehensive dataset created by Rachel Wellhausen, supplementing her dataset with new cases and information about awards and settlements from various sources.[257] Second, this project developed specific *country tallies*, which consist of twenty customized datasets drawn from the master dataset to measure the wins and losses that selected sovereigns have experienced in ISDS.[258]

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[249] *See* CAITISA, *Executive Summary*, *supra* note 219, at 61.
[250] Magali Zavallos, *Perú Gasta Más de 53 millones de Soles en Defensa de Arbitrajes Internacionales,* AMÉRICA LATINA EN MOVMIENTO (last visited May 11, 2018) (translation: Peru Spends Over 53 Million Peruvian Sols to Defend Itself in International Arbitration), https://www.alainet.org/es/print/174820.
[251] *See*, *e.g.*, *Korea Spends 50 Billion Won in ISD Battles*, YONHAP NEWS AGENCY (Nov. 21, 2016), http://english.yonhapnews.co.kr/news/2016/11/21/0200000000AEN20161121002600320.html?did=2106m (reporting on South Korea's legal costs in ISDS).
[252] Sinclair, *supra* note 245, at 8.
[253] *Id*.
[254] Arbitrators often earn $3,000 per day plus expenses. ICSID rules cap the amount at $3,000. *See* Hodgson & Campbell, *supra* note 228.
[255] *Id*.
[256] Sinclair, *supra* note 245, at 8.
[257] *See supra* note 27.
[258] This losses in the country tally datasets include—where available—amounts paid or owed in awards, settlements, legal fees, and tribunal costs. The wins include in the country tally datasets include amounts recovered or owed to

The following sources were used to gather data and build the datasets: UNCTAD's Investment Dispute Settlement Navigator,[259] Rachel Wellhausen's comprehensive ISDS dataset,[260] Andrew Newcomb's ITA Law,[261] and Luke Peterson's Investment Arbitration Reporter.[262] Information from the above sources is supplemented by information from media outlets. The datasets include arbitrations organized through—or under the rules of—ICSID, UNCITRAL, the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), and the Permanent Court of Arbitration (PCA).

Annex 1 illustrates the case volumes and bottom line outcomes of ISDS activity for the twenty selected sovereigns. As illustrated in Annex 2 and explained in Parts II.B.2 and III.B, the country tally analysis takes cost calculations a step further—comparing those figures to the economic and financial conditions of the selected countries. Specifically, calculations are made to compare ISDS costs with FDI inflows, GDP, and government spending.[263]

1. The Master Dataset

The master dataset consists of nearly 900 public ISDS cases filed from 1987 through 2017. To build master dataset for this Article, we started with Wellhausen's dataset, which is publicly available and even more comprehensive than UNCTAD's *ISDS Navigator*, which is also a terrific resource.[264] The Wellhausen dataset is current through December 31, 2015.[265] First, we searched for new cases—using *ISDS Navigator* primarily—and new information on existing cases in order to build out the most complete and updated master dataset possible. Then, using the updated master dataset, we pulled all publicly known ISDS cases involving the selected countries and cross-checked key information, including case volumes, awards, and settlements.

2. The Country Tallies

The primary contribution of this project is the creation of twenty country-specific datasets, which shed some light on the tangible outcomes of the ISDS system. Previously, most analysis of ISDS outcomes has been limited to the volume of cases by country.[266] The country tallies estimate the known costs and benefits of ISDS for selected countries with high levels of ISDS activity. In alphabetic order, the twenty countries include Argentina, Albania, Belize, Bolivia, Canada, Ecuador, Egypt, France, India, Kazakhstan, Kyrgyzstan, Libya, Mexico, Netherlands, Peru, Poland, Russia, Spain, the United States, and Venezuela. Five of the countries selected are winning

investors from that sovereign minus legal fees and tribunal costs. For a full explanation of wins and losses in ISDS, see Part II.A.

[259] *See* UNCTAD, *ISDS Navigator*, *supra* note 34.

[260] *See* Wellhausen Dataset, *supra* note 27.

[261] *See* INVESTMENT TREATY ARBITRATION, https://www.italaw.com/ (last visited April 27, 2018).

[262] *See* INVESTMENT ARBITRATION REPORTER, https://www.iareporter.com/ (last visited April 27, 2018).

[263] *See infra* Part III.B.

[264] The *ISDS Navigator* is an excellent resource on ISDS information. But Wellhausen's data contains some cases that the *ISDS Navigator* does not. *See* Wellhausen Dataset, *supra* note 27.

[265] *Id*.

[266] *See*, *e.g.*, Franck, *Evaluating Claims*, *supra* note 22, at 34.

substantial amounts as home states to investors in the ISDS system.[267] For reasons explained later in this Article, this project places a greater emphasis on losses in ISDS.[268] However,

Using the master dataset, data was collected and organized for these twenty countries. Data gathered for the selected countries includes a number of variables connected to *case volumes*: cases as respondent, cases as home state, losses (adverse awards), wins (home state awards), settlements as respondent, settlements as home state, pending cases as respondent, pending cases as home state. Additionally, data gathered on wins and losses includes the approximate *dollar amounts of ISDS outcomes*: claims as respondent, claims as home state, losses (amounts of adverse awards), wins (amounts of home state awards), settlement amounts as respondent, settlement amounts as home state, arbitration costs (an estimate of legal fees and tribunal costs). From there—to the extent available—we calculate the bottom lines of ISDS participation for the twenty selected countries: total wins and total losses.

3. Adjustments and Calculations

Those country-level estimates are then analyzed with a variety of adjustments and comparisons. First, the "wins" of investors from a given country are compared with that country's "losses" in ISDS. Some countries are losing a great deal in ISDS while their investors gain relatively little or nothing. For others, like the United States, France, and the Netherlands, the opposite is true. Second, sovereign losses are considered relative to FDI inflows, GDP, and government spending.[269] Relative comparisons are critically important because they illustrate the proportional impact of cost and benefit distributions in the ISDS system.

To date, observations about the impact of ISDS at the country level have been limited primarily to the sheer volume of claims that sovereigns have faced as a respondent. Other observations about ISDS outcomes stem from one or a handful of exceptionally notable cases.[270] While case volumes do correlate with costs for respondent sovereigns, they are very crude figures. Case volumes do not account for the variety of ISDS outcomes—awards (respondent pays investor or alters regulation as non-pecuniary relief), settlements (same as awards), dismissals, and withdrawals. Another factor that is nearly impossible to account for is the chilling effect that the threat of ISDS can create on potential laws and regulation.

To better grasp the distribution of costs and benefits of ISDS, analysis must go beyond case volumes. For one, case volume numbers do not reflect losses (monetary damages resulting from awards against). Second, case volumes—and even monetary damages—do not consider the proportionality of the economic impact of ISDS claims.[271] Third, considering respondent claim volumes alone does not consider the potentially positive—and countervailing—impact of claims that investors from that sovereign bring against other sovereigns.[272] Spain, for instance, has faced 34 claims as a respondent. Only Argentina and Venezuela have faced more. But investors with a presence in Spain have made even more claims—currently 38—against other sovereigns. Canada

[267] Countries selected for the tally that—as home states—are winning in ISDS include Canada, France, the Netherlands, Spain, and the United States. For details, see Annex 1 and Annex 2.
[268] *See infra* Part III.A.
[269] *See infra* Part III.B.
[270] Sometimes this focus can be appropriate. Other times, it may be misleading. For instance, super-sized awards like *CME* can provoke backlash in respondent countries. But they do not necessarily reflect aggregate trends in the ISDS system. *See supra* note 195 and accompanying text (discussing proportions of *CME* award).
[271] *Id*.
[272] For a discussion of limitations of considering "wins" for sovereigns in ISDS is discussed Part III.A.

is similarly situated, having faced many claims while simultaneously being the home state to many ISDS cases. While there is reason to believe that the impact of losing may be more likely to mobilize opposition than the impacts of winning, both outcomes should at least be considered.

The aim of this Article is use empirical data to enhance existing discussions about ISDS outcomes for sovereigns. First, this project updates certain aspects of Wellhausen's comprehensive dataset, gathering and adding date from 2016 and 2017. Second, this project attempts to generate the best dataset possible on awards to quantify the wins and losses for states that are particularly active in ISDS. Third, the wins and losses—the losses in particular—are contextualized with calculations of ISDS wins and losses in relation to key metrics: FDI inflows, GDP, and government spending.[273]

C. Limitations of ISDS Data

This Article acknowledges that many of the calculations of wins and losses are significantly underestimated due to gaps in ISDS data.[274] Appreciating those empirical limitations, the analysis in this Article aims to advance the understanding of ISDS outcomes and provide a baseline for future work in this direction. Though information exists about a majority of ISDS cases and transparency is improving, a complete dataset on ISDS activity does not exist.[275] Even the most complete datasets contain material gaps in terms of individual cases, settlement amounts, award amounts, and more.[276]

Even if complete figures on awards and settlements were available, those amounts would fail to reflect significant but less direct ISDS costs, including the chilling effect on regulation, costs assumed by local authorities, opportunity costs, and the cost of internally vetting new laws and regulations for potential treaty breaches.[277] As a result, this Article acknowledges that the country tallies do not reflect the full extent and costs of ISDS activity.[278] However, the data gathered for this Article constitute the best available figures on the direct costs and benefits of participating in ISDS.

III. DISCUSSION: WINNERS AND LOSERS IN ISDS

Critics allege that ISDS is a one-way street. Strictly speaking, that is true—only foreign investors can bring claims in ISDS.[279] However, the flow of substantive and procedural rights under investment treaties may be an overly narrow view of the costs and benefits of the IIA-ISDS system.[280] While the debate surrounding other benefits for sovereigns that participate in the IIA-ISDS system continues unresolved—and those questions are outside the scope of this analysis—distinguishing between winning and losing in ISDS from a sovereign perspective is critical to the

[273] For a discussion of why losses are particularly relevant and why wins may not have proportionally similar effects, see *infra* Part III.A.
[274] *See supra* notes 169–174 and accompanying text.
[275] *See*, *e.g.*, Franck, *Evaluating Claims*, *supra* note 22, at 16–20.
[276] *See supra* notes 179–182 and accompanying text.
[277] *See* Sinclair, *supra* note 245, at 8–9.
[278] *See* Gallagher & Shrestha, *supra* note 25, at 923.
[279] *See supra* notes 163–165 and accompanying text.
[280] For a discussion of the benefits of the IIA-ISDS system for participating sovereigns, *see* Salacuse, *Handcuffs and Signals*, *supra* note 21, at 132.

analysis developed in this Article.[281] This Part begins with a conceptual discussion on the measurement of wins and losses in ISDS, arguing that losses have a greater impact on sovereign interests than wins.

This Part then addresses key findings and observations from the datasets. In addition to general issues of cost, questions of distribution and proportional burdens are deeply connected to legitimacy debates surrounding the purpose and direction of ISDS.[282] While it is widely speculated that lower-income, developing states pay disproportionately more to be part of the ISDS system, the analysis in this Article offers some anecdotal insights into the extent of that disproportionality. Cost, proportionality, and distribution issues are explored through in the analysis that follows.

A. Winning versus Losing

From a sovereign perspective, losses mean much more than wins in ISDS. Losing in ISDS represents a direct financial liability to sovereign governments, a direct conflict with sovereign legal and regulatory power, or some combination of both. Losses through adverse awards or settlements are direct liabilities, payable by the sovereign.[283] These amounts can become considerable for countries facing high volumes of investment claims.[284] And, even when a sovereign prevails against an investor claim, the state often loses substantial sums of money—on average, $5.6 million per case—through legal and tribunal costs.[285]

Furthermore, ISDS outcomes have less overall fiscal impact on wealthier countries. The winningest countries in ISDS tend to be high-income countries, which dampens the impact—and perhaps the internally perceived benefits as well—of their wins. For instance, a group of the three winningest countries in ISDS have gained approximately $15.8 billion while losing just $0.1 billion in ISDS, yet the net wins of $15.7 billion represent less than one percent of the government spending in 2010 of these states.[286] As a function of net foreign direct investment inflows, As a function of GDP, the wins barely register at all. Meanwhile, some of the highest ISDS loss concentrations exist in lower-income countries, where the fiscal impact is also much greater.[287]

There are non-financial costs for sovereigns in ISDS as well, including infringement on sovereign powers.[288] Though arbitral tribunals cannot overturn the domestic laws of a sovereign, they may make legal or regulatory measures so expensive they are effectively impractical.[289] Another impact that is effectively impossible to quantify are threats of ISDS claims made by foreign investors as leverage to negotiate regulatory outcomes.[290] Finally, there are political costs

[281] *See supra* note 39 and accompanying text.
[282] *See supra* note 194 and accompanying text.
[283] *See supra* Part II.A.1, II.A.4 (discussing awards and settlements in ISDS).
[284] *See* Annex 1 (illustrating costs of ISDS for selected sovereign participants).
[285] Even when sovereigns prevail in ISDS proceedings, they can lose substantial amounts of money. In an average ICSID arbitration, sovereigns pay about $5.6 million per case as a respondent ($5,188,000 in legal fees plus half of $910,000 in tribunal costs). *See* Hodgson & Campbell, *supra* note 228. For a broader discussion of legal and tribunal costs, see *supra* Part II.A.2–3.
[286] Exhibit 2 and Annex 2 provide additional details.
[287] See infra Part III.B (discussing proportional impact and the figures in Exhibit 2).
[288] *See supra* note 277 and accompanying text.
[289] Gaukrodger & Gordon, *supra* note 195, at 25.
[290] *See supra* note 194 and accompanying text.

resulting from adverse awards—or, in some cases, even just claims—that make headlines and have implications for domestic politics.[291]

On the other hand, winning in ISDS is relatively indirect for sovereigns. Sovereigns do not receive ISDS awards.[292] At most, sovereigns are home states to investors that collect favorable awards and settlements against other sovereigns. These winnings can be substantial—especially for certain wealthy capital exporting countries—and could indirectly expand a home state's tax base.[293] Theoretically, sovereigns with a large base of multinational companies and investors—likely beneficiaries that might lobby in favor of the IIA-ISDS system—should be expected to promote ISDS. Strong support for ISDS is evident, for instance, at the U.S. Chamber of Commerce.[294] But, even then, the connection to state interests is less direct than losses, which take a direct toll on state finances and sovereign power.

Finally, sometimes domicile in a home state for the purposes of ISDS represents only a tenuous connection with that government. For instance, the Netherlands is a leading "winner" in ISDS with over $9.4 billion in documented wins—a large but substantially underestimated figure.[295] Yet approximately two-thirds of investor claimants that bring disputes as Dutch investors have virtually no connection to the Netherlands.[296] While this level of treaty shopping is likely not representative of ISDS practices in general, the Dutch case is illustrative of sometimes tenuous connections between claimants and home states.

B. Key Findings and Analysis

More complete datasets are needed for broader, more conclusive observations about the ISDS system. At present, ISDS data are probably insufficient for some of the most important but ambitious observations. For instance, concluding that the ISDS system is functioning well—or not functioning well—is difficult given the present limitations.[297] As a result, some of the findings of this study are necessarily descriptive and resulting conclusions are tentative. Causal relationships, in particular, are difficult to determine. However, certain important observations about the ISDS system are within reach.

First, the data gathered and analyzed in this Article certainly raise questions about the concentration of costs and benefits in ISDS. Some of the "winningest" countries are winning considerable sums and losing very little or nothing. For instance, a group of three countries with high concentrations of wins gained approximately $17.5 billion while losing just $0.3 billion. Meanwhile, some of the "losingest" countries are losing considerable sums—especially in relation to economic capacities—and winning very little or nothing. Whether or not the distribution of

[291] *See*, *e.g.*, *Nuclear Phase-Out Faces Billion-Euro Lawsuit*, DER SPIEGEL, (Nov. 2, 2011) http://www.spiegel.de/international/germany/vattenfall-vs-germany-nuclear-phase-out-faces-billion-euro-lawsuit-a-795466.html (reporting on Swedish company's claims related to Germany's energy policies).

[292] Generally speaking, only foreign investors can bring claims in ISDS. *See supra* notes 163–165 and accompanying text.

[293] *See* Annex 1 (illustrating winnings for ISDS winners like France, the Netherlands, and the United States).

[294] *See* U.S. CHAMBER OF COMMERCE, *supra* note 198.

[295] *See* Annex 1 (illustrating home state wins for the Netherlands).

[296] *See* UNCTAD, *Cases Under Dutch IIAs*, *supra* note 156, at 7.

[297] *See* Gallagher & Shrestha, *supra* note 25, at 920–21 (noting sample size problems in previous empirical research on ISDS).

ISDS outcomes is regressive in the aggregate (i.e., primarily shifting capital from wealthy countries to low-income countries) is a question deserving of further research.[298]

Exhibit 2 compares a small group of high loss concentration countries with a small group of high win concentration countries. The figures in Exhibit 2 are not presented as representative of systemic distribution, but instead as an illustration of outcome concentration at the poles of ISDS activity. The contrasts are stark. Among three high win countries—France, the Netherlands, and the United States—net ISDS outcomes (wins minus losses) were approximately $17.2 billion in gains. Meanwhile, among the three high loss countries—Argentina, Poland, Venezuela—net outcomes amounted to approximately -$22.3 billion in losses. These ISDS outcomes worth about $40 billion in capital involved just six countries and—as with other ISDS data—the figures are likely significantly underestimated due to gaps in ISDS data.[299]

Exhibit 2: Concentration of Outcomes

	High Win Concentration: France, Netherlands, U.S.	*High Loss Concentration: Argentina, Poland, Venezuela*
Case Volume as Respondent	18	134
Case Volume as Home State	331	12
Losses (millions USD)	$100	$22,794
Wins (millions USD)	$15,829	$413
Net Wins	$15,729	-$22,381
Net Wins / FDI Inflows	3.80%	-71.48%
Net Wins / Public Expenditures	0.47%	-11.91%

Source: Author's Datasets and Calculations

There is a notable correlation between countries with high concentrations of ISDS losses and withdrawal—full or partial—from the IIA-ISDS system.[300] Among countries with highly unfavorable ISDS outcomes, policy reactions that steer treaty policies away from the IIA-ISDS system are very prevalent.[301] Examples include Bolivia, Ecuador, Venezuela, and Russia. Though tempting to draw inferences about causation, caution is warranted. For one, as explained elsewhere in the Article, there are material limitations in ISDS data.[302] Furthermore, controlling for all the variables in play is difficult. Some variables are inherently difficult to quantify and confounding variables might be difficult to control. For instance, a shift towards resource nationalism is difficult to quantify accurately and might lead to measures that violate investment treaty provisions as well

[298] See Part III.B (discussing the concentration of wins and losses and the proportion of their impact relative to FDI flows and government spending).
[299] *See supra* notes 170–174 and accompanying text (describing limited availability of ISDS data).
[300] For a discussion of policy responses to ISDS risks, *see supra* Part I.E.
[301] *See* Annexes 1–2.
[302] *See supra* Part II.C.

as policies that lead to IIA-ISDS withdrawals. Nonetheless, this might be a question deserving further research.

Second, as illustrated above in Exhibit 2 and below in Exhibit 3, the impact of ISDS can be substantial, particularly for smaller countries. As a function of key economic indicators, ISDS costs are indeed significant for the most active respondents. For instance, among three countries examined in Exhibit 2, their combined net ISDS losses represent approximately 77 percent of their combined net FDI inflows in 2010 or almost 12 percent of their combined government spending in 2010. Even with underestimated figures on ISDS costs, the proportions are dramatic for countries that are losing the most in the IIA-ISDS system. Exhibit 3 below illustrates data for the five countries with the worst ratios of ISDS losses to government spending in the country tally datasets.

Exhibit 3: Net ISDS Outcomes versus Government Spending in 2010 for High-Loss Countries

Country	*Net ISDS Losses*	*Net Losses / Govt' Spending*
Belize	-208.2	-93.45%
Ecuador	-2683	-29.22%
Kyrgyzstan	-240.5	-27.67%
Bolivia	-731.8	-26.93%
Libya	-1949.8	-22.50%

Source: Author's Datasets and Calculations

Another clear takeaway is that legal fees and tribunal costs are non-trivial sources of overall ISDS costs for high volume participants (e.g., Argentina Canada, Ecuador, and Venezuela).[303] Though difficult to estimate with a high degree of accuracy, a number of indicators suggest that these costs are significant.[304] For low-income countries in particular, these costs should be a source of concern.

Case volumes alone are insufficient for making observations about the systemic workings of ISDS.[305] Although they likely have a correlation with costs and benefits in ISDS system, case volumes alone fail to take into account the magnitude of claims, wins, losses, and other costs—all of which directly affect the crucial bottom lines of ISDS.

Likewise, win-loss rates (e.g., the percentage of cases that investors win) are insufficient to evaluate the outcomes and legitimacy of ISDS.[306] For one, while aggregate win-loss rates are relevant statistics, they do not shed light on the experience of particular countries in ISDS. Viewing the percentage of amounts claimed that become investor awards to, as an indication of systemic legitimacy is also a stretch.

[303] Notes describing the approach to estimating legal fees and tribunal costs is explained in Annex 2.
[304] *See supra* Parts II.A.2–3.
[305] *See*, *e.g.*, Franck, *Evaluating Claims*, *supra* note 22, at 34.
[306] Win-loss rates only tell a small part of the story.

CONCLUSIONS

Existing pitfalls in empirical analysis, such as reliance on insufficient samples for conclusions about systemic issues in ISDS, have previously been identified.[307] This Article adds some additional perspective to empirical research on ISDS and hopefully provides a baseline for future work.[308] Though the transparency of ISDS information has improved a great deal in recent years, more information on the bottom lines of ISDS—particularly, the amounts of settlements and awards—is needed for better research and more informed public dialogue. Such information is, without a doubt, a direct matter of public interest and can be sought in some jurisdictions through freedom of information requests.[309] Additionally, academic and policy researchers can improve the available quality and quantity of ISDS information through collaborations and shared datasets.[310]

Though multiple factors are at play, the distribution of costs and benefits may help explain the legitimacy crisis facing the IIA-ISDS system.[311] In the absence of conclusive evidence that participation in the IIA-ISDS system provides purported benefits, we might expect skepticism among sovereign participants and certain elements of civil society to continue. Calculations made from the data sets—though acknowledged as imperfect estimates—for this Article illustrate the degree of concentration of ISDS outcomes among highly active participants. Although fragmentation of the international investment system dampens the beneficial impact of solutions, a better understanding of the sources and distribution of costs in the IIA-ISDS system may shed light on potential areas of improvements and reform.[312]

[307] *See supra* note 25.
[308] The datasets created and relied upon for the analysis in this article are available at [_____].
[309] *See*, *e.g.*, Sinclair, *supra* note 245, at 1.
[310] *See*, *e.g.*, Wellhausen Dataset, *supra* note 27.
[311] *Come and Get Me*, ECONOMIST (Feb. 18, 2012), http://www.economist.com/node/21547836 (reporting on backlash against ICSID in South America); Singh & Ilge, *supra* note 15 (describing India's turn away from ISDS).
[312] *See supra* note 65 and accompanying text; *see also* Wells, *supra* note 70, at 57.

ANNEX 1: ISDS Data, Albania through Kazakhstan (all $ in millions USD)

	Albania	Argentina	Belize	Bolivia	Canada	Ecuador	Egypt	France	India	Kazakhstan
Cases as Respondent	9	62	5	14	29	28	31	1	21	19
Cases as Home State	5	26	2	2	11	13	11	0	2	12
Figures Below Represented in Millions USD										
Claims as Respondent ($)	1,305	33,398	820	4,200	14,103	7,165	5,062	0	13,349	9,101
Claims as Home State ($)	0	1,889	0	0	32,231	0	16,014	71,944	690	1,330
Losses as Respondent ($)	0	2,608	59	78	37	2,453	151	0	102	699
Wins as Home State ($)	0	56	0	0	3,313	0	0	1,489	20	25
Settlements as Respondent ($)	136	6,350	122	576	150	74	0	0	0	0
Settlements as Home State ($)	0	357	0	0	0	0	0	284	0	0
Arbitration Costs as Respondent ($)	28	146	11	11	62	73	62	0	11	67
Total Losses ($)	164	9,104	191	665	249	2,599	213	0	113	766
Total Wins ($)	0	413	0	0	3,313	0	0	1,773	20	25
Net Total ($)	-164	-8,691	-191	-665	3,064	-2,599	-213	1,773	-93	-741

ANNEX 1: ISDS Data, Kyrgyzstan through Venezuela (all $ in millions USD)

	Kyrgyzstan	Libya	Mexico	Netherlands	Peru	Poland	Russia	Spain	U.S.	Venezuela
Cases as Respondent	13	12	31	0	17	28	28	34	17	44
Cases as Home State	6	3	17	0	11	16	11	5	13	25
Figures Below Represented in Millions USD										
Claims as Respondent ($)	2,048	3,395	4,828	0	66,148	19,624	144,073	5,264	24,098	63,411
Claims as Home State ($)	0	0	5,334	100,293	31	14,445	4,503	22,296	119,626	0
Losses as Respondent ($)	168	1,883	243	0	102	260	50,097	140	0	6,055
Wins as Home State ($)	0	0	0	7,121	0	0	114	831	3,683	0
Settlements as Respondent ($)	0	0	0	0	0	4,379		0	0	2,392
Settlements as Home State ($)	0	0	0	2,292	16	0	0	5,536	961	0
Arbitration Costs as Respondent ($)	73	67	174	0	95	157	157	190	95	246
Total Losses ($)	241	1,950	417	0	197	4,796	50,254	330	95	8,693
Total Wins ($)	0	0	0	9,413	16	0	114	6,366	4,644	0
Net Total ($)	-241	-1,950	-417	9,413	-181	-4,796	-50,140	6,036	4,549	-8,693

ANNEX 2: ISDS Calculations, Albania through Kazakhstan

	Albania	Argentina	Belize	Bolivia	Canada	Ecuador	Egypt	France	India	Kazakhstan
FDI	1,090	11,333	96	622	29,713	166	6,386	38,900	27,397	7,456
GDP	11,927	423,627	1,397	19,650	1,613,464	69,555	218,888	2,646,837	1,656,617	148,047
Gov't Spending	1,331	64,238	223	2,718	347,315	9,181	24,436	630,668	184,413	16,007
Figures Above Represented in Millions USD										
Net Total / FDI	-15	-77	-198	-107	10	-1,567	-3	5	0	-10
Net Total / GDP	-1	-2	-14	-3	0	-4	0	0	0	-1
Net Total / Gov't Spending	-12	-14	-86	-24	1	-28	-1	0	0	-5
Total Losses / FDI	15	80	199	107	1	1,568	3	0	0	10
Total Losses / GDP	1	2	14	3	0	4	0	0	0	1
Total Losses / Gov't Spending	12	14	86	24	0	28	1	0	0	5
Total Wins / FDI	0	4	1	0	11	1	0	5	0	0
Total Wins / GDP	0	0	0	0	0	0	0	0	0	0
Total Wins / Gov't Spending	0	1	0	0	1	0	0	0	0	0

ANNEX 2: ISDS Calculations, Kyrgyzstan through Venezuela

	Kyrgyzstan	Libya	Mexico	Netherlands	Peru	Poland	Russia	Spain	U.S.	Venezuela
FDI	473	1,784	21,063	115,730	8,455	18,395	43,168	41,020	259,344	1,583
GDP	4,794	74,773	1,051,129	836,390	147,529	479,258	1,524,916	1,431,617	14,964,372	393,191
Gov't Spending	869	8,665	122,543	221,486	15,529	91,632	285,542	293,674	2,522,209	44,075
Figures Above Represented in Millions USD										
Net Total / FDI	-43	-106	-2	8	-2	-26	-116	15	2	-542
Net Total / GDP	-4	-3	0	1	0	-1	-3	0	0	-2
Net Total / Gov't Spending	-23	-22	0	4	-1	-5	-18	2	0	-19
Total Losses / FDI	43	107	2	0	2	26	116	0	0	542
Total Losses / GDP	4	3	0	0	0	1	3	0	0	2
Total Losses / Gov't Spending	23	22	0	0	1	5	18	0	0	19
Total Wins / FDI	0	0	0	8	0	0	0	16	2	0
Total Wins / GDP	0	0	0	1	0	0	0	0	0	0
Total Wins / Gov't Spending	0	0	0	4	0	0	0	2	0	0

NOTES ABOUT DATA AND CALCULATIONS IN ANNEXES

Total Wins, Total Losses, Net Totals. The calculations in Annex 2 are based on the last three rows of Annex 1: Total Losses, Total Wins, and Net Totals. Total Losses include adverse awards and adverse settlements as a respondent state plus an estimate of legal fees and arbitration costs. Total Wins include home state awards and home state settlements. Finally, the Net Totals represent the bottom line ISDS results for each country (total wins minus total losses). Those figures are represented in millions of U.S. dollars. They were not adjusted for inflation.

Legal Fees and Tribunal Costs. These costs were estimated by multiplying the number of claims against a sovereign by $5.6 million, the average cost of defending an ISDS case ($5,188,000 in legal fees plus half of $910,000 in tribunal costs).[313] These are the averages for ISDS activity since 2013—the numbers are slightly lower for ISDS activity prior to 2013. However, because the ISDS data involves significantly underestimated numbers virtually across the board, the author does not believe that taking the higher numbers for the purposes of these calculations will materially impact the overall calculations. Due to a variety of factors, the estimates are quite inexact. For one, the actual cost of an ISDS case can vary dramatically. Some cases are discontinued relatively early in the arbitration process with few costs. But large, complex cases can run in the tens of millions of dollars. *Yukos* alone has a distortionary effect on the averages, for instance. Second, direct legal fees and tribunal costs do not reflect the full spectrum of ISDS costs imposed on sovereign participants.

FDI. The data for FDI are World Bank figures for net inflows of foreign direct investment in 2010 represented in current U.S. dollars.[314]

GDP. The data for GDP are World Bank figures for GDP in 2010 represented in current U.S. dollars.[315]

Government Spending. The data for government spending are World Bank figures for "general government final consumption expenditures" in 2010 represented in current U.S. dollars.[316] These figures are a proxy for government spending.[317] Because the 2010 data for Libya was not available, 2008 data was used for the Libya calculations in Annex 2 instead.

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[313] *See* Hodgson & Campbell, *supra* note 228. For a broader discussion of legal and tribunal costs, see *supra* Part II.A.2–3.

[314] Graph of Foreign Direct Investment, Net Outflows, THE WORLD BANK GROUP, https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD (last visited May 13, 2018).

[315] Graph of GDP, THE WORLD BANK GROUP, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited May 13, 2018).

[316] Graph of General Government Final Consumption Expenditure, THE WORLD BANK GROUP, https://data.worldbank.org/indicator/NE.CON.GOVT.CD (last visited May 13, 2018).

[317] The World Bank defines "general government final consumption expenditure" as all government current expenditures for purchases of goods and services (including compensation of employees). The definition includes most expenditures on national defense and security but excludes government military expenditures that are part of government capital formation. *Id*.

2010 as Baseline Calendar Year. 2010 was chosen as the baseline calendar year for economic indicators (FDI inflows, GDP, and government spending) used to contextualize ISDS outcomes for two reasons. First, 2010 is the average award or settlement date of all of the cases in the country tally datasets. Second, the amounts of claims and settlements have not been adjusted for inflation. Though the 2010 World Bank data used is expressed in current U.S. dollars, using 2018 numbers would further distort the numbers downward—and they are already acknowledged as underestimates.

Annex 2 Calculations. Each metric— FDI inflows, GDP, and government spending—was divided by one million to match the win/loss data in the country tallies. Then the net wins for each country was divided by the standardized metric. The resulting calculations were then multiplied by 100 for greater readability, which essentially expresses them as a percentage. For readability the "%" symbol is only used in exhibits with fewer numbers. Thus, a positive number indicates beneficial ISDS outcomes whereas negative numbers indicate adverse ISDS outcomes. The larger the numbers, the more favorable or adverse the outcomes.

Zero Values. In many cases, zero values exist in ISDS outcomes. For instance, having never been sued in ISDS, the Netherlands has zero values for ISDS losses. Likewise, Venezuela has zero values for ISDS wins. In these cases, $1 was added to avoid mathematical errors in the calculations.