Trends in Investment Treaty Arbitration

Rachel Wellhausen
University of Texas at Austin
rwellhausen@utexas.edu

October 2015

Draft. Comments welcome.

Abstract

Investor-State Dispute Settlement (ISDS) via investment treaty arbitration has grown in prominence, making waves among legal professionals and corporate executives as well as triggering intense public debate. Systematic data about investment arbitration is increasingly important to our understanding of modern relations between governments and multinational corporations. This article updates Susan Franck's "Empirically Evaluating Claims about Investment Treaty Arbitration" (2007) by exploring data collected through 2014. The article addresses topics including (1) the industry, nationality, and other characteristics of arbitration filers; (2) win, loss, settlement, and annulment rates; and (3) trends in amounts claimed and amounts awarded. Central takeaways are that users of the de facto ISDS regime are incredibly diverse and that outcomes track those common in other legal settings. Nonetheless, both proponents and detractors of ISDS may find fodder for their positions in recent developments.

Acknowledgements

For research assistance, I thank Riitta-Ilona Koivumaeki, Torben Behmer, Ross Buchanan, Brendan Apfeld, and April Kessler.

Introduction

Investor-State Dispute Settlement (ISDS), once obscure, has in the last years triggered headlines in countries around the globe. Developing countries have pushed back against ISDS institutions, some have delayed ratification, some have renegotiated enabling treaties, and governments in places as diverse as Ecuador, South Africa, and Indonesia have railed against it and withdrawn from some (but not all) relevant treaties.[1] Growing concern that foreign property protections enshrined in international treaties are in fact deterring host governments from setting domestically-desired health, welfare, environment, and other policies has led treaty writers to include more caveats in treaty language. The investment chapter of the Trans-Pacific Partnership (TPP) includes a specific carveout for tobacco regulation, itself a direct response to ISDS arbitration.[2] ISDS, which in principle is intended to aid governments in credibly committing to allow foreign investors to operate on their soil without undue interference, has grown into a de facto regime that many observers worry is tilting the scales too far in favor of multinational corporations.[3]

Without taking a position on the normative value of the ISDS regime, this article provides information on trends in investment treaty arbitration that can inform our understanding of whether and in what ways the regime is promoting desirable goals. Susan Franck (2007) made an important contribution in collecting and analyzing information on

---

[1] Haftel and Thompson 2013, Haftel and Thompson n.d., Peinhardt and Wellhausen n.d.
[2] *Philip Morris Asia Limited v. The Commonwealth of Australia, Order of the High Court of Australia (Tobacco Plain Packaging Act),* as well as *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*.
[3] E.g., Jan Kleinheisterkamp and Lauge Poulsen. December 2014. "Investment Protection in TTIP: Three Feasible Proposals." *Policy Brief, Global Economic Governance.*

ISDS until that point.[4] I replicate and extend her work, examining the characteristics of the (at least) 685 public international investment arbitrations that have taken place from the beginning of the de facto regime in 1965 through the end of 2014. Of these, 659 arbitrations were filed from 1990 through 2014.

I emphasize several central takeaways. The users of ISDS are incredibly diverse, particularly in national origins, industry, and characteristics of the claims they make. ISDS is not limited to the classic "immobile" industries – those in which assets are location-specific and difficult for firms to threaten to move in response to political risk.[5] Investors from (at least) 74 home countries have filed investment arbitrations. Further, win/loss/settlement rates are consistent with those in other legal settings. States win arbitrations just over one-third of the time, and arbitrations are settled – the kind of outcome both a state and an investor can spin as a "win" – about one-third of the time. Though several prominent, extremely large awards have been made in recent years, there remains much variation in the size of arbitration awards. On average, investors are being awarded only a fraction of their initial demands.

Nonetheless, the fact remains that the regime provides a means for multinational corporations (and not domestic corporations) to demand compensation for government policies that they deem unlawful. Uncertainty over the ISDS process and the possibility of facing arbitration raises the costs of regulation. This last worry, that many sovereign government policies may in fact even inadvertently trigger a claim from a multinational corporation, remains a central motivating force for those who seek adjustments or an overhaul of the de facto regime. The literature supports concern on this point, as scholars

[4] Franck 2007.
[5] Vernon 1971.

have demonstrated that host states lose out on foreign direct investment (FDI) as a result of being sued.[6]

In this article, I first specify the data collection methods. Then, I discuss trends in arbitration filing; trends in arbitration outcomes; and trends in claims and awards. I conclude by emphasizing what the findings imply for the future of ISDS.

Data Collection Methods

This paper draws on data collected from many sources. The first key source is the records of the World Bank's International Center for the Settlement of Investment Disputes (ICSID). Since its charter in 1965, ICSID has been the most public venue to host international investment treaty arbitrations. Accordingly, the data here stretches back to ICSID's founding. However, the institution's arbitration tribunal was used only 25 times until the 1990s. Statistics here include these early cases, but trends are robust to their exclusion. As an institution, ICSID makes its full caseload public. While details of the arbitrations may remain private – for example, exact sizes of investor demands or the final award – we do know a considerable amount about the 462 ICSID cases filed in ICSID and ICSID-supervised tribunals from 1990 through the end of 2014.

We know much less about the more secretive world of international investment treaty arbitrations filed at other tribunals, such as the Stockholm Chamber of Commerce, the London Court of International Arbitration, the Permanent Court of Arbitration, the International Chamber of Commerce, other regional arbitration tribunals, and ad hoc committees. Nearly every international investment treaty (and likely nearly every contract

[6] Allee and Peinhardt 2011, Wellhausen 2015a,b.

with an investment arbitration provision) allows investors to bring cases under rules put together by UNCITRAL, the United Nations Commission on International Trade Law.[7] Arbitrations facilitated by UNCITRAL rules may be more or less private.[8] Some arbitrations are self-consciously made public, whereas others are made public through the efforts of investigative journalists. This database includes 198 public UNCITRAL-rules arbitrations from 1988 through 2014. Sources for these data are varied. One key source is ITA Law archives, which collects and distributes publicly available court rulings in these cases.[9] Another crucial source is *IAReporter*, a venture by Luke Eric Peterson that focuses its efforts on investigative journalism around investment arbitration.[10] Other sources include local and secondary journalism, which we accessed through systematic searches of the news databases Factiva and LexisNexis. Content alerts on newly available material on the Internet, using the keywords "nationalization," "expropriation," "arbitration," and "foreign direct investment," have proven especially useful in finding updates on the proceedings of these arbitrations. Altogether, we are confident that the database includes non-ICSID arbitrations that are public enough to make it into international and/or domestic press.

How much our data undercount the true population of arbitrations can only be guessed at. I do not provide a theory here of the decision-making process that leads investors to choose to go to a more or less public arbitration venue, but simply point out that it is by no means a random decision. We also cannot be confident that the characteristics of observable arbitrations discussed here match trends in unobservable

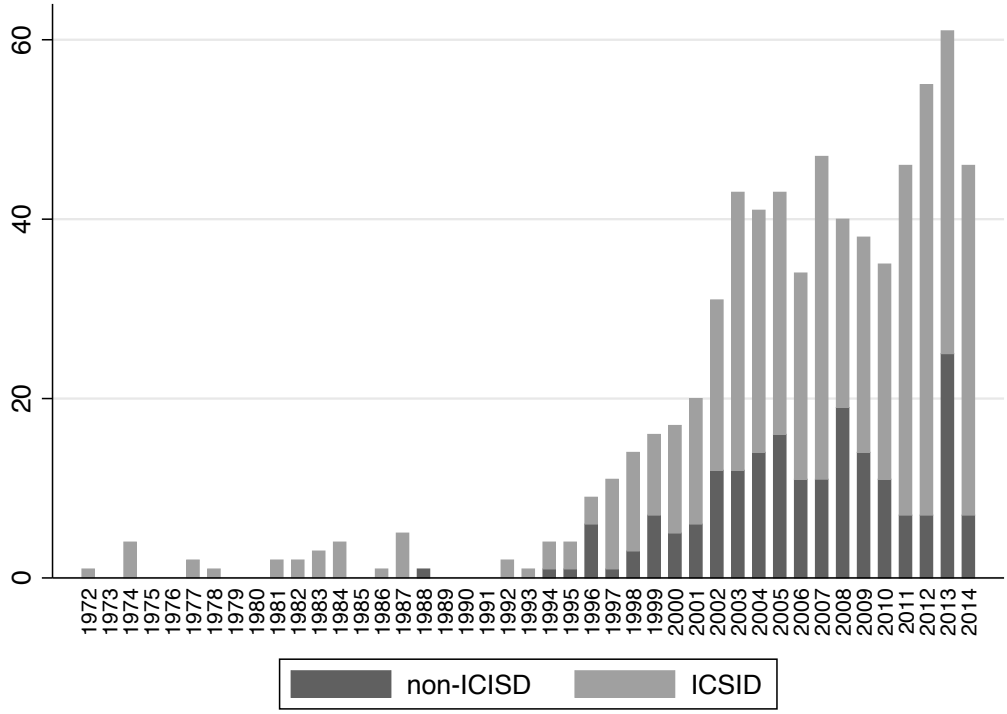
[7] Allee and Peinhardt 2010.
[8] New UNCITRAL "Rules on Transparency in Treaty-based Investor-State Arbitration" are effective as of 1 April 2014.
[9] ITA Law (www.italaw.com), maintained by Professor Andrew Newcombe, Faculty of Law, University of Victoria.
[10] *IAReporter* available at www.iareporter.com.

arbitrations. But, to the extent that it is trends in observable arbitrations that drive popular politics around ISDS, not to mention government behavior, I contend that an analysis of public arbitrations is in itself useful if not fully illustrative of the characteristics of ISDS as a whole.

Figure 1 documents the increasing use of investment treaty arbitration over time, whether at ICSID or other venues. This increase tracks with the explosion of investment treaties since the 1990s. Today, some 3000 international treaties protect foreign direct investor rights abroad. This dense network of treaties is mostly constituted of Bilateral Investment Treaties (BITs) (about 2700). Additionally, a variety of other International Investment Agreements (IIAs), such as trade treaties like the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership (TPP), include investment protection chapters. Investors are invoking more and more of the arbitration provisions of these treaties as knowledge of and investor experience with ISDS increases.[11]

Figure 1. Annual count of publicly known investment treaty arbitration filings, by venue (1965-2014)

[11] Jandhyala et al 2011.



Note: While ICSID was formed in 1965, the first filing there was in 1972.

Arbitration Filing

Public arbitration filings are not an adequate count of the presence of disputes between foreign investors and a host state. A foreign investor may feel that its property rights are infringed on by a government policy but take no action. A foreign investor may draw on other resources like diplomatic pressure or collective action with other foreign investors to push its case with the state.[12] A foreign investor may threaten arbitration and induce settlement without needing to file. An investor may "free ride" on other firms' pursuit of compensation through arbitration in hopes that the government will be pushed to change policies in ways favorable to it, too. Or, an investor may choose from a variety of other strategies to resolve disputes, such as filing for a political risk insurance claim or

[12] Wellhausen 2015b.

simply changing its investment strategy. One of the unique aspects of ISDS is that foreign investors have standing to file for arbitration with the host government. This is different, for example, from the World Trade Organization (WTO) where only the home government has standing to file on behalf of its aggrieved firms.[13] Thus, we must take seriously both the agency of foreign investors to bring their own claims against the host state and the reality that investors have a variety of options to pursue compensation outside of ISDS.

That said, if an arbitration is filed, we can infer that the foreign investor is sufficiently aggrieved to take this relatively costly step, which has the potential to "burn bridges" with the host government or host polity. Investment treaty arbitration also incurs legal costs and opportunity costs for investors that devote time and resources to the pursuit of arbitration. And, filing for arbitration does not guarantee compensation. Given these costs and the uncertainty around the arbitration process, what can we say about the qualities of those disputes that investors choose to file? What can we say about the kinds of investors that file and the kinds of states that are respondents? Here, I review trends by (1) investor industry, (2) investor national origins, and (3) respondent state.

Trends by industry of the filing investor (claimant)

We code the data into nine industry categories, which we arrived at endogenously by examining the kinds of investors that have filed for investment treaty arbitration through 2014. Table 1 lists the categories, the number of filings, and the percent of findings accounted for by each industry.[14]

Table 1: Investment Treaty Arbitration Filings, by Industry (1965-2014)

[13] Simmons 2014.
[14] In seven cases we are unable to code investor industry.

Industry	**No. of Filings**	**Pct. of Filings**
Agriculture	36	5.3
Finance and banking	44	6.4
Manufacturing	89	13.0
Mining	61	8.9
Oil and gas	106	15.5
Real estate	30	4.4
Services	120	17.5
Telecommunications	40	5.8
Utilities	152	22.2
Unknown	7	1.0

Most commonly, foreign investors in utilities industries file for investment treaty arbitration, accounting for 152 filings or 22 percent of the data. Of those, at least 80 filings concern electric power concessions, where the foreign investor owns and operates electricity generation and/or transmission in the host state. Foreign investors in water and wastewater management have also filed a large number of claims. Much of the FDI in utilities around the world can be traced to the development policies put forward in the 1990s "Washington Consensus" era, which emphasized privatization and recruitment of foreign capital into utilities.[15] It is perhaps not surprising that this push, which led a great number of foreign investors to enter into contractual relationships directly with host governments, has resulted in a large number of ensuing conflicts as foreign investors face the problem of maximizing profits in what have traditionally been subsidized industries.

Scholars of political risk have long associated "immobile industries" with a higher potential of government interference and/or government breach of contract. As an investor cannot move an electricity grid, post-investment it becomes more vulnerable to changed

[15] Post 2014.

government treatment as its pre-investment bargain "obsolesces."[16] Thus, it is perhaps surprising that services – a set of industries with traditionally more mobile assets – account for the second most investment treaty arbitrations. Investors in a wide variety of services industries have filed arbitration: tourism, aviation, broadcasting and media, gaming, importers/exporters, maritime services, retail, and more. Investors in telecommunications services – often including mobile phone licensing – have also filed a large number of arbitrations (40), as have investors in finance and banking (44).

The "obsolescing bargain" logic does match with the high number of arbitration filings in oil and gas (106) as well as filings in mining (61), agriculture (36), and real estate (30). However, the many filings in manufacturing industries (89) again suggest that asset immobility does not fully explain which investors are likely to feel sufficiently aggrieved to file arbitrations. Arbitrations filed by manufacturers include products as diverse as cement, textiles, steel, cigarettes, food products, chemicals, and machinery.

Trends by national origin of the filing investor (claimant)

Investors from at least 74 home countries have filed investment treaty arbitrations. We code the home country of an investor using several different sources. First, if the treaty that facilitates the arbitration is country-specific, as when treaties are bilateral, then we code investor national origin based on the treaty invoked. If the treaty does not indicate national origin, we code origin by the country in which the claimant is incorporated. In many cases, claimants sue via subsidiaries that are incorporated in second countries

[16] Vernon 1971, Kobrin 1987.

different than the home country otherwise associated with the multinational corporation.[17] In 29 arbitrations, different claimants in the same filing originate from two or more home countries.

Far and away, US investors are responsible for the most public investment arbitration filings (153). UK investors have filed many arbitrations (54), as have investors from France (47), Canada (37), Italy (35), Spain (34), and Belgium and Luxembourg (29 filed under joint Belgium-Luxembourg investment treaties). Investors from Austria, Greece, Russia, Switzerland, and Turkey have filed ten or more publicly known arbitrations. Recall that these counts are based on treaty usage and incorporation. In the modern globalized era, many multinational corporations have nationality claims on a variety of home countries. Thus, these are likely undercounts of the number of investors that have relationships with or even a direct legal tie to these home states.

A growing worry is that the many overlapping ISDS protections available in the 3000 international investment treaties give multinational corporations the ability to "nationality shop." Just as some corporations use varying ownership structures to gain access to tax havens, so too may corporations use multiple nationality claims to gain access to friendlier investment protections. For example, in Central and Eastern Europe and the former Soviet Union, some otherwise domestic firms leverage incorporation in Cyprus to gain access to treaty protections, including ISDS.[18] This phenomenon is largely responsible for the 15 known filings by Cypriot investors.

The Netherlands has grown most notorious as a home country for "nationality shopping" investors. The Netherlands has 101 BITs in force, many of which have

[17] In two cases we are unable to assign a national origin.
[18] Wellhausen 2015b.

particularly broad and strong ISDS provisions.[19] It is also known as a tax haven, at least by some definitions.[20] Thus, many multinational corporations – including many of the world's largest – happen to have some Dutch ownership. Many of the investors filing from the Netherlands may have legal claims to the Netherlands but legal (and identity) claims elsewhere as well. To date, 70 filings have been made by Dutch entities – the second most common national origin in the data. The complex national profiles of "Dutch" filers have not gone unnoticed by respondent countries. In fact, Venezuela, South Africa, and Indonesia have specifically withdrawn from their BITs with the Netherlands, citing nationality-shopping concerns.

Increasingly, nationality shopping is leading arbitration tribunals to make rulings on exactly how Dutch, Cypriot, or otherwise foreign an investor is. Can an investor have access to ISDS if its CEO holds the requisite foreign passport? Is a Dutch mailbox enough? The jurisprudence on these issues is still being developed, although the decentralized nature of ISDS has weakened the growth of universally acknowledged case law. Regardless, it is clear that the trend is in the direction of ever more global ownership of multinational corporations. This suggests that investors will continue to use arguably weak nationality ties to file arbitrations via treaties accessible to only investors of specific national origins, leaving it to the tribunal to decide whether the investor is indeed owed compensation under ISDS.[21]

Trends by country sued (respondent)

[19] UNCTAD.
[20] Palan et al 2013.
[21] The growing inclusion of Most Favored Nation (MFN) clauses in investment treaties may allow investors even with no national ties to access the protections afforded to a different nationality of investors.

At least 124 countries have been sued in investment treaty arbitration.[22] These countries span the world: sub-Saharan Africa (30); Eastern Europe and the former Soviet Union (29); Latin American and the Caribbean (22); emerging Asia (19); the Middle East and North Africa (12); and the developed countries of North America, Western Europe, and Australasia (12). Of these regions, the countries of Central and Eastern Europe and the former Soviet Union have faced the most filings, with Latin America and the Caribbean close behind (Table 2). Twenty-one countries have faced 10 or more filings, with the most being filed against Argentina (57), Venezuela (39), the Czech Republic (28), and Egypt (25).

Table 2. Investment Treaty Arbitration Filings, by Region

Central and Eastern Europe and former Soviet Union	222
Latin America and Caribbean	211
Sub-Saharan Africa	74
Emerging Asia	55
Middle East and North Africa	72
Developed countries	51

There are a few key takeaways from these summary statistics. First, although filings have been concentrated in some regions and in some countries, most countries around the world have been exposed to ISDS. Thus, the uncertainty around and perhaps ignorance of ISDS on the part of states in the past is less prevalent today than it once was.[23] Second, the "lumpiness" of filings revolves around financial and political crisis in particular respondent states or the turmoil associated with political and economic transition. In many cases, these triggering events are associated with middle-income countries. Thus, while very poor

[22] Belgium and Luxembourg often sign joint investment treaty protections; this count includes them separately. I count as one country the Former Yugoslavia/Serbia and Montenegro/Serbia, each of which have been respondents in arbitration.
[23] Poulsen 2015.

countries have also been respondents in arbitration, development level alone is not a good predictor of the distribution of filings. Developed countries have faced some filings, although the lion's share of these is made up by NAFTA filings by investors in the United States against Canada, or Canadian investors filing against the United States. However, intra-European Union ISDS has begun to make Western European countries more susceptible to filings, a trend which has concerned the EU and is shaping the EU's position on member state v. supranational investment treaties. If and when it is ratified, the Trans-Pacific Partnership (TPP) will increase the availability of ISDS for investors into United States as well as Japan, which to date has not been a respondent in a public investment treaty filing. The in-progress Transatlantic Trade and Investment Partnership (TTIP), an encompassing trade and investment deal between the United States and the EU, may further extend ISDS access to investors originating from developed countries to file against developed countries. The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada already extends ISDS provisions. With more ISDS treaty commitments between countries in the global "North," it is likely that the number of filings against developed countries will continue to rise.

Arbitration Outcomes

Do the outcomes of public investment arbitrations appear biased for or against claimants or respondents? Here, I review data on (1) overall trends in outcomes, (2) outcomes by industry, (3) outcomes by claimant national origin, and (4) outcomes by respondent state characteristics. I also discuss trends in the growing use of annulment processes for ICSID cases.

Quantities overall

Of the 685 public investment arbitrations in the data, 204 remain pending as of 31 December 2014.[24] Settlements or rulings have been reached in 480. We code that a case is settled if the case was discontinued and/or there is public information that the parties reached an agreement and withdrew the case before a final ruling. We count that the investor wins if the arbitration tribunal reaches a final ruling and determines that the state was at fault (regardless of the size of the award made to the investor). We count that the state wins if the tribunal's ruling does not determine that the state was at fault. Reasons for a state win include, but are not limited to, the tribunal finding that the investor does not deserve compensation, that the tribunal does not have jurisdiction, or that the investor did not have adequate standing to file the arbitration.

Of the 480 concluded arbitrations, the parties reached a settlement in 161 (34 percent), the investor won in 142 (30 percent), and the state won in 172 (36 percent).[25] These results, roughly one-third to each of settlement, claimant, and respondent, track with trends in other areas of law.[26]

Do these trends suggest bias for or against investors? If the investor wins or the arbitration settles out of court, then we expect that the investor walks away with some compensation. If the state wins or the arbitration settles out of court, then we expect the stay to pay no compensation – or less than they would have paid in the event of an investor win. In short, investors (and their lawyers) likely look at both rulings in their favor and settlements as "wins." States are likely paying some sort of compensation in most if not all

[24] In one case it is unknown whether a ruling has been made or whether it has been settled.
[25] In four cases the arbitration is known to have concluded but the outcome is unknown.
[26] Cooter et al 1982.

of 64 percent of concluded arbitrations. Yet, states have reason to see both rulings in their favor and settlements as "wins" as well. States either avoid paying compensation or pay less than they otherwise expect to in 70 percent of cases.

Outcome trends by industry

Across all concluded arbitrations, the state wins the ruling in 36 percent. The state wins considerably more often than the overall mean in agriculture (55 percent), services (44 percent), and finance (41 percent). The state's win rate reflects the overall mean in manufacturing (37 percent) and mining (34 percent). The state wins less often in telecommunications (32 percent), real estate (32 percent), and utilities (31 percent). The state's poorest record is in oil and gas (28 percent). Put differently, investors win or arbitrations settle most often in two of the most common industries for investment treaty arbitration: utilities and oil and gas.

Outcome trends by country sued (respondent)

Compared to the mean state win-rate of 36 percent across all completed arbitrations, state-win rates are higher for states in Central and Eastern Europe and the former Soviet Union (43 percent) and the Middle East and North Africa (48 percent). State-win rates are considerably lower for states in Asia (32 percent), Africa (28 percent), or Latin America (24 percent). The developed countries of Western Europe and North America are the most likely to win at arbitration, with win rates of 54 percent.[27] This last, higher win rate may be comforting to those in developed countries that worry about the chilling effect ISDS may have on their regulatory decision-making. Indeed, only in

[27] Japan has not faced a public filing. New Zealand is also included in this category (1 arbitration).

developed countries are states winning arbitrations more often than they are losing or settling them. This statistic might also be concerning to an observer worried about pro-"North" rulings. It suggests further research.

Outcome trends by national origin of the filer (claimant)

Recall that the mean investor-win rate is 30 percent and the settlement rate is 34 percent. When US investors file arbitrations, they win 28 percent of the time and settle 37 percent of the time. Do Dutch investors, which likely disproportionately include "nationality shopping" investors, have win rates around the mean? In fact, Dutch investors win only 16 percent of the time. But, arbitrations filed by Dutch investors settle before a ruling 54 percent of the time. This trend suggests that Dutch investors (however "Dutch" they may be) have been systematically less likely to win awards but have been in fact more successful in extracting early settlements.

Annulment at ICSID

To date, there is no appeals process in investment treaty arbitration.[28] For those investors and states engaged in arbitrations under UNCITRAL-rules, there is no mechanism by which they can subvert the ruling outside of non-compliance. For arbitrations filed at ICSID, a party can file for annulment. However, annulment does not deal with whether there may have been an error in the tribunal's application of the law. Rather, annulment can only be granted on grounds including errors in process (such as an error in the tribunal's constitution or procedure) or an error due to omission of reasoning in a final

[28] There has been some agitation for an appeals process, especially by actors in the European Union, and several recent US investment treaties make provisions for such a process should it ever emerge.

award (but not an error in reasoning itself).[29] As such, annulment is not a substitute for an appeal although, surely, some parties filing for annulment hope for it to be interpreted as such.

As of 31 December 2014, ICSID annulment processes have been filed with regard to 76 initial rulings. Altogether, 30 rulings have been upheld and 6 overturned either fully or partially. In 17 cases, the parties discontinued the proceedings. Twenty-three were pending.

In 45 of the annulment proceedings, the investor (claimant) had won an award in the initial ruling. The original ruling was upheld 19 times and overturned 3 times, with parties discontinuing the proceedings 6 times. Seventeen were pending. Thus, the state has been unsuccessful in 68 percent of its attempts at annulment. In 21 percent of proceedings, the state and investor settled prior to an annulment ruling, and the state won in only 11 percent of annulment rulings.

In 31 annulment proceedings, the state (respondent) won the initial ruling. Here, the investor (claimant) may be interested in seeking annulment to avoid paying costs associated with the arbitration, which the tribunal often imposes on the losing party. Investors may also want annulment to serve as a pseudo-appeal to reinvigorate their claim. In these proceedings, the ruling was upheld 11 times and overturned 3 times, while the parties discontinued proceedings 11 times. Six were pending. Thus, the investor has been unsuccessful in 44 percent of its attempts at annulment. In another 44 percent of cases, the

[29] Chapter VII, Rule 50, (1)(c)(iii). Applications for revision of the award must include "the discovery of some fact of such a nature as decisively to affect the award" which was not known to the party nor to the tribunal in its original proceedings. Chapter VII, Rule 50, (1)(c)(ii).

investor and state settled prior to an annulment ruling, and the investor won in only 12 percent of annulment rulings.

From these trends, it is difficult to discern a clear pro- or anti-state bias in annulment proceedings at ICSID. If anything, trends in rulings make clear how constrained the criteria for annulment are, as successful annulments are low regardless of the filer.

Claims and Awards

When claimants file for investment arbitration, how much is at stake? When they win awards, how do those awards compare to their initial demands? Are the large awards that make headlines exceptional or the norm? In this section, I use publicly available information to review (1) the amount of compensation sought, (2) the amount of compensation awarded, (3) percentages of claims fulfilled, and (4) notable large awards.

Amount of compensation sought

We have public information on the amount of compensation sought by the investor (claimant) in 312 cases. This information comes from court documents or, where unavailable, news sources in which a representative of the investor provides the information. Amounts sought are converted into millions of US dollars at exchange rates at the point of the arbitration filing. If the investor specifies a range of amounts, we code the minimum requested by the investor. We do not code additional requests by the investor for interest on awards or costs associated with the arbitration. With this strategy, we bias our reporting downward to capture the minimum amounts investors see as at stake in the arbitration.

Compensation claims range from tens of thousands of US dollars to billions. In 50 percent of observed claims, the compensation demanded is US$120 million or less. The mean compensation demanded is US$910 million. This is pulled up significantly by the 45 claims in which the investor sought US$1 billion or more in compensation.

Amount of compensation won

Of those proceedings in which an investor won the ruling (142), public information on 126 awards is available. Fifty percent of awards are below US$15.3 million. Large awards again pull up the mean award, to US$480 million. There are 5 proceedings with awards of US$1 billion or more.

Wins v. claims

In 112 proceedings, we know the award sought, but the investor either lost or the arbitration was settled privately out of court. In 85 instances in which the investor won, we know both the award sought and the award won. Of these, in 50 percent of rulings, the investor won less than 30 percent of its original claim. In the mean ruling, the investor won 38 percent of its claim. In only 6 rulings did the investor win the full amount demanded or greater.[30]

While data availability is constrained, these statistics do suggest that investors on average win only fractions of their demands. Certainly, claimants (in any legal setting) have an incentive to inflate their demands. We thus cannot infer whether awards are consistent with investors' expected compensation. But, at least as regards the optics of the de facto

[30] Recall that we code the lowest amounts sought by investors, accounting for the instances of awards greater than claims in our data.

ISDS regime, highlighting the limited amounts of compensation being awarded per initial demands might facilitate its longevity.

Notable large awards

Nonetheless, in absolute terms, states have been found liable for over US$1 billion in compensation in 5 awards, all taking place since 2012. In 2012, Occidental Petroleum won US$1 billion from Ecuador – an award that has generated significant press and for which Ecuador has filed for annulment (pending). In 2014, Venezuela was ruled to owe the oil major Mobil US$1.62 billion, in a proceeding that Mobil (commonly thought of as a US firm) filed as a Dutch investor under the Netherlands-Venezuela BIT.[31] Like Ecuador, Venezuela has filed for annulment of this award (pending).

Also in 2014, Russia was found liable in three arbitrations brought by previous owners of Yukos, the oil and gas firm that was dismembered in bankruptcy after its chairman Mikhail Khordokovsky was imprisoned. As a result of these arbitrations, Russia owes US$1.85 billion, US$8.2 billion, and US$40 billion.[32] Because these arbitrations were heard under UNCITRAL rules, Russia does not have access to the ICSID annulment system. Russia has already refused to comply with these awards, and investors are seeking to freeze Russian assets and/or confiscate Russian property outside of Russia as a means of enforcement.

While enforcement proceedings have given rise to interesting stories – such as claimants attempting to seize state-owned planes or a warship in compensation – in

[31] This claim was filed in 2007. Venezuela terminated its BIT with the Netherlands in 2008, but it allowed the claim to go forward per the rules of the treaty.
[32] Yukos Universal Ltd. v Russian Federation (AA227), Veteran Petroleum Ltd. v Russian Federation (AA228), Hulley Enterprises Ltd. v Russian Federation (AA226). All brought at the Permanent Court of Arbitration under the Energy Charter Treaty.

general, there has been a sense that enforcement of investment treaty awards is aided by two mechanisms. First, investors have been able to leverage the deep international legal systems around enforcement, much of which overlaps with the means investors have to enforce awards derived from international commercial arbitration. Second, respondent states want future investment, and there has been a sense that states are willing to pay awards today in order to send positive signals to tomorrow's investors.[33] However, if these recent, large awards are an example of things to come, then we should likely expect more strain on the enforcement of arbitral awards. Suffice it to say, states have more at stake when they are found liable for billions of US dollars. Those costs may outweigh states' willingness to "play by the rules" of international law and/or states' willingness to pay now in hopes of establishing a good reputation with future investors.

Conclusions

This paper has presented simple trends in investment treaty arbitration as a means of providing information pertinent to a number of questions, relevant to ISDS proponents and detractors alike. Who is getting sued, and by whom? The majority of states in the world have been sued under ISDS, and investors from a great number of home states have filed arbitrations – though the large number of filings by Dutch entities suggests that concerns about "nationality shopping" are credible. While industries with "immobile" assets, like utilities and oil and gas, account for a great number of arbitrations, so too do investors in industries like services and manufacturing.

[33] It could also be that states pay awards because they want investment back from exactly those claimants in the arbitration. Chapman et al n.d.

Who is winning? The trends in ISDS outcomes roughly follow those observed in other legal settings – respondents and claimants each win about one-third of the time, and arbitrations are settled about one-third of the time.[34] Investors are winning more often in oil and gas, an industry that is often highly politicized. States are winning more often in developed countries. This statistic may be comforting to those worried about the chilling effect on regulation that extending ISDS to "North-North" treaties will have. On the other hand, one might question whether this discrepancy is due to simply the qualities of state actions or whether there exists systematic bias against developing country respondents.

How much are investors winning? Certainly, investors have sought and won large, multi-billion dollar awards, especially in recent years. But, on average, it appears investors are winning only a fraction of their claims. Whether these findings support or undermine the legitimacy of ISDS depends on one's point of view.

Indeed, one take-away of this paper is that the trends in investment treaty arbitration do not provide clear evidence to one normative camp or the other. Rather, we can conclude that ISDS is widespread, accessible to and used by small and large investors, in a variety of industries, from a variety of home countries, and in a variety of host countries. We do have other evidence that states lose out on FDI when investment treaty arbitrations are filed against them.[35] But this review of trends in arbitration does not suggest that those filings, or the outcomes of filings, are unassailably distorted. Nonetheless, the spread of filings to developed countries, differential win rates by industry and home country, and the size of recent awards have potential to feed controversy over

[34] Cooter et al 1982.
[35] Allee and Peinhardt 2011, Wellhausen 2015a.

the de facto regime. Whether or not growing domestic backlash and calls for ISDS reform, among politicians and practitioners alike, will change these trends remains to be seen.

References

Allee, Todd, and Clint Peinhardt. "Contingent credibility: The impact of investment treaty violations on foreign direct investment." *International Organization* 65.03 (2011): 401-432.

Allee, Todd, and Clint Peinhardt. "Delegating differences: Bilateral investment treaties and bargaining over dispute resolution provisions." *International Studies Quarterly* 54.1 (2010): 1-26.

Chapman, Terrence, Riitta-Ilona Koivumaeki, and Rachel Wellhausen. N.d. "Endogenous Sources of Compliance with International Law: The Case of FDI Arbitration."

Cooter, Robert, Stephen Marks, and Robert Mnookin. 1982. "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior." *Journal of Legal Studies* 11: 225-251.

Franck, Susan D. 2007. "Empirically Evaluating Claims About Investment Treaty Arbitration." *North Carolina Law Review* 86(1).

Haftel, Yoram Z., and Alexander Thompson. "Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties." *International Organization* 67.02 (2013): 355-387.

Haftel, Yoram and Alexander Thompson. N.d. "When do States Renegotiate International Agreements? The Case of Bilateral Investment Treaties."

Jandhyala, Srividya, Witold J. Henisz, and Edward D. Mansfield. "Three waves of BITs: The global diffusion of foreign investment policy." *Journal of Conflict Resolution* (2011): 0022002711414373.

Kobrin, Stephen J. "Testing the bargaining hypothesis in the manufacturing sector in developing countries." *International organization* 41.04 (1987): 609-638.

Milner, Helen V. "Introduction: The Global Economy, FDI, and the Regime for Investment." *World Politics* 66.01 (2014): 1-11.

Palan, Ronen, Richard Murphy, and Christian Chavagneux. *Tax havens: how globalization really works*. Cornell University Press, 2013.

Peinhardt, Clint and Rachel Wellhausen. N.d. "Strategic Withdrawal from Investment Treaties."

Post, Alison E. *Foreign and domestic investment in Argentina: the politics of privatized infrastructure*. Cambridge University Press, 2014.

Poulsen, Lauge N. Skovgaard. *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries*. Cambridge University Press, 2015.

Simmons, Beth A. "Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment." *World Politics* 66.01 (2014): 12-46.

Vernon, Raymond. 1971. *Sovereignty at Bay.*

Wellhausen, Rachel L. "Investor-State Disputes: When Can Governments Break Contracts?" *Journal of Conflict Resolution* 59(2): 239-261. 2015.

Wellhausen, Rachel L. *The Shield of Nationality: When Governments Break Contracts with Foreign Firms*. Cambridge University Press, 2015.