

# Recent Trends in Investor–State Dispute Settlement

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## ABSTRACT

Systematic data about investor–state dispute settlement (ISDS) are increasingly important to our understanding of modern relations between states and multinational corporations. This article updates Susan Franck’s ‘Empirically Evaluating Claims about Investment Treaty Arbitration’ (2007) and complements Thomas Schultz and Cedric Dupont’s ‘Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study’ (2015). I use a political science lens to explore data on the modern incarnation of ISDS, from 1990 to 2014. The article addresses topics including: (i) the industry, nationality and other characteristics of arbitration filers; (ii) win, loss, settlement and annulment rates; and (iii) trends in amounts claimed and amounts awarded. It also serves to introduce the accompanying data set. A central takeaway is that users of the *de facto* ISDS regime are incredibly diverse. Nonetheless, both proponents and detractors of ISDS may find fodder for their positions in recent developments.

## 1. INTRODUCTION

Some 3000 treaties allow foreign investors to sue the governments of countries in which they invest for violating their property rights. Decentralized international tribunals decide whether or not the investor is owed compensation, and no appeals system is yet in place. Domestic investors cannot sue. This *de facto* regime of investor–state dispute settlement (ISDS), once obscure, has in the last years triggered headlines in countries around the globe.<sup>1</sup> Some governments have pushed back, by delaying ratification of enabling treaties or renegotiating treaties.<sup>2</sup> Other governments in places as diverse as Ecuador, South Africa and Indonesia have railed against ISDS and withdrawn from some (but not all) of their investment treaties. Today, treaty writers are including more caveats in treaty language, amid growing concern that foreign property protections are in fact deterring host states from

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1 JW Salacuse, ‘The Emerging Global Regime for Investment’ (2010) 51(2) *Harvard International Law Journal* 427.  
2 YZ Haftel and A Thompson, ‘Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties’ (2013) 67(2) *International Organization* 355.

setting domestically desired health, welfare, environment and other policies. In a prominent example, the investment chapter of the Trans-Pacific Partnership (TPP) includes a specific carveout for tobacco regulation, itself a direct response to a specific investment arbitration.<sup>3</sup> In principle, ISDS is intended to help governments credibly commit to allow foreign investors to operate on their soil without undue interference. In reality, many observers worry that ISDS tilts the scales too far in favour of foreign investors.<sup>4</sup>

Without taking a position on the normative value of the ISDS regime, this article provides information on recent trends in ISDS that can inform our understanding of whether and in what ways the regime is promoting desirable goals. The article uses a political science lens to update Susan Franck's 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) and complements Thomas Schultz and Cedric Dupont's 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2015).<sup>5</sup> This article and accompanying data set draw on characteristics of 676 public international investment arbitrations filed from 1990 through 2014.

The central takeaway is that the users of ISDS are incredibly diverse. I measure diversity in several ways—in industry, in national origins and in the characteristics of the claims for compensation that investors make. First, ISDS is not limited to those industries in which assets are location specific. Such location-specific, 'immobile' investors are especially exposed to political risk,<sup>6</sup> but foreign investors in a variety of more mobile services and manufacturing industries also use ISDS. Second, while American investors file most often, investors from over 70 different home countries have filed investment arbitrations. Third, there remains variation in arbitration outcomes: states are winning arbitrations more than one-third of the time, and arbitrations are settled before a judgment about one-third of the time. Fourth, based on publicly available data, there remains great diversity in the size of claims that investors make. Based on conservative codings, investors are winning only 30–40% of their initial demands.

3 *Philip Morris Asia Limited v The Commonwealth of Australia*, Order of the High Court of Australia (Tobacco Plain Packaging Act) UNCITRAL, PCA Case No. 2012–12.

4 See, for example, G Van Harten, D Schneiderman and others 'Public Statement on the International Investment Regime' (31 August 2010) [www.osgoode.yorku.ca/public-statement](http://www.osgoode.yorku.ca/public-statement). See also J Kleinheisterkamp and L Poulsen, *Investment Protection in TTIP: Three Feasible Proposals* (Policy Brief, Global Economic Governance 2014).

5 Franck looks at 82 arbitrations with public awards as of 2006. SD Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86(1) *North Carolina Law Review* 1. Schultz and Dupont examine 541 public arbitrations filed from 1972 to 2010. T Schultz and C Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2015) 25(4) *The European Journal of International Law* 1147. For a defense of empirical research in legal scholarship, see SD Franck, 'Empiricism and International Law: Insights for Investment Treaty Dispute Resolution' (2008) 48(4) *Virginia Journal of International Law* 767. See Van Harten for a consideration of the limits of quantitative studies in answering legal questions. G Van Harten, 'Summary of G. Van Harten, "The Use of Quantitative Methods to Examine Possible Bias in Investment Arbitration" and "Reply" [to Franck, Garbin, and Perkins] in the Yearbook on International Investment Law & Policy (2011)' (2011) All Papers, Paper 33.

6 R Vernon, *Sovereignty at Bay* (Basic Books 1971).

ISDS provides a means for multinational corporations (and not domestic corporations) to demand compensation for government policies that they deem unlawful. The trends discussed here suggest that states have faced and will continue to face demands for compensation from a variety of ISDS users. Uncertainty over likely sources of arbitration raises the costs of regulation for states, as any of a variety of policies could trigger a claim from somewhere in the economy. Because investment treaties protect investors against both direct and indirect forms of expropriation, a central worry is that states' policy choices might inadvertently violate foreign investors' property rights. This worry motivates those who seek adjustments or an overhaul of the *de facto* regime.<sup>7</sup> On the other hand, the variation discussed here suggests that ISDS provides legal options to investors big and small, allowing them legal institutions (but not guaranteed wins) outside of potentially biased host state institutions—exactly as intended. Along these lines, Schultz and Dupont argue that ISDS is moving away from a 'neo-colonial instrument' into one that today 'appears . . . to promote the rule of law'.<sup>8</sup> In short, those both pessimistic and optimistic about ISDS may find fodder for their positions in the data examined here.

In this article, I first specify 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 and the politics of foreign investment.

## 2. DATA COLLECTION METHODS

The unit of analysis here is a publicly disclosed international investment arbitration filed by a foreign investor against a sovereign state.<sup>9</sup> From a political science point of view, we know that filing matters. For example, states that get filed against get less foreign direct investment in the future,<sup>10</sup> and states that get filed against can face penalties in sovereign bond markets.<sup>11</sup> These results hold irrespective of the legal basis of the arbitration. As such, the data here include all investor–state disputes that are formalized in public international tribunals, whether triggered by an investment treaty, by contractual clauses, by host state law or otherwise. While legal distinctions are important in answering other questions, here I focus on political implications of the fact that these are all instances in which investors formally demand compensation from sovereign states.

This article draws on data collected from many sources. The first key source is the record of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). Since its charter in 1965, ICSID has been the most public venue to host ISDS. However, the institution's arbitration tribunal was used

7 For example, BA Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66(1) *World Politics* 12.

8 Schultz and Dupont (n 5) 1150.

9 Therefore, the data exclude instances where investors only declare their intent to file.

10 T Allee and C Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65(3) *International Organization* 401; RL Wellhausen, 'Investor-State Disputes: When Can Governments Break Contracts?' (2015) 59(2) *Journal of Conflict Resolution* 239.

11 RL Wellhausen, 'Bondholders v. Direct Investors? Competing Responses to Expropriation' (2015) 59(4) *International Studies Quarterly* 750.

only 25 times until the 1990s. Statistics here exclude these early arbitrations, but trends are robust to their inclusion.<sup>12</sup> 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 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 and domestic law with an international investment arbitration provision) allows investors to bring cases under rules put together by the United Nations Commission on International Trade Law (UNCITRAL).<sup>13</sup> Arbitrations facilitated by UNCITRAL rules may be more or less private.<sup>14</sup> Some arbitrations are self-consciously made public, whereas others have been made public through the efforts of investigative journalists. This database includes 214 public UNCITRAL-rules arbitrations filed from 1990 through 2014.<sup>15</sup> Sources for these data are varied. One key source is Andrew Newcombe's Investment Treaty Arbitration Law archives, which collects and distributes publicly available court rulings.<sup>16</sup> Another crucial source is *IARReporter*, a venture by Luke Eric Peterson that focuses its efforts on investigative journalism around investment arbitration.<sup>17</sup> Other sources include the United Nations Conference on Trade and Development (UNCTAD) Database of Investor-State Dispute Settlement,<sup>18</sup> *Global Arbitration Review*,<sup>19</sup> Todd Weiler's North American Free Trade Agreement (NAFTA) Claims database,<sup>20</sup> and local and secondary journalism, accessed through systematic searches of Factiva and LexisNexis. Altogether, we are confident that the database includes non-ICSID arbitrations that are public enough to make it into the international and/or domestic press. All data are coded based on information available on 31 December 2014.<sup>21</sup>

How much the data undercount the true population of arbitrations can only be guessed at.<sup>22</sup> Because I cannot plausibly assume that missing data are random, I cannot be confident that the characteristics of observed arbitrations discussed here match trends in unobserved arbitrations. But, to the extent that it is trends in

12 For a consideration of the special characteristics of these early arbitrations, see Schultz and Dupont (n 5).

13 T Allee and C Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions' (2010) 54(1) *International Studies Quarterly* 1.

14 New UNCITRAL 'Rules on Transparency in Treaty-based Investor-State Arbitration' are effective as of 1 April 2014.

15 This excludes one known arbitration brought against Ghana in 1988.

16 <[www.italaw.com](http://www.italaw.com)>.

17 <[www.iareporter.com](http://www.iareporter.com)>.

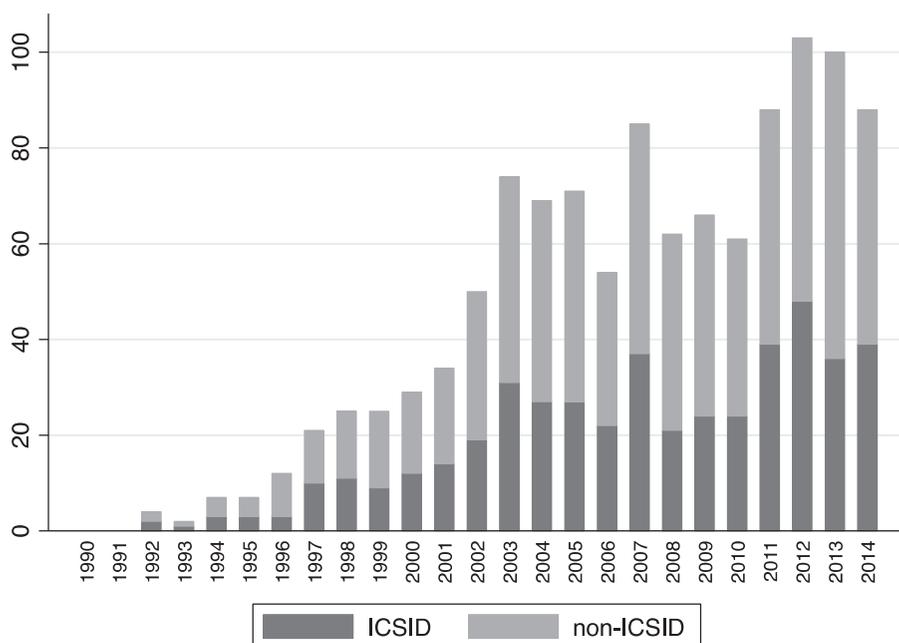
18 <[unctad.org/en/Pages/DIAE/ISDS.aspx](http://unctad.org/en/Pages/DIAE/ISDS.aspx)>.

19 <[globalarbitrationreview.com](http://globalarbitrationreview.com)>.

20 <[naftaclaims.com](http://naftaclaims.com)>.

21 See the [codebook](#) accompanying this article's data set for more information.

22 Schultz and Dupont guess that their sample of 541 arbitrations from 1972 to 2010 is missing less than 10% of the population of claims: Schultz and Dupont (n 5) 1150.



**Figure 1.** Annual Count of Publicly Known ISDS Filings, by Venue (1990–2014)

observed arbitrations that drive both state behaviour and popular politics around ISDS, an analysis of public arbitrations is in itself useful if not fully illustrative of ISDS as a whole.

Figure 1 documents the increasing use of ISDS over time, whether at ICSID or other venues. Over the whole time period, approximately 68% of cases were filed at ICSID and the remainder filed elsewhere.<sup>23</sup> The general increase in filings tracks with the explosion of investment treaties since the 1990s.<sup>24</sup> 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 including NAFTA and the TPP, include investment protection chapters. Investors are invoking more and more of the arbitration provisions of these treaties as knowledge of ISDS and the investors' experience with that increases.<sup>25</sup>

23 This is somewhat lower than Franck, which finds that 79% of cases with awards as of 2006 were filed at ICSID and the remainder elsewhere: Franck (n 5) 39.

24 Allee and Peinhardt argue that IIAs, especially those with strong arbitration provisions, spread due to pressure from capital-exporting states. T Allee and C Peinhardt, 'Evaluating Three Explanations for the Design of Bilateral Investment Treaties' (2014) 66(1) *World Politics* 47. For political implications of variation in the speed of investment treaty ratification, see Haftel and Thompson (n 2).

25 A Kaushal, 'Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime' (2009) 50(2) *Harvard International Law Journal* 491. S Jandhyala, WJ Henisz and ED Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55(6) *Journal of Conflict Resolution* 1047.

**Table 1.** ISDS Arbitration Filings by Industry (1990–2014)

Industry	Filings ( <i>n</i> )	Filings (%)
Agriculture	35	5.2
Finance and banking	43	6.4
Manufacturing	89	13.2
Mining	57	8.4
Oil and gas	102	15.1
Real estate	27	4.0
Services	120	17.8
Telecommunications	40	5.9
Utilities	153	22.6
<i>Unknown</i>	10	1.5

### 3. ARBITRATION FILING

Public investment 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 such as diplomatic pressure or collective action with other foreign investors to resolve its dispute with the state.<sup>26</sup> A foreign investor may threaten arbitration and induce settlement without needing to file. An investor might file confidentially. An investor may ‘free ride’ on other firms’ pursuit of compensation through arbitration in hopes that the state will be pushed to change policies in ways favourable 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 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 state. This is different, for example, from the World Trade Organization (WTO) where only the home state has standing to file on behalf of its aggrieved firms. 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 a public investment 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. ISDS also incurs legal costs and opportunity costs for investors that devote time and resources to the pursuit of arbitration.<sup>27</sup> 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 disputes that investors choose to file, the kinds of investors that file and the kinds of states that are respondents? Here, I review trends by (i) investor industry, (ii) investor national origins and (iii) respondent state.

26 RL Wellhausen, *The Shield of Nationality: When Governments Break Contracts with Foreign Firms* (CUP 2015).

27 See Franck for a consideration of arbitration costs. SD Franck, ‘Rationalizing Costs in Investment Treaty Arbitration’ (2011) 88(4) *Washington University Law Review* 769.

### A. Trends by Industry of the Filing Investor (Claimant)

Industry data fall into nine industry categories, arrived at endogenously by examining the kinds of investors that have filed for ISDS through the year 2014. Table 1 lists the categories, the number of filings and the percentage of findings accounted for by each industry.<sup>28</sup>

Most commonly, foreign investors in utilities industries file for investment treaty arbitration, accounting for 153 filings or 23% 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 waste water management have also filed a large number of claims. Much of the foreign direct investment 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.<sup>29</sup> It is perhaps not surprising that this push, which led a great number of foreign investors to enter into contractual relationships directly with host states, 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.<sup>30</sup>

Scholars of political risk have long associated ‘immobile industries’ with higher potential state interference in foreign-owned property. As an investor cannot move an oil well, post-investment the investor becomes more vulnerable to changed treatment by the state as its pre-investment bargain ‘obsolesces’.<sup>31</sup> The ‘obsolescing bargain’ logic matches with the high number of arbitration filings in oil and gas (15%) as well as filings in mining, agriculture and real estate (collectively 18%).

However, services—a set of industries with traditionally more mobile assets—account for a large number of investment arbitrations (18%). Investors in a wide variety of services industries have filed for arbitration: tourism, aviation, broadcasting and media, gaming, importers/exporters, maritime services, retail and more. Investors in telecommunications services (especially those using state-provided mobile phone licenses) have also filed a large number of arbitrations. So too have investors in finance and banking. Additionally, the many filings in manufacturing industries (13%) reinforces the notion that asset immobility does not fully explain which investors are likely to feel sufficiently aggrieved to file for investment arbitration. Manufacturing industry arbitrations have been filed with regard to products as diverse as cement, textiles, steel, cigarettes, food products, chemicals and machinery. In short, investors from across the economy are accessing ISDS.

### B. Trends by National Origin of the Filing Investor (Claimant)

Trends in filing investors’ national origin reflect political and economic realities that shape states’ potential exposure to ISDS.<sup>32</sup> Coding an investor’s home state draws

28 In 10 cases, we are unable to code investor industry.

29 AE Post, *Foreign and Domestic Investment in Argentina: The Politics of Privatized Infrastructure* (CUP 2014).

30 *ibid.* Though the coding is somewhat different, Franck finds that some 20% of 82 cases with a public award by 2006 are in utilities industries, not including energy: Franck (n 5).

31 Vernon (n 6). SJ Kobrin, ‘Testing the bargaining hypothesis in the manufacturing sector in developing countries’ (1987) *International Organization* 41(4) 609.

32 Wellhausen (n 26). C Schreuer, ‘Nationality of Investors: Legitimate Restrictions v. Business Interests’ (2009) *ICSID Review* 521.

**Table 2.** Top 15 Home States for ISDS Filings (1990–2014)

Home state	Filings ( <i>n</i> )	Arbitrations (%)
United States	151	22.3
The Netherlands	69	10.2
UK	53	7.8
France	46	6.8
Germany	45	6.7
Canada	40	5.9
Spain	35	5.2
Italy	32	4.7
Belgium and Luxembourg	29	4.3
Switzerland	19	2.8
Turkey	18	2.7
Cyprus	15	2.2
Greece	13	1.9
Austria	12	1.8
Russia	12	1.8
<i>Total</i>		87.1

Notes: Breaking arbitrations up by national origins results in 728 observations of ISDS filings, in 676 arbitrations. Multiple nationalities of investors participated in 43 arbitrations.

on several different sources. First, if the treaty that facilitates the arbitration is state-specific, as when treaties are bilateral, then we code investor national origin based on the treaty invoked. This accounts for the vast majority of cases. However, some treaties are accessible to investors of several national origins, such as the Energy Charter Treaty.<sup>33</sup> In the case that a multilateral treaty is invoked and nationality is not obvious from publicly available documents, we code national origin by the state in which the claimant is incorporated. We also code based on incorporation if an arbitration is based on contractual access to ISDS.<sup>34</sup> Now, incorporation is not always the nationality-determining criterion in an investment treaty. For example, the passport of the CEO might be consequential under a certain treaty. But from a political point of view, incorporation impacts popular understanding of an investor's nationality.<sup>35</sup> Thus, the data rely on incorporation in lieu of a legal measure when arbitrations are less transparent.<sup>36</sup>

In the data, investors from 73 different home countries have filed for ISDS.<sup>37</sup> Despite this great variety, investors from the top 15 states are present in 87% of arbitrations. Note that, in 43 instances, investors from more than one home state were

33 The Energy Charter Treaty was the sole triggering treaty in 37 instances.

34 ICSID reports that ISDS arose from a contract with the host state in 57 instances.

35 For evidence on the importance of incorporation in investor–state disputes in Ukraine, Romania and Moldova, see Wellhausen (n 23).

36 In two cases, we are unable to assign a national origin.

37 In her study of 82 arbitrations with awards as of 2006, Franck found that investors originated from 23 countries: Franck (n 5) 27.

claimants in a given arbitration.<sup>38</sup> Table 2 reports the top 15 home states. Far and away, US investors are responsible for the most public investment arbitration filings. The Netherlands is second. UK investors have filed many arbitrations, as have investors from France, Germany, Canada, Spain and Italy. Twenty-nine have been filed under joint Belgium and Luxembourg investment treaties. Investors from Switzerland, Turkey, Cyprus, Greece, Austria and Russia have filed 10 or more arbitrations.

A growing worry is that the many overlapping ISDS protections available in the 3000 odd international investment treaties give multinational corporations the ability to ‘treaty shop’.<sup>39</sup> 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.<sup>40</sup> This phenomenon is largely responsible for the 15 known filings by Cypriot investors.

The Netherlands is the second most popular home state in the data. In fact, it has grown notorious as a site for ‘treaty shopping’. The state is known as a tax haven, at least by some definitions.<sup>41</sup> Many multinational corporations—including many of the world’s largest—happen to have some Dutch ownership. The Netherlands also happens to have 101 BITs in force, many of which have particularly broad and strong ISDS provisions.<sup>42</sup> These two facts coincide to provide context as to why 69 filings have been made by Dutch entities. Many of the investors filing from the Netherlands may be legally considered Dutch under the relevant treaties and at the same time be corporate citizens in one or several other states under other investment treaties. Investors filing from the Netherlands might prefer the Dutch protections or might not have access to ISDS in the other states in which they may have origins (whether in a legal or only a cultural sense).

Politics around ISDS often pick up on complex nationality issues. States often argue that an investor is not sufficiently foreign, or sufficiently Dutch, to file. Is a Dutch mailbox enough? How old does the Dutch mailbox need to be? The complex national profiles of Dutch filers in particular have not gone unnoticed by respondent states. In fact, Venezuela, South Africa and Indonesia have specifically withdrawn from their BITs with the Netherlands, citing treaty shopping concerns. Nonetheless, it is clear that in international business the trend is in the direction of ever more global ownership of multinational corporations. We should expect investors to continue

38 This is an undercount of multiple home arbitrations. First, because Belgium and Luxembourg have signed joint investment treaties, the data treat them as a single home country. Secondly, it is also possible that parent companies, in one state, exert influence over subsidiaries that file from a second state against a third state.

39 For normative arguments about ‘treaty shopping’ in ISDS, see J Lee, ‘Resolving Concerns of Treaty Shopping in International Investment Arbitration’ (2015) 6 *Journal of International Dispute Settlement* 355.

40 Wellhausen (n 26).

41 R Palan, R Murphy and C Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell Univ Press 2013).

42 As of 31 December 2014. UNCTAD <<http://investmentpolicyhub.unctad.org/IIA>>.

**Table 3.** Top 20 Host State Respondents in ISDS Arbitration (1990–2014)

Host state	Filings ( <i>n</i> )	Host state	Filings ( <i>n</i> )
Argentina	57	Peru	14
Venezuela	39	Kazakhstan	14
Czech Republic	28	Hungary	13
Mexico	26	Slovakia	12
Ecuador	24	Spain	12
Canada	23	India	12
Egypt	23	Russia	11
Poland	17	Romania	11
Ukraine	16	Turkey	10
United States	16	Costa Rica	10

to use a multiplicity of national origins to file arbitrations under the friendliest available rules.<sup>43</sup>

### C. Trends by State Sued (Respondent)

A growing literature looks at how host state political and economic characteristics shape the determinants of investor–state disputes, sometimes proxied for by arbitration filings.<sup>44</sup> This section steps back from that literature and simply counts: 124 states have been sued via ISDS from 1990 to 2014.<sup>45</sup> These states span the world.<sup>46</sup> Figure 2 summarizes filings by world region. Some 39 different European states (including those of the former Soviet Union) have been filed against, as well as 24 different states in North and South America. In sub-Saharan Africa, 32 states have been filed against, 17 states in Asia and 11 states in the Middle East and North Africa.

Table 3 presents the 20 countries that have been respondents 10 or more times. Argentina and Venezuela top the list, but states as diverse as the Czech Republic, Egypt, Kazakhstan, Turkey and Costa Rica have seen significant numbers of filings against them. Canada and the United States are on the list, too, thanks to ISDS provisions in Chapter 11 of NAFTA.

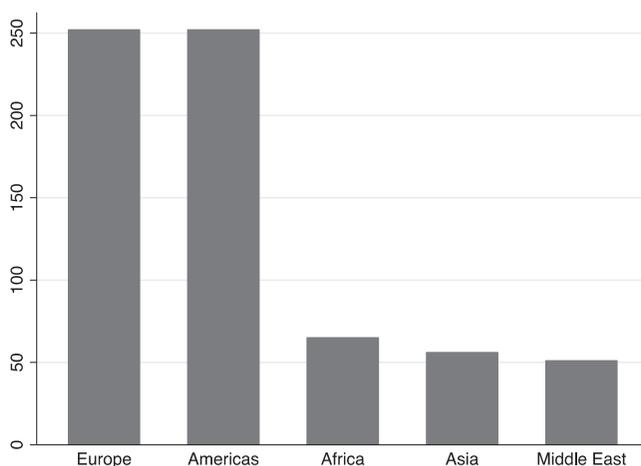
There are a few key takeaways from these summary statistics. First, although filings have been concentrated in some regions and in some states, most states around the world have been exposed to ISDS. Thus, the one-time uncertainty around and

43 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.

44 See Simmons (n 7); RL Wellhausen (n 10); L Johns and RL Wellhausen, 'Under One Roof: Supply Chains and the Protection of Foreign Investment' (2016) *American Political Science Review* (forthcoming); C Dupont, T Schultz, M Wahl and others, 'Types of Political Risk Leading to Investment Arbitrations in the Oil and Gas Sector' (2015) *Journal of World Energy Law and Business* (forthcoming).

45 Belgium and Luxembourg regularly sign joint investment treaty protections, but this count includes them separately. The former Yugoslavia/Serbia is counted as one state and Montenegro/Serbia is counted as another state.

46 In her study of 82 cases with awards as of 2006, Franck identified 37 host country respondents, including developed and developing countries: Franck (n 5) 31.



**Figure 2.** ISDS Respondents by Host State Region (1990–2014)

perhaps ignorance of ISDS on the part of states is less prevalent today.<sup>47</sup> Second, while very poor states have been respondents, development level alone is not a good predictor of the distribution of filings. For example, none of the top 20 respondents are classified by the World Bank as low-income economies (US\$1045 per capita or less). Only Egypt, Ukraine and India are lower-middle-income economies (US\$1046–US\$4125). A cursory read of the top regions and states suggest roles for the strain of economic transition, economic nationalism, and financial and political crisis. Again, as emphasized earlier, arbitration filings are not a satisfactory measure of the presence of investor–state disputes, so one must move with caution when suggesting trends without positing a theory of why investors choose public arbitration.<sup>48</sup> Rather, I simply note that ISDS—and the phenomenon of states taking actions that trigger investors to look to ISDS—is widespread.

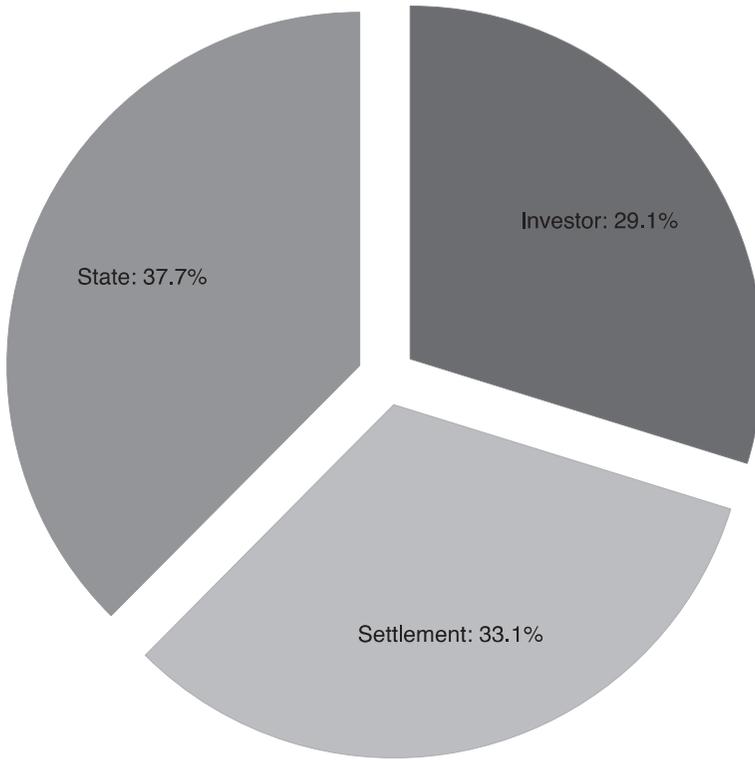
Ten Organisation for Economic Co-operation and Development (OECD) states have been filed against 62 times, accounting for 9% of arbitrations.<sup>49</sup> In addition to filings against Canada and United States under NAFTA, intra-European Union (EU) ISDS has begun to make Western European states more susceptible.<sup>50</sup> The trend of intra-EU ISDS, among both older and newer EU members, is shaping the EU’s position on Member State versus supranational investment treaties. The European Commission, for example, has argued that intra-EU treaties should be terminated.

47 LNS Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (CUP 2015).

48 This may help to explain why Dupont and Schultz do not find a clear link between GDP growth and arbitration filings. C Dupont and T Schultz, ‘Do Hard Economic Times Lead to International Legal Disputes? The Case of Investment Arbitration’ (2013) 1(4) *Swiss Political Science Review* 564.

49 This count excludes post-1994 OECD states. In addition to Canada, United States and Spain, other OECD states include: Germany (3), France (2), Greece (2), and Austria, UK, Italy and Portugal (1 each).

50 Schultz and Dupont point out that more developed–developed country arbitrations have taken place since the mid-2000s: Schultz and Dupont (n 5) 1156.



**Figure 3.** Outcomes of Concluded Arbitrations (1990–2014)

Italy has been the ‘model citizen’ in doing so, and the Czech Republic has also been proactive in this regard.<sup>51</sup> 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. If and when it is ratified, the TPP will increase the availability of ISDS for foreign investors in the United States as well as foreign investors in Japan, which to date has not been a respondent in ISDS. With more ISDS treaty commitments between countries in the global ‘North’, the number of filings against developed countries will continue to rise.

#### 4. ARBITRATION OUTCOMES

How do claimants and respondents fare in ISDS? Here, I review data on (i) overall trends in outcomes, (ii) outcomes by industry, (iii) outcomes by claimant national origin and (iv) outcomes by respondent state characteristics. I also discuss trends in the growing use of annulment processes for ICSID cases. Note that again, I present trends with a political science mindset. Trends do not allow us to discern whether or

51 J Hepburn and L Peterson, ‘Italy is the EU’s Model Citizen’ (2 June 2015) IARReporter.

not any particular outcome was legally justified. Trends, however, are a key source of information that may drive policy and politics around ISDS.

### A. Quantities Overall

Of the 676 public investment arbitrations in the data, 211 are pending as of the end of 2014. Settlements or rulings have been reached in 461.<sup>52</sup> We code that a case is settled if the case was discontinued, if there is public information that the parties reached an agreement and withdrew the case before a final ruling, or if the ruling itself contains a settlement by the parties. We also code as settled arbitrations that are dormant, when no legal action or media reporting has taken place for five years or more. We count that the investor wins if the arbitration tribunal reaches a final ruling and determines that the state was at fault. In such instances, we code that an investor wins regardless of the size of the award.<sup>53</sup> 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 461 concluded arbitrations, the parties reached a settlement in 153, the investor won in 134, and the state won in 174. [Figure 3](#) presents this breakdown.<sup>54</sup>

What do these general trends mean for investors and states? Ambiguity over interpreting settlements can make these data support different arguments about which actors generally dominate ISDS. States are likely paying some sort of compensation or changing their policies in most if not all of settled and investor-win outcomes, or 62% of the time. Because of this, investors (and their lawyers) likely look at both settlements and investor-win outcomes as 'wins'. On the other hand, a rational approach to state behaviour would say that states settle when the cost of settlement is less than the expected cost of arbitration and a potential award.<sup>55</sup> Thus, states may interpret settlements as 'wins' for them, too, such that an argument could be made that states win from 38% to 71% of the time.

### B. Outcome Trends by Industry

Are there certain kinds of investors against which states have a better track record? Returning to arguments about industry characteristics, investors in immobile, 'obsolescing bargain' industries are thought to have struck less durable deals with the state. Perhaps obsolescence proves too much of a temptation in these instances, making states more willing to act outside of their legal commitments? This conjecture suggests that states should settle and lose more often when investors' assets are immobile. The data include 248 concluded arbitrations brought by investors in immobile

52 In four cases, it is unknown whether a ruling has been made or a settlement agreed upon.

53 Schultz and Dupont code investor wins based on the percentage of claims awarded: Schultz and Dupont (n 5) 1158–60. From a political science point of view, it is not clear which actors if any would judge the state's behaviour on such a partial basis.

54 cf to Franck, which looks only at arbitral awards (including settlements codified in an award). She finds that investors won 38% of the time and that the state won 58% of the time: Franck (n 5) 50.

55 From a legal point of view, Schultz and Dupont point out that more settlements suggest weaker developments in international rule of law: Schultz and Dupont (n 5) 1164.

**Table 4.** Annulment at ICSID (1990–2014)

Winner	Annulment filed	Overtaken	Upheld	Discontinued	<i>Pending</i>
Investor	42	2	18	5	17
State	30	3	10	11	6

industries (utilities, oil and gas, mining, agriculture and real estate). Of these, the state settled 36% of the time and won 36% of the time. There are 209 concluded arbitrations in mobile industries (finance, manufacturing, services and telecommunications). Of these, the state settled 30% of the time and won 41% of the time. At the margin, it seems that states do settle and lose more when arbitrations concern immobile investments. International business and political economy scholars would do well to extend bargaining models to better theorize these trends in ISDS.

### C. Outcome Trends by National Origin of the Filer (Claimant)

Recall that, across the data, the respondent state wins 38% of the time and settles 33% of the time. The data include 118 concluded arbitrations in which a US investor was a claimant. When US claimants were involved, the respondent state wins 36% of the time and settles 36% of the time. These proportions are roughly similar for concluded arbitrations involving British investors (state wins 34% of the time and settlement 34% of the time). It does not appear that these prominent users of ISDS are having differential levels of success.

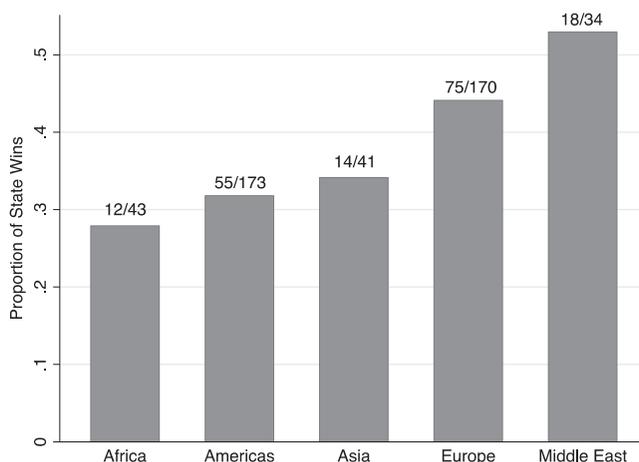
What of home states that may be providing resources to ‘treaty shoppers’? Forty-nine arbitrations have concluded in which a Dutch entity was a claimant. Of these, the state won 29% of the time—lower than aggregate trends. The parties settled 55% of the time—considerably higher than aggregate trends. Given that these outcomes are characteristic not of Dutch investors but of ‘treaty shopping’ investors, it is worth exploring what about ‘treaty shopping’ induces states and investors to settle more often. Here is a puzzle in need of explanation.

### D. Outcome Trends by Country Sued (Respondent)

Figure 4 reports state win rates by the respondent’s world region. Compared with the aggregate state win rate of 38%, states in the Middle East and North Africa as well as Europe (and the former Soviet Union) win significantly more often. States in Asia are around the mean, and states in North and South America and sub-Saharan Africa win less often. Note however the very different denominators by region. Not only the rate but also the sheer quantity of non-wins (whether losses or settlements) may in itself play a political role in a region. Again, from a political science point of view, one can understand how both the proportion and the quantity of losses may affect politics about ISDS in, say, Latin America, independent of the quality of the legal arguments involved.

Thirty-three arbitrations against OECD states had concluded by the end of 2014.<sup>56</sup> Of these, the state won 55% of the time. This high win rate for wealthy

56 These include cases against Canada, United States, Germany, Spain, France and Portugal. Post-1994 OECD members are not considered here.



**Figure 4.** State Wins in ISDS, by Region of Respondent (1990–2014)

OECD states may be comforting to those that worry about the chilling effect ISDS may have on regulatory decision-making in the OECD.<sup>57</sup> Conversely, the fact that even OECD states settle or lose 45% of the time is notable. US policymakers tout the United States’ perfect win rate in arbitrations that have gone to ruling against it, attributing that record to ‘the strong safeguards in the US approach’.<sup>58</sup> Nonetheless, the fact that peer democracies, with similarly well-developed legal and governing institutions, sometimes lose should give the United States pause. And the fact that peer states settle 33% of the time—again, an outcome that investors can spin as a ‘win’—suggests that strong legal arguments may not always outweigh the exigencies of avoiding costly litigation.

### E. Annulment at ICSID

To date, there is no appeals process in ISDS.<sup>59</sup> For arbitrations heard at ICSID, a party can file for annulment.<sup>60</sup> 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

57 In a subsample of 1998–2010, Schultz and Dupont find that high-income countries win 1.7 times more often than low-income countries: Schultz and Dupont (n 5) 1166–67. Van Harten finds evidence of proclaimant and pro-capital-exporting country bias on the part of arbitrators in a sample of 140 publicly available awards made through mid-2010. G Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50(1) *Osgoode Hall Law Journal* 211.

58 J Zients, ‘Investor-State Dispute Settlement (ISDS) Questions and Answers’ (26 February 2015) <[www.whitehouse.gov](http://www.whitehouse.gov)>.

59 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.

60 UNCITRAL-enabled awards can be amended in the domestic court system at the seat of arbitration.

the tribunal's constitution or procedure) or an error due to omission of reasoning in a final award (but not an error in reasoning itself).<sup>61</sup> As such, annulment is not a substitute for an appeal although, surely, some parties filing for annulment hope for it to be popularly interpreted as such.

As of the end of 2014, ICSID annulment processes had been filed with regard to 72 initial rulings. Altogether, 5 rulings have been overturned either fully or partially and 28 rulings have been upheld.<sup>62</sup> In 16 cases, the parties discontinued the proceedings. Twenty-three were pending (see Table 4).

In 25 of the arbitrations with completed annulment proceedings, the investor (claimant) had won an award in the initial ruling. The original ruling was overturned 2 times and upheld 18 times, with parties discontinuing the proceedings 5 times. Put differently, the state has been successful in annulment 8% of the time.<sup>63</sup>

In 24 of the arbitrations with completed 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 to get the award annulled to make it legally 'disappear', allowing the investor to try again.<sup>64</sup> When the investor has filed for annulment, the ruling was overturned 3 times, upheld 10 times and discontinued 11 times. Put differently, the investor has been successful in annulment 13% of the time.

From these trends, it is difficult to discern a clear pro- or anti-state bias in annulment proceedings at ICSID. If anything, annulment trends make clear how constrained the criteria for annulment are, whichever party files for it.

## 5. 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: (i) the amount of compensation sought, (ii) the amount of compensation awarded, (iii) percentages of claims fulfilled and (iv) notable large awards.

### A. Amount of Compensation Sought

We have public information on the amount of compensation sought by the investor (claimant) in 325 instances. This information comes from court documents or, where unavailable, news sources in which a representative of the investor provides

61 ICSID Convention, Regulations, and Rules, ch VII Interpretation, Revision and Annulment of the Award, r 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. ch VII, r 50, (1)(c)(ii).

62 Trends presented in previous sections are based on initial rulings and are robust to amendment of the few changed outcomes.

63 Simmons points out that, particularly in recent years, annulments have been filed not only by autocratic but also by democratic states: Simmons (n 7) 38–39. Simmons also argues that annulments are a way for states 'to signal that an award is not acceptable,' raising the possibility that filing for annulment is 'a symbolic action to express growing frustration with the regime' (38).

64 I thank Thomas Schultz for this point.

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 to billions of US dollars. In 50% of observed claims, the compensation demanded is US\$120 million or less.<sup>65</sup> The mean compensation demanded is US\$884 million. This is pulled up significantly by the 45 claims in which the investor sought US\$1 billion or more in compensation.

### B. Amount of Compensation Won

Of those proceedings in which an investor won the ruling (134), public information on 119 awards is available; 50% of awards are below US\$16 million.<sup>66</sup> Large awards again pull up the mean award, to US\$508 million. There are five proceedings with awards of US\$1 billion or more.

### C. Wins v Claims

In 86 instances in which the investor won, we know both the award sought and the award won. Of these, in 50% of rulings, the investor won less than 33% of its original claim. In the mean ruling, the investor won 40% of its claim. In only six instances did the investor win the full amount demanded or greater.<sup>67</sup>

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* ISDS regime, highlighting the limited amounts of compensation being awarded per initial demands might help those interested in the regime's longevity.

### D. Notable Large Awards

States have been found liable for US\$1 billion or more in compensation in five awards, all taking place since 2012. In 2012, Occidental Petroleum won the biggest award to date—an award that generated significant press and for which the respondent Ecuador filed for annulment. In November 2015, Ecuador won partial annulment of the award, reducing the award of US\$1.77 billion (including interest and fees) by approximately US\$700 million.<sup>68</sup> In 2014, Venezuela was ruled to owe the oil major Mobil US\$1.6 billion, in a proceeding that Mobil (commonly thought of as a US

65 cf with Franck, which finds that in a sample of 44 arbitrations with available information and a public award by 2006, the mean compensation demanded was US\$343 million: Franck (n 5) 57–58.

66 In a sample of arbitrations with available awards by 2006, Franck finds that the mean award is US\$10 million: Franck (n 5) 59.

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

68 L Peterson, 'Ecuador Achieves Partial Annulment' (2 November 2015) IAREporter.

firm) filed as a Dutch investor under the Netherlands–Venezuela BIT.<sup>69</sup> Like Ecuador, Venezuela 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\$1.9 billion, US\$8.2 billion and US\$40 billion.<sup>70</sup> 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.

Enforcement proceedings have given rise to interesting stories, such as claimants attempting to seize state-owned planes or a warship in compensation. But in general, there has been a sense that enforcement of ISDS awards is aided by two mechanisms. First, investors have been able to leverage the deep international legal systems around enforcement, via the Washington Convention that established ICSID and the New York Convention that provides means to enforce international arbitral awards of any type. Second, respondent states want future investment, and there has been an expectation that states are willing to pay awards today in order to send positive signals to tomorrow's investors. Indeed, the hope of increasing credibility with future investors is at the core of why states have signed investment treaties.<sup>71</sup> 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 comply for (only) the payoff of an abstract future reputation.

## 6. CONCLUSIONS

This article has presented simple trends in ISDS to provide information pertinent to a number of questions, relevant to ISDS proponents and detractors alike. It uses a political science lens to do so.<sup>72</sup>

Who is suing, and who is getting sued? While investors in industries with 'immobile' assets, such as utilities and oil and gas, account for a great number of arbitrations, so too do investors in industries such as services and manufacturing. Investors from a great number of home states have filed arbitrations—though 'treaty shopping' is an issue. And the majority of states in the world have been respondents in ISDS. Who is winning? State-win, investor-win and settlement rates are such that both states and investors can find comfort. 'Treaty shopping' investors seem to settle

69 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.

70 *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.

71 For example, Simmons (n 7); Allee and Peinhardt (nn 10 and 24).

72 For an excellent example of the influence of political considerations on legal outcomes in ISDS and investment treaties, see A Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56(2) *Harvard International Law Journal* 353.

more often, and OECD states often win. But, in general, states tend to win more than one-third of the time and arbitrations tend to settle around one-third of the time. How much are investors winning? Certainly, investors have sought and won large, multibillion dollar awards, especially in recent years. But it appears investors are winning only 30–40% of their claims.

The clearest takeaway from this review of the data is 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. 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 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.

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