

# ISDS: A Fact- and Experience-Based Review

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## Outline

- Introduction
- Some brief historical remarks
- „Regulatory chill“
- Investment Protection in CETA
  - Pre- and Post-establishment
  - Fair and equitable treatment
  - Expropriation
- Why ISDS with Canada and USA?
- State Courts and ECJ Review of ISDS-Awards

### International Investment Protection - Some Basics -

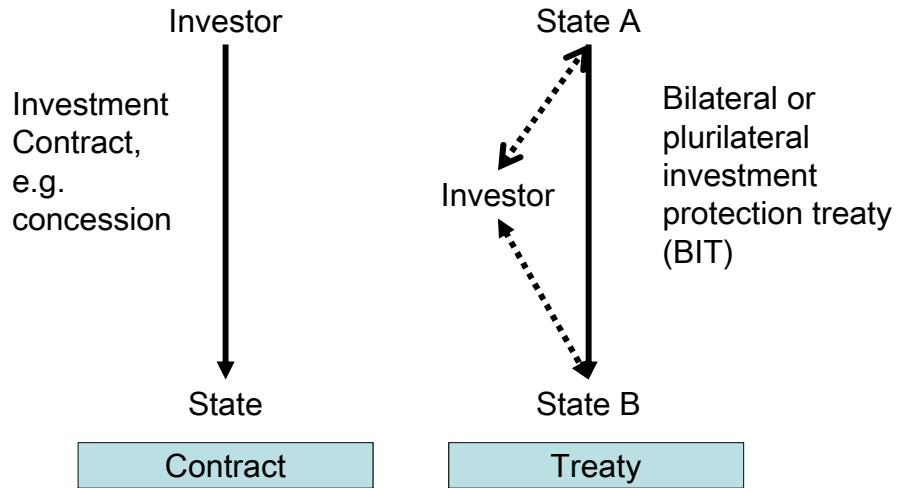
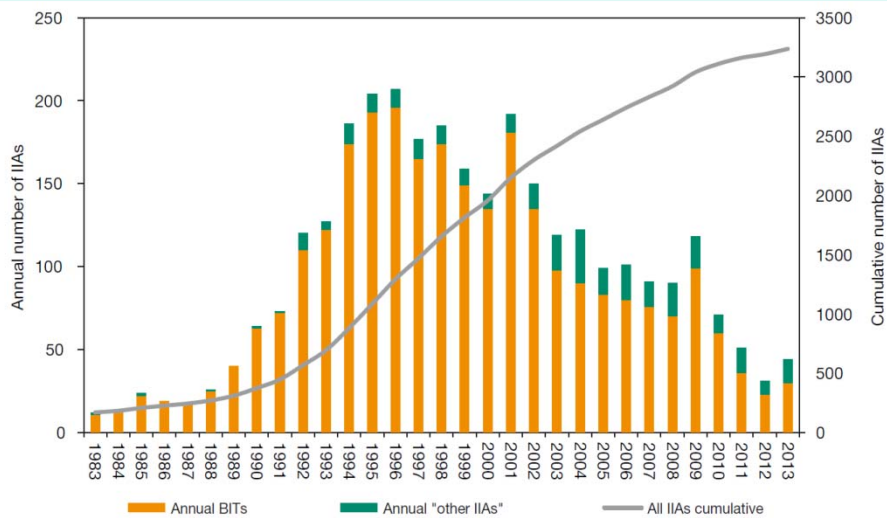
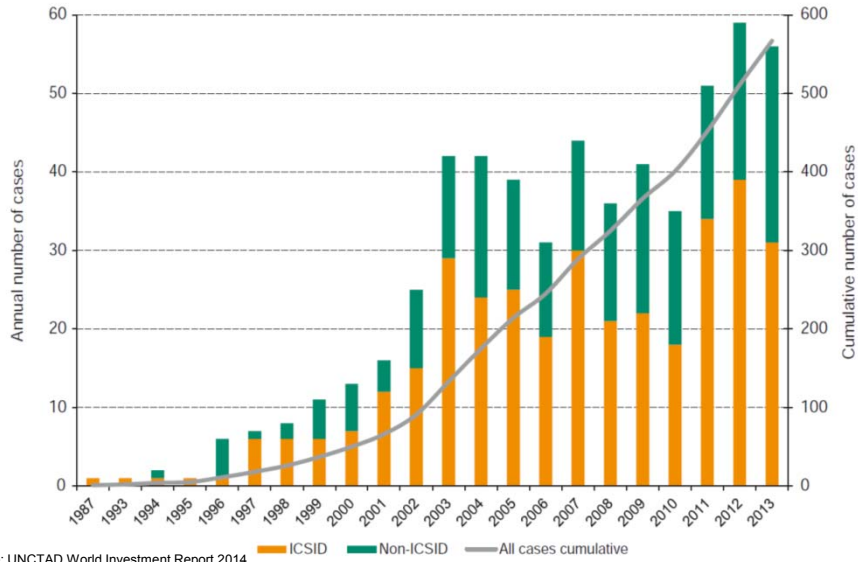


Figure III.8. Trends in IIAs signed, 1983–2013



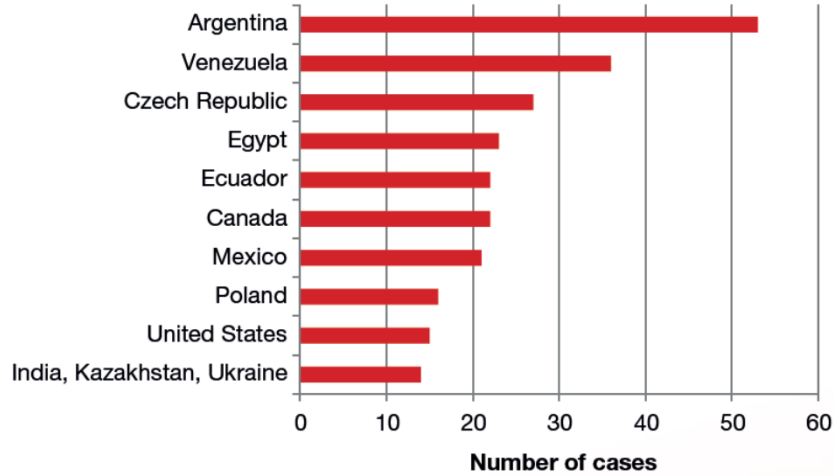
Source: UNCTAD World Investment Report 2014

Figure III.13. Known ISDS cases, 1987–2013



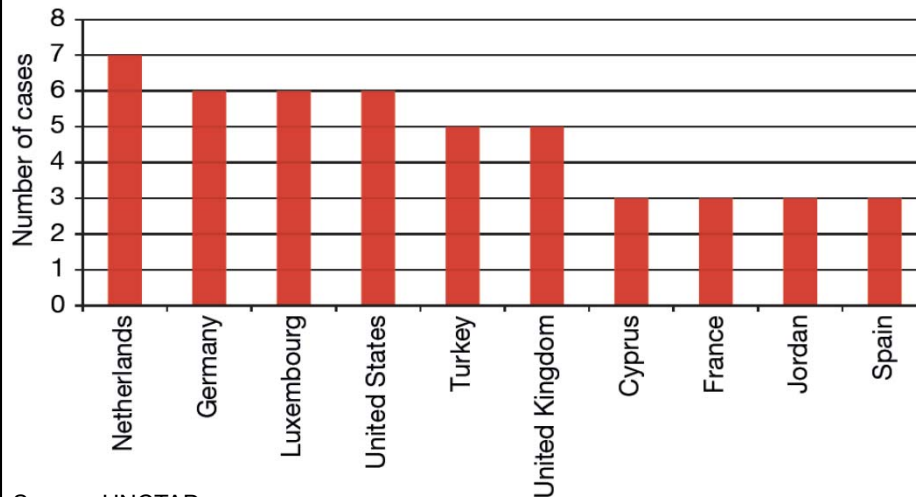
Source: UNCTAD World Investment Report 2014

Figure 8. Most frequent respondent States (total as of end 2013)



Source: UNCTAD

**Figure 4. Most frequent home States (2013)**



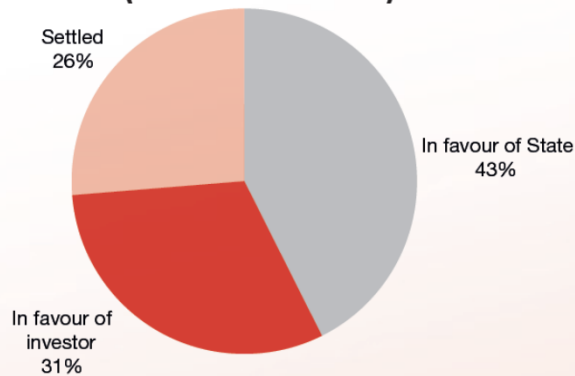
Source: UNCTAD

### ISDS History

- 25 November 1959 signing of first ever BIT Germany-Pakistan
- Thus, ISDS as instrument of „post-colonialism“?
- 1959 until end of 1960th
  - expropriation, non-discrimination, only State-State dispute settlement
- 1970th and 1980th
  - as above
  - first ISDS, but limited to amount of compensation in case of expropriation
- Beginning 1990th
  - comprehensive ISDS
- Since ca 2001
  - increasingly sustainability and public interest provisions in BITs
  - deep and comprehensive FTAs

2013 arbitral developments brought the **overall number of concluded cases** to 274.<sup>33</sup> Out of these, approximately 43 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 26 per cent of cases were settled (figure 12). In settled cases, the specific terms of settlement typically remain confidential.<sup>34</sup>

**Figure 12. Results of concluded cases (total as of end 2013)**



Source: UNCTAD

### NAFTA Cases

Claims Against CAN		Claims Against USA		Claims Against MEX	
Type		Type		Type	
Natural Resources	9	Natural Resources	7	Real Estate	6
Environment	6	Environment	2	Environment	4
Postal	2	Healthcare/Pharm	5	Agriculture/Food	4
Healthcare/Pharm	3	Agriculture/Food	1	Finance/Taxation	1
Agriculture/Food	4	State Court Decisions	2	Gambling	1
Energy	5	Procurement	1	Healthcare/Pharm	1
Other	5	Other	2	Other	2
Outcomes		Outcomes		Outcomes	
Against State	3	Against State	0	Against State	5
Settled	4	Settled	0	Settled	0
Dismissed	5	Dismissed	9	Dismissed	6
Withdrawn	6	Withdrawn	3	Withdrawn	0
Inactive	9	Inactive	4	Inactive	7
Pending	7	Pending	4	Pending	1
	34		20		19
Overall Trends					
Natural Resources	16	Against State	8		
Environment	12	Settled	4		
Healthcare/Pharm	9	Dismissed	20		
Agriculture/Food	9	Withdrawn	9		
Other	9	Inactive	20		
Real Estate	6	Pending	12		
Energy	5	TOTAL	73		
State Court Decisions	2				
Postal	2				
Procurement	1				
Finance/Taxation	1				
Gambling	1				
TOTAL	73				

## Policy Space und Regulatory Chill

- „Restriction of democratic rights of parliaments/ legislator because of ‚chilling effects‘ of actual or potential ISDS case“



**Table 1. Distribution of disputes as of September, 2013**

Source: ICSID.org. Claims sum to >100% due to rounding.

Government actor	All claims		Expropriation claims	
	Number	Percent	Number	Percent
Head of state or government	18	11	9	10
Ministry	60	37	33	37
<b>Total executive branch</b>	<b>78</b>	<b>48</b>	<b>42</b>	<b>47</b>
<b>Legislature</b>	<b>14</b>	<b>9</b>	<b>12</b>	<b>13</b>
Subnational	14	9	11	12
State-owned firm	19	12	7	8
Other agency	27	17	9	10
Court	12	7	8	9
<b>Total</b>	<b>163</b>		<b>89</b>	

## Policy Space und Regulatory Chill

- “The evidence yields two important insights for policymakers seeking to reduce risk for foreign investors. First, the most common actor associated with disputes is the executive.[4] Thus, reforms that limit the discretion of the executive to interfere with foreign investment are likely to reduce investor-state claims and, more generally, may reduce political risk.[5] Second, this prevalence of disputes originating from executive activity suggests that investor-state arbitration can serve as an additional external check on executive discretion, particularly where domestic checks are weak. Given the low rate of disputes involving legislative branch activity, arguments that investor-state arbitration may encroach on the legitimate prerogatives of domestic governments appear to be overstated. Instead, democratic legislatures should embrace investor-state arbitration as an additional check on executive branch misbehavior.”

Which host country government actors are most involved in disputes with foreign investors? By Jeremy Caddel and Nathan M. Jensen, Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment, No. 120, April 28, 2014

## Investment Protection in CETA

- Pre- and post-establishment
  - ISDS not applicable for pre-establishment
  - i.e. no ISDS enforcement of market access
  - Market access remains sovereign freedom of EU and MS (subject to WTO and CETA limitations)
- Fair and equitable treatment
  - Early tendency in arbitral practice of extensive interpretation
  - However, much more restrictive for several years already

## Investment Protection in CETA

- Fair and equitable treatment
  - US Model BIT 2012 Art. 5 (2)

„For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”

## Investment Protection in CETA

- Fair and equitable treatment
  - CETA Art. X.9

“A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

    - Denial of justice in criminal, civil or administrative proceedings;
    - Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
    - Manifest arbitrariness;
    - Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
    - Abusive treatment of investors, such as coercion, duress and harassment; or
    - A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.”



## Expropriation

- Problem: indirect expropriation
  - Determination

“indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.”

CETA Art. X.11 (1)
  - Jurisprudence of European Court of Human Rights

## Expropriation

- Problem: indirect expropriation
  - Limitations

“For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.”

CETA Art. X.11 (3)

## Why ISDS with Canada and USA?

- Long standing conflict of judicial systems US / EU
  - jury system; discovery vs data protection; “exorbitant” or “extraterritorial” jurisdiction; punitive and triple damages, etc.
- Loewen vs. USA (NAFTA Award 26 June 2003)
  - “By any standard of measurement, the trial involving O’Keefe and Loewen was a disgrace. By any standard of review, the tactics of O’Keefe’s lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.”
- See also, e.g., Mondev vs. USA (NAFTA 2002)
- Don’t forget the political dimension of equal treatment (China, etc.)

## State Courts and ECJ Review of ISDS-Awards

- EU not a party to ICSID (and will not become a party), thus always UNCITRAL, ICC, etc.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
  - Art. V (2)**
    - “Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
      - (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”
- ECJ, Case C-126/97, Eco Swiss [1999]:
  - basic principles of EU law as public policy

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