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DEMYSTIFYING INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

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EXECUTIVE SUMMARY

- Investor-State Dispute Settlement, a legal provision in Bilateral Investment Treaties (BITs) or other International Investment Agreements that gives investors a right to call for arbitration with a state, has recently become the centre of controversy in a debate over the Transatlantic Trade and Investment Partnership (TTIP). Critics argue that such a provision is either illegitimate, unnecessary, and/or does not have any positive influence on flows of Foreign Direct Investment (FDI). More radical critics argue that ISDS is a provision that allows big companies to sue governments when they have made democratic choices with negative consequences for companies.

- This study surveys the recent decade of ISDS activity. It concludes that the number of ISDS cases has continued to grow, and that the growth is concentrated to certain sectors with a high degree of government involvement or political patronage.

- Based on the ISDS data, it is clear that investors in the European Union are by far the most active users of ISDS. EU countries have many more BITs with ISDS than for instance the United States. EU investors represent more than half of the entire complaints filed at international investment tribunals in the past decade.

- ISDS cases are often settled in advance of a ruling. It is a mechanism to facilitate an ordered settlement of a dispute and represents a preference for settlements between the parties rather than tribunal rulings. Twice as many cases that end with a tribunal ruling are won by the state than the investor. The number of known ISDS cases in the past ten years that ended with a tribunal ruling in favour of the investor is no more than 16.

- The typical ISDS case is between a developed-country investor and a developing-country government. There is a correlation between the number of disputes and a legal system's capacity to facilitate dispute resolution, or the quality of the legal and regulatory regimes. There has been no ISDS case between the United States and an EU-15 country, but a handful of cases between a U.S. investor and the countries that joined the EU in the 2000s.

- Economic research gives support to the argument that investment-protection agreements help to promote FDI. The effect is unlikely to be strong because there are far more important determinants of FDI, such as investment market access.

- The choice of the EU to favour a new collective BIT with the United States or not is likely to have systemic consequences. If EU member states withdraw from their existing BITs, which is the logical conclusion from a good part of the criticism, the consequences are likely to be far stronger. The competitiveness of EU investors in third countries, especially in sectors with high government involvement, is likely to be damaged.

1. INTRODUCTION

Investor-State Dispute Settlement (ISDS) is a legal instrument in Bilateral Investment Treaties (BITs), or BIT-like bilateral and international agreements such as the Energy Charter Treaty, that grants investors the right to call for arbitration in the event they believe that a government has violated such an agreement. In contrast to a mechanism to resolve disputes between states, like the World Trade Organisation's dispute-settlement mechanism, it is not an instrument that "puts on trial" laws and regulations in a host country, with the consequence that a government has to change a law or a regulation in the event they lose a case. Nor do investment-protection agreements demand that a country fully transpose the general principles of such an agreement into national laws and regulations.

However, in the past months BITs have become the centre of controversy in Europe in the debate over the current negotiations for the so-called Transatlantic Trade and Investment Partnership (TTIP). It is not the first time that international investment agreements have provoked controversy. In the late 1990s, there was a big discussion over a new Multilateral Agreement on Investment (MAI), at the time negotiated in the OECD, and much of the criticism now follows the script of the critics back then. In the European Union, criticism has now come from both individual Member States and from deputies in the European Parliament. Several Non-Governmental Organisations (NGOs) have also voiced criticism.

It is somewhat difficult to give a distinct character of the criticism. One wing of the argument appears to entirely disapprove that states enter international agreements that constrain their flexibility to change policy in future. Another wing goes even further and claims that courts, including national courts, have no legitimate role in defending companies against democratic decisions by a government. These views are not challenging because they undermine ISDS – they are challenging because they refute constitutional democracy, the principle that subjects of the state have rights, including legal recourse to defend against state actions, and because they make it impossible for a government to enter an international binding agreement.

There are differences also between the softer critics. While some appear to disapprove in principle of investment protection, which BITs and ISDS are all about, others appear to argue that they may be necessary instruments in agreements with some countries, but not with others. The qualifying factor is the quality of the national legal system and the recourse that the legal system offers to settle disputes with host governments. There is also a wing of the argument that favours ISDS with all countries but that wants to reform BITs and provisions around ISDS with the view of limiting the use of ISDS.

Part of the debate now is also a reflection of a fraction between EU member states, and between some member states and the European Commission, following the entry of the Lisbon Treaty. These divisions have concerned what the Lisbon Treaty actually imposes- the transfer of Foreign Direct Investment (FDI) competence from Member States to the EU - and what the new Common Commercial Policy[1], including investment protection, implies for the legal standing of existing BITs that individual EU Member States have signed with other countries. While this debate has been fraught with technical and legal aspects, some of the big issues have related to the compatibility of existing BITs (signed by individual Member States) and EU single market law, and the extent to which those existing BITs actually carry full legal force until they have been substituted by a common EU BIT.

1. The EU Common Commercial Policy is now also a matter of full competence in the EU, meaning that individual countries cannot engage in trade policy agreements with third countries.

That debate, depending on whom you ask, has been settled or paused. Yet the European Commission is now reviewing its approach to ISDS with the ambition of defining a new stance in the autumn of 2014. A document with proposals for how the EU should approach ISDS was released last autumn.[2] During this period of review, the EU has taken a pause in its negotiations of investment protection in TTIP. The mandate for the TTIP negotiations, endorsed by Member States as well as the European Parliament, gives, however, a clear instruction to the Commission to negotiate a new accord on investment protection with the United States that substitutes the current BITs and BIT-like bilateral agreements that individual Member States have with the U.S. Furthermore, the European Parliament has passed a resolution on the urgency of replacing individual EU Member State BITs with a common EU BIT.[3]

This study examines the recent history of Investor-State Dispute Settlements with the purpose of getting a better factual understanding of what cases have been brought to arbitration and what the outcomes of these cases have been. It records the cases between 2003 and 2013, and presents aggregate as well as individual results. This is done in chapter 3. Furthermore, the study presents the results from academic research about the consequences of BITs. The paper ends with some concluding remarks.

2. THE RISE OF INVESTMENT PROTECTION: MAPPING THE BIT LANDSCAPE

Trade disputes have existed for as long as people wanted to trade with each other – between different towns in the same region and between neighbouring countries – and beyond. Mostly these could be imagined to be disputes about non-performance of a contract – failure to deliver the right goods and at the right time. They were disputes person-to-person.

Investment disputes have a shorter history, since the time when some richer countries started to invest overseas and companies built factories in other countries. In practice, this was around the start of the 20th century, when investment flows started in both directions across the Atlantic, and between Europe (mostly the UK) and America and the 'old' members of the British Empire – Canada, South Africa, Australia and New Zealand. At this point also the nature of disputes changed as investors (companies) had to deal with jurisdictions other than their own and, where large investment projects were involved, with the State of another country.

One indication of the trend is that the London Court of International Arbitration was established as early as 1903, and was the successor to earlier arbitration tribunals first set up in the 1880s by the City of London. Some years later in 1917 the Arbitration Institute of the Stockholm Chamber of Commerce was established as part of, but independent from, the Stockholm Chamber of Commerce. Finally the International Court of Arbitration at the International Chamber of Commerce (ICC) in Paris was established in 1923.

Efforts were pursued at the League of Nations during the interwar period to codify treatment of 'foreign nationals' and to clarify their property rights; but these failed to produce any general agreement. So the next significant phase in seeking protection for investors occurred after the end of the Second World War, in the 1950s. Two developments took place in parallel: first, former colonies in Asia and in Africa began to secure their independence, and

2. European Commission (2013) Investment Protection and Investor-to-State Dispute Settlement in EU Agreements. November 2013.
3. The European Parliament resolution can be accessed at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0206&language=EN

encouraged foreign investment in their economies to promote their infant industries and secure the transfer of technology; and second, the investors themselves, led by legal experts in London and business interests in Germany, began to formulate general principles and rules which in due course led to the drafting of a *"Proposed Convention to Protect Private Foreign Investment" (the so-called Abs-Shawcross Convention)*.

These developments underlined the need for greater investor protection and were discussed in due course in the OECD but without producing any formal agreement. Some countries then took the initiative on the bilateral front, with the first Bilateral Investment Treaty appearing between Germany and Pakistan in 1959. The principal aim of these agreements was to protect investors against expropriation in countries where property rights were still a novel concept and where redress through action in domestic courts was often impossible and always uncertain.

In the 1960s, the first multilateral instrument for stronger investor protection and for resolving disputes was the ICSID Convention.[4] This treaty was established by the members of the World Bank in 1965, with the primary purpose of providing conciliation and arbitration facilities to resolve international investment disputes. This marked a significant shift from power politics and at times gunboat diplomacy towards settling and resolving disputes through mediation and arbitration.

The ICSID Convention, together with UNCITRAL (the United Nations Commission on International Trade Law), set up in 1966 to provide harmonised rules for international trade, marked a shift to the 'modern era' of investment dispute resolution. They did not replace the older Courts of Arbitration in London and Stockholm and at the ICC, but built additional facilities and established a wider set of rules and principles than had previously existed.[5]

In the early years no overall record of such disputes was kept, but what we know from the statistics that UNCTAD has compiled since 1987 is that there has been a steady growth in the recourse by investors to the provisions available; and this also suggests that the system has worked fairly well. There have been problems in the interpretation of some Bilateral Treaties or of the ICSID and UNCITRAL guidance and rules; but that is an inherent factor in every legal jurisdiction.

In the 1990s there have been further developments with the arrival of new legal contexts in which such disputes are handled: both the Energy Charter and NAFTA contain investment chapters and provisions for settling disputes, in the areas that are covered by their respective treaties. With the break-up of the Cold War era, many new BITs were signed with new countries previously part of the Soviet bloc. And there is currently a growing trend to insert investment chapters with similar provisions in bilateral Free Trade Agreements. The EU, for instance, is negotiating investment protection in all its current Free Trade Agreement negotiations that have been initiated after the Lisbon Treaty (which transferred investment protection competence from Member States to the EU). Thus, the continuing need for investor protection seems to be endorsed by developments in the kinds of agreements that countries feel are necessary in their relations with each other.[6]

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4. ICSID is an acronym for the International Center for Settlement of Investment Disputes.
5. UNCITRAL was established almost 20 years after the GATT which already provided multilateral rules for international trade. It does not duplicate GATT but has led to many Conventions and proposed Model Laws in more specific areas of concern to international business and to traders.
6. Such chapters are certainly proposed in both the TPP and TTIP negotiations, and they are part of the EU's new Free Trade Agreements negotiations.

This historical survey suggests two main threads that run through all of the last 115 years. The first is the growing realisation over the period of the importance of investor protection if FDI is to be promoted as an international economic policy; this trend is in evidence from the growing number of agreements (BITs and others) and of the fora where issues can be raised – and of disputes whose number has increased dramatically since about 2003.

The second thread is the consistently central presence of European countries – in the post war period led by Germany and the UK – in promoting the basic principles and values which have supported this policy. Collectively they have also accounted for a larger number of disputes initiated than the United States; and as we shall see from statistics (below) they continue to contribute to much of the increase in dispute activity in the last ten years, including the emergence of intra-EU dispute cases.

A backward look at the history of BITs and arbitration tribunals suggests that there is a kind of virtuous circle that has developed between the growth of FDI, the parallel activity of host countries to promote inward investment, and the need for greater protection of investors. FDI is the starting point, and has grown for both business/commercial reasons and as a policy issue; investors are encouraged to invest, and such investments are welcomed by countries that compete with each other to secure the employment and industrial benefits of FDI. In turn, the investor protection needed by investors and represented by BITs and UNCITRAL rules is also increased.

When seen from this angle, investment disputes and ISDS problems might seem like merely unintended consequences of a broader economic trend. But they are in fact almost inevitable outcomes from the widely different situations in different countries in respect of laws of contract and property rights and the quality of the independent judiciary. This reflects the concept of 'first world' set against 'third world'. But there are other elements, such as the conflicting interests of the State and the individual or company that invests, that also contribute to a situation of increasing tensions and disputes.

We should now review the evidence, bearing in mind that data is approximate as there is no public registry of claims. Let us start with some general descriptions about BITs.

The number of BITs has increased steadily over the past decades, but there was a spurt after the collapse of the Soviet Union when countries in the Soviet bloc stepped into the world economy and new states were created. The total worldwide is now estimated to be around 2800. Most of these BITs are inter-regional in character. Taking a wider measure, there were an estimated 3196 International Investment Agreements in 2012. Of these 2857 were Bilateral Investment Treaties and 339 were "other International Investment Agreements", including chapters in Free Trade Agreements.

There is no BIT between the EU (as a group) and the U.S.; nor are there BITs between the EU and other countries.[7] The U.S. has signed BITs with the following EU countries: Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, and Slovakia.[8] Most of these BITs were negotiated and entered into force in the 1990s. In addition to the agreed BITs, the U.S. has an 'older' form of investment-protection agreement with several other EU countries. They are so-called Friendship, Commerce and Navigations Treaties (FCNT) and cover, among other things, investment protection and matters of arbitration.

7. The US has not signed BITs with any of the EC-15 members. Germany has followed the same pattern.
8. The full list of U.S. BITs can be accessed at http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp

However, there is no effective investor-state dispute-settlement mechanism in these FCNTs. There are only three EU countries that have no direct bilateral investment-protection relation with the U.S.: Portugal, Spain, and Sweden.

Of the 2800 BITs reported, about half are agreements between EU countries and developing countries. Among EU countries, Germany has the most BITs – around 147. But a number of intra-EU BITs have also been signed since 2004, when new members joined the EU. Following the new investment provisions of the Lisbon Treaty, the EU Commission has now begun to negotiate new BITs for the group as a whole. Investment-protection clauses, with provisions on ISDS, are part of the almost finished agreement with Canada and the finished agreement with Singapore.

International Investment Agreements like BITs are increasingly used in international arbitration. According to an estimate by UNCTAD, the total number of known ISDS cases, from 1987 up to the end of 2013, is 568**.** The number of these cases has increased rapidly, especially so over the last ten years. From 100 cases initiated in the period 1987-2002, the total had tripled by end-2007 and almost doubled again by end-2013.

The majority of these (363) were filed under ICSID and its Additional Facility, with a further 158 under UNCITRAL rules. The new claims recorded in 2013 were 57, the highest number ever in a single year. This number too has been growing rapidly: the annual average of claims since 1987 is around 26 per year, but in recent years it is well over 50 per year. At least 37 arbitration decisions were issued in 2013. There is clearly increasing recourse to dispute settlement by investors.

In terms of disputes, investors from EU countries are responsible for the vast majority of cases in the whole period since 1987 (Netherlands, the UK and Germany are the most active), compared with 22 % for the United States. The degree of EU country involvement has grown in recent years: there were as many as 252 EU initiated cases in 2003-2013 (or 273 if cases against an EU country are included), and the ratio of EU to total cases had risen from 56% in the period 2003-2011 to 67% in the last two-year period.[9]

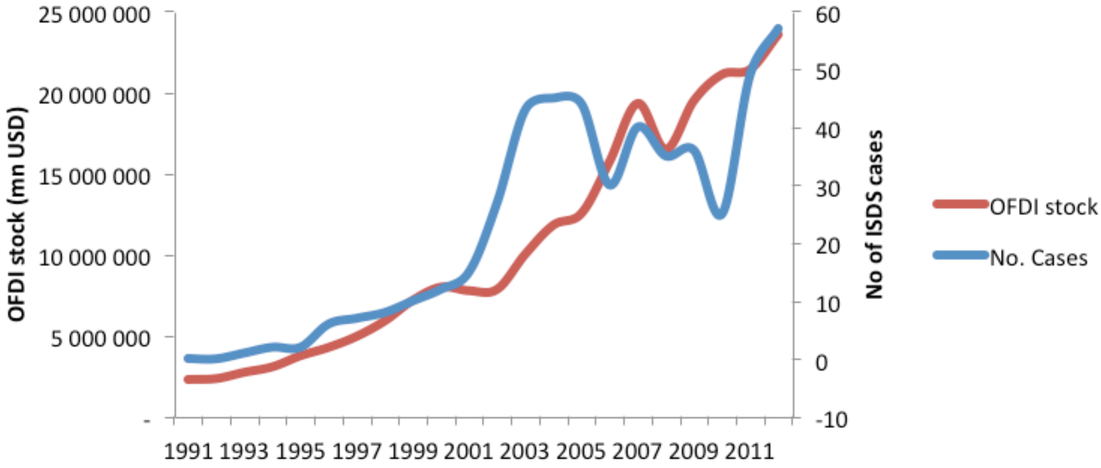
One question that has been raised is whether this increasing use of ISDS provisions is a signal that the investors now have too much power in challenging States and that their power to regulate is being diminished. It is difficult, not to say impossible, to prove or disprove such a view on the basis of the past cases; it is rather a question of political judgement. More generally, there has been a wider trend in the world in the past decades towards more transparency and a greater degree of consultation with stakeholders outside government than used to be the case.

At its core, the number of ISDS cases is a reflection of the amount of investments in the world. The simple rule of thumb is that the bigger the stock of FDI, the higher the number of ISDS cases are likely to be, provided that the vast part of the investment flows are covered by investment-protection agreements. As shown in figure 1, the growth in ISDS cases and the growth of the outward FDI stock largely follow the same trend. There are other sides to this story, which will be discussed later, but the general pattern is that ISDS case intensity is

9. The data in this paragraph refer to ECIPE calculations based on the UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases, which covers 499 cases for the period 1987-2012, and on the most recent data presented in the latest UNCTAD IIA Issue Note, which presents 57 cases started in 2013. The database is accessible at http://iiadbcases.unctad.org/and and the Issue Note is available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

a reflection of globalisation. So the key explanation behind the rise of cases is simply that the volumes of FDI have grown enormously, and that the proportion of that going to developing countries and transition economies has also grown, leading – with a slight lag – to greater problems faced by investors much as one could expect.

FIGURE 1. OFDI STOCK AND NUMBER OF ISDS CASES



Source: UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies.* Geneva: UNCTAD

There has also been a general growth in the support of the principle of "international rule of law" in commerce, which is manifested by the rise of BITs as well as State-to-State agreements like the World Trade Organisation (WTO). Even if disputed by some, there is wide acceptance of the principle that an increasing role of cross-border integration in the world economy is assisted by rules and disciplines that constrain the behaviour of governments to abuse its power and offer recourse to effective dispute settlement in the event of a conflict.

3. PROFILING INVESTOR-STATE DISPUTES 2003-2013

3.1. THE GROWTH OF DISPUTE INTENSITY

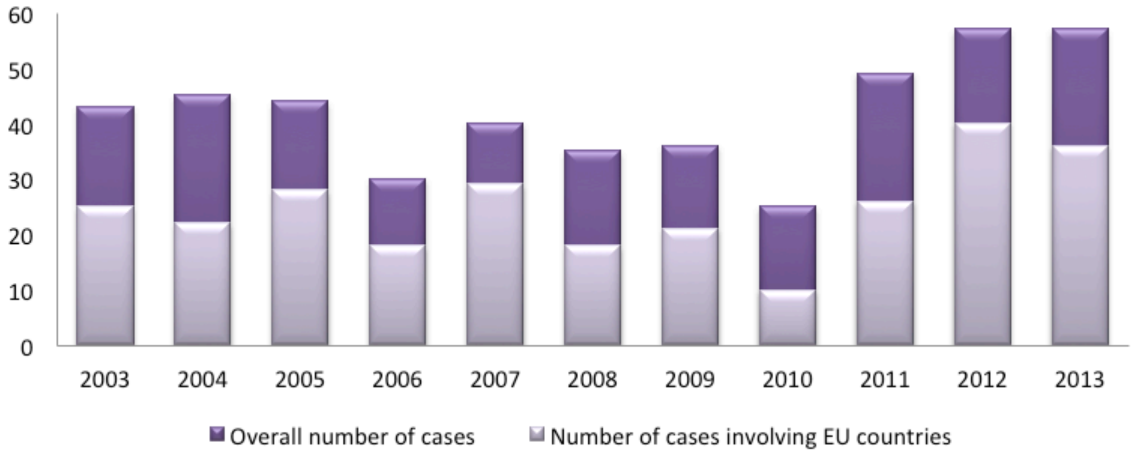
The number of known cases filed for arbitration between a private investor and a state has increased over the past two decades.[10] In the first half of the 1990s, the number of cases was not significant but since then it has steadily increased, with acceleration in the first years of the last decade. Before 2003, the accumulated number of cases was fewer than 100. There was a decline in the number of filed cases in the latter half of the 2000s. In the first three years of the 2010s, however, the number of cases has yet again gone up. In the past two years, close to 60 new cases have been filed annually. Figure 2 below shows the number of new ISDS cases filed between 2003 and 2013. In total there were 461 cases filed for ISDS arbitration in this period.

EU countries are involved in a big part of the disputes that have been filed in the past decades. A majority of the cases in this period figure an EU country, most often as the host of the claimant in a case. While the United States is the country that has brought the highest num-

10. When this paper hereafter refers to the number of cases it should be read as the number of known cases. There is no public registry for arbitration cases between investors and states. Consequently, it is impossible to know the full number of cases that have been arbitrated.

ber of cases to investor-state arbitration, the number of cases filed by the EU as a collective group exceeds by far the total filed by the United States. There is also a clear dominance of developed countries on the claimant side and a clear dominance of developing countries on the respondent side. The dominance of the EU is also increasing over the years. A majority of the new cases have been filed under ICSID, the second most popular venue for arbitration is UNCITRAL followed by the Stockholm Chamber of Commerce.

FIGURE 2. NEW ISDS CASES FILED, 2003-2013



Source: UNCTAD; ECIPE calculations

It is not surprising that EU countries are the most active claimants. The EU is by far the biggest source of FDI in the world with a stock of outward FDI that is twice the size of the United States according to data from UNCTAD. The EU represents 43 percent of all global outward FDI. Other countries in the top group are developed economies.

TABLE 1. OUTWARD FDI (OFDI) AND OFDI SHARES, STOCKS 2012 (MILLION USD)

	Outward FDI (OFDI) stock	% of global OFDI stock
EU	9 198 832	43
U.S.	4 499 962	21
Hong Kong, China	1 045 920	≈5
Switzerland	991 966	≈5
Japan	962 790	≈5
Canada	670 417	≈3

Source: UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies*. Geneva: UNCTAD

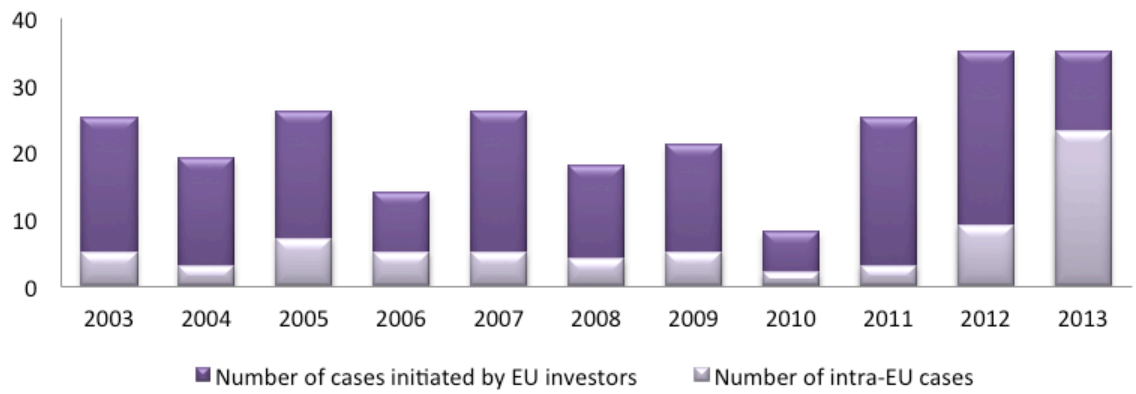
Contrary to the perception, the growth in the number of cases has not resulted in longer arbitrational proceedings. On the basis of the 85 cases where there is public information about the time when a case was filed and when it was concluded, the average duration of ISDS cases between 1987 and 2002 was approximately 3.5 years – and between 2003 and 2013 the average duration was 2.6 years. If we only take into account those cases that ended with an arbitrational ruling, the results do not differ much – 3.6 and 2.5 years, respectively.

3.2. CASES BY COUNTRY

The EU also represents the biggest number of cases for ISDS arbitration – 252 – in the period between 2003 and 2013. As for the number of global cases in the same period, it has accelerated in the past three years since 2011 , but over the past decade there is a variation between the quantity of cases per year. As figure 3 below also shows, for some years, a significant number of the cases filed by an EU investor target an EU state. In this period, no case brought by an EU investor had the United States as respondent. There has been no known case with an EU investor as claimant and the United States as respondent since the late 1980s, the time from when there is some public information available.

Between 2003 and 2013, there were 92 filed cases against an EU state. In 71 of these cases – or in 77 percent of all cases – the claimant was an EU investor. Investors from the United States have initiated six cases against an EU state in this period – Poland and Romania have been the respondents in three cases each. Norway and the Russian Federation have each filed three cases against an EU state. Norway's cases target the Czech Republic, Lithuania and Hungary while all of the Russian cases are against Lithuania. China and India have filed one case respectively against an EU state (Belgium and UK, respectively).

FIGURE 3. ISDS CASES INITIATED BY EU INVESTORS, 2003-2013



Source: UNCTAD; ECIPE calculations

If claimants are measured by country, the United States has filed the biggest number of complaints between 2003 and 2013, followed by the Netherlands, the UK, Germany and France. The most frequent respondents in ISDS cases are Argentina, Venezuela, the Czech Republic and Egypt. This pattern of respondents is the same for all global ISDS cases and cases brought by EU investors.

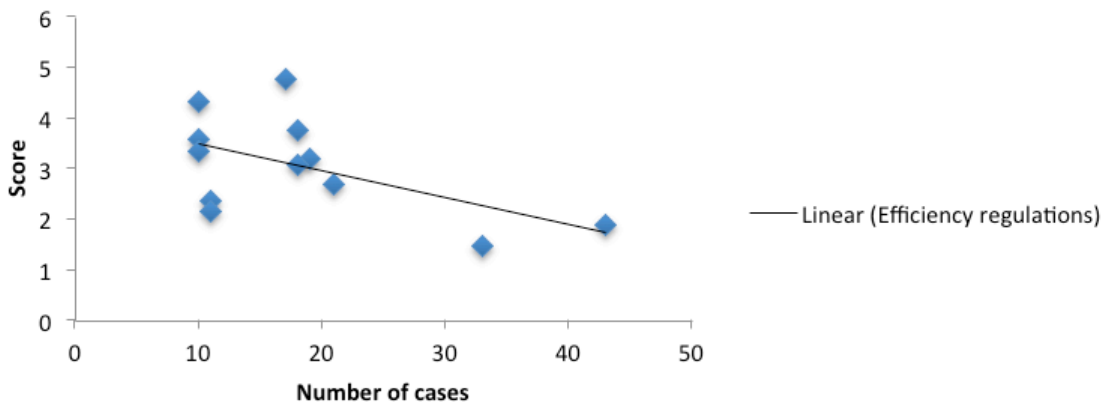
TABLE 2. MOST FREQUENT RESPONDENTS AND CLAIMANTS IN ISDS CASES, 2003-2013 (NUMBER OF CASES WITHIN BRACKETS)

	Respondents (all cases)	Claimants (all cases)*	Respondents (EU cases)
1	Argentina (43)	United States (84)	Argentina (29)
2	Venezuela (33)	Netherlands (53)	Venezuela (19)
3	Czech Republic (21)	United Kingdom (36)	Czech Republic (18)
4	Egypt (19)	Germany (31)	Egypt (12)
5	Ecuador/India (18)	France (27)	Hungary/India (10)

Source: UNCTAD; ECIPE calculations
*Cases started by investors from more than one country are counted for each country

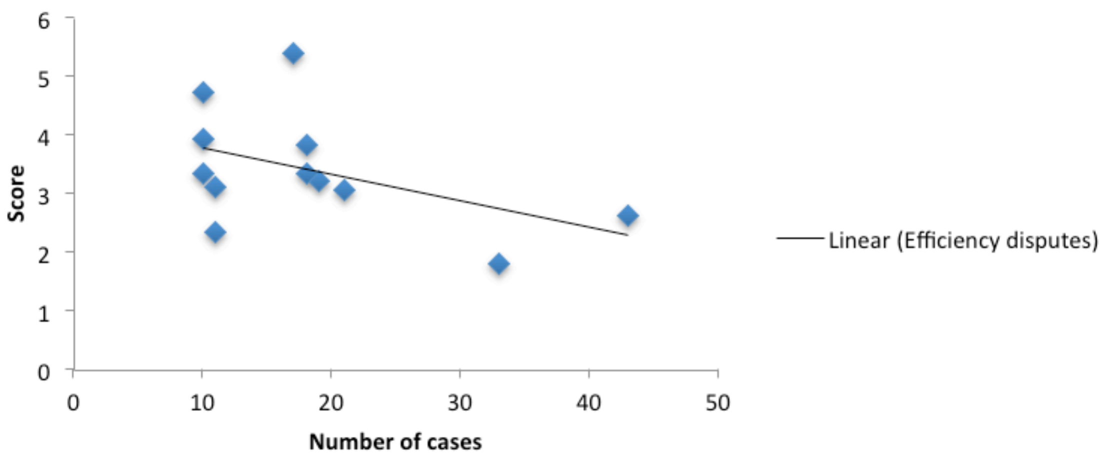
There are merits to the claim that the selection of the respondents in ISDS cases relates to the quality of the legal system in these countries. Figures 4 and 5 illustrate this pattern. They are based on the countries that have been the respondent in more than 10 cases between 2003 and 2013, and they plot these countries performance in different indices of the quality of the legal system in matters close to disputes and arbitration. Both figures show that countries with weak(er) performances in indices of legal quality are targeted more frequently in ISDS cases. The two most frequently targeted countries, Argentina and Venezuela, are ranked as the 147th and 148th countries (out of 148 ranked countries) in World Economic Forum's index on Efficiency of Legal Framework in Challenging Regulations. In the same organisation's index on Efficiency of Legal Framework in Settling Disputes, Argentina and Venezuela are ranked as the 133rd and 148th countries (out of 148 ranked countries).[11]

FIGURE 4. ISDS INTENSITY AND SCORE IN INDEX OF EFFICIENCY IN LEGAL FRAMEWORK IN CHALLENGING REGULATIONS



Sources: UNCTAD; World Economic Forum, Global Competitiveness Report 2013-2014

FIGURE 5. ISDS INTENSITY AND SCORE IN INDEX ON EFFICIENCY OF LEGAL FRAMEWORK IN SETTLING DISPUTES



Sources: UNCTAD; World Economic Forum, Global Competitiveness Report 2013-2014

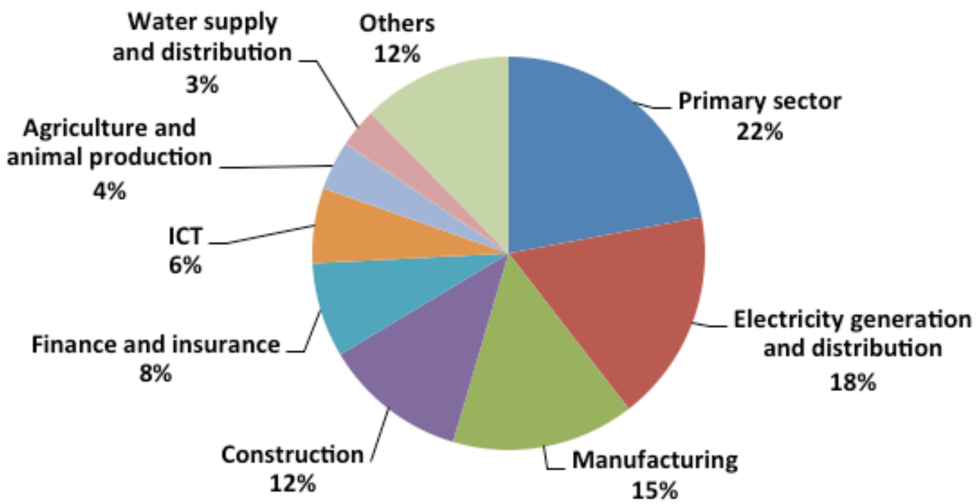
11. The score values are based on an average of the performance in surveys in 2012 and 2013.

3.3. CASES BY SECTOR

ISDS CASES ARE concentrated to specific sectors and there is generally not a proportionate connection between the amount of FDI in a sector and the frequency of ISDS disputes. As can be seen in figure 6, the two sectors that are most frequent in ISDS cases are the primary sector (oil, mining, hydrocarbon, etc) and electricity generation and distribution. For Argentina, the most frequent respondent in ISDS cases between 2003 and 2013, 25 out of 43 ISDS cases concerned the energy, electricity and water sectors.

If the sectoral distribution of ISDS cases is compared with the sectoral distribution of FDI flows between 2003 and 2013, the differences are stark. While the primary sector represents 22 percent of all ISDS cases, the sector only stood for less than 10 percent of all greenfield FDI flows. Electricity generation and distribution, representing 18 percent of all ISDS filed cases, had a share similar to the primary sector's of all greenfield FDI flows if one also includes water distribution. The manufacturing sector, on the other hand, represented about 46 percent of all greenfield FDI flows but was covered in 15 percent of the ISDS cases. If the comparison is made with the value of mergers and acquisitions, the significance of the primary sector and electricity generation and distribution in ISDS cases become even more disproportionate.[12]

FIGURE 6. SECTORS IN ALL ISDS CASES, 2003-2013

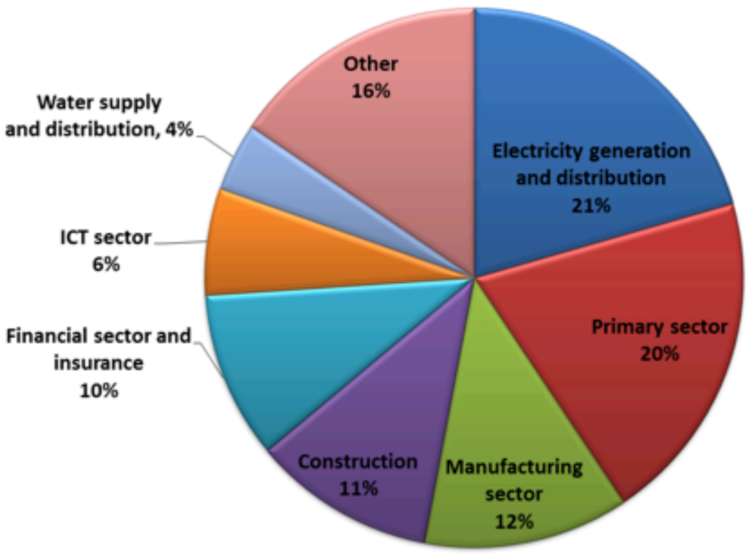


Source: UNCTAD; ECIPE calculations

The sectoral distribution of cases filed by EU investors is similar (see figure 7). The manufacturing sector has a somewhat higher share of the cases while the big difference is that the primary sector does not have the same prominence in EU cases as in global cases. The significance of the financial sector and the construction sector is more accentuated in cases brought by EU investors.

12. The calculations are made on the basis of data from UNCTAD (2013), *World Investment Report: Global Value Chains – Investment and Trade for Development*. Geneva: UNCTAD

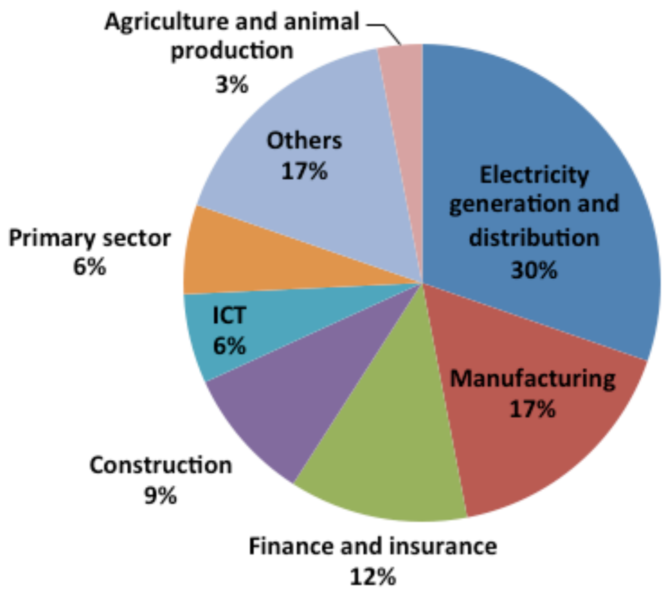
FIGURE 7. SECTORS IN ISDS CASES BY EU INVESTORS, 2003-2013



Source: UNCTAD; ECIPE calculations

However, when looking at the cases brought by an EU investor against another EU state the sectoral distribution is somewhat different (see figure 8). Electricity generation and distribution is by far the biggest sector covered in these ISDS cases and the manufacturing sector has a somewhat higher share of the cases while the big difference is that the primary sector does not have the same prominence. The significance of the financial sector is slightly more accentuated in intra-EU cases, while the presence of the construction sector is somewhat lower. Consequently, those countries in the EU, e.g. Germany, that are worried that investment protection provision in TTIP will trespass on their discretion to act unconstrained by international investment agreements in the energy and electricity sectors should rather worry about investment protection enjoyed by other EU states vis-à-vis them.

FIGURE 8. SECTORS IN INTRA-EU CASES, 2003-2013



Source: UNCTAD; ECIPE calculations

3.4. THE LEGAL PRINCIPLES OF ISDS CASES

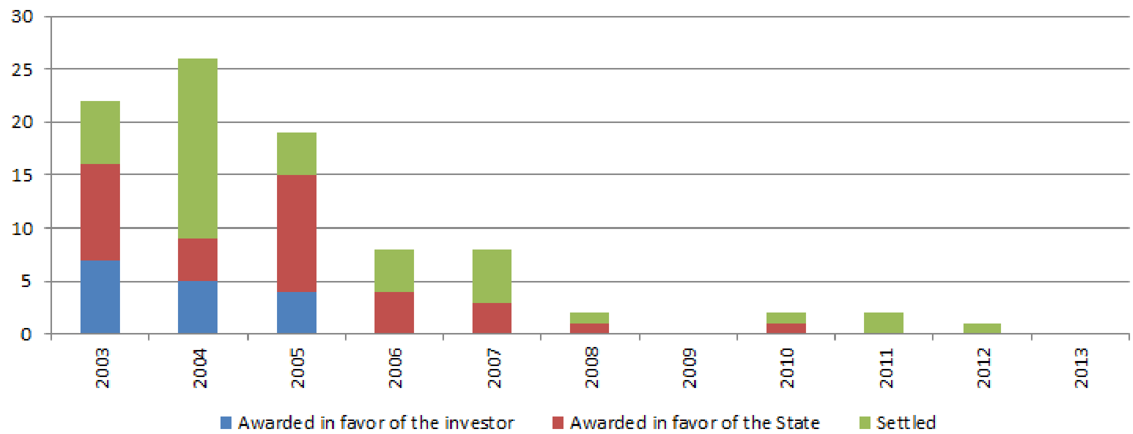
According to UNCTAD estimates 90 ISDS cases were concluded between 2003 and 2013. In most of those cases, it is impossible to learn the exact legal substance of the dispute: what sections of a BIT that is referenced in the complaint. In some cases, however, it is possible to get an understanding of what violations an investor argued that a state had made. The typical BIT includes four distinct categories or principles. First, a typical BIT contains provisions on expropriation, direct as well as indirect expropriation. Second, most BITs have provisions on national treatment. Third, a typical BIT provides for treatment on the basis of Most-Favoured Nations (MFN), meaning that a protection granted to one third country also should be unconditionally granted to other third countries. Lastly, there are provisions on fair and equitable treatment.

In six known cases the investor had complained about direct expropriation and in 15 cases of indirect expropriation. In 20 cases the investor complained about not getting a fair and equitable treatment. In four cases there was a legal reference to not having been granted MFN and in two cases the investor claimed it was not getting the same treatment as a national provider.

3.5. THE OUTCOME OF ARBITRATION

Most of the cases filed never goes through the entire process of dispute proceedings. They are rather settled in advance of an arbitrational ruling. Figure 6 below shows the outcome of the 90 cases that have concluded between 2003 and 2013. In 46 percent of the concluded cases, the two parties settled in advance of an arbitrational ruling. In 37 percent of the cases, the arbitration panel sided with the state and in 18 percent of the cases the arbitration panel ruled in favour of the investor. In other words, of the cases that were concluded with an arbitrational ruling between 2003 and 2013 there were twice as many cases won by states as cases won by investors.

FIGURE 9. OUTCOME OF CONCLUDED ISDS CASES, 2003-2013



Source: UNCTAD; ECIPE research and calculations

The results are similar if we consider only the 51 concluded ISDS cases brought by an EU investor in the same time period. In 43 percent of the cases, a settlement was reached before the arbitrational ruling. In 35 percent of the cases the arbitration panel ruled in favour of the state. And in 22 percent of the cases the panel ruled in favour of the investor.

In most cases won by an investor, the investor is not awarded the amount claimed in the complaint. Table 3 below examines the cases that have been ruled in favour of the investor by an arbitration panel and estimate the share of the amount sought that was awarded by the tribunal when that information has been possible to retrieve.

TABLE 3. AMOUNT RATIO IN AWARDS BY TRIBUNAL, 2003-2013

Year	Respondent	Investor country	Amount awarded/amount sought
2003	Argentina	United Kingdom	≈47 %
2003	Argentina	United Kingdom	≈78%
2003	Argentina	United States	≈ 2%
2003	Kyrgyzstan	United Kingdom	≈27%
2003	Poland	Netherlands	N.a.
2003	France/UK	France/UK	N.a.
2003	Hungary	Cyprus	≈33%
2004	Ecuador	United States	≈22%
2004	Estonia	Finland	N.a.
2004	Mexico	United States	N.a.
2004	Czech Republic	Netherlands	≈29%
2004	Moldova	Russian Federation	≈60%
2005	Bangladesh	Italy	100%
2005	Zimbabwe	Netherlands	≈80%
2005	Yemen	Oman	≈7%
2005	Czech Republic	Croatia	N.a.

Source: UNCTAD; ECIPE research and calculation

4. ECONOMIC EFFECTS OF BITS: VIEWS FROM ACADEMIC RESEARCH

While fewer than 400 BITs were concluded in the 30 years from 1959 to 1989, some 2000 BITs were signed in the next 15 years (UNCTAD, 2008), with an increasing presence of agreements signed by developing countries with other developing countries or what has been called 'economies in transition' (Sauvant and Sachs, 2009). The EU27 have signed 1557 BITs to date compared to Japan and the US, which 'only' have signed 11 and 48 BITs respectively. Among the EU member states, Germany is by far the most active proponent of BITs with 147 BITs signed.

These general numbers are important when reviewing economic analyses of BITs, especially their role in promoting FDI. Most of the existing BITs have emerged at a later date and the limited duration sometimes prevents scholars from finding patterns of investment flow or other result that are conclusive. There is often an assumption underlying academic research, and the popular debate about investment protection, that BITs are critical factors of determining investment flows. While such an assumption is not necessarily unwarranted, it portrays BITs somewhat awkwardly.

BITs are typically not agreements to promote investment by opening up markets for investment, so-called pre-establishment investment policy. They are agreements addressing matters of post-establishment rights. Consequently, BITs are only one of many factors behind the scale and profile of investments – and there are factors that play much more significant roles, most importantly market access: if an investment is allowed or not. Economic research, therefore, is mostly in agreement with the proposition that BITs alone do not determine FDI flows. Most scholars would also agree that BITs are likely to have only a marginal role for the aggregate volumes of FDI.

However, BITs can nonetheless play an important role in promoting a more enabling regulatory and institutional framework (Sauvant and Sachs, 2009; UNCTAD, 2009). In particular, BITs contribute to better regulatory frameworks by complementing the policies of the recipient country related to FDI, guaranteeing certain investor rights, making the legal framework more stable and transparent and mitigating the potential impacts of political or economic instability by establishing certain enforcement procedures. Moreover, governments can use the commitments in the treaties to advance domestic policy reforms that support more inward FDI and/or economic growth.

There have been several studies estimating the impact of BITs using econometric techniques and there are plenty of studies that have criticized the use of econometric models and instead opted for alternative survey-based approaches. The results of the studies show a wide disparity of conclusions, which is only natural given the fact that they are not identical in their scope and methodology. There are several factors that differ between the studies, such as the different degrees of protection and benefits in the treaties, the approach used in the BIT (whether it contained liberalization and not just protection), the presence of alternative investment promotion or investment protection measures, the primacy of BIT rights over national law, and other economic and regulatory variables which generally are not taken into account in the regression analyses. Another factor, normally not taken into account in these studies, is the positive effect that BITs might have on retaining existing levels of FDI in the recipient country.

A vast body of economic research provides evidence of a positive effect of BITs on investment flows. This literature often shows that the result of the BITs is an enhancement of the FDI attractiveness of the recipient country adding security, transparency, stability and predictability to the investment framework (UNCTAD, 2009). Salacuse and Sullivan (2005) and Buthe and Milner (2009) find a positive effect of BITs on FDI inflows, which is larger when the agreement is signed with economically more important countries. In particular, Salacuse and Sullivan have checked the hypothesis that United States BITs, which tend to focus on a liberalization approach rather than on a more traditional protection approach, would have a more significant association with FDI flows than less stringent BITs.

The study is based, first, on the analysis of aggregate FDI inflows to more than 100 developing countries in a given year. Second, it analysed FDI flows from the United States to 39 developing and transition countries over a 10-year period (1991-2000). The results showed that United States BITs are more likely to induce FDI inflows than those concluded by other OECD countries. Egger and Pfaffermayr (2004) examined the potential anticipation effects after signing and before ratifying a BIT using bilateral outward FDI stock data from 19 OECD home countries and 57 host countries (including 27 OECD member countries). They found that merely signing a BIT has a positive signalling effect and that BITs that have entered into force have stronger positive effect than those that have merely been signed.

Another study by Büthe and Milner (2009) presents the argument that FDI inflows can be seen as a function of the success of BITs to show a political commitment of the recipient countries to economically liberal policies. Neumayer and Spess (2005) and Coupé, Orlova and Skiba (2009) suggest that BITs function as substitutes for poor institutional quality and that the positive effect of BITs decreases as governments become more stable. In fact, it is argued that BITs are most useful when they provide security and certain standards of treatment to foreign investors where domestic institutions fail to deliver these standards.

Moreover, several studies, including Neumayer and Spess (2005), Grosse and Treviño (2005) and Gallagher and Birch (2006), find a positive relation between the total number of BITs concluded by a country and the FDI inflows to that country. Their studies focused respectively on developing countries in general, Central and Eastern Europe, and Latin America.

Guerin (2010) has instead examined the effect of BITs into FDI outflows and found that both OECD BITs and EU BITs have a statistically significant and positive impact on investment outflows,[13] while the UK Government (2014) confirmed the positive impact of FDI outflows on productivity, profitability and competitiveness of firms in the exporting-capital country. Guerin highlighted that the EU member states that have the highest number of BITs also have the largest stocks of FDI invested abroad, and that EU27 have the tendency to negotiate BITs more with Asian and Latin American countries than with African countries. Using a large panel data of bilateral FDI inflows to 25 middle-income developing countries from 14 OECD member countries over the period 1992-2004, Guerin found positive effects of BITs on FDI outflows through two channels. First, the BIT encourages FDI by reducing the risk of expropriation and, second, by providing better market access.

UNCTAD (2009) presented a comparison between the impacts of different categories of investment agreements in terms of increased FDI inflows. The study suggested that there is generally a stronger impact in the case of free trade agreements, regional integration agreements or economic cooperation agreements than in the case of BITs. This is because more broad agreements improve the economic determinants of FDI, as opposed to BITs, whose influence is limited to the policy determinants of FDI.

While a majority of existing quantitative studies suggests BITs to have a positive influence on FDI flows, there are also studies suggesting that BITs do not significantly encourage FDI inflows. Most of this literature suggests that FDI inflows are a factor of other economic and regulatory conditions. One of the earliest quantitative analyses of the effect of BITs on FDI by UNCTAD (1998) used a differences in means test for the change in FDI flows within varying windows around the signing of a BIT, as well as a 1995 cross-sectional analysis of the effect of signed BITs on various measures of FDI. The study found that BITs do not play a primary role in increasing FDI and that a larger number of BITs ratified does not necessary lead to higher FDI inflows.

Yackee (2010) also suggests that BITs probably spur investment only irregularly, inconsistently, and with generally low impacts. Using regression analysis and surveys, he shows that BITs are not meaningfully correlated with measures of political risk, that providers of political risk insurance do not reliably take BITs into account when deciding the terms of insurance, and that in-house counsel in large U.S. corporations do not view BITs as playing a major role in their companies' foreign investment decisions.

Hallward-Driemeir (2003), using bilateral FDI outflows from 20 OECD countries to 31 developing countries covering the years of 1980 to 2000 and capturing the surge in the number of BITs, found that BITs are either insignificantly correlated with FDI, or even negatively associated, implying that BITs might actually harm a country's FDI prospects. She also found

13. This result is robust to the inclusion of variables such as privatisation proceeds that control for the level of economic reform, the level of trade linkages, the level of democratic freedom and a measure of risk of expropriation among other standard controls.

a positive effect only in countries with stable business and institutional environment. Aisbett (2008) and Swenson (2009) suggested a reverse causality and therefore BITs being rather pursued by countries with rising level of outward investment into certain countries in order to protect their investors. Critics of BITs argue that these might bring developing countries to neglect domestic legal institutions and mechanisms (Ginsburg, 2005).

Survey-based studies also lead to different conclusions. UNCTAD (2009) found that, for the majority of reviewed companies from all sectors, BITs' participation in host developing countries and transition economies plays a role in making a final decision on where to invest. A UK Government study (2014), summarizing the results from four survey studies, suggests that BITs play an important role only for some investors. One of the study presented showed that a fifth of the corporate executives took into account investment agreements when deciding where to locate their investment. Another study showed that only 10% of European investors interviewed had a working knowledge of BITs. Another survey study examined in the UK Government study showed that, based on surveys of public and private political insurance risk providers, BITs are partially taken into account by public providers and largely ignored by private providers.

According to UNCTAD (2009) and Colen et al. (2014), the most recent studies – based on larger data samples, improved econometric models that address the endogeneity of BITs, and more tests – have shifted the balance towards concurring that BITs do have some influence on FDI inflows from developed countries into developing countries.[14] Sauvant and Sachs (2009) consider that the incidence of treaty shopping – that is the case when a firm invests in another country not from its home country but via a country that has a BIT with the prospective recipient country – also suggests that at least some firms deliberately seek the protection of a treaty. Yet, the authors suggest that these results have to be contextualized and it remains clear that the effect of BITs on investors' decisions is influenced by a wide range of determinants.

In a recent empirical study, which for the first time analyses the effect of BITs on FDI inflows by sector, Colen et al. (2014) found the effect of BITs to differ significantly across sectors of investment and that FDI characterized by higher sunk investment costs responds more strongly to the signing of BITs, supporting the hypothesis that investment projects with a large degree of irreversibility are more sensitive to risks and more attractive for expropriation, and therefore more responsive to the protection provided by BITs.[15] Based on data on FDI stocks for 13 countries in the Former Soviet Union and Central and Eastern Europe, Colen at al. (2014) found that BITs appear particularly successful in attracting FDI in the utilities sector, real estate, banking and mining, while no significant effect is found on manufacturing and service.

Finally, there is some recent evidence that the financial burden of arbitration proceedings and the sovereignty costs associated with the implementation of these treaties are considered by some countries to outweigh the benefits of BITs. Bolivia, Ecuador and Venezuela have terminated several BITs and have withdrawn from ICSID, while the Australian government announced, in spring 2011, that it would no longer include investor-state dispute settlement provisions in its trade agreements. Moreover, South Africa has announced that it will not re-

14. Among others, Egger and Merlo (2007), Busse et al. (2010), Berger et al. (2012).
15. This finding contradicts Sauvant and Sachs (2009) assertion that BITs effects might be weaker for natural resource investors, given that the economic determinants of FDI are already clear for them. Sauvant and Sachs also suggest that market-seeking investors might be less influenced by BITs than efficiency-seeking investors for whom several investment locations may be otherwise equally attractive.

new old investment treaties due to expire and last year started to cancel some of its bilateral investment treaties (Financial Times, 2014), India is reported to have decided not to include investor-state dispute provisions in future free trade agreements and Indonesia has recently announced that intends to terminate more than 60 bilateral investment treaties (Financial Times, 2014). This recent trend is likely to bring new factors, such as the risk to be sued or the size of awards, in the future analysis of the effect of BITs on FDI flows (Sauvant and Sachs, 2009).

5. CONCLUDING REMARKS

THIS STUDY HAS examined filed and concluded ISDS cases between 2003 and 2013. Its findings largely confirm the result of similar studies. Like other studies, the findings also contradict some of the opinions now circulating in the debate over the role of ISDS in TTIP. While there should be a dispassionate debate about the character and effects of ISDS, much (but not all) of the criticism is based on erroneous information or opinions, with no direct connection to ISDS, aiming for a broader argument about the illegitimacy of international arbitration between an investor and a state.

- The number of ISDS cases has grown in the past decades. EU investors are the most frequent claimants in ISDS cases and the respondent in the vast majority of cases is a developing country.

- ISDS are concentrated to specific sectors that are highly dependent on public buyers or political patronage. These sectors represent a disproportionate number of the ISDS cases. It has also been confirmed by academic research that BITs with ISDS play a more significant role in promoting FDI in such sectors than in sectors with predominantly private buyers. The simple reason behind that pattern is that there is a greater degree of political and regulatory risk in sectors with significant government involvement.

- Intra-EU ISDS cases have an even higher frequency of public-buyer sectors represented.

- Close to a majority of the concluded ISDS cases are settled before there is an arbitrational ruling. Of the cases that have been ruled by a tribunal, a significantly larger share of the rulings is in favour of the state than in favour of the investor. The cases won by an investor typically included alleged breaches of several BIT principles.

- When the investor wins a case the award is typically substantially smaller than the award sought.

How could these results help to inform current investment-protection policy in the EU? Going forward, countries or groups in the EU that are uncertain about the merits of BITs or investment-protection agreements have three options. Let us attempt to outline the consequences of these three different options.

OPTION 1: NEGOTIATE NEW BITS IN ORDER TO SUBSTITUTE EXISTING BITS

THE FIRST OPTION is to negotiate investment-protection agreements, substituting existing BITs signed by individual Member States, with many countries. This option will establish greater political and legal certainty for outward as well as inward FDI: current member state BITs cannot remain valid infinitely. In a way, this option will uphold the broad pattern of investment protection today, albeit with some differences. It enables the EU to take part in a process of updating rules and provision in BITs – that is, continue to participate in the emerging (and patchy) system for an 'international rule of law' in investments. For EU investors in sectors that are more subject to investment disputes than others, the anchoring of investment-protection policy in the EU will likely lend more authority to investment-protection treaties.

The cost to the EU is that it needs to negotiate many new agreements with countries that have not previously acted in a way suggesting a BIT to be necessary to facilitate investor-state arbitration.

OPTION 2: WITHDRAW FROM INVESTMENT PROTECTION AGREEMENTS

The second option is to withdraw from the system of investment protection and follow the principle that foreign investors have to use the local court system to defend their rights when they believe they have been violated.

This option is the logical conclusion of the principled criticism of BITs and ISDS. For those that consider arbitration in outside tribunals to be a principally flawed system it should make sense for the EU as a whole to withdraw from its current investment-protection agreements.

The obvious problem in such an approach is that EU investors will lose stability in political conditions for its outward FDI. It is most likely that the consequence will be an emigration of companies to other parts of the world that still offer investment protection in international agreements with third countries, especially in sectors under heavy political influence. EU FDI in some countries and in some sectors, those with a higher frequency of arbitration, is likely to decline.

There will also be greater pressure on national courts to settle disputes between investors and governments, and many of these disputes will have the consequence of putting "policy on trial", which arbitrations do not do. Obviously, policy frictions around FDI will increase, most likely also in the EU.

OPTION 3: A SELECTIVE APPROACH

The third option is that the EU selects countries for investment-protection agreements on the basis of the quality of the legal system in other countries. With such an approach, the EU does not need to spend time and resources negotiating new investment agreements with countries that have a high-standard court system and that in the past have not been frequent respondents in ISDS cases brought by EU investors.

The flaw in such an approach, however, is that the EU may find itself in the awkward political position of having to point out where in the world, including the EU, it does not trust the quality of the legal system. Such an approach is likely to present problem for efforts to negotiate investment-protection agreements with some countries. Furthermore, some countries may choose not to enter an agreement with the EU if it is not part of an international effort to establish policies and case law for determining arbitration.

Another drawback is that it limits the possibilities of the EU to lead a process of updating global investment-protection rules. Other countries that are willing to reform, and have the capacity to transmit reforms into their many BITs, tend to be countries with high-standard legal systems.

Furthermore, the EU may not able to negotiate BITs with those countries that it would benefit having an investment-protection accord with. Some countries that are frequently respondents in international investment tribunals have withdrawn from ISDS provisions or signaled an intention to do so. As EU investors are the biggest users of ISDS in these countries it is unlikely that it can cherry-pick BIT partners without restrictions.

A final flaw is that investment protection in several countries with high-standard legal systems is still not good enough to motivate a strategy of not having access to arbitration tribunals. The United States like many EU countries are in some sectors and areas acting in a way that undermines foreign investors. And they are more likely to do so if there is no investment-protection agreement that constrains potential government abuse. As with many other international agreements and contracts, their main achievement is not to facilitate dispute settlement when such a need occur but to establish a framework to avoid disputes to occur at all. From the viewpoint of political economy, the role of a BIT is often to balance those actors within a government that prefer to act without taking notice of potentially negative consequences for other countries or foreign investors.

A decision by the EU to reject a BIT with effective ISDS with the US will have systemic consequences. More radical choices, such as withdrawing from current BITs, will prompt even bigger consequences. Importantly, the consequences of taking away ISDS is not that there will be no mechanism to deal with post-establishment protection. The more likely consequence is that many countries over time will develop an approach to investment liberalisation that ensures post-establishment principles to be adopted in national law. Several critics of BITs and ISDS are opposed to investment liberalisation, too, and would not mind a sharply decreased degree of investment integration. These critics have a consistent position. But if investment openness and integration is desirable, there will have to be new forms of agreements substituting BITs.

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