BDI
The Voice of
German Industry

Background: Facts and Figures

International Investment Agreements and Investor-State Dispute Settlement

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Foreign direct investment (FDI) is currently protected by more than 3 000 International Investment Agreements (IIAs) worldwide. Most of these agreements feature an Investor-State Dispute Settlement (ISDS) mechanism to enforce investor rights. In recent years there has been an increase in the number of ISDS cases, accompanied by growing criticism of the way investor-state disputes are settled. Critics fear that ISDS gives investors the ability to challenge national laws, particularly in the environmental and social domains. These fears are fuelled by headline-grabbing cases such as Vattenfall v. Federal Republic of Germany, and Philip Morris Asia v. Australia. Critics are particularly concerned about the negotiations of the Transatlantic Trade and Investment Partnership (TTIP).

1. International Investment Agreements

Within international investment agreements (IIAs), the signatory countries commit themselves to non-discriminatory as well as fair and equitable treatment of foreign investors. They also pledge not to expropriate (directly or indirectly) the foreign investment without compensating the investor. Traditionally, most IIAs were Bilateral Investment Treaties (BITs) between two countries. According to the United Nations Conference on Trade and Development (UNCTAD), BITs still dominate in quantitative terms but regional agreements, such as the trilateral investment agreement signed by China, Japan, and South Korea in 2012, are gaining in importance. Furthermore, investment rules are increasingly integrated in bilateral and plurilateral free trade agreements (FTAs).

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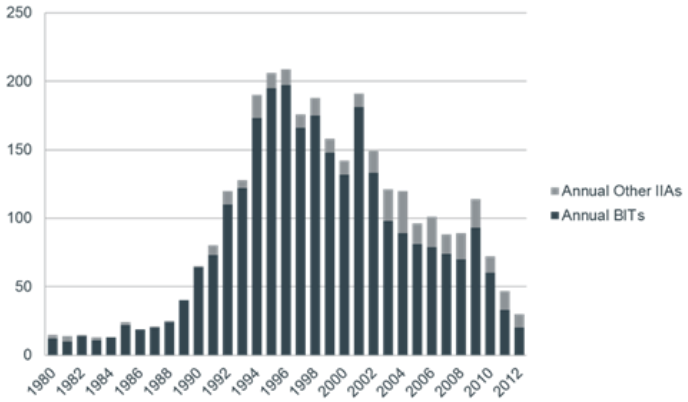
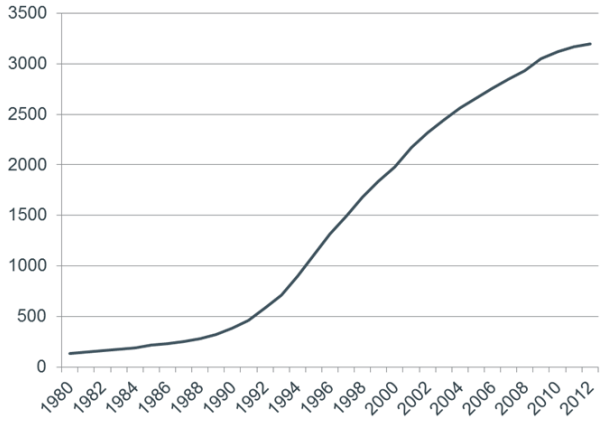
Figure 1: New BITs and IIAs concluded for each year (1980-2012) per year



Source: UNCTAD, *World Investment Report 2013*, United Nations, New York and Geneva, 2013, p. 102, <http://unctad.org/en/PublicationChapters/wir2013ch3_en.pdf>.

Figure 2: Accumulation of BITs and other IIAs concluded from 1980-2012



Source: UNCTAD, *World Investment Report 2013*, p. 102, <http://unctad.org/en/PublicationChapters/wir2013ch3_en.pdf>.

1.1 Special Focus: The European Union

The Lisbon Treaty of 2009 granted the European Union the power to regulate foreign direct investment (FDI) as part of its trade policy (Articles 207 [1] and 3 [1] [e], Consolidated Version of the Treaty on the Functioning of the European Union). But the Commission has yet to sign an autonomous investment agreement with another state, so the BITs of the EU Member

Box 1: Guarantees most commonly offered in IIAs (note: the interpretation of the below-mentioned concepts can differ between different IIAs, ISDS cases, and dispute settlement institutions).

1. The investor is ensured *Most-Favored-Nation treatment* (MFN) and *National Treatment*. According to the latter, an investor from the treaty partner shall be treated no worse than a local investor. MFN prohibits disadvantage compared to investors from third countries.
2. The Parties of the agreement commit themselves *not to directly or indirectly nationalize or expropriate the investments of investors* except
    a) for public purpose
    b) under due process of law
    c) on a non-discriminatory basis
    d) against payment of prompt, adequate, and effective compensation.
3. Investors are guaranteed *fair and equitable treatment*. Treatment is not fair and equitable if (among others) a) investors are denied justice in criminal, civil, or administrative proceedings; b) if fundamental principles of due process are neglected; c) if investors are abused (including coercion, duress, or harassment); d) if principles of effective transparency are disregarded.
4. The Parties to the agreement are obliged to *honor specific obligations* to which they have committed with regard to foreign investments.
5. Each Party is obliged to permit all *transfers* related to an investment.

States are currently the valid legal framework. As of 2013, the EU Member States had signed 1,400 investment protection agreements.[1]

The EU is currently negotiating a BIT with China. The Comprehensive Economic and Trade Agreement (CETA) with Canada, which is likely to be signed in the coming months, will be the first comprehensive free trade agreement of the European Union to contain an ambitious investment chapter. Investment protection and market access is also part of the negotiations on a Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States. Furthermore, the EU is mandated to negotiate investment chapters in FTAs with India, Japan, Thailand, and Vietnam. The FTA with Singapore, which has otherwise been completed, is also to feature a chapter on investment protection and market access. Negotiations of the investment chapter are yet to be concluded as they started later than the general FTA negotiations.

[1] European Commission, *Factsheet: Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, November 2013, p.1, <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf>.

On June 21, 2012 the EU defined how financial responsibility is to be shared between Member States and the Union in the event of dispute settlement procedures. For example, if a foreign investor takes action against Germany over unfair treatment based on a European Directive, the European Union will have to cover the legal costs and any compensation. On February 11, 2013 the European Union also came out in favour of the United Nation's (UN) new transparency rules for investor-state dispute settlement (ISDS). Under the UN rules, the public will have access to documents submitted, access to hearings, and the ability to contribute submissions to arbitral proceedings. The EU has introduced these new transparency rules for arbitration into its FTA with Canada.[2]

Box 2: Germany's BITs

Germany has concluded the highest number of BITs worldwide, with a total of 131 active treaties.

The 2005 and 2008 German model BIT:

- Fair and equitable treatment and full protection and security
- Protection against expropriation/indirect expropriation
- Definition of "investor"
- National and most-favored nation treatment except in tax matters
- State/State and Investor/State Dispute Settlement
- "Umbrella" clause

Source: OECD, "Novel Features in Recent OECD Bilateral Investment Treaties," chapter in *International Investment Perspectives*, 2006, p. 143-181, <http://www.oecd.org/investment/internationalinvestmentagreements/40072428.pdf>.

1.2 Special Focus: The United States

The United States has concluded 47 BITs since 1982. As of September 2012, the United States had active BITs with 41 countries, and 12 FTAs including investment protection. Examples of FTAs with investment provisions include the FTA with South Korea, which includes an investment chapter, and the Trans-Pacific Partnership, where investment is currently under negotiation. Although the United States has no BIT with China, it has resumed the talks it broke off after the Tian'anmen massacre of 1989. The U.S. FTA with Jordan does not include BIT-like provisions, and the U.S. FTA with Australia does not include an ISDS. The investment provisions in the U.S.-Israel FTA only apply to trade-related performance requirements.[3]

The U.S. model BIT was reformed in 2004 after heavy use of ISDS under NAFTA demonstrated that the scope of investment protection was too broadly defined. The 2004 version narrowed both the definition of invest-

[2] European Commission, *Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements*, November 2013, p. 9, <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf>.
[3] Shayerah Ilias Akhtar and Martin A. Weiss, *U.S. International Investment Agreements: Issues for Congress*, Congressional Research Service, R43052, 29 April 2013, p. 12, 14-15, <https://www.fas.org/sgp/crs/row/R43052.pdf>.

ment that would be covered, as well as the minimum standard of treatment. It also defined in greater detail the provisions for using ISDS, added rules for greater transparency of laws and case proceedings, and introduced environmental and labor standards into its preamble.[4]

On April 20, 2012 Washington unveiled a new model BIT with modified rules for dealings with state-owned companies, expanded possibilities for U.S. businesses to "participate in the development of standards and technical regulations" in the host country, and new standards for transparency in governance. Tighter prohibitions on performance requirements are intended to prevent a host country from placing particular requirements on foreign investors (for example access to particular technology). The 2012 model BIT also defines new labor and environmental standards, including prohibiting governments from suspending environmental and labor laws to attract foreign investors.

2. Investor-State Dispute Settlement (ISDS)

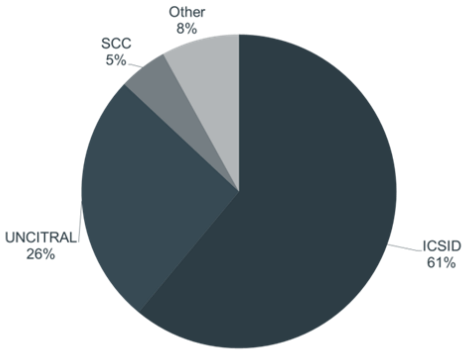
In a study conducted by the OECD of 1,660 IIAs, 93.5 percent include a clause providing for international arbitration.[5] Usually, the IIA specifies the forum to be used for ISDS. The International Centre for Settlement of Investment Disputes (ICSID) is historically one of the most-used of these forums, followed by the United Nations Commission on International Law (UNCITRAL). The Stockholm Chamber of Commerce (SCC) and the International Chamber of Commerce (ICC) are also used, though less frequently. Figure 3 shows the cumulative distribution of known cases amongst the institutions available.

Box 3: The ISDS procedure

1. The investor notifies the host state that an ISDS claim has been filed
2. Both parties are involved in choosing the tribunal (unless it is already specified in the investment agreement that a certain one will be used); each appoint one arbitrator, while agreeing jointly on the third
3. The arbitration proceeding can last several years
4. The award is granted and compensation determined

[4] Shayerah Ilias Akhtar and Martin A. Weiss, *U.S. International Investment Agreements: Issues for Congress*, Congressional Research Service, p. 9, <https://www.fas.org/sgp/crs/row/R43052.pdf>.
[5] Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment, No. 2012/2, November 2012, p. 11, <http://dx.doi.org/10.1787/5k8xb71nf628-en >.

Figure 3: Historical distribution of cases among arbitral institutions

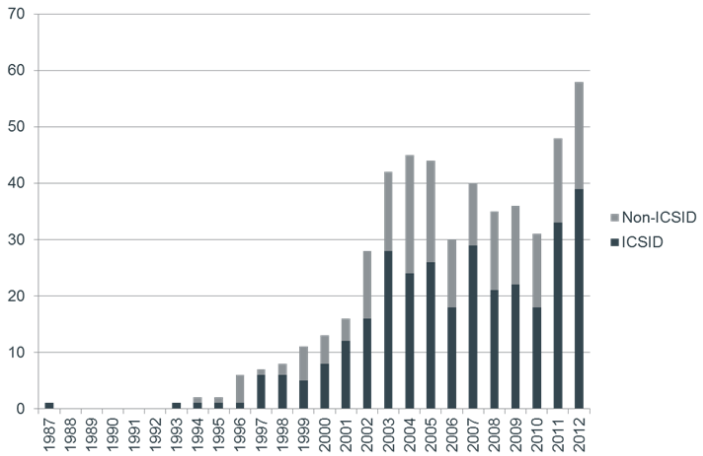


Source: UNCTAD, *Recent Developments in Investor State Dispute Settlement (ISDS)*, May 2013, p. 4, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

The ICSID publishes details about the cases filed under its rules, including filed cases and decisions reached in the tribunals. Under ICSID rules, arbitration is conducted by an independent tribunal made up of three lawyers from around the world: one appointed by the investor, one by the host country, and one appointed jointly by both parties.

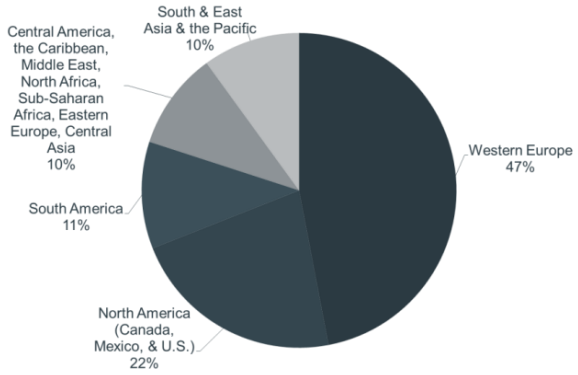
In a study done by ICSID of cases registered under ICSID rules up until December 2013, the institution found that the majority of the arbitrators, conciliators, and ad hoc committee members selected under its rules were from Western Europe. This is depicted further in Figure 5.

Figure 4: Number of all ISDS cases since 1987, separated between ICSID and non-ICSID



Source: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014); UNCTAD, *World Investment Report 2013*, p. 111, <http://unctad.org/en/PublicationChapters/wir2013ch3_en.pdf>.

Figure 5: Regional distribution of panel members in ICSID cases, historically, up until December 2013

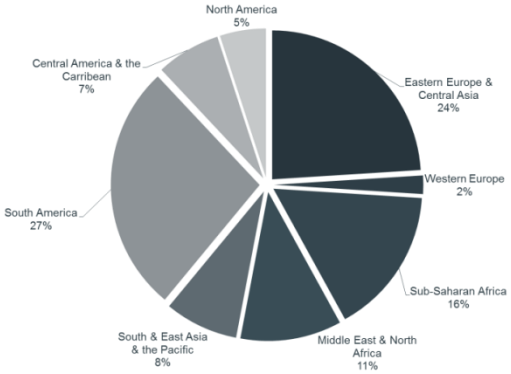


Source: Institutional Centre for Settlement of Investment Disputes, *The ICSID Caseload – Statistics*, (Issue 2014-1), 2014, p. 18, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English51>.

2.1 Regional Distribution of ISDS Cases

ICSID publishes several reports per calendar year with up-to-date statistics about its caseload. Focusing on ICSID cases alone, the majority of cases were historically initiated against states in South America and Eastern Europe/Central Asia. Figure 6 shows this breakdown for ICSID cases.

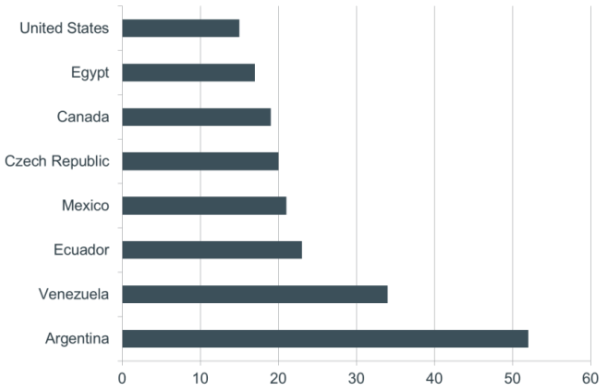
Figure 6: Regional distribution of respondents to ICSID cases (total, as of end 2013)



Source: Institutional Centre for Settlement of Investment Disputes, *The ICSID Caseload – Statistics*, (Issue 2014-1), 2014, p. 11, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English51>.

Looking at both ICSID and non-ICSID cases, it is developing and transition economies that are most often the respondents in ISDS cases. The general pattern is that investors from developed countries tend to initiate claims against developing and transition countries: In 2012, 73 percent[6] of the claims from investors from developed countries were against developing countries, while in 2011, this figure was 80 percent.[7] Argentina is the host country most often involved in ISDS cases, a great deal of which were initiated in response to sudden legislation in 2001 on foreign exchange transactions and cash withdrawals during the country's financial crisis. As Figure 7 shows, Venezuela and Ecuador are the next most frequent respondents.

Figure 7: Most frequent respondents in ISDS cases (total, as of end 2012)

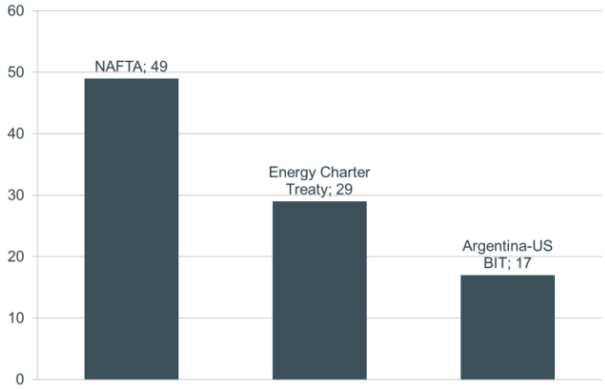


Source: UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISD*S), May 2013, p. 4, 29, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

The three investment vehicles most frequently used to initiate an ISDS case are the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty, and the Argentina-U.S. BIT. The cases are spread across a variety of institutions, not just ICSID. Figure 8 shows the accumulated number of ISDS cases for these three treaties registered under all tribunals.

[6] UNCTAD, *Recent Developments in Investor State Dispute Settlement (ISDS)*, May 2013, p. 3, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.
[7] UNCTAD, *Latest Developments in Investor-State Dispute Settlement (ISDS)*, Issues Notes, No. 1, April 2012, p. 2, <http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf>.

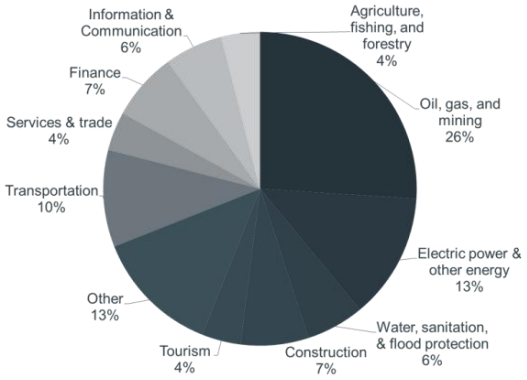
Figure 8: Cases attributed to the three most-used investment treaties to initiate an ISDS case (cumulative, through 2012)



Source: UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, May 2013, p. 4, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

ICSID has provided information about its cases that shows the economic sectors most often involved in ISDS cases. Figure 9 reveals that the sector for oil, gas, and mining accounts for the greatest share of all ICSID cases as of December 2013.

Figure 9: Distribution of ISDS cases registered under ICSID rules by economic sector (total cases, up until December 2013)

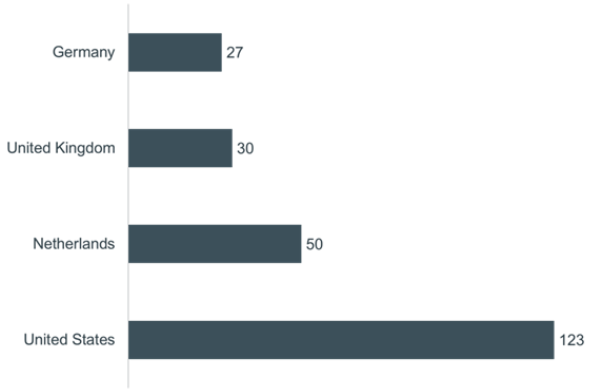


Source: Institutional Centre for Settlement of Investment Disputes, *The ICSID Caseload – Statistics*, (Issue 2014-1), 2014, p.12, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English51>.

2.2 Who Files Most of the Cases?

Up through the year 2012, there were 514 known ISDS cases, across all arbitral institutions. 24 percent, or 123 cases, were initiated by investors from the United States (see Figure 10).[8]

Figure 10: Number of ISDS cases initiated by the top four countries through 2012

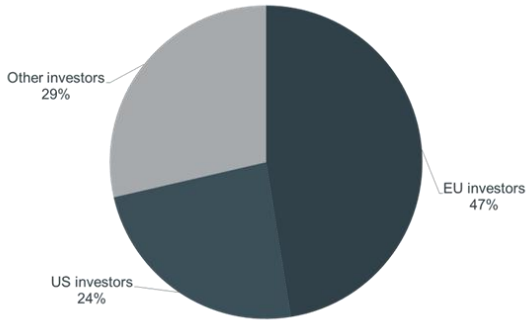


Source: UNCTAD, *Recent Developments in Investor State Dispute Settlement*, May 2013, p. 4, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

However, looking at data that goes through 28 February 2014, investors from the EU as a whole initiated roughly 47 percent of the historical cases, as depicted in Figure 11.[9] 2012 was a particularly high year for ISDS cases, wherein EU investors initiated 32 (about 60 percent) of the 58 cases, in comparison with 4 cases (about 8 percent) initiated by investors from the United States.[10]

[8] UNCTAD, *Recent Developments in Investor State Dispute Settlement (ISDS)*, May 2013, p. 4, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.
[9] This figure comes from an informal assessment of the UNCTAD ISDS database: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).
[10] UNCTAD, *Recent Developments in Investor State Dispute Settlement (ISDS)*, May 2013, p. 27-28, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

Figure 11: Percentage of ISDS cases initiated by investors from the EU, the United States, and other countries (all cases up until 28 February 2014)



Source: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded),* via <http://iiadbcases.unctad.org/> (accessed 28 February 2014). [11]

2.3 Special Focus: Germany

On the list of country of origin of investors who initiate ISDS cases, Germany ranks fourth with 27 known cases (as can be seen in Figure 10). However, this number is likely higher, as news articles from 2013 and 2014 report additional cases which, as of April 2014, have not yet been recorded in the *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases* or in UNCTAD publications. The chart in Annex 1 details the 27 cases initiated by German investors listed in the database, along with two additional cases. German investors have most often brought cases against Argentina, the Czech Republic, and Poland, as depicted in Figure 12 below. Cases were filed under both ICSID and UNCITRAL, as well as one case filed under the SCC. Germany has been sued twice by a foreign investor, as outlined in Box 4.[12]

[11] The author found numbers for EU investors by counting the number of cases from each EU member country listed in the database. It is possible that some cases the database are double-listed, which affects the outcome of this chart. For Germany, the UK, and the Netherlands, the author used figures officially published by UNCTAD in 2012.

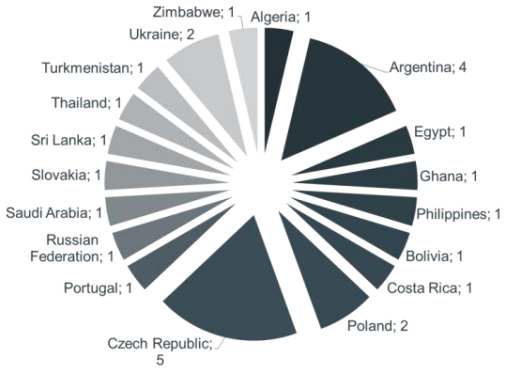
[12] A third case is recorded in the *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*. This case appears to have been terminated before arbitration.

Box 4: Cases brought against Germany by a foreign investor

In 2009, the Swedish energy company *Vattenfall* filed a case at the ICSID after new water quality standards to protect the Elbe River were enacted by the Hamburg Environmental Authority. According to Vattenfall, these standards made the construction of a new coal-fired power plant in Hamburg-Moorburg uneconomical. The company argued that the new standards were in breach of the principle of fair and equitable treatment and of the ban on expropriation under the Energy Charter Treaty, and sued for compensation of €1.4 billion. The dispute was settled in 2011 when Germany promised Vattenfall that it would introduce less stringent environmental permits.

Vattenfall instigated arbitration proceedings at the ICSID in 2012 on account of an alleged breach of its investor rights based on the Energy Charter Treaty. Vattenfall claims that the amendment of the nuclear power regulations by the German government as part of the country's switch to renewables had caused considerable damage to the company. Vattenfall owns two of the oldest nuclear power stations in Germany (Brunsbüttel and Krümmel), both of which were decommissioned with immediate effect by the new legislation passed in the summer of 2011 (although Krümmel had already been out of operation since 2007, apart from a few weeks, due to several incidences). Vattenfall was the only nuclear power station operator

Figure 12: States against which German investors directly initiated ISDS cases (total, through 28 February 2014)



Source: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

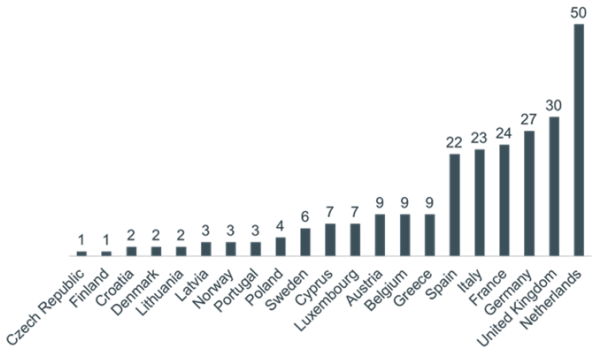
2.4 Special Focus: The European Union

An informal count of the ISDS cases listed in the UNCTAD *Database of Treaty-Based Investor-State Dispute Settlement Cases* revealed that 81 ISDS cases have been initiated against EU Member States. The Czech Republic, Hungary, Poland, and Romania lead by far, each being the respondent in between 10 and 18 known ISDS cases.[13] Looking in the other direc-

[13] *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 14 April 2014).

tion, at claims brought by EU investors, this number was roughly 244, or 47 percent of all historic claims.[14]

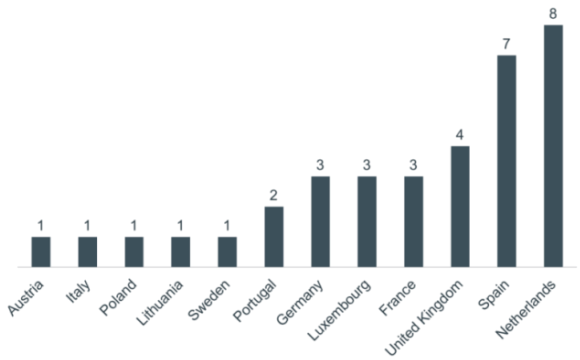
Figure 13: All cases brought by current EU Member States, (Germany, UK, Netherlands until end of 2012; other Member States up until 28 February 2014



Source: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014)[1]; UNCTAD, *Recent Developments in Investor State Dispute Settlement (ISDS)*, p. 4, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

Of these 244 claims, UNCTAD has published that the Netherlands have led the way with 50, followed by the United Kingdom with 30, and Germany with 27 cases. The rest of the data for Member States was taken from the *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases* on 28 February 2014. However, the dynamics can change from year to year. As Figure 14 shows, in 2012 Spanish investors filed the second highest number of ISDS cases of all EU countries.

Figure 14: All cases initiated by current EU Member States in 2012



Source: UNCTAD, *Recent Developments in Investor State Dispute Settlement (ISDS)*, p. 27-28, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

[14] Number is a result of the author's informal count and subject to slight variation.

2.5 Special Focus: United States

The United States has been the respondent in 15 ISDS cases, all of which used NAFTA as the investment protection instrument (14 filed by Canadian investors, 1 filed by a Mexican investor).[15] The cases brought by Canadian investors have included two cases in which an investor challenged the implementation of environmental regulations in mining and gasoline additives (see case descriptions on page 20). Other examples include cases from lumber companies challenging antidumping and countervailing duties. The Mexican trucking company Canacar brought a case against the United States in 2009 after Mexican investment in U.S. carriers and Mexican carrier operations in the United States were restricted.[16] The case is still pending. Most of the cases against the United States are still pending, and 6 have come to a conclusion. The United States has won all 6.[17]

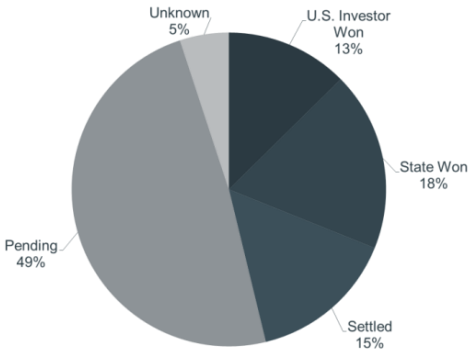
Box 6: U.S. investors challenge EU Member States

In 2001, *Noble Ventures*, a U.S. company specializing in consulting services specific to the steel industry, brought an ISDS claim against Romania under ICSID rules. Noble Ventures had bought Resita Steel Works in 2000 for USD 4 million, and took on the plant's debt, relying on a debt rescheduling plan agreed upon in the contract. The debt rescheduling plan was halted by the new government after elections, and Noble Ventures was unable to operate the steel plant as planned. The government terminated the purchase in 2002, basing its action on a clause in the privatization contract that it could be cancelled if the investor was not able to make two installments in a row. The tribunal decided in favor of Romania, and dismissed Noble Venture's claims in 2005.

U.S. investor *Alex Genin* brought a case against Estonia to the ICSID in 1999. Genin was the owner of Eastern Credit Limited, Inc, which owned A.S. Baltoil, a principle shareholder of the Estonian Innovation Bank (EIB). Problems arose after EIB had invested in an insolvent local Estonian bank, which had discrepancies on its balance sheet that before had not been known. EIB sought to recover compensation from the Bank of Estonia, which is Estonia's central bank. After a series of investigations in which the Bank of Estonia began conducting background investigations on the shareholders of EIB, including Mr. Genin, the Bank of Estonia revoked EIB's banking license. The tribunal decided that Estonia did not violate the BIT during the sale of the insolvent bank or by revoking EIB's banking license.

[15] UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, May 2013, p. 29, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>; The cases filed by Canadian and Mexican investors were drawn from the *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).
[16] U.S. Department of State, *Canacar v. United States of America*, site for Cases Filed Against the United States of America, <http://www.state.gov/s/l/c29831.htm> (accessed 3 March 2014).
[17] *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

Figure 15: Results of cases initiated by U.S. investors (all, through 28 February 2014)



Source: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded),* via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

Looking at ISDS cases in the other direction, investors from the United States have filed 123 ISDS cases, under various arbitral institutions. As Figure 15 shows, the majority is still pending, but of the cases that have come to a conclusion, the State has won 22 times, slightly more often than the U.S. investor (15 times).

Box 5: U.S. investors don't always win

The U.S. corporation *GAMI Investments* owned shares in 5 Mexican sugar mills. The investor filed a claim against the State through UNCITRAL after Mexico passed regulations aiming to support the national sugar industry, which GAMI saw as discriminatory and negatively affecting the investment. The State later expropriated 22 sugar mills in the interest of saving the national economy, including all 5 of GAMI's sugar mills. GAMI claimed that its business was expropriated by the State without compensation. GAMI's claims were rejected by the tribunal.

Source: U.S. Department of State, *GAMI Investments v. United Mexican States,* <http://www.state.gov/s/l/c7119.htm> (accessed 3 March 2014).

Up until March 2014, the country that has been sued the most by U.S. investors is Canada (19 cases), followed by Argentina (17 cases), Mexico (14 cases), and Ecuador (14 cases).[18] Looking at EU Member States, investors from the United States have brought cases against the Czech Republic (1), Estonia (2), Poland (4), and Romania (4). Of these cases, the U.S. investor has never won. While many are pending or unknown, the Czech Republic, Estonia, and Romania have each won cases brought against them by a U.S. investor.[19] A U.S. investor has never filed an ISDS cases against Bulgaria, Croatia, Slovakia, Latvia, or Lithuania, although it has BITs with these

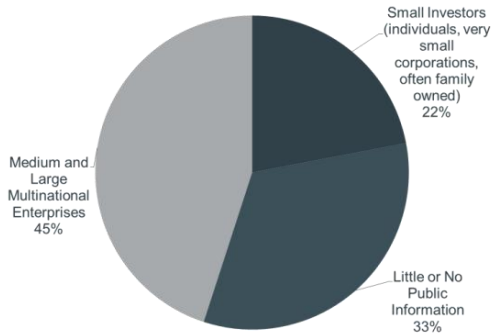
[18] These numbers come from a count in the *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded),* via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).
[19] *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded),* via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

countries which specify the ability of an investor to bring disputes to an international court.[20]

2.6 Do Only the Big Multinationals Initiate ISDS Cases?

A survey completed in 2011 from OECD of 50 ICSID and 45 UNCITRAL cases shows that investor claimants are very diverse, ranging from individuals and SMEs to large corporations.[21] This is shown below in Figure 16.

Figure 16: Claimants from 50 ICSID[22] and 45 UNCITRAL[23] cases (cases up to 2011)



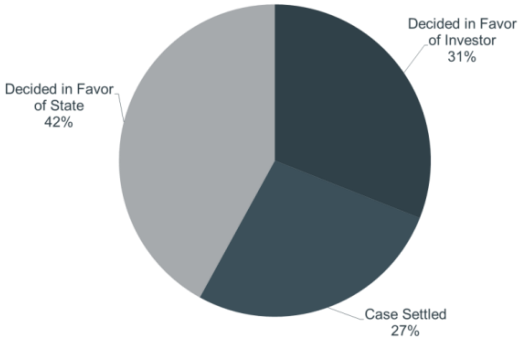
Source: David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, December 2012, p. 18, <http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf>.

2.7 Who Wins? Who Loses? Results of Cases All Over the World

Looking at all known ISDS cases around the world, including all of the possible reporting institutions (ICSID, UNCITRAL, SCC, ICC, etc.), 244 have been brought to a conclusion.[24] Of these 244, the State has won the most often, as shown in Figure 17.

[20] *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014). The texts of the BITs are found online, except for the text for the Lithuania-US BIT, which could not be found online.
[21] David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, December 2012, p. 18, <http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf>.
[22] The ICSID cases included were the 50 most recent settled cases on the ICSID website, at the time the study was conducted in 2011. The cases were settled between April 2006 and April 2010.
[23] The UNCITRAL cases included all 45 UNCITRAL cases that were posted on a subscription law website at the time the OECD study was concluded.
[24] This figure excludes cases that are pending or unknown.

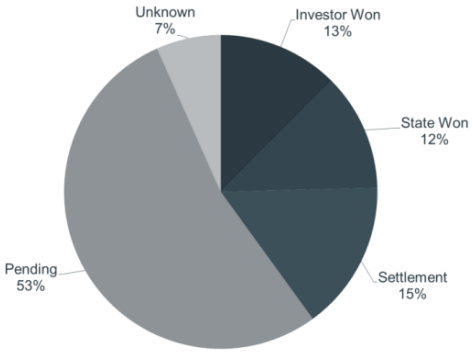
Figure 17: Results of cases worldwide (244 cases up until end of 2012)



Source: UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, May 2013, p. 1, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf>.

Figure 18 focuses on the results of cases initiated by investors from the United States, the United Kingdom, the Netherlands, and Germany.

Figure 18: Results of cases initiated by investors from the United States, the Netherlands, the United Kingdom, and Germany (all cases counted together, through 28 February 2014)



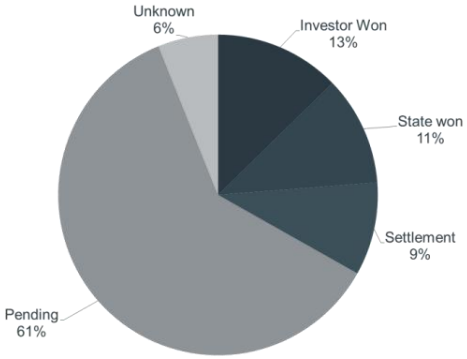
Source: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).[25]

Analyzing the cases against countries which have been the most frequent respondents to ISDS cases (the United States, Egypt, Canada, the Czech Republic, Mexico, Ecuador, Venezuela, and Argentina), the picture is more mixed. Figure 19 shows that the investor has won 13 percent of the cases,

[25] These figures come from the current state of each case as listed in the database: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

while the State has won 11 percent. The vast majority of ISDS cases are pending.

Figure 19: Results of cases against the most frequent respondents to ISDS claims (including all cases brought against the United States, Egypt, Canada, the Czech Republic, Mexico, Ecuador, Venezuela, and Argentina up until 28 February 2014)



Source: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).[26]

2.8 How Much Does an ISDS Case Cost?

According to a survey conducted by the OECD of 143 available ISDS arbitration awards, 28 of which provide information about fees, the average legal and arbitration costs for a party involved are over USD 8 million. There are some cases where costs exceed USD 30 million. The OECD writes that legal counsel and experts account for 82 percent of these costs, while arbitrator fees are about 16 percent of the costs. About 2 percent of the costs go to the institution (ICSID, SCC, UNCITRAL, etc.).[27]

Box 7: Why is ISDS so expensive?

- The nature of the applicable law and the cases, including little legal precedent
- Small group of available arbitrators, making availability costly
- Weak "case management", allowing costs to run up
- Role of large law firms with expensive techniques for litigation
- High damages claims
- Unestablished rules for "cost shifting"

[26] These figures come from the current state of each case as listed in the database: *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

[27] David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, December 2012, p. 19, <http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf>.

3. ISDS: Case Studies

The following section gives an overview of selected ISDS cases. The order of the cases below proceeds as follows:

1. Disputes (5) involving a German investor, in which the German investor won or partially won.
2. Dispute (1) involving a European investor, in which the European investor won.
3. Dispute (1) in which a developing country won against a European investor.
4. Disputes (2) in which a State's environmental regulations were upheld and defended.
5. Dispute (1) in which a State's right to change regulations was upheld.

Case Study 1: Saar Papier v. Poland – Decision in Favor of the Investor (DM 2.3 million awarded)

Germany-based Saar Papier produced paper products. It received a license which allowed Saar Papier to establish a subsidiary in Poland, which would produce paper products out of imported paper. In 1991 Poland suddenly banned the import of recovered paper on the grounds that it is considered waste which was banned under the environmental protection law of Poland.

Saar Papier initiated the claim under UNCITRAL rules in 1994, claiming that the decision of the Polish import ban violated the BIT between Germany and Poland and could be considered an expropriation. The case was brought under UNCITRAL rules, and the tribunal decided that the Germany-Poland BIT was indeed breached. Poland was ordered to pay Saar Papier 2.3 million Deutsche Mark (about EUR 1.2 million at the time).

Saar Papier subsequently initiated a second arbitration claim in 1996 to seek compensation for a different period of time in which the imports of waste paper were blocked by Poland. This time, the tribunal ruled in favor of the State. A third arbitration was launched in 1998 by Lutz Ingo Schaper, who was a partner in the Saar Papier firm, under UNCITRAL rules. Not much about the case is known.[28]

[28] Luke Eric Peterson, "Early Investment Arbitrations Against 'Improper' Use of Environmental Laws Uncovered," post in *INVEST-SD: Investment Law and Policy Weekly News Bulletin*, 5 January 2004, <http://italaw.com/documents/investment_investsd_jan5_2004_000.pdf>.

Case Study 2: Sedelmayer v. Russia - Decision in Favor of the Investor (USD 8 mn awarded)

Franz Seldelmayer was a German citizen and the owner of Sedelmayer Group of Companies International Inc. (SGC). In 1990, Sedelmayer entered SGC into a joint venture with the St. Petersburg Police Department to create a company called Kammenij Ostrov (KOC), which would provide law enforcement equipment and training. Each side owned 50 percent of KOC. In 1994 the building of KOC was seized by the government upon a directive from President Yeltsin. Mr. Sedelmayer filed a complaint at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) citing the Germany-USSR BIT. In 1998 the tribunal found that the act constituted expropriation and that Russia would have to pay compensation of USD 2.4 million plus interest.[29] Russia, however, did not pay the compensation. ICSID and UNCITRAL arbitration rules specify that awards are final and binding[30], and as Russia has not ratified these rules, Russia may have felt less pressure to enforce the award. As the enforcement of an arbitration award lies with the national courts of the State, the SCC could not help further. Sedelmayer attempted to obtain his payment through the seizure of Russian property outside of Russia.[31] In February 2014 a Russian trade office in Sweden was auctioned off by the Swedish government to repay Sedelmayer. Sedelmayer has brought a similar case over a Russian trade property in Cologne, which is currently pending.

Box 8: How are ISDS awards enforced?

As Sedelmayer v. Russia shows, enforcement of an ISDS award against a State is difficult as it relies on the State's courts to uphold. Investors have three choices to deal with a State's refusal to pay an award:

1. Settle with the State for prompt payment in at lower amount, or for other types of compensation.
2. Locate the State's assets abroad and initiate enforcement procedures in the relevant third country.
3. Enlist home government for support.

Case Study 3: Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines – Decision Pending

[29] Sergey Ripinsky and Kevin Williams, "Case Summary: Mr. Franz Sedelmayer v The Russian Federation", online chapter from *Damages in International Investment Law*, November 2008, <http://www.biicl.org/files/3932_1998_sedelmayer_v_russia.pdf>.

[30] Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large sample survey*, OECD Working Papers on International Investment, No. 2012/2, November 2012, p. 36, <http://dx.doi.org/10.1787/5k8xb71nf628-en >.

[31] Yaraslau Kryvio, "Chasing the Russian Federation", online post on *CIS Arbitration Forum*, 13 July 2011, <http://cisarbitration.com/2011/07/13/chasing-the-russian-federation/>.

Fraport filed a claim at ICSID after the Philippine government expropriated an investment Fraport had made in PIATCO, a Philippine company which had won the rights to an airport terminal construction project. During the court process, a dispute settlement tribunal found that Fraport had managerial control over the project, which violated a local law that provided that public utilities remain under Philippine ownership. Thus, the tribunal ruled that Fraport did not have access to claim a dispute under the Philippine-Germany BIT for expropriation.

In 2010, however, an ICSID ad-hoc committee decided that the original tribunal had failed to hear all the evidence. The committee came to the conclusion that, according to Philippine law, the foreign share of a company, rather than *de facto* control over its management is the determining factor. The committee decided Fraport had been a victim of a failure of the tribunal to implement the right procedures.[32] Another claim was officially filed by Fraport in 2011 under the ICSID, and is still pending.[33]

Case Study 4: GEA v. Ukraine - Ruled in Favor of Investor, but Investor Never Received the Award from the State

The dispute is between a German firm, New Klöckner, and a Ukrainian state-owned chemical company, Oriana. New Klöckner was to provide fuel to Oriana for conversion, and Oriana would get a tolling fee. New Klöckner was later acquired by the claimant, GEA Group Aktiengesellschaft.

The conversion agreement began to fall apart in the late 1990s when 125,000 tons of fuel went missing. The parties initiated a settlement and repayment agreement to repay GEA for the fuel that was missing. This agreement failed, and a dispute was filed with the ICC.

The ICC found Oriana liable for some USD 30 million. However, Ukraine failed to enforce the award. In 2008, GEA filed a request against Ukraine with ICSID under the German-Ukraine bilateral investment treaty, claiming that Ukraine kept failing to meet its promise to compensate GEA for the missing fuel. The tribunal ruled that GEA's previous award by the ICC did not constitute an investment, and therefore non-payment of the award could not be brought to the tribunal. GEA lost and had to pay Ukraine USD 1.6 million for its arbitration costs at the ICSID. [34]

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[32] Jarrod Hepburn, "Fraport Files New Claim at ICSID over Expropriation of Airport Terminal Project; Annulment Committee Ruling Paved Way for New Hearing by Finding Breach of Investor's Right to be Heard", *IIA Reporter*, 31 March 2011.

[33] *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

[34] Damon Vis-Dunbar, "Ukraine Cleared of Claim by German Investor over Stolen Fuel," post in *Investment Treaty News, Awards and Decisions*, website of the International Institute for Sustainable Development, 12 July 2011, <http://www.iisd.org/itn/2011/07/12/awards-and-decisions-4/>. There is a contradiction: according to the UNCTAD ISDS Database, this case is still pending.

Case Study 5: Adem Dogan v. Turkmenistan – Pending

The German investor Adem Dogan ran a chicken farm in Turkmenistan. In light of his success the Turkmen government decided to claim 50 percent of the farm, and in 2006 soldiers confiscated large amounts of the machinery on the property. After first attempting to bring attention to the seizure at the diplomatic level, Dogan then brought the case to the ICSID. He claimed EUR 46 million in damages. The case was accepted and is now pending.[35]

Case Study 6: Tecmed v. Mexico – Decision in Favor of Investor

The Spanish company Tecmed was the highest bidder in an auction for a hazardous waste landfill in Mexico and won the property. Tecmed formed a company, "Cytrar," to operate the landfill and incorporated it under Mexican law. In 1996, Tecmed requested from the Mexican government that an operating license be issued in the name of Cytrar. The government initially issued a renewable license. Later on, it rejected Tecmed's renewal application for the landfill, citing failure to abide by environmental regulations. The government required Tecmed to close the landfill. Tecmed alleged that the reason its application was denied related to a change in the political regime in the municipality where Cytrar was located, rather than deficiencies in Tecmed's investment in Cytrar itself. In its complaint, Tecmed claimed that by not granting a renewal permit for the landfill, the government had expropriated Tecmed's investment.

The government argued that the wastes in the landfill exceeded legal limits, and that some waste was illegally stored in other facilities. It also claimed that the landfill received waste it did not have the correct permit for. According to the government, Tecmed had also failed to relocate the landfill further from an urban center, as it allegedly promised to do.

The tribunal decided that Mexico had expropriated Tecmed's investment and violated the standard of fair and equitable treatment.[36] Mexico was ordered to pay Tecmed USD 5.5 million with interest.[37]

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[35] Hubert von Gude, "Der Kampf des Hühnerbarons," *Der Spiegel*, 27 May 2013, <http://www.spiegel.de/spiegel/print/d-96238930.html>.

[36] International Institute for Sustainable Development, *International Investment Law and Sustainable Development: Key cases from 2000-2010*, edited by Nathalie Bernasconi-Osterwalder and Lise Johnson, 2011, p. 137-140, <http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf>.

[37] *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases (Pending and Concluded)*, via <http://iiadbcases.unctad.org/> (accessed 28 February 2014).

Case Study 7: Biwater Gauff Ltd. v. Tanzania – Decision Split, but Investor Paid State

A British firm, Biwater Gauff Ltd. won a bid to operate and manage Tanzania's water and sewage system. To do so, the company created the Tanzanian subsidiary City Water in 2003. By February 2005, City Water had run into severe financial trouble and requested to renegotiate its contract with the Tanzanian government, to which the government agreed. However, City Water rejected the compromise suggested by the mediator in the renegotiation. In view of the failure to renegotiate a contract and City Water's failure to meet its responsibilities under the original contract, Tanzania terminated the contract and seized the company.

City Water filed a claim under the ICSID citing that Tanzania had violated five aspects of the United Kingdom-Tanzania BIT: expropriation, fair and equitable treatment, full protection and security, unreasonable or discriminatory measures, and unrestricted transfer of capital and returns. The ICSID court found Tanzania had indeed breached the first four, but not the fifth. As City Water had lost no profit during the time period, the ICSID court decided that Tanzania should not pay City Water.[38]

At the same time, City Water had also started arbitration under the UNCITRAL rules. Here, the tribunal decided in 2007 to reject City Water's claims and ordered that City Water pay Tanzania £3 million to cover damages to the Tanzanian government.[39]

Case Study 8: Methanex v. United States – Decision in Favor of the State

The Canadian company Methanex was one of the main producers of methanol for the U.S. market, where it was converted into the gasoline additive, MTBE (methyl tert-butyl ether). After several studies revealing that this methanol additive was polluting the groundwater, California implemented a ban on the use of the methanol additive. In 1999, Methanex challenged California under NAFTA in light of its reduced future profits. Methanex claimed that California had breached obligations for national treatment, minimum international standards of treatment and fair and equitable treatment, and expropriation without compensation. The tribunal ruled that the regulation was non-discriminatory and for the public good.[40]

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[38] International Institute for Sustainable Development, *International Investment Law and Sustainable Development: Key Cases from 2000-2010*, edited by Nathalie Bernasconi-Osterwalder and Lise Johnson, p. 22-25, <http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf>.

[39] Ashley Seager, "Tanzania Wins £3m Damages from Biwater Subsidiary," *The Guardian*, 11 January 2008, <http://www.theguardian.com/business/2008/jan/11/worldbank.tanzania>.

[40] International Institute for Sustainable Development, *International Investment Law and Sustainable Development: Key cases from 2000-2010*, edited by Nathalie Bernasconi-Osterwalder and Lise Johnson, p. 82-83, <http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf>.

Case Study 9: Glamis Gold Lt. v. United States – Decision in Favor of State

The Canadian company Glamis Gold Ltd had begun to obtain permits to develop a mine in California. While they were proceeding with the permits, California started adopting more strict standards for mining, which would apply to all mines. It also established new requirements for sites near Native American religious grounds. Glamis was not dispossessed of its property, but its profits were anticipated to be lower as a result of the new regulations. Glamis initiated ISDS through NAFTA in 2003, citing expropriation and lack of fair and equitable treatment and minimum international standards of treatment. The tribunal ruled that the claimant's loss of profit was not large enough to constitute expropriation, and ruled in favor of the State.

Case Study 10: Parkerings-Compagniet AS v. Lithuania – Decision in Favor of the State

The Norwegian company Parkerings-Compagniet owned a Lithuanian subsidiary, which became part of a consortium of entities that would develop, construct, and operate car parks in Vilnius. The consortium would collect the parking fees and penalties, transferring a portion to the city of Vilnius. After the agreement was executed, Lithuania passed a number of laws hindering the ability of municipalities to enforce parking violations and their right to make contracts with private partners. There was also backlash against the location of a development in Vilnius' historic Old Town. After a failed renegotiation of the contract, Vilnius terminated the agreement with the consortium. Parkerings-Compagniet initiated a claim under the ICSID in 2005 that Lithuania had breached its obligations under the Lithuania-Norway BIT. Lithuania had, according to the case, not granted the investor fair and equitable treatment, had violated clauses against expropriation, not granted most-favored nation treatment, and neglected full protection and security of the investment. The tribunal rejected all four claims in 2007, citing mainly that regulatory changes must be anticipated by an investor.

4. Reforming ISDS and IIAS

As stated earlier, the number of ISDS cases has grown over time. ISDS was originally intended to provide investors with a depoliticized, fast, neutral, cheap, and flexible method of enforcing the protection of their investments. It intended to encourage productive foreign direct investment to the benefit of both the host country and the investor. Yet several high-profile cases, in which a powerful company challenged the regulatory environment of a sov-

ereign State, have called the ISDS mechanism into question. These include Vattenfall v. Germany and Philip Morris v. Australia. Cases such as Occidental v. Ecuador, resulting in the State owing billions to a foreign investor, also spark concern.

Weaknesses of the ISDS system have been revealed, including: inconsistent interpretation of clauses and definitions, creative use of the ISDS system by investors, challenges against environmental and labor regulations intended for the public good, long and expensive arbitral procedures, and limited transparency and secret proceedings.[41] Opponents of ISDS point out that, while national courts tend to include a focus on the "public good," ISDS tribunals might put the investment contract first.

As the global investment climate changes rapidly, changes to investment protection must take place as well. Instead of rejecting the entire system of IIAs and ISDS, there are several reforms that can be made to help treaties and their mechanisms provide both effective and secure assurance to both investors and host States.

4.1 Reform Proposals for Both IIAs and ISDS

Not only critics but also proponents of ISDS call for a reform of both IIAs and ISDS. UNCITRAL has already begun the reform process, adopting transparency rules that will enter into force in April 2014 for new IIAs. These new rules give the public the right to access records without having to provide proof of justified interest. A series of documents will also be required to be made accessible to the public, including applications to initiate proceedings. Details including the names of the parties, the economic sector, the IIA used, statements of the claims and the defense, and the arbitral award will be publicized. Unless parties object, the hearings will be public.

UNCTAD has also examined different options for the reform of the IIA and ISDS system to strengthen the policy space for governments in light of increasing ISDS claims. These reforms have been published in UNCTAD's *Investment Policy Framework for Sustainable Development*. This report establishes eleven basic principles for structuring investment policy to promote sustainable growth and development in the host state while simultaneously protecting investors. Further, recommendations to improve the transparency of ISDS are put forward, as well as the recommendation that investors be required to exhaust national legal systems before resorting to ISDS.

To summarize, the most frequent reform proposals involve: a) defining central terminology such as indirect expropriation or fair and equitable treatment more precisely; b) establishing a mechanism which prevents frivolous

[41] UNCTAD, *Investment Policy Framework for Sustainable Development*, United Nations, 2012, p. 43, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>.

claims; c) improving transparency; d) creating an appellate mechanism; e) improving the quality of the panelists.

a) Definition of Terms

Indirect expropriation refers to regulatory takings, creeping expropriation, and actions "tantamount to" expropriation. It can apply to a regulation passed by a State, which can leave the investment less profitable.[42] While prohibiting expropriation without proper compensation is a fundamental element of IIAs, the inclusion of indirect expropriation can blur the line between a country's right to regulate for the public good (in terms of the environment, health, labor) and what qualifies as expropriation. UNCTAD recommends that agreements list specific guidelines for regulation that does not require compensation to the investor.[43] According to the EU indirect expropriation occurs when a measure or series of measures has an effect equivalent to direct expropriation. Thus the measure has to substantially deprive the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment. Factors to determine whether an indirect expropriation took place are: 1) the economic impact of the measure; 2) the duration of a measure or the duration of its effects; 3) the character or series of measures. Non-discriminatory measures designed to protect legitimate public policy objectives do not constitute indirect expropriation.[44]

Box 9: Differences in the U.S. and EU definition of FET

The U.S. 2012 model BIT links the idea of FET with "customary international law," with the intention of narrowing the scope of how FET can be interpreted. Thus, governments themselves define what constitutes a minimum standard of treatment, and the interpretation can evolve over time.

The EU favors a different approach: specifying specific types of government actions that can be challenged under FET. This discrepancy could become an issue in the negotiations for a TTIP investment chapter.

Source: *Inside U.S. Trade*, "EU Approach on Investment Protections May Be At Odds With U.S. Model," 4 April 2014, <http://insidetrade.com/201402272462647/WTO-Documents/Text-Document/leaked-ttip-text-illustrates-differences-between-us-eu-investment-approach/menu-id-174.html>.

Fair and equitable treatment (FET) is frequently cited by investors, yet very vaguely defined in most treaties. It is meant to protect an investor against a denial of justice as well as arbitrary and abusive treatment. Most problematic is that it also includes protection of an investor's legitimate expectations for the investment. A broad definition of FET can greatly reduce a country's policy space and

[42] UNCTAD, *Investment Policy Framework for Sustainable Development*, United Nations, 2012, p. 51, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>.
[43] UNCTAD, *Investment Policy Framework for Sustainable Development*, United Nations, 2012, p. 43, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>
[44] EU Commission, *Draft: Trade in Services, Investment and E-Commerce*, 2 July 2013, via <http://keionline.org/sites/default/files/eu-kommission-position-in-den.pdf>.

expose the country to financial liability for pursuing legitimate policy objectives. For this reason the UNCTAD recommends an FET clause that includes a list of the State's obligations under the clause.[45] According to the EU, treatment is not fair and equitable if (among others) a) investors are denied justice in criminal, civil, or administrative proceedings; b) if fundamental principles of due process are neglected; c) if investors are abused (including coercion, duress, or harassment); d) if principles of effective transparency are disregarded.

Most-favored nation clauses (MFN) in IIAs could incentivize the investor to search for other investment treaties that the State has with third countries, and choose more favorable clauses from these.[46] In some ways, this is positive because it is an "upward harmonization" of the multilateral system.[47] On the other hand, this allows for "treaty shopping": investors will look for the most favorable treaty. As a result, many countries have started to exclude the option of invoking the aspect of most-favored nation as cause for ISDS in their IIAs. Another option is to limit the scope of MFN usage by carving out sectors and certain policies for which other BITs cannot be invoked.[48]

Box 10: Unpredictability in the application of MFN

In the case of *Wintershall AG* v. Argentina, Wintershall attempted to initiate an ISDS case through MFN, citing the Argentina-U.S. BIT, which allowed more flexibility for investors in initiating ISDS before exhausting local resources. The ICSID tribunal declined the case in 2009.

Siemens, however, was granted ISDS arbitration against Argentina through the Argentina-Chile BIT. It is therefore rather unpredictable whether or how MFN will be interpreted to allow ISDS arbitration.

Source: Elizabeth Whitsitt, "Investment Treaty News," *International Institute for Sustainable Development*, 5 January 2009, <http://www.iisd.org/itn/2009/01/05/german-firm-fails-to-pass-jurisdictional-hurdle-in-claim-against-argentina-decision-provokes-questions-about-the-scope-and-applicability-of-mfn-protection/>.

Umbrella clauses hold the State responsible for all obligations pertaining to specific investments. In other words, under an umbrella clause, a violation of an investor's contract can be brought against the State, even if no breach of the IIA is committed. This expands the scope of obligations that the State has to its investors. Like MFN, tribunals have had very different interpretations of the applicability of umbrella clauses,

[45] UNCTAD, *Investment Policy Framework for Sustainable Development*, United Nations, 2012, p. 43, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>.
[46] This was done by Siemens in its ISDS procedure against Argentina, in which it sought to use the Chile-Argentina BIT to speed up the procedure to file an international investment dispute.
[47] UNCTAD, *Investment Policy Framework for Sustainable Development*, United Nations, 2012, p. 42, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>.
[48] UNCTAD, *Investment Policy Framework for Sustainable Development*, United Nations, 2012, p. 51, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>.

rendering how they are used unpredictable.[49] Many of the EU Member States include an umbrella clause in their BITs, and the clause was included in the Commission's draft mandate for TTIP. [50] Yet the EU Parliament has voiced concern about the clause, and it is uncertain if it would be included. The United States does not use an umbrella clause in its BITs.

b) Establish a Mechanism to Prevent Frivolous Claims

Arbitration procedures are expensive, and a State must pay out of public funds. To discourage an investor from bringing a meritless claim to an international tribunal, a mechanism for excluding "frivolous claims" is needed. This could involve a pre-screening process, as is done in the ICSID by the Secretary General.[51] It could also mean stipulating that the loser of the case is responsible for paying the costs of arbitration for both sides.

c) Improve Transparency

A main concern for critics is the alleged secretiveness of the arbitration process in ISDS cases. Full transparency is not possible, as companies often have trade secrets that must be protected. Yet there is room for improvement. ICSID reports regularly on the state of its ISDS cases, as well as when a case has been concluded. If both parties agree, decisions and awards can be made public. Suggestions for further improvement might include allowing the public to make submissions to the court, and making hearings public.

d) Create an Appellate Mechanism

Where it now stands, decisions reached in ICSID and UNCITRAL rules are binding and final. An appellate mechanism similar to the WTO dispute settlement body would help alleviate concerns of consistency and legitimacy in ISDS decisions. The appellate body could be a standing body of permanent members appointed from different States who would review awards given by arbitral tribunals.[52]

e) Improve the Quality of Arbitration Panelists

The different interests and the partiality of the arbitrators often come into question. Based on a survey of cases filed under ICSID, arbitrators

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[49] UNCTAD, *Investment Policy Framework for Sustainable Development*, United Nations, 2012, p. 54, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf>.

[50] Inside U.S. Trade, "EU Approach on Investment Protections May Be At Odds With U.S. Model," 4 April 2014, <http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-04/05/2013/eu-approach-on-investment-protections-may-be-at-odds-with-us-model/menu-id-710.html>.

[51] ICSID, *ICSID Convention, Regulations, and Rules*, Washington, DC, April 2006, p. 42, <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf>.

[52] The text of the US-Chile FTA has left a gap where an appellate mechanism can be inserted in case the parties decide they want it. As of now, however, no action has been taken to build one.

are selected from a small group of lawyers specializing in international investment law, and are mostly from Europe and North America. Some of the lawyers in these ICSID cases have served previously in ISDS cases as counsel to investors and (much less often) to States.[53] There is an array of fears regarding the incentives of the arbitrators, including their incentive to preserve the system through consistent rulings and information asymmetries on choosing an arbitrator. Sometimes one party will challenge the arbitrator appointed by the other party because they see the selected arbitrator as potentially harboring a bias.[54] These issues should be addressed in the future.

f) Other Improvements

Promote alternative dispute resolution (ADR): This means encouraging avenues of conciliation and mediation through a third party. This is more cost-effective, can prevent a conflict from escalating, and reduce the overall ISDS caseload according to UNCTAD.[55]
Create a standing international investment court: This would mean replacing arbitral tribunals with a permanent court, in which the judges would be appointed by States. This approach is questioned, however, as opponents point out that enlarging and empowering the system could further exacerbate the problem of its legitimacy.

Concluding Remarks

BITs and other IIAs are key to giving investors the security to invest abroad, and thus forward the pursuit of global growth. However, the recent rise in the number of investment disputes initiated in international investment courts fuels critics' arguments against the ISDS mechanism and IIAs as a whole. This factsheet provides information and clarifies misconceptions about IIAs and ISDS. But it also shows that the area of investment protection is still developing, and the needs of both States and foreign investors can change with the investment environment.

[53] David Gaukrodger and Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, D2012, p. 44-45, <http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf>.
[54] UNCTAD, *Reform of Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, June 2013, p. 4, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf>.
[55] UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, June 2013, p. 5, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf>.

Annex 1: ISDS cases initiated by German investors

Chart 1: All ISDS cases initiated by German investors listed in the *UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases* as of April 2014				
German Investor (date launched)	***State Respondent***	***Reason for Dispute***	***Decision***	***Award***
Saar Papier (3 cases) (1994, 1996, 1998)	Poland	The State blocked the import of waste paper on environmental grounds. The waste paper was essential for the investor to run his business	Investor won and received award. In the second claim, the State won. The third claim's status is unknown.[56]	Deutsche Mark 2.3 million
Sedelmayer (1996)	Russia	Expropriation by the State of the investor's real estate in Russia	Investor won[57]	USD 2.35 million
Siemens (2002)	Argentina	The State allegedly breached a contract for the production of ID cards, suddenly terminating the agreement	Investor won, but then subsequent corruption charges against the investor led to an appeal, which was then settled out of court[58]	Original decision awarded USD 237.8 million plus interest
German investor (2002)	Portugal	Unknown	Settled	Unknown
Fraport AG Frankfurt Airport Services Worldwide (2003, 2011)	Philippines	Construction of an airport terminal that was cancelled	State initially won. Later the case was refiled after a review, and is now pending[59]	(Investor is seeking USD 450 million)
Ed Züblin AG (2003)	Saudi Arabia	Construction of university facilities	Settled	Unknown
Wintershall AG (2004)	Argentina	Investor claimed that State hurt its oil and gas operations by not allowing it to	Tribunal declined hearing case[60]	--

[56] Luke Eric Peterson, "Early Investment Arbitrations Against 'Improper' Use of Environmental Laws Uncovered," post in *INVEST-SD: Investment Law and Policy Weekly News Bulletin*, 5 January 2004, <http://italaw.com/documents/investment_investsd_jan5_2004_000.pdf>.
[57] Sergey Ripinsky and Kevin Williams, "Case Summary: Mr. Franz Sedelmayer v The Russian Federation", online chapter from *Damages in International Investment Law*, November 2008, <http://www.biicl.org/files/3932_1998_sedelmayer_v_russia.pdf>.
[58] International Institute for Sustainable Development, *International Investment Law and Sustainable Development: Key Cases from 2000-2010*, edited by Nathalie Bernasconi-Osterwalder and Lise Johnson, p. 128-131.
[59] Jarrod Hepburn, "Fraport Files new Claim at ICSID over Expropriation of Airport Terminal Project; Annulment Committee Ruling Paved Way for new Hearing by Finding Breach of Investor's Right to be Heard", *IIA Reporter*, 31 March 2011, <http://www.iareporter.com/articles/20110331_7>.
[60] Elizabeth Whitsitt, "German Firm Fails to Pass Jurisdictional Hurdle in Claim Against Argentina; Decision Provokes Questions about the Scope and Applicability of MFN Protection", *IISD Investment Treaty News*, web-

		receive dividends from Argentine subsidiary, and impairing the subsidiaries' rights		
Daimler Chrysler Services AG (2004)	Argentina	Dispute arose from change in Argentina's policies through its financial crisis, in which it allowed USD denominated debt to be settled in Pesos, thus reducing debt owed to Daimler	Claims dismissed[61]	--
Walter Bau (2005)	Thailand	Dispute arose over a toll road built by Walter Bau. The investor complained that the Thai government raised the toll level, thus reducing the road's competitiveness.	Investor won initially. Case is in appeal phase.[62] In the meantime, the airplane of the Thai prince was confiscated at the Munich airport, until the State delivered a bank guarantee that the money would be paid.	The initial sum was EUR 29.21 million plus interest, plus the costs of arbitration (EUR 1.8 million)
R.J. Binder (2006)	Czech Republic	Transport company	Claims dismissed[63]	--
Hochtief AG (2007)	Argentina	Highway system construction contract: the State enacted measures during its financial crisis that breached commitments to calculate road tolls in US dollars, with periodic adjustments to inflation	Pending, tribunal has accepted case	--
Gustav F W Hamester GmbH (2007)	Ghana	Joint cocoa production enterprise, in which beans were not delivered to enterprise, causing it to incur losses	Claims dismissed	--

site of the International Institute for Sustainable Development, 5 January 2009, <http://www.iisd.org/itn/2009/01/05/german-firm-fails-to-pass-jurisdictional-hurdle-in-claim-against-argentina-decision-provokes-questions-about-the-scope-and-applicability-of-mfn-protection/>.

[61] Herbert Smith Freehills Dispute Resolution, "Consistently Inconsistent: Another Contrasting Decision on 'Most Favoured Nation' Provisions, Another Split Decision," 2 September 2012, <http://hsfnotes.com/arbitration/2012/09/06/consistently-inconsistent-another-contrasting-decision-on-most-favoured-nation-provisions-another-split-decision/>.

[62] Investment Treaty Arbitration Case documents, <http://italaw.com/cases/documents/1515> (accessed 1 March 2014).

[63] Cecilia Olivet, *A Test for European Solidarity, the Case of Intra-EU Bilateral Investment Treaties*, Transnational Institute, January 2013, p. 10, <http://www.tni.org/sites/www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf>.

Nordzucker (2007)	Poland	Dispute arising out of privatization issues of Polish sugar producers. The State allegedly delayed the purchase of two sugar plants, causing Nordzucker loss of time for valuable alternative investments	Claims dismissed	--
Marion und Reinhard Hans Unglaube (2008)	Costa Rica	The investors were contracted to develop a tourist site, when the State passed a decree that the property was to become a national park, and began to expropriate the site	Investor won, second claim pending	USD 3.1 million plus interest
InterTrade (2008)	Czech Republic	The investor claimed that he sustained losses in his shares of a Czech forestry company after irregularities in government policy in forestry management and tendering	Claims dismissed[64]	--
GEA Group AG (2008)	Ukraine	Petrochemical industry: the dispute arose out of allegations that Ukrainian partner stole fuel from GEA	Investor won initially, but was not paid by Ukraine. Investor filed this failure to pay at the ICSID, and lost. Investor had to pay for State's arbitration costs.[65]	Ukraine was to pay USD 30 million based on the original case decision. In the second ruling, GEA was to pay USD 1.6 million for Ukraine's arbitration costs
Inmaris Perestroika Sailing Maritime Services GmbH and others (2008)	Ukraine	The Ukrainian government broke a contract stating that the investor could use a windjammer sail training ship after the investor paid for its repairs	Investor won[66]	Award not public
Nepolsky (2008)	Czech Republic	Dispute arose in light of the State's denial of a permit	Claim dropped by investor[67]	(investor was seeking CZK 968 million as

[64] Cecilia Olivet, *A Test for European Solidarity, the Case of Intra-EU Bilateral Investment Treaties*, Transnational Institute, January 2013, p. 10, <http://www.tni.org/sites/www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf>.

[65] Damon Vis-Dunbar, "Ukraine Cleared of Claim by German Investor over Stolen Fuel", *IISD Investment Treaty News*, 12 July 2011, <http://www.iisd.org/itn/2011/07/12/awards-and-decisions-4/>.

[66] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine (ICSID Case No. ARB/08/8*, p. 55-56, <http://italaw.com/sites/default/files/case-documents/italaw1411.pdf> (accessed 1 March 2014).

		for water use		of 2008)
Deutsche Bank AG (2009)	Sri Lanka	Sri Lankan state-owned petroleum enterprise defaulted on funds paid to Deutsche Bank in a hedging agreement	Investor won, and there was a dissenting opinion of one arbitrator	Sri Lanka to pay USD 60.4 million plus interest, plus USD 8 million for legal fees[68]
Adem Dogan (2009)	Turkmenistan	The investor's successful poultry farm was expropriated by the State	Pending	--
P.F. Vöcklinghaus (2009)	Czech Republic	The investor owned 50 percent of a company that was building a golf course. When the company went bankrupt, the golf course was auctioned off by the State to a third party	Claim dismissed[69]	--
ECE Projektmanagement (2009)	Czech Republic	The investor claimed inconsistent and extended issues with authorities over construction of a shopping center	Pending	--
Bernhard von Pezold and others (2010)	Zimbabwe	The investor claimed that the State had expropriated timber plantations without compensation, as part of a land reform program	Pending	--
Oil Tanking GmbH (2010)	Bolivia	The investor claimed that the State nationalized its stake in an energy pipeline firm	Pending	--
Ampal-American Israel Corporation and others (included German citizen who invested in the gas company) (2012)	Egypt	Investors claimed breaches in the contract by the State in their investment in a local gas company	Pending	--

[67] Cecilia Olivet, *A Test for European Solidarity, the Case of Intra-EU Bilateral Investment Treaties*, Transnational Institute, January 2013, p. 10, <http://www.tni.org/sites/www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf>.

[68] International Centre for Settlement of Investment Disputes, *Award: Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, p. 124, <http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf>.

[69] Cecilia Olivet, *A test for European solidarity, the case of intra-EU Bilateral Investment Treaties*, Transnational Institute, p. 10, <http://www.tni.org/sites/www.tni.org/files/download/briefing_on_intra-eu_bits_0.pdf>.

Slovak Gas Holding; GDF International SAS and E.ON Ruhrgas International GmbH (2012)	Slovakia	Investors claim that changes in domestic regulations changed the price of natural gas, which in turn caused financial loss for the investment	Settled	Settlement not public
Gelsenwasser AG (2012)	Algeria	The State terminated the investor's water management contract due to a lack of progress in the operating firm's investment program	Pending	--

Additional ISDS cases initiated by German investors; not yet recorded by UNCTAD in the database as of April 2014				
German Investor (date launched)	***State Respondent***	***Reason for Dispute***	***Decision***	***Award***
RREEF Infrastructure fund (subsidiary of Deutsche Bank) (2013)	Spain	In 2013 Spain passed a law that cut premiums paid for electricity produced by solar thermal alternative energy technology. Foreign investors in the industry had been assuming that this form of subsidy for the technology would continue. A group of investment funds including RREEF banded together to sue Spain under the Energy Charter in light of their lost profits. The case was filed with ICSID and appears on the ICSID website	Pending. International funds have about EUR 13 bn invested in Spain's alternative energy sector	--
Deutsche Telekom (2013)	India	The Indian company Devas, which Deutsche Telekom had 20% ownership in, won a bid to provide internet broadband service to a remote area. Devas had an agreement with a branch of the government's satellite agency that it could use a certain amount of the broadband capacity produced by the satellites. This deal was then revoked when the government decided the bandwidth must be saved for strategic purposes. The case was allegedly filed with ICSID	Pending. Other investors holding shares in Devas are asking for EUR 1.6 bn	--