

INTERNATIONAL INVESTMENT LAW IN TIMES OF CHANGE: WHAT IS THE ROLE OF THE GLOBAL SOUTH?

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1. THE INTERNATIONAL INVESTMENT REGIME IN A NUTSHELL

IIR is defined as the struggle between property rights of investors against sovereignty rights of host states.

From 1990 to 2007: From 404 IIAs to 2.663 IIAs

As of 2016: 3.324 IIAs

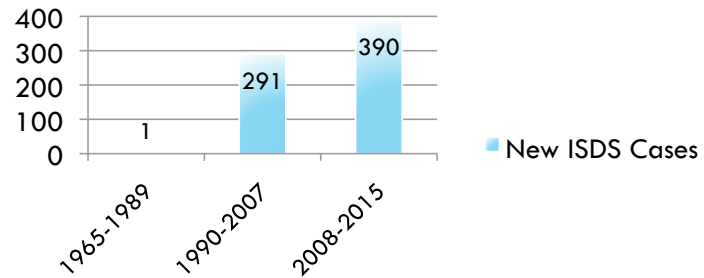
Bilateral Investment Treaties (BITs) are the prevailing form of IIA:

(Property rights-based approach)

- Broad definitions of investor and investment
- Expansive investment protection clauses – NT, MFN, FET, FSP, etc.
- Strict rules on expropriation (direct and indirect) and compensation
- Free transfer of funds
- Dispute settlement clause – traditionally ISDS.

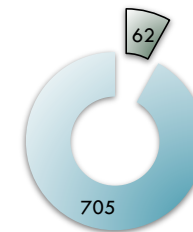
2. INTERNATIONAL INVESTMENT DISPUTES

The increasing number of ISDS cases in 50 years:



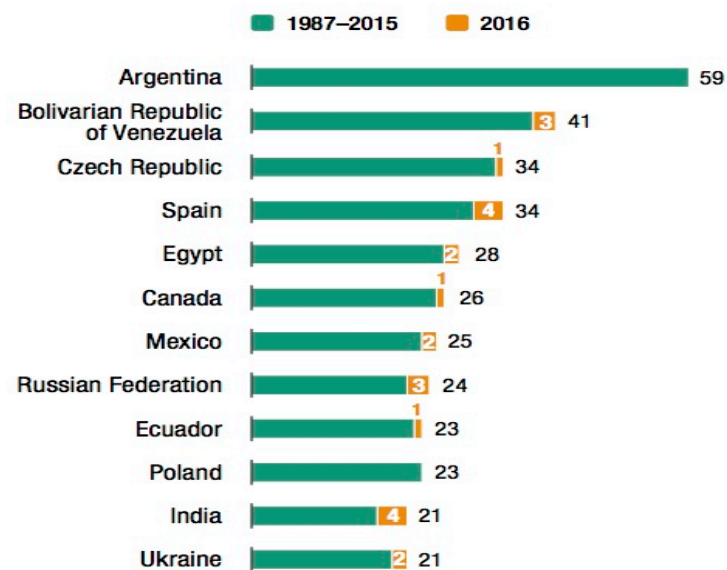
Number of ISDS Cases

As of 2016 Up to 2015



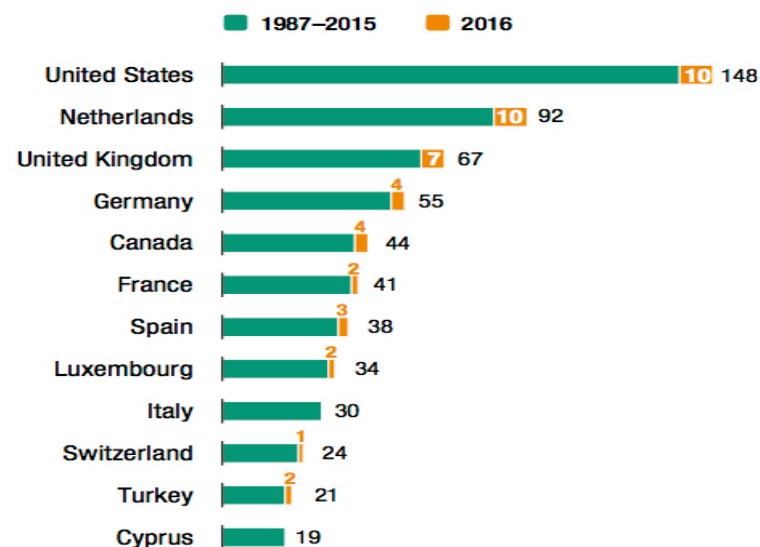
2. INTERNATIONAL INVESTMENT DISPUTES

Figure III.13. Most frequent respondent States, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Figure III.14. Most frequent home States of claimants, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

3. THE INTERNATIONAL INVESTMENT REGIME UNDER ATTACK

1) Right to regulate/ policy space debate

- Protection of health – *Phillip Morris v. Australia* (Jurisdiction, 2015); *Phillip Morris v. Uruguay* (2016)
- Right to redress legacies of the apartheid rule – *Foresti v. South Africa* (2010)
- Effectiveness of a country's judiciary – *White Industries v. India* (2011)
- 1990's congressional debate in Brazil
 - Development promotion.

2) Investor-State Dispute Settlement (ISDS)

- Bypasses local, state or federal domestic administrative bodies and courts
- Lack of arbitrator accountability
- Arbitrator's bias
- Lack of transparency
- Lack of *amicus curiae* & third party participation
- Inconsistency of awards
- Absence of appeal
- Constraint on policy space

WAYS TO DEAL WITH THE LEGITIMACY CRISIS OF THE INVESTMENT REGIME

1) Exit

2) Reform

4. EMERGING ORDER: MEGAREGIONAL TRADE AND INVESTMENT REGULATION

TPP (now CPTPP):

- Refines the US investment treaty practice:
 - Investor-protective language.
 - Provides some room for “sovereign policy space” only to correct negative externalities.
- **ISDS**
 - More detailed rules.

CETA + TTIP (EU’s proposal) + EU-Vietnam FTA:

- Investor-protective language.
- Provides room for “sovereign policy space” only to correct negative externalities.

Replaces ISDS by:

- Tribunal of First Instance (composed of 15 appointed judges);
- Appellate Tribunal (of six judges).

5. THE ARGUMENT



A new international economic order to govern investment relations is emerging

- The critical voices of the Global South become both stronger and more relevant.

5.1. GLOBAL SOUTH ECONOMIC ORDERING: BRAZIL, INDIA AND SOUTH AFRICA

Regulatory space	Brazil	India	South Africa
Investor/investment definition	Defined by national law	“Real and substantial business operations”	Enterprise-based definition (qualified) + national law
Standards of treatment	National Treatment + Most-Favored-Nation Excludes FET	Qualified NT (intentional + unlawful discrimination) Excludes MFN Qualified FET	Qualified NT (post-apartheid exception) Excludes MFN Excludes FET
Expropriation & compensation	Only direct Compensation according to the Constitution	Direct and qualified indirect “Adequate” and “fair market value” w/ mitigating factors	Only direct Compensation according to the Constitution

5.2. GLOBAL SOUTH ECONOMIC ORDERING: BRAZIL, INDIA AND SOUTH AFRICA

Dispute settlement	Brazil	India	South Africa
ISDS	Rejects ISDS	ISDS, <i>but</i> :	Rejects ISDS
Alternatives	Mediation + State-to-state arbitration	<ul style="list-style-type: none"> → Exhaustion of local remedies → Limits tribunal jurisdiction to: <ul style="list-style-type: none"> a) re-examine any legal issue that has been finally settled by a judicial authority; b) review the merits of a decision made by a judicial authority. 	Non-mandatory mediation + Local courts + State-to-state arbitration

DISPUTE SETTLEMENT: BRAZIL'S ALTERNATIVE



DISPUTE SETTLEMENT: S.A. ALTERNATIVE



6. LOOKING FORWARD: SCENARIOS FOR THE FUTURE

- 1) The end of the commodity prices boom, reducing the freedom of countries in the Global South to experiment FDI regulation that better meets their interests;
- 2) The lack of a Global South joint initiatives on investment rules;
- 3) The uncertain role played by China
 - RCEP and OBOR;
- 4) TPP-type policies & CETA as the new global economic ordering
 - Could Brazil, South Africa and India oppose to it?

THANK YOU

**Reconceptualizing
International
Investment Law
from the Global South**

*Edited by Fabio Morosini and
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