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Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey

Joachim Pohl,

Kekeletso Mashigo,

Alexis Nohen

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Abstract

DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY

by

Joachim Pohl, Kekeletso Mashigo, Alexis Nohen *

Investor-State dispute settlement mechanisms (ISDS) are an important component of most International Investment Agreements (IIAs) and have significant influence on how disputes between States and investors are resolved.

This statistical survey of a large sample of 1,660 bilateral investment treaties (BITs) identifies the main parameters of ISDS regulation in BITs; traces their emergence, frequency and dissemination over time; and highlights past and recent country-specific treaty practice. The survey finds among other things that many countries define the procedural framework thinly compared to advanced domestic procedural frameworks, despite a broad trend toward greater regulation in treaties of parameters of ISDS. Many treaties offer foreign investors a range of procedural choices, such as a choice between arbitration fora.

The survey also highlights the diversity that characterises the design of ISDS: over a thousand different combinations of rules regulating ISDS can be found in only 1,660 bilateral treaties –, with variation found both at editorial and substantial level. Differences in policy approaches between countries are the source of some of this variance, but it appears that much of it may not reflect differences in policy.

The study also found little evidence of general convergence of approaches towards regulating ISDS in BITs, or indeed much development in the BIT negotiating practice of a number of countries. A different approach, characterised by significantly more thorough ISDS regulation and pioneered by some countries, seems to spread increasingly in multilateral IIAs and more comprehensive treaties.

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Keywords: Foreign investment; international investment; international investment law; international investment agreements; bilateral investment treaties; international arbitration; dispute resolution; regulation.

* This report was written by Joachim Pohl (Legal Analyst, OECD Investment Division), Kekeletso Mashigo (then on secondment from the Department of Trade and Industry of South Africa to the OECD Investment Division), and Alexis Nohen (then Consultant to the OECD Investment Division). It was submitted for comments to the countries participating in the "Freedom of Investment" Roundtables. However, it does not necessarily reflect the views of the OECD, those of its member governments or of the governments of Participants in the Roundtables.

Further information on freedom of investment at the OECD may be found at:
www.oecd.org/daf/internationalinvestment/investmentpolicy/foi.htm

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EXECUTIVE SUMMARY

This document surveys Investor-State Dispute Settlement (ISDS) provisions in a sample of 1,660 bilateral investment treaties (BITs) and other bilateral agreements with investment chapters (mainly Free Trade Agreements, FTAs). The treaties in the sample were concluded by the 54 countries that participate in the "Freedom of Investment" (FOI) Roundtables with any other country[1], regardless of whether these treaties are in force or not. In some cases, the bilateral treaties are also compared with selected multilateral agreements with investment chapters (e.g. NAFTA, Energy Charter Treaty) .

The survey presents a statistical portrait of ISDS provisions of this treaty sample that is both comprehensive and detailed. The intention is to provide a factual and statistical catalogue of treaty content and not to in any way engage the OECD or countries participating in the FOI process regarding interpretation of treaty language in an arbitral setting.

The survey is restricted to a descriptive analysis of the language used in ISDS provisions, defined as either separate ISDS sections or articles or as the dispute settlement content of expropriation clauses. The survey refrains from interpreting treaty language, beyond what is required for statistical categorisation; it does not use or allude to external interpretations or doctrinal analysis of treaty language and refrains from assessing the merits of various approaches to establishing ISDS systems.

The survey sheds light on various aspects of ISDS provisions, including the frequency of their use, both in the entire sample and by individual countries, as well as treaty practice in relation to seventeen major ISDS issues identified (e.g. remedies, cost allocation, coordination of domestic court proceedings and international arbitration).

The key findings of the survey include:

- 93% of the treaties contain language on ISDS.
- Most of the treaties deal with only a few ISDS issues. Seventeen ISDS issues were identified in the treaty sample, but countries' propensity to cover individual issues varies widely. Some of the issues that are not dealt with in treaties may be covered in other sources, such as rules provided in ICSID and UNCITRAL instruments.
- In addition to major differences among treaties and country practice in terms of major ISDS issues (e.g. remedies, cost allocation, coordination of domestic court proceedings and international arbitration), fine variations in details of language are also a feature of treaty language. The determination as to whether any of these fine variations in language have any legal significance is beyond the scope of the present survey.

[1] Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, and United States.

- 56% of the treaties offer investors the possibility to choose from among at least two arbitration fora. The number of fora that treaties offer investors to choose from has increased over time; ICSID and *ad hoc* arbitral tribunals established under UNICTRAL rules are by far the most frequently proposed fora.
- Many countries' treaty samples – especially countries with pronounced evolution of treaty writing practice – show "legacy" characteristics. The average age of the treaties in the sample is 16.5 years. Several countries have an average treaty age of almost 21 years (e,g. the United Kingdom, Norway and France). Colombia is the country with the lowest average treaty age in the sample – 7.7 years. Countries that have concluded treaties at different times often have treaties in force that exhibit quite different ISDS features. The determination of how governments and other treaty users deal with the various treaty "vintages" is beyond the scope of this paper.
- Many countries continue to take a lean approach towards regulating ISDS in their investment treaties; this leads, even when considering the application of default rules such as the ICSID Convention, UNCITRAL Arbitration Rules or national arbitration statutes, to a relatively thinly defined procedural framework compared to advanced domestic procedural frameworks.
- There is nonetheless a broad and steady upward trend in the regulation of parameters of ISDS, complemented by a policy followed by only a few countries to include very comprehensive rules on ISDS.
- Procedural and institutional issues are sparingly addressed in bilateral investment treaties.
- A great deal of diversity is observed in ISDS provisions – exceeding an estimated 1,000 different rule sets on ISDS among only 1,660 bilateral treaties –, with variation found both at editorial and substantial levels; the effect of this variance is not always obvious.

INTRODUCTION

The textual basis of the investor-state dispute settlement system (ISDS) is found in a set of some 3,000 international investment treaties and in related treaties, rules and conventions (e.g. ICSID Convention and UNCITRAL Rules). With such disperse texts, obtaining a comprehensive picture of ISDS treaty content is a daunting, though necessary, task. Understanding the full range of treaty texts is an important input to policy making in this area because these texts are among the most important tools available to governments as they seek to ensure that ISDS serves to enhance, to the maximum extent possible, the welfare of the societies on whose behalf investment treaties have been concluded.

Thus, this survey was conducted in the spirit of fact finding and seeks to enhance the information available to the international investment community as it conducts dialogue on ISDS. The present statistical survey of the ISDS provisions of 1,660 bilateral investment treaties (BITs) aims to help the international investment policy community come to an understanding of the nature and diversity of investment treaty content in this area. The survey documents the many dimensions of variation of language within the treaty sample – across time, across countries and idiosyncratic variation (small language changes that appear to stem from the particular circumstances for the negotiations of individual treaties).

The treaty sample consists of the BITs and other bilateral agreements with investment chapters, mainly Free Trade Agreements (FTAs), concluded by the 54 countries that participate in the FOI Roundtables with any other country, regardless of whether these treaties are in force or not. The sample of 1,660 bilateral treaties represents a little over half of the global population of bilateral treaties. In some cases, the bilateral treaties in the sample are also compared with selected multilateral agreements with investment chapters (e.g. NATFA and Energy Charter Treaty).

ISDS provisions appear primarily in two places in sample treaties: in clauses or sections on expropriation; and in specific articles or sections dealing on ISDS. For this reason and in order to manage the complexity of the survey, the textual analysis focuses only on these two texts (separate ISDS articles or sections and expropriation clauses). Thus, when referring to ISDS provisions, the study refers only to these types of text. The OECD Secretariat analysed ISDS provisions with respect to a "grid" of characteristics; each treaty is "scored" with respect to all of these characteristics. The methodology for the treaty survey is described in more detail in Annex 1.

The OECD Secretariat performed this analysis in order to provide information about treaty content of a large sample of investment treaties. The Secretariat survey is intended to be a descriptive catalogue of treaty language; it is not based on interpretations developed in case law and legal analyses. Furthermore, the Secretariat survey does not engage the OECD or participating countries with respect to the interpretation of any treaty texts.

FREQUENCY AND EVOLUTION OF ISDS PROVISIONS IN INVESTMENT TREATIES

ISDS provisions are a major component of investment treaties -- they provide fora for investors to bring disputes regarding the treaty's substantive provisions. ISDS provisions list the institutions to which investors may present claims for remedy under the treaty, in most cases domestic judicial proceedings, or international arbitration. States have adopted very different approaches when it comes to providing ISDS to investors (see section 1. below). Yet, most sample treaties allow investors to bring their case to international arbitration *and* domestic remedies; they also often coordinate how the two should be accessed (see section 1. below).

ISDS provisions are frequently included in the treaty sample – 96% of the treaties in the sample contain such provisions, including almost all of the recently concluded treaties.[2] Even some of the oldest treaties in the sample, dating back to 1960, provide for basic ISDS mechanisms. Treaty practice has evolved since then, so that treaties of different time periods reflect the treaty writing policies prevailing in various countries at a given point in time.

1. Providing access to domestic courts and/or international arbitration

Of low frequency in the sample is a first category of treaties (mostly early treaties) that only provide access to domestic courts, and only to bring claims arising under the expropriation clause. The ISDS language is then contained in the expropriation clause itself. For instance, the expropriation clause in the Korea-Bangladesh BIT (1986) states:[3]

> The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

A second category of treaties provides for ISDS through international arbitration exclusively, and does not include any mention of domestic judicial review as a means to settle investment disputes. Only a small number of treaties, all concluded in the 1990s, include that type of language.[4] For instance, the Egypt-Netherlands BIT (1996) provides:[5]

> Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party, at the choice of the national concerned, to

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2 Among the 1,660 bilateral treaties in the sample, only 4% do not mention any ISDS mechanism. Countries that began their BIT programme early on have a large number of treaties that do not provide for ISDS. For instance, 32% of Germany's treaties and around 28% of Switzerland's treaties do not provide for ISDS. Some very recent treaties do not contain ISDS provisions either, for instance the Australia-United States FTA (2004) and the *Australia-New Zealand (ANCERTA Investment Protocol) (2011)*.

3 Korea-Bangladesh BIT (1986), Article 5.1.

4 E.g. *Austria-Bolivia BIT (1997)*; Belgium/Luxembourg-Cyprus BIT (1991); Belgium/Luxembourg-Estonia BIT (1996); Belgium/Luxembourg-Georgia BIT (1993); Belgium/Luxembourg-Mongolia BIT (1992); Belgium/Luxembourg-Vietnam BIT (1991); France-Haiti BIT (1984); Hungary-Croatia BIT (1996); and South Africa-Iran BIT (1997).

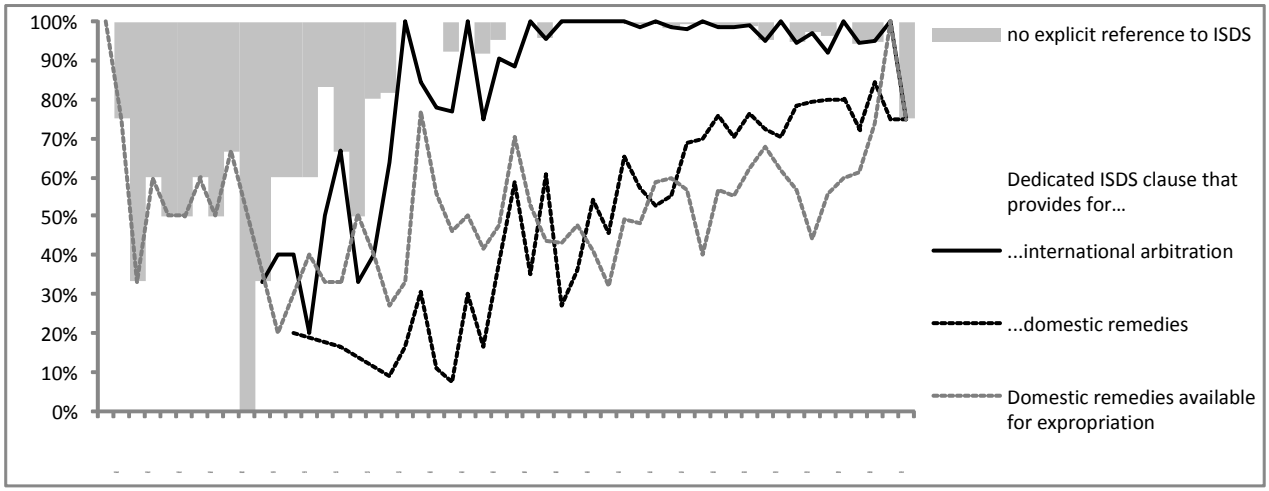
5 Egypt-Netherlands BIT (1996), Article 9.1.

– the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965. […],
– a sole arbitrator or *ad hoc* arbitration tribunal established under the Arbitration Rules of the United Nations Commission on international Trade Law,
– the Regional Centre for International Commercial Arbitration in Cairo,
– the Court of Arbitration of the Paris International Chamber of Commerce,

Finally, a third category of treaties provides for both international arbitration *and* domestic remedies. From 1970 onwards, full ISDS sections (or annexes) began to appear in the treaties. These treaties featured two innovations: i) they provided recourse to international arbitration as a dispute settlement mechanism, and ii) while ISDS was initially limited to claims arising under the expropriation clause, those treaties provided ISDS for claims arising under other substantive treaty provisions.[6]

Over time, ISDS through international arbitration has become a common feature of investment treaties – only 108 treaties, or 6.5% of the sample, do not provide for international arbitration. Moreover, the right to bring an investment-related claim to international arbitration is now mainly provided *in addition* to the possibility of resort to domestic proceedings. Domestic proceedings have since 1972 frequently been made available for claims arising under all substantive treaty provisions – not only, as in the early treaties, for claims under the expropriation clause. Over 70% of recent treaties indeed explicitly mention domestic judicial review as a dispute settlement mechanism in the ISDS clauses (Figure 1).[7]

Figure 1. Proportion of bilateral treaties concluded in a given year that explicitly provide for access to international arbitration and domestic judicial review in dedicated sections on ISDS and to domestic judicial review in expropriation clauses; the grey shaded sections indicate the proportion of treaties that contain no explicit reference to an ISDS mechanism.



6 The first treaty in the sample to contain a specific ISDS section and to propose international arbitration as a dispute settlement mechanism is the Belgium/Luxembourg-Indonesia BIT (1970), followed by BITs concluded by the Netherlands (Malaysia-Netherlands BIT (1971), Morocco-Netherlands BIT (1971)), and in 1972, by France (France-Tunisia BIT (1972)).

7 Treaties that provide for the right to bring claims to domestic courts *both* in the expropriation clause and in the ISDS clause have also become more frequent. This may create some tension insofar as the coverage of possible claims overlaps, while applicable procedural rules appear to diverge, especially with respect to cooling-off periods. Only a few concerned treaties resolve that issue by including a cross reference to the ISDS section in the expropriation clause.

However, practice in this area varies amongst countries. For instance, Canada, France, Germany and the United Kingdom rarely mention access to domestic remedies in their ISDS clause, while ISDS clauses in treaties concluded by Argentina, Brazil, Chile, Greece and Korea consistently refer to domestic proceedings. For example, the Korea-Bolivia BIT (1996) states:[8]

> (2) If such disputes cannot be settled in accordance with the provision of paragraph (1) of this Article within six months from the date of request for settlement, the disputes shall be submitted to: (a) *the competent court of justice of the Contracting Party for decision*, or, (b) the International Center for the Settlement of Investment Disputes established by the Washington Convention of 18 March 1965 on the settlement of investment disputes between states and nationals of other states in the event that the Republic of Bolivia becomes a party to this Convention. Until that moment the dispute shall be submitted to conciliation or arbitration procedures to be mutually agreed upon on the basis of the Washington Convention.

Thus, the most often observed treaty practice is to provide a *choice of forum* to investors who may bring their claims to international arbitration or domestic courts. International investment agreements contain language to regulate that choice and set out rules to organize the relationship between recourse to domestic courts and to international arbitration.

2. Relation between judicial review in the host state and international arbitration

950 treaties in the sample provide recourse to both international arbitration and domestic courts, under certain conditions. States have adopted various approaches to regulating investors' access to domestic courts and international arbitration. In the order of frequency observed in the sample, those approaches consist of: giving parties to the dispute a choice between domestic remedies and international arbitration (section a.); defining a chronological sequence to make both adjudicative avenues successively available (section b.); or identifying the competent institution by reference to the subject matter of the dispute (section c.). Only a few treaties in the sample take an approach falling outside of those main categories (section d.).

A significant analytical difference between the approaches described below is the number of fora that are made available to an investor in the context of a given dispute. Treaties that require investors to make a final and exclusive choice between dispute settlement mechanisms arguably allow only one attempt to obtain satisfaction. By contrast, other categories of treaties allow investors to bring their case to two dispute settlement mechanisms.

a. Choice

Almost all treaties concluded in the past decade give investors an explicit choice whether to use domestic remedies or international arbitration to present their claims. Variation is observed as to whether that choice is final and exclusive.

Choice final and exclusive

More than a third of the treaties that provide a choice between domestic judicial review and international arbitration specify that a choice, once made by the investor, is final and exclusive (so-called "fork-in-the-road" provision, 367 occurrences, 39% of the treaties providing access to both international arbitration and domestic review). Under that approach, an investor could not initiate international arbitration proceedings once it has brought its case to domestic courts, and *vice versa*.[9]

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8 Korea-Bolivia BIT (1996), Article 12(2).

9 *South Africa-Zimbabwe BIT (2009)*, Article 7(2) and 7(3):

In addition, many treaties contain provisions that make only one of the two possible choices explicitly final (224 occurrences, 24%). These provisions exist in two forms: the large majority denies access to international arbitration once an investor has chosen to bring its case to domestic courts (but remains silent as to an investor's right to bring a claim to domestic courts once it has started arbitration); and 24 treaties require that an investor waive its right to access domestic courts prior to initiating international arbitration proceedings.

58 treaties provide an exception to fork-in-the-road provisions by allowing investors to seek interim relief in domestic courts of the host state. There are two type of provisions, one allowing the investor to seek interim relief with domestic courts only *before* the arbitration proceedings are initiated,[10] the other allowing the investor to seek interim relief *at all times*, including after arbitration proceedings are initiated.[11]

Choice not final or exclusive

Some treaties leave the choice between international arbitration and domestic court proceedings reversible until a specified event occurs, often – but not always – a decision by the initially chosen adjudication body.[12] A few treaties explicitly allow the simultaneous pursuit of the claim in domestic courts and international arbitration until this moment.[13]

About a third of the treaties do not clarify whether the initial choice made by investors is exclusive, thus suggesting that an investor could also choose both ways of dispute settlement.

b. Chronological sequence

In the sample, 73 treaties (8% of the concerned treaties) require investors to first present their dispute to domestic courts before they may, under certain conditions, bring it to international arbitration. This type of

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7(2) If the dispute has not been settled within six (6) months from the date at which it was raised in writing, the dispute may at the choice of the investor, after notifying the party concerned of its intention to do so in writing, be submitted – (a) to the competent courts of the Party in whose territory the investment is made; (b) to arbitration by the International Centre for the Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and nationals of other States, opened for signature at Washington DC on 18 March 1965; or (c) an ad hoc arbitration tribunal, which unless otherwise agreed upon by the parties to the dispute, is to be established under the Arbitration Rules of the United Nationals Commission on International Trade Law (UNCITRAL).

7(3) If the investor submits the dispute to the competent court of the host Party or to international arbitration mentioned in sub-Article (2), the choice shall be final.

10 Peru-Singapore FTA (2008), Article 10.17(5) states:

Neither Party shall prevent the disputing investor from seeking interim measures of protection, not involving the payment of damages or resolution of the substance of the matter in dispute before the courts or administrative tribunals of the disputing Party, prior to the institution of proceedings before any of the dispute settlement fora referred to in paragraph 3, for the preservation of its rights and interests.

11 *Japan-Brunei Darussalam EPA (2007),* Article 67.11 states:

Notwithstanding [the condition that an investor may only bring claims to international arbitration if he has not initiated domestic proceedings] a disputing investor may *initiate or continue* an action that seeks interim injunctive relief that does not involve the payment of damages before an administrative tribunal or agency or a court of justice under the applicable laws of the disputing Party.

12 The Austria-Mexico BIT (1998) and Austria-Slovenia BIT (2001), for instance, allow switching from domestic court proceedings to international arbitration until the first instance decision of a domestic court is rendered.

13 For example, Article 11(2) of the Germany-Madagascar BIT (2006) states:

Si le différend ne peut être réglé dans un délai de six mois a compter de la date a laquelle l'une des deux parties au différend l'aura soulevé, il sera, au choix et sur demande de l'investisseur de l'autre État contractant, soumis *respectivement ou successivement* : 1. a une procédure judiciaire dans l'État contractant sur le territoire duquel l'investissement est situe ; 2. a une procédure d'arbitrage du Centre international pour le Règlement des Différends relatifs aux Investissements […].

provision was a common feature of international investment agreements during the 1970s and the 1980s; since then, it is very much less used, and has not appeared in treaties concluded from 2004 onwards. The United Kingdom and, to a lesser extent, Germany, Hungary and Romania have used this mechanism in a significant share of their treaties.

The conditions set to determine whether an investor may eventually bring its case to international arbitration fall into three categories:

- Some treaties allow an investor access to international arbitration if domestic courts have failed to deliver a decision within a given period of time. Treaty language varies as to whether a "decision", or a "final decision", or a "decision on the merits" by domestic courts results in foreclosing the investor's right to bring its claim to arbitration. For instance, some treaties concluded by Argentina and Belgium/Luxembourg, allow an investor to bring the claim to arbitration if the domestic courts have not delivered a final decision within a specific period of time, often 18 months.[14]
- Other treaties limit the right of an investor to eventually bring its case to arbitration to circumstances where the decision rendered by domestic courts fails to fully settle the dispute.[15]
- A third category of treaties allows recourse to international arbitration in case the decision rendered by domestic courts is "manifestly unjust or violates the provisions of the [international investment] agreement".[16]

c. Subject matter

Forty-four treaties determine the available fora for dispute settlement (domestic courts or international arbitration) in relation to the subject-matter of the investor's claim. Most often, these treaties restrict access to international arbitration to claims concerning alleged breaches of specific treaty provisions such as the amount of compensation for expropriation, provisions on compensation for losses, or free transfers.[17]

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14 For example, Article 10(3) of the Argentina-Netherlands BIT (1992) states:

> If within a period of eighteen months from submissions of the dispute to the competent organs mentioned in paragraph (2) above, these organs have not given a final decision or if the decision of the aforementioned organs has been given but the parties are still in dispute, then the investor concerned may resort to international arbitration or conciliation"

15 For example, Argentina-Austria BIT (1993); Argentina-Italy BIT (1990); Austria-Philippines BIT (2002);The latter treaty sets a 6-month period for the settlement of dispute before domestic courts, after which, if the dispute is not settled, the investor may proceed to an international arbitral tribunal.

16 Article 8 (2)(ii) of the United Kingdom-Uruguay BIT (1991). Similar language can be found in Article 10 (2)(b) of the Germany-Ecuador BIT (1996), under which international arbitration would normally be blocked once domestic remedies have been approached; the treaty allows access to international arbitration nonetheless if the domestic court has "disregarded a provision of the BIT". Article 11(3) of the Belgium/Luxembourg-Uruguay BIT (1991) similarly allows access to international arbitration exceptionally if the decision by the domestic court does not conform with "the provisions of the present treaty or the generally accepted rules of international law". Article 9(2) and (3) of the Italy-Uruguay BIT (1990) provides that if the domestic court has not rendered a decision within 18 months, the investor may proceed to international arbitration. The investor may also, according to Article 9(3) proceed to international arbitration if the court decision is "in contrast to norms of international law, with the contents of the present agreement, or if it is manifestly unjust or constitutes a denial of justice".

17 E.g. Australia-China BIT (1988) Article XII:

> 2. If the dispute has not been settled within three months from the date either party gave notice in writing to the other concerning the dispute, either party may take the following action: (a) in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before its competent judicial or administrative bodies; and (b) where

This approach was first used in 1985, and has been occasionally used throughout the early 1990s. Yet, it was gradually abandoned and the last treaty containing such provisions was concluded in 2003. China and, to a much lesser extent, some other countries have used this approach in a significant number of their treaties.

d. Miscellaneous criteria

A few treaties use combinations of the aforementioned approaches or use entirely different criteria to determine the available fora for the settlement of investment disputes. The Australia-Czech Republic BIT (1993) for instance requires the home state of the investor to agree *ad hoc* to a proposed submission to international arbitration. The China-Albania BIT (1993), under which access to international arbitration is available for disputes involving the amount of compensation, allows both the investor and the host State to bring the matter to an international arbitral tribunal; the investor – but not the host State – loses this right once it has brought the claim to domestic courts. Some treaties contain asymmetric provisions that subject investors from one State party to different rules than investors from the other State party.[18] One treaty – the France-Jamaica BIT (1993) – requires the parties in dispute to agree on whether they settle their dispute through domestic review or international arbitration; international arbitration is the default mechanism should the parties not find an agreement.

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the parties agree or where the dispute relates to the amount of compensation payable under Article VIII [Article VIII: Expropriation and nationalisation], submit the dispute to an Arbitral Tribunal constituted in accordance with Annex A of this Agreement.

18 E.g. Argentina-China BIT (1992); *Germany-Trinidad and Tobago BIT (2006)*; Netherlands-Bulgaria BIT (1999); Netherlands-El Salvador BIT (1999).

B. ACCESS TO ISDS

ISDS provisions adopt a variety of approaches to organising access to ISDS. This section describes, first, limitations relating to subject matter, time and claimant (section 1). The following section describes the rules that determine how host State court proceedings relate to the arbitral process (section 2), and, where applicable, how the choice among different arbitral fora is organised (section 3).

1. Limitations on access

ISDS provisions often contain language limiting access to ISDS with respect to subject matter and scope (*ratione materiae* limitations), to time (*ratione temporis* limitations) and with regard to claimants' status or identity (*ratione personae* limitations). These limitations are discussed in turn below insofar as they are addressed in ISDS sections. Of course, language in other parts of the treaty also influences access to ISDS (e.g. definitions of investment and investor, substantive provisions, and any umbrella clause that the treaty might contain). In keeping with the methodology of this statistical survey, the findings below are based only on review of language contained in dispute settlement or expropriation provisions.

a. Subjects of claims – ratione materiae limitations

As discussed above, a few investment treaties provide for access to international arbitration only for a limited scope of claims, typically the amount of compensation for expropriation. Where specific sections on ISDS exist, these sections invariably contain language mentioning the scope of possible claims. This description may be broad – "disputes", "any dispute" or "any dispute in relation to an investment". Some treaties add that the violation of a treaty obligation must have resulted in losses or damage to the investor.[19] Some limit the scope of disputes to those having a relation to obligations created by the treaty itself – "any investment dispute with respect to matters regulated by this agreement" – or even a limited subset of treaty obligations – "a dispute concerning expropriation or nationalisation of an investment".

Some treaties – in particular those concluded by Australia, Canada, and the United States – mention breach of obligations established in contracts between an investor and the host State in the definition of investment disputes in ISDS clauses. Other treaties may also cover disputes over alleged violations of contractual obligations by the ISDS mechanism, but do so through a separate umbrella clause (not covered in this survey).[20]

Finally, some treaties[21] exclude tax-related issues from the scope of ISDS unless there is a case by case decision by a bi-national commission.[22]

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19 The abbreviated treaty clause of some post-NAFTA Canadian treaties reads "…a dispute relating to a claim that a measure taken or not taken is in breach of this agreement and that the investor has incurred loss or damage by reason of or arising out of that breach…", and at least three recent Austrian treaties specify that the dispute must concern "an alleged breach of an obligation under this agreement which causes loss or damage to the investor or his investment".

20 More details on umbrella clauses are available from an earlier study that was subject to discussions of the OECD Investment Committee, "Interpretation of the Umbrella Clause in Investment Agreements", October 2006.

21 For example, Belgium/Luxembourg-Bangladesh BIT (1981); Canada-Armenia BIT (1997); Canada-Barbados BIT (1996); *Canada-Colombia FTA (2008)*; Canada-Ecuador BIT (1996); Canada-Egypt BIT (1996);

b. Ratione temporis limitations and non-confrontational settlement attempts

Ratione temporis provisions limit access to international arbitration in two ways: 1) Provisions establishing cooling-off periods may require claimants to wait before they can bring a claim, and 2) Statutes of limitation – found far less frequently – preclude access to arbitration after a specified period has elapsed.

Cooling-off periods

Almost 90% of the treaties with ISDS provisions require that the investor respect a cooling-off period before bringing a claim. Often, an investor must respect this waiting period regardless of whether it brings the dispute to domestic courts or before an international arbitral tribunal; a few treaties set different delays for international arbitration, however. For instance, treaties concluded by Mexico and the United States, require the cooling-off period exclusively prior to international arbitration. Most treaties require or suggest that the disputes be subjected to non-confrontational settlement procedures during this period (see below).

The length of the cooling-off period varies. Most often, it is set to 6 months, but many treaties set a shorter period of 3, 4 or 5 months. Other periods, such as 7,[23] 12,[24] and 18 months,[25] occur occasionally. The average required waiting time of treaties concluded in a given year has been stable since the mid 1980s.

Preliminary non-confrontational dispute settlement procedures

Mandatory preliminary procedures have now become almost the norm among the treaties that provide for dispute settlement through international arbitration: 81% of the treaties that provide for ISDS through international arbitration require such procedures, while another 8% of the treaties suggest that parties should use them (Figure 2). Parties are often, but not always,[26] under the obligation to use these procedures to try to settle the dispute during cooling-off periods..

Over 30 different designations of these preliminary procedures have been found in the treaties, plus some very rare descriptions that occur only once in the sample. A large, but slightly declining majority of them require parties in dispute to attempt to settle the dispute "amicably"[27]. Many treaties, and an increasing share in the total, are more specific and order that settlement through "negotiations" or "consultations"[28]

Canada-El Salvador BIT (1999); *Canada-Latvia BIT (2009)*; Canada-Lebanon BIT (1997); *Canada-Panama FTA (2010)*; *Canada-Peru BIT (2006)*; *Canada-Peru FTA (2008)*; and *China-Peru FTA (2009)*.

22 For example, Canada-Colombia FTA (2008), Article 821.4 reads:

> An investor may submit a claim relating to taxation measures covered by this [ISDS] Chapter to arbitration under this Section only if the taxation authorities of the Parties fail to reach the joint determinations specified in Article 2204 (Exceptions – Taxation) within six months of being notified in accordance with those provisions.

23 For example, Austria-Egypt BIT (2001); Belgium/Luxembourg-Colombia BIT (2009).

24 For example, Turkey-Bangladesh BIT (1987); Indonesia-Spain BIT (1995)

25 For example, Austria-Kuwait BIT (1996)

26 United States-Albania BIT (1995); United States-Armenia BIT (1992); United States-Azerbaijan BIT (1997) for instance set cooling off periods without linking them to non-confrontational dispute settlement procedures.

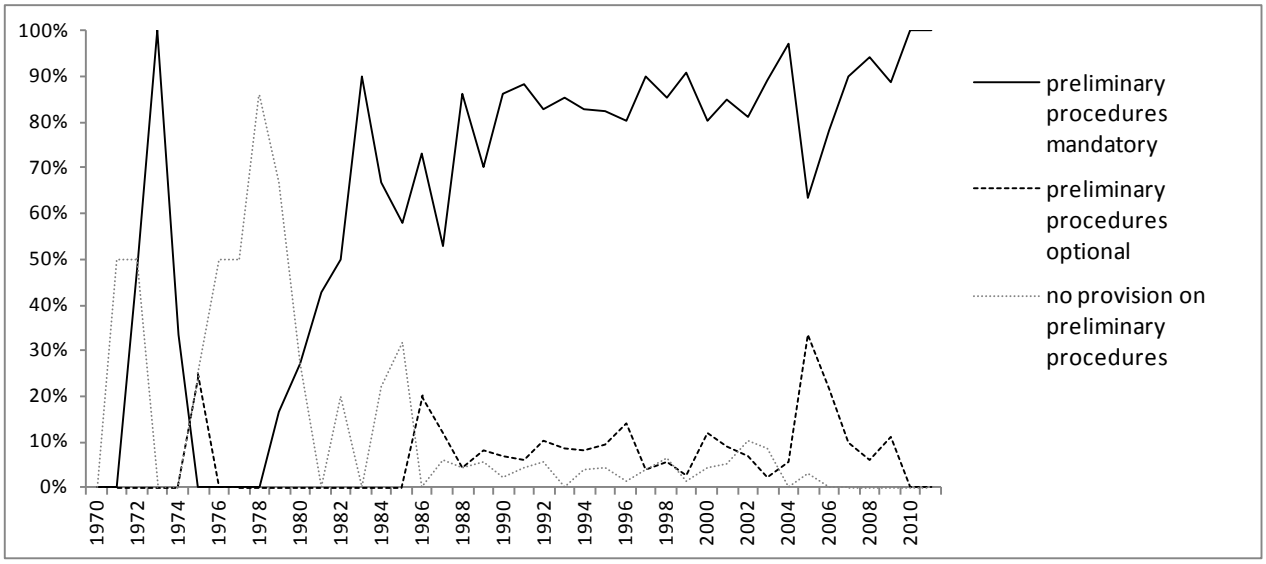
27 Turkey-Qatar BIT (2001), Article 9.1:
> Any legal dispute arising directly out of an investment between an investor of one Contracting Party and the other Contracting Party shall be settled amicably between the two parties concerned.

28 Austria-Iran BIT (2001), Article 11.1:

> If any dispute arises between a Contracting Party and an investor of the other Contracting Party with respect to an investment, the host Contracting Party and the investor shall primarily endeavour to settle the dispute amicably through negotiation and consultation.

be attempted. Other methods of settlement such as conciliation and mediation are also mentioned in treaties, albeit very rarely.[29]

Figure 2. Proportion of treaties concluded in a given year that require or suggest attempts of non-confrontational dispute settlement.



Statutes of limitation

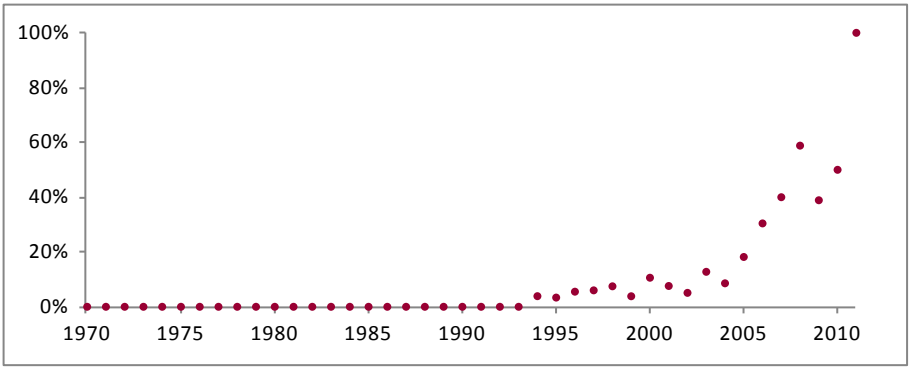
Slightly over 100 treaties – 7% of the sample of treaties with ISDS sections – contain statutes of limitation that bar access to international arbitration if a claim has not been brought within a specified period of time. The 1992 NAFTA treaty and the Canada-Czech Republic BIT (1992)[30] were the first to include such clauses. The proportion of treaties that contain such clauses has only begun to increase significantly since 2004 in bilateral treaties in general and in BITs in particular (Figure 3). Multilateral agreements, including CAFTA (2004), NAFTA (1992), the Investment Agreement for the COMESA Common Investment Area (2007) and the ASEAN Comprehensive Investment Agreement (2009) all set limitation periods, while the Energy Charter Treaty (ECT) (1991) does not.

[29] Belgium/Luxembourg-United Arab Emirates BIT (2004), Article 12.1:

> As far as possible, the Parties shall endeavour to settle the dispute amicably through negotiations, if necessary by seeking expert advice from a third party, or by conciliation between the Contracting Parties through diplomatic channels, by way of an ad hoc joint commission.

[30] This treaty has been superseded by the *Canada-Czech Republic BIT (2009)*; the treaty concluded in 1992 was no longer available online in February 2012 and is thus not included in the sample.

Figure 3. Development of the prevalence of clauses on limitation periods in bilateral treaties that contain ISDS provisions in percent in treaties concluded in a given year.



The treaties that deal with this issue usually set the limitation period at 2,[31] 3,[32] 4,[33] 5[34]; however, more unusual periods – 39 months for instance [35] – can also be found. The beginning of the limitation period is most often set as the time when an investor has "acquired knowledge or should have acquired knowledge [of the] alleged breach" or of the "event that gave rise to the dispute". Many treaties set as an additional condition for the start of the limitation period that the investor has acquired (positive) knowledge of the loss or damage resulting from the breach.[36] Other clauses found in the sample only deviate slightly from this language.[37]

35 of the 54 countries that participate in the Freedom of Investment process have at least one treaty that contains a clause on limitation periods, but only Mexico, Colombia, Canada and Japan have included them in at least half of their treaties in the sample.

Neither the ICSID Convention nor the UNCITRAL Arbitration Rules (2010) deal with statutes of limitation. Thus, for about 93% of the sample treaties that allow access to international arbitration, no explicit specification of a statute of limitations appears to apply. This finding contrasts with the situation in domestic adjudication procedures, where limitation periods are an almost universal feature.

Treaties that require the claimant to seek remedy through the domestic court system as a precondition to international arbitration – 73 treaties in the sample – may arguably "import" domestic prescription: Where the domestic limitation period has elapsed and thus precludes access to domestic judicial review as a mandatory step prior to international arbitration, one might think that access to arbitration is likewise precluded. At least one treaty in the sample, the Austria-Iran BIT (2001) applies the limitation periods to both domestic judicial review and international arbitration.

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31 *Japan-Thailand EPA (2007).*

32 For example. Australia-Chile FTA (2008); Canada-Jordan BIT (2009); *Indonesia-Japan EPA (2007).*

33 For example, France-Mexico BIT (1998); Germany-Mexico BIT (1998).

34 For example, Colombia-Switzerland BIT (2006); *Japan-Papua New Guinea BIT (2011).*

35 *Canada-Colombia FTA (2008), Canada-Peru FTA (2008).*

36 India-Mexico BIT (2007) Article 12.4 (c):

> …no more than three years have elapsed from the date on which the investor, or the enterprise that an investor owns or controls, first acquired, or should have acquired knowledge of the alleged breach and knowledge that the investor or the enterprise has incurred loss or damage thereby […].

37 For example, *Colombia-United Kingdom BIT (2010)* in which the loss or damage are also covered by the "ought to know" condition.

c. Claimants – Ratione personae limitations

Some treaties' ISDS clauses contain delimitations of possible claimants which complement other language regarding *ratione personae* of the treaty protections. Two types of language were found in ISDS clauses in the treaty sample: One addresses the possible claimant status of companies that are established in the host state but are majority-owned or controlled by foreign investors; the other concerns the standing of foreign natural persons that have been residing in the host State at a given point in time.

Close to 20% of the treaties address, in the ISDS clauses, the standing of foreign-controlled companies established in the host State. This is an issue because these companies' establishment in the host State may preclude their status as "foreign", which may in turn affect their standing under the ISDS mechanism. Article 25(2)(b) of the ICSID Convention, for instance, recognises this issue and, for the purpose of the ICSID Convention, makes the standing of such legal persons dependent on whether the host State has *agreed* to treat such legal person "as a national of another Contracting State for the purposes of the [ICSID] Convention". In the treaties addressing this issue, States consent to treat foreign-owned companies established in the host State as nationals of another contracting party entitled to bring their dispute to ISDS.[38]

One other ISDS provision in relation to claimants is found in the Argentina-United Kingdom BIT (1990): this treaty excludes access to ISDS under the BIT for foreign natural persons who were residents of a State party to the dispute; instead, it imposes an obligation to consult in order to settle disputes.

2. Access to international arbitration – choice of forum

a. Available fora

A number of institutions offer arbitration services, and treaties in the sample refer to different fora, including, in the order of frequency, to tribunals established under ICSID, *ad hoc* tribunals established under UNCITRAL rules, the ICC, the *Arbitration Institute of the Chamber of Commerce in Stockholm*, as well as the *Cairo Regional Center for International Commercial Arbitration*, the *Conciliation and Arbitration Centre of the Chamber of Commerce of Bogota*, the *Kuala Lumpur Regional Centre for Arbitration*, the *Cour Commune de Justice et d'Arbitrage* of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, the *Permanent Court of Arbitration*, and the *International Arbitral Centre of the Austrian Federal Economic Chamber*. In addition to references to these institutions, some treaties order or allow that disputes be settled by an *ad hoc* arbitral tribunal, the setup of which is specified by the individual IIA (in the following referred to as "treaty-designed tribunal").

The frequency at which bilateral treaties refer to these different tribunals varies widely. As shown in Figure 4, ICSID as well as *ad hoc* tribunals established according to UNCITRAL rules are by far the most often mentioned as possible fora for ISDS, while the ICC comes a distant third. Other fora, including treaty-designed *ad hoc* tribunals and regional tribunals in Stockholm, Cairo, Bogota, etc. are mentioned infrequently.

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[38] For instance, Denmark-Malaysia BIT (1992), Article 10(3):

> A company which is incorporated or constituted under the law in force in the territory of one Contracting Party in which, before such a dispute arises, the majority of shares are owned by nationals or companies of the other Contracting Party shall, in accordance with Article 25(2)(b) [of the ICSID Convention], be treated for the purposes of the Convention as a company of the other Contracting Party.

Figure 4. Arbitral fora mentioned in stock of bilateral treaties that provide for ISDS through international arbitration at end of given year.

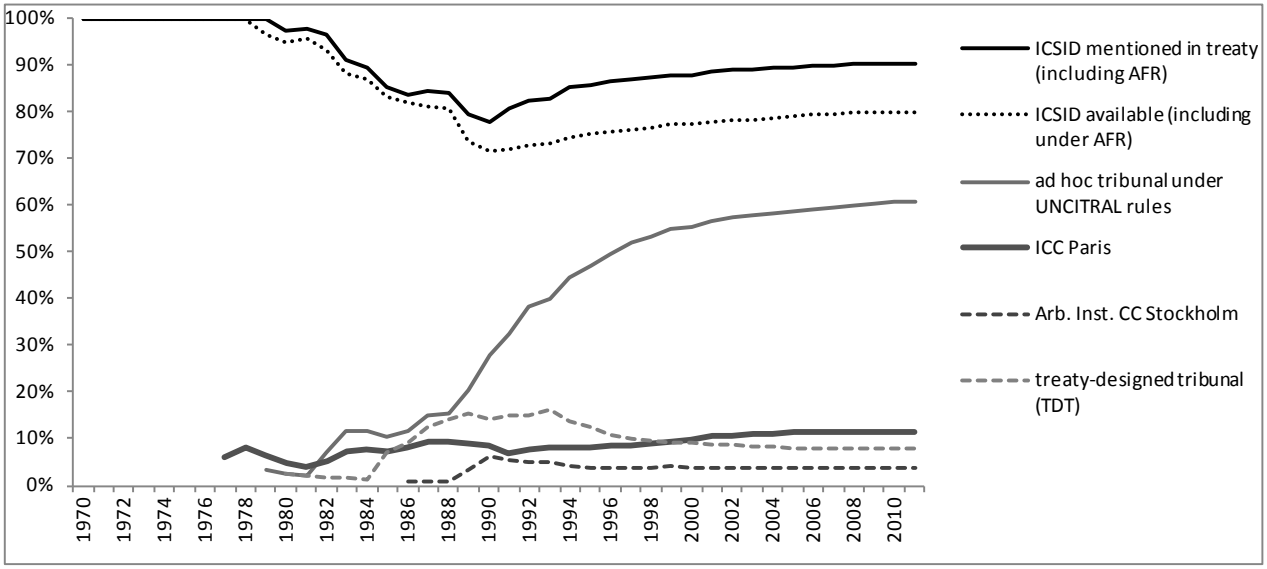


Figure 4 also shows that in 38 treaties mentioning ICSID arbitration – either as one among several fora or exclusively – ICSID is not available to investors due to the ICSID Convention membership status of the treaty partners.[39] Venezuela's withdrawal from ICSID on 24 January 2012 and earlier withdrawals by Bolivia in 2007 and Ecuador in 2009 may increase this difference between the number of fora proposed in the treaty and available fora. Participants in the Freedom of Investment Roundtables have 52 treaties with these three countries in the sample, and all but two[40] of them propose access to ICSID in the treaty text.

Some States also seem to promote their local arbitration institutions. For instance, Egypt systematically includes the *Cairo Regional Centre for International Commercial Arbitration* (CRCICA) as a possible forum, and Egypt is also the only country to offer this forum. Likewise, Colombia is the only country that proposes in a treaty the *Conciliation and Arbitration Centre of the Chamber of Commerce of Bogotá*,[41] and Malaysia is the only country that lists the *Kuala Lumpur Regional Centre for Arbitration* (KLRCA) as a forum to settle disputes. By contrast, Sweden never includes the *Chamber of Commerce of Stockholm* as a forum, and the frequency of French treaty references to the ICC, located in Paris, is below the average of the overall sample.

b. Choice among international arbitration tribunals

44% of the sample treaties that provide access to international arbitration for the settlement of investment disputes make only one single forum available. Among the other treaties, an overwhelming majority gives the investor a *unilateral choice* between listed fora.

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39 In treaties where ICSID is the *only* forum, this results in the absence of *any* available forum for arbitration. See Chile-Bolivia BIT (1994); Chile-Ecuador BIT (1993); France-Ecuador BIT (1994); Germany-Bulgaria BIT (1986); Germany-Ecuador BIT (1996); Germany-Moldova BIT (1994); Germany-Namibia BIT (1994); Germany-Thailand BIT (2002); Indonesia-Kyrgyzstan BIT (1995); Indonesia-Lao PDR BIT (1994); Israel-Thailand BIT (2000); Korea-Thailand BIT (2002); Netherlands-Belize BIT (2002); Netherlands-Tajikistan BIT (2002).

40 *China-Bolivia BIT (1992)* and Sweden-Bolivia BIT (1990).

41 *Belgium/Luxembourg-Colombia BIT (2009).*

Some other treaties require an *agreement between the parties* to access specified fora; if the parties fail to find an agreement, the treaty may designate a tribunal by default or give the prerogative to the investor.[42]

Yet other treaties are silent on who has the right to choose the forum.

The number of fora made available to investors varies significantly across sample treaties,[43] from one forum[44] to up to five different fora.[45] Overall, Figure 5 demonstrates that States have gradually made an increasing number of fora available to investors: while bilateral treaties concluded in the 1970s typically referred to one single forum treaties concluded in 2010 offer investors a choice between three fora on average, following a fairly uniform increase in the average breadth of choice over time. The proportion of treaties that offer only one forum has steadily declined since the early 1980s, and no such treaty has been found since 2009.

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42 For example, Denmark-Ghana BIT (1992); *Egypt-Botswana BIT*; France-Hong Kong, China BIT (1995); Switzerland-Cuba BIT (1996); Ukraine-United Kingdom BIT (1993). The *Denmark-Ethiopia BIT (2001)* requires an agreement between the parties, but does not resolve the situation in which parties cannot agree on one of the fora listed in the treaty.

43 The calculation is based on the choices offered by the treaty text, not on the number of actually available tribunals. These bases differ where ICSID is mentioned in the treaty but is not available, including under the AFR, due to the membership status of the treaty partners. The study has not evaluated the result from a clause in the Australia-Thailand FTA (2004), which provides access to additional ISDS fora on a MFN basis; this treaty opens access to additional fora for international arbitration if one of the treaty partners includes these fora in its later treaties.

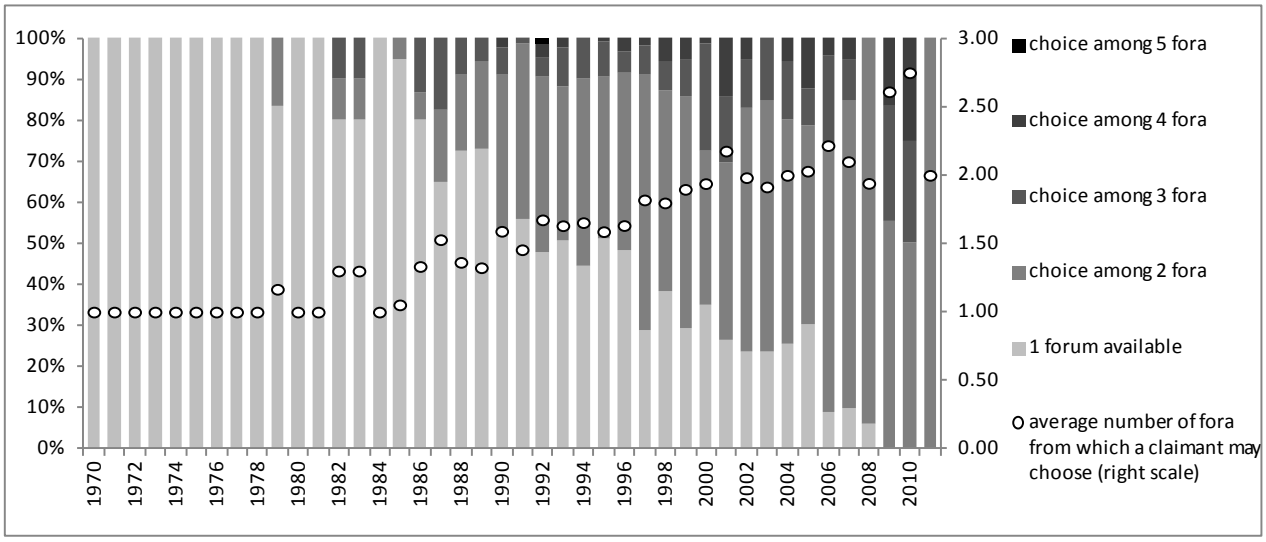
44 Serbia-Sweden BIT (1978), Article 6:

> In the event of a dispute arising between a national or a company of one Contracting State and the other Contracting State in connection with an investment on the territory of that other Contracting State, it shall upon the agreement by both parties to the dispute be submitted for arbitration to the [ICSID] established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, dated March 18, 1965.

45 Egypt-Spain BIT (1992), Article 11 :

> Si las controversias no pueden ser resueltas de esta forma en un plazo de seis meses a contra desde la fecha de notificacion escrita mencionada en el apartado 1, serán sometidas, a opcion del investor : - a un tribunal de arbitraje de acuerdo con el Reglamento del Instituto de Arbitraje de la Camara de Comercio Estocolmo ; - a la Corte de Arbitraje de la Camara de Comercio Internacional de Paris ; - al Tribunal del arbitraje ad hoc establecido en el Reglamento the Arbitraje de la Comision de la Nacions Unidas sobre Derecho Mercantil Internacional ; - al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI) […] ; - al Centro Regional de Arbitraje Comercial Internacional de El Cairo.

Figure 5. Choice of arbitration fora: Distribution of treaties that offer investors a unilateral choice of one or more fora. Dots show the average number of fora offer in all such treaties concluded in a given year (right scale).

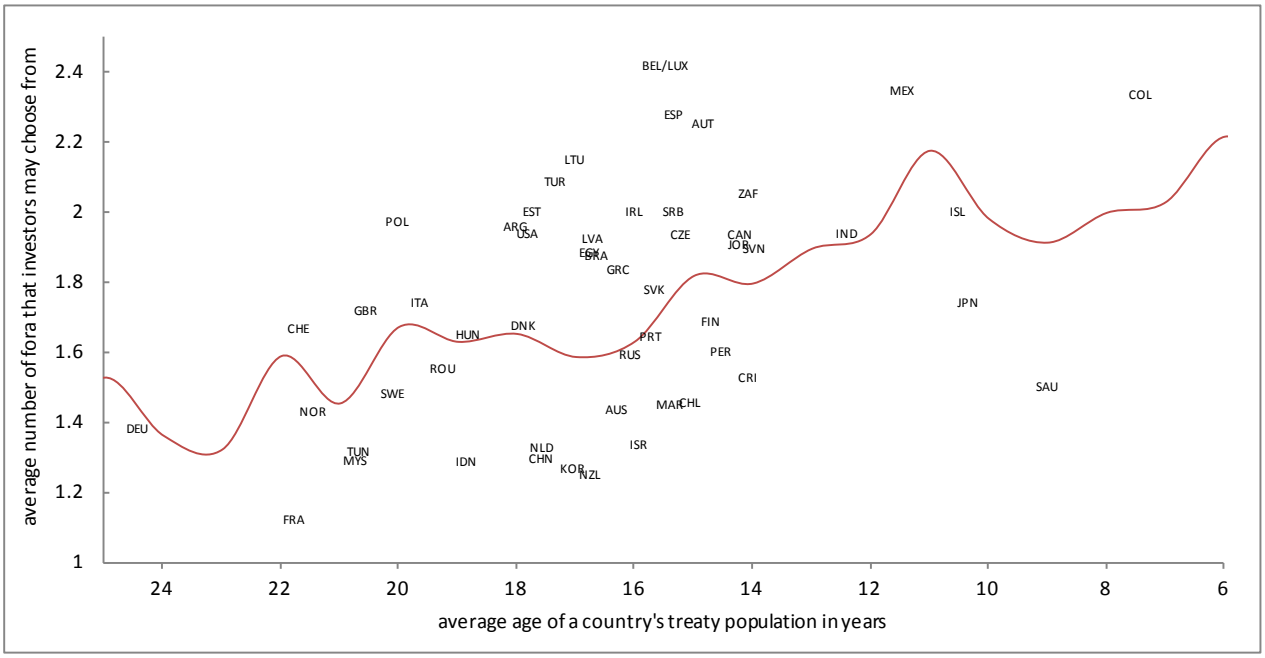


Some countries have made the same number of fora available to investors in most of their sample treaties. For instance, Germany, Korea, the Netherlands and the United Kingdom tend to offer only one forum, while Spain tends to offer a choice of up to 5 different fora.

Other countries have taken different approaches, and do not consistently make available the same number of fora across their treaty sample. For instance, Belgium/Luxembourg has 24 treaties in the sample that propose a choice among 4 fora, and 28 treaties that provide access to only one.

According to Figure 6, this variation cannot be explained only by the different ages of countries' treaty samples. Figure 6 shows the average number of arbitration tribunals made available by given countries, in relation to the average age of these countries' treaties; only treaties that provide for international arbitration have been considered. There is a general trend towards the inclusion of more fora over time. Yet, Figure 6 shows the impact of country policies, as certain countries, including Belgium/Luxembourg, Spain, Austria and Mexico offer a broader choice of fora than the global average, while France, New Zealand, Korea and Saudi Arabia offer a narrower choice than the global average, even controlling for the age factor..

Figure 6. Relation between average age of a given country's treaty population (x-axis, in years) and the average number of arbitration fora offered for investors' unilateral choice. The line graph shows the average number of fora offered in all treaties at the corresponding time.



Offering a choice of arbitration fora has several implications for the respondent State and the investor in a specific dispute. The choice among fora has repercussions on the rules that apply to the procedures and, to some extent, on the substance of arbitral decisions. Unless treaty partners have explicitly defined detailed rules – which is rarely the case – the selected forum comes with rules on the appointment of arbitrators, the rules of procedure, the *situs* and the related local laws, transparency, participation on non-disputing parties and the sharing of costs, for instance. Where States offer investors a broader choice, they thus also allow investors to select the set of rules that they consider most favourable to their individual case.

c. Arbitration rules

Most treaties that refer arbitration to ICSID or *ad hoc* tribunals established under UNCITRAL rules do not contain a specific statement on the applicable arbitration rules, thus incorporating the rules used as default by these tribunals, either as they stood at a fixed, predetermined date[46] or, through a dynamic reference, at any relative point in time.[47] Slightly over 160 bilateral treaties specify either the arbitration rules that tribunals must apply (to the proceedings as a whole or to individual issues), or, alternatively, procedures for the determination of the applicable arbitration rules.

Many treaties that address the issue of applicable arbitration rules delegate the design of these rules entirely to the tribunals. A few treaties call on the tribunals to draw on ICSID, UNCITRAL or Stockholm Chamber of Commerce arbitration rules, or from rules of "international law" to define their arbitration rules.

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46 For instance referring to the UNCITRAL Arbitration Rules (1976). E.g. Italy-Bulgaria BIT (1988)

47 For instance referring to UNCITRAL Arbitration Rules "in the latest version agreed by the States parties" at the time of the claim (e.g. Austria-Latvia BIT (1994); Austria-Lithuania BIT (1996); Austria-Moldova BIT (2001); Austria-South Africa BIT (1996); Austria-Ukraine BIT (1996); Austria-Vietnam BIT (1995); Austria-Latvia BIT (1994)).

Other treaties impose arbitration rules on selected issues such as the principle of majority decisions or the fact that the tribunal decides on the extent of its jurisdiction, while leaving it to the tribunal to define all other rules.

C. ASPECTS OF ARBITRATION PROCEEDINGS

A number of treaties in the sample contain provisions regulating aspects of the conduct of international arbitration. They cover a broad range of issues such as the composition and setup of arbitral tribunals, the qualification of arbitrators, the involvement of non-disputing parties, provisions that relate to transparency and accountability of proceedings and their outcomes as well as the *situs* of arbitration. Depending on the chosen forum, those rules may either (i) complement or supersede provisions set out in the arbitration rules applicable to a given dispute (e.g. ICSID Convention and rules, or UNCITRAL Arbitration Rules (2010)), or (ii) when there are no such applicable arbitration rules, provide rules for the establishment of *ad hoc* tribunals and the conduct of their proceedings.

From a functional perspective, organisational rules covered in this section seek to ensure that an impartial arbitral tribunal composed of competent arbitrators make an informed decision in a reasonably brief period of time. Given this important role, the rarity of such provisions – with the exception of rather basic rules on the composition of arbitral tribunals – is remarkable; moreover, many of these provisions are concentrated in a small number of treaties.

1. Initial phase of proceedings – composition of the tribunal and place of arbitration

a. Composition of arbitral tribunals

Most treaties that contain clauses on ISDS through international arbitration refer disputes to ICSID or *ad hoc* tribunals established under UNCITRAL rules. Both the ICSID Convention and the UNCITRAL Arbitration Rules (2010) contain rules on the composition of arbitral tribunals, thus making the definition of rules in an IIA dispensable where treaty partners are satisfied with these default rules. The ICSID Convention rules set as default a three member arbitral panel; each party in dispute designates one arbitrator and the parties agree upon the chairman of the tribunal.[48] The composition rules under the UNCITRAL Arbitration Rules (2010)[49] are similar except that the two party-designated arbitrators, rather than the parties, choose the third arbitrator as their chairman.

Roughly 16% of the treaties in the sample specify the rules on the composition of arbitral tribunals. In most cases, those rules apply to the composition of *ad hoc* tribunals established under rules set out in the treaty (rather than UNCITRAL rules). Almost all these designations call for three-member tribunals, and around two thirds follow the UNCITRAL approach for the selection of the presiding arbitrator, i.e. require the two arbitrators chosen by the parties in dispute to designate their president. Only two bilateral treaties in the sample[50] and the Energy Charter Treaty (ECT) (1991) also mention the option of a single arbitrator.

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48 Article 37(2)(b) of the ICSID Convention reads "(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."

49 Article 9 of the UNCITRAL Arbitration Rules (2010) reads: "1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal."

50 The *China-Belize BIT (1999)* and Italy-Romania BIT (1990).

Treaties that follow a different approach than either the ICSID Convention or the UNCITRAL Arbitration Rules (2010) for the composition of tribunals are rare: The Investment Agreement for the COMESA Common Investment Area (2007) foresees that arbitrators are selected by the COMESA Secretariat, rather than by the disputing parties; the COMESA Secretariat selects the arbitrators from a roster of qualified arbitrators.

b. Qualification and impartiality of arbitrators

Few treaties deal with characteristics of individual arbitrators that serve on arbitration panels. Rules that are occasionally found concern their qualification and miscellaneous grounds that would exclude them from dealing with a specific case. Another issue that is related to impartiality is arguably the *situs* of arbitration that a few treaties are concerned about (see below).

Qualification of arbitrators

24 bilateral treaties (1,5% of the sample) contain clauses that address the qualification of arbitrators.[51] Multilateral agreements, such as NAFTA (1992), the Investment Agreement for the COMESA Common Investment Area (2007), and the ASEAN Comprehensive Investment Agreement (2009) also feature such language.[52] Article 14 of the ICSID Convention for tribunals constituted under ICSID also contains rules on the qualification of arbitrators.[53]

The clauses in these agreements fall in two functionally different groups: They either restrict the population of individuals from which parties can choose arbitrators (rules contained in the bilateral treaties, ASEAN Comprehensive Investment Agreement (2009), and ICSID Convention); or they define minimum requirements for access to a roster from which arbitrators are selected when a tribunal is not completely established by the parties (NAFTA (1992)).[54] The provisions of the Investment Agreement for the COMESA Common Investment Area (2007) also only apply to the composition of a roster, but under the COMESA Agreement, all arbitrators are chosen from a roster by the Secretary-General of the COMESA Secretariat.

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51 For instance, the *Canada-Panama FTA (2010)*, Article 9.25 reads

> Arbitrators shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent of, and not be affiliated with or take instructions from, either Party or the disputing investor.

52 Article 35(2) of the ASEAN Comprehensive Investment Agreement (2009) states:

> [Arbitrators] shall have expertise or experience in public international law, international trade or international investment rules, and be independent of, and not be affiliated with or take instructions from the disputing Party, the non-disputing Party, or disputing investor.

53 Article 14(1) of the ICSID Convention applies directly to the selection of arbitrators for the Panel, but Article 40(2) of the ICSID Convention requires that party-appointed arbitrators also possess the qualities stated in Article 14(1). Article 14 of the ICSID Convention states:

> (1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.
>
> (2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

54 NAFTA Art. 1124 reads:

> 4. On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters.

Impartiality of arbitrators

Treaties do not explicitly require arbitrators to be impartial, but some treaties address potential conflicts of interests of arbitrators. The main concern that bilateral treaties reveal in this regard are conflicts of interest induced by the nationality or, rarely, permanent residence,[55] of arbitrators; a sizeable number of bilateral treaties state that individuals that have the nationality of the home or host State cannot be elected as presiding arbitrators.[56]

These rules in individual treaties are complemented by rules in the ICSID Convention and ICSID Arbitration Rules,[57] and the UNCITRAL Arbitration Rules (2010). The rules established by the ICSID framework addresses incompatibilities resulting from an earlier involvement as a conciliator or arbitrator in the dispute. The UNCITRAL Arbitration Rules (2010) take a different approach to deal with impartiality: Articles 11-13 UNCITRAL Arbitration Rules (2010) require arbitrators to be transparent on circumstances that could give rise to doubts as to his or her impartiality and independence, and allows parties to challenge the nomination thereof.

Whether the nationality or permanent residence of an arbitrator is still a relevant criterion as a source of bias, and whether it is the only one that merits to be mentioned as an objective criterion for exclusion, may be questioned. Nonetheless, even more recent treaties focus exclusively on this criterion to ensure impartiality of arbitrators, and the multilateral rule frameworks add only few additional restrictions.

c. Place of arbitration

A sizeable number of treaties – 188 occurrences (12% of the sample) – contain language on the place (*situs*) of arbitration. The *situs* may have an impact on the applicable arbitration rules and may influence enforcement possibilities. Clauses on the *situs* of arbitration are meant either to ensure that awards can be enforced or that proceedings are not subject to undue interference.

First, many treaties that contain a clause related to the *situs* of arbitration impose that the arbitration be held in a State party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Many other treaties state that the arbitration shall be held in a New York Convention country where one party so requests.

Second, some treaties require arbitration to be held in a specific state or even city, which include, in decreasing order of frequency, The Hague,[58] Sweden,[59] Stockholm,[60] Paris,[61] and, "as far as possible",

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55 *Colombia-Japan BIT (2011)*; Article 35 (1)(b) ASEAN Comprehensive Investment Agreement (2009).

56 For instance, China-Qatar BIT (1999), Article 9.3:

> […] each party shall appoint one arbitrator in the tribunal and within two months from their appointment, the two members by mutual agreement nominate a third member a citizen of the third State having diplomatic relations with both Contracting Parties to act as Chairman.

57 In particular Article 39 of the ICSID Convention and Article 1 of the ICSID Arbitration Rules.

58 Germany-Qatar BIT (1996), Korea-Qatar BIT (1999), Switzerland-Qatar BIT (2001).

59 *Denmark-Kuwait BIT (2001)*, Poland-United Arab Emirates BIT (1993).

60 Italy-Albania BIT (1991), Italy-Bosnia and Herzegovina BIT (2001), Italy-Tanzania BIT (2001).

61 Italy-Congo (Democratic Republic) BIT (1994).

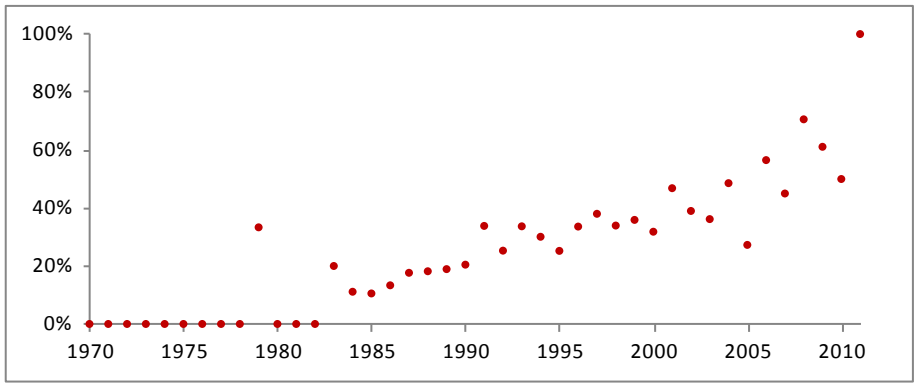
Singapore.[62] With the exception of the China-Singapore BIT (1985), all these designations place the arbitration in a third country that is not a treaty partner.

The Investment Agreement for the COMESA Common Investment Area (2007) requires arbitration to be held at the COMESA Secretariat (in Lusaka, Zambia), unless the parties agree otherwise.

2. Applicable law

Slightly over 32% of the sample treaties that feature an ISDS clause contain language on applicable law. The first occurrence of such language is in a treaty concluded in 1979; since then, the proportion of treaties that include clauses on applicable law has slowly but steadily increased (Figure 7).

Figure 7. Frequency of clauses on law applicable by arbitral tribunals in treaties concluded in a given year as a percentage of treaties that contain language on international arbitration.



The propensity to include language on applicable law varies by country: Argentina, Canada, Mexico and Spain almost always include provisions on applicable law, while Denmark, Israel, Malaysia, Norway and Tunisia rarely or never include such language.

The treaties mention 7 distinct sources of law, including, in the order of frequency: 1) the investment treaty itself (31% of the sample treaties that contain provisions on international arbitration); 2) principles of international law (29%); 3) domestic law of the host State (23%); 4) domestic rules on conflict of law of the host State (17%); 5) a special agreement concluded in relation to the specific investment concerned by the dispute (14%); 6) a common interpretation that the States parties to the IIA have agreed on (2%); and 7) other treaties that the States parties to the IIA have concluded (1%).[63]

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62 China-Singapore BIT (1985).

63 Belgium/Luxembourg-Cyprus BIT (1991), as an example of treaty referring to multiple bodies of applicable laws, states in its Article 10.5:

> The arbitral tribunal shall decide on the basis of:
> – the national law, including the rules relating to conflicts of law, of the Contracting Party involved in the dispute in whose territory the investment has been made;
> – the provisions of this Agreement;
> – the terms of the specific agreement which may have been entered into regarding the investment;
> – the principles of international law.

The Argentina-Croatia BIT (1994), as an example of treaty referring to only one body of applicable law states in its Article 9(4):

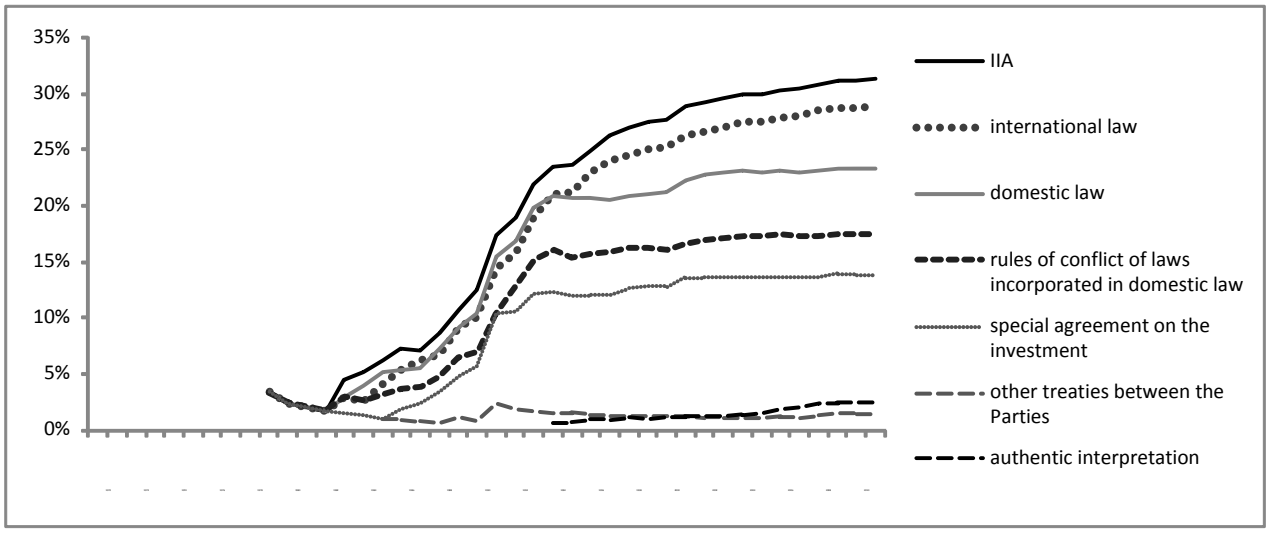
> The arbitration tribunal shall decide in accordance with principles of international law.

Most treaties that include provisions on applicable law mention multiple bodies of law in various combinations, leading to a total of 29 different combinations of sources of applicable law. Moreover, the nature of the language referring arbitrators to these bodies of law varies: some Australian treaties for instance call on the arbitral tribunals to "take into account" certain bodies of law, while other treaties in the sample require that the tribunals "base their decision on" certain bodies of law. Also, some treaties do not mention the IIA itself, which would suggest that the list of bodies of law to be applied is not exhaustive.

Some treaties do not define the bodies of law that an arbitral tribunal has to apply but delegate this decision to the disputing parties;[64] only some of these treaties define a default applicable law that applies in the absence of an agreement. Some treaties specify the applicable law only in relation to a specific tribunal that is called to decide the dispute.[65]

Figure 8 shows the proportion of treaties that mention specific bodies of law in the stock of treaties concluded at the end of a given year. It counts – but does not single out – treaties that allow parties to deviate from the default set of bodies of law by agreement or those treaties that make the applicable law dependent on the type of arbitral tribunal.

Figure 8. Proportion of treaties that mention specific bodies of law to be applied by arbitral tribunals in stock of treaties at the end of a given year.



In the absence of explicit treaty language, other bodies of rules apply for the selection of the applicable laws. For instance, the ICSID Convention and the UNCITRAL Arbitration Rules (2010) instruct the disputing parties to seek agreement amongst themselves on the laws applicable to the arbitration. In the absence of such an agreement, arbitrators will decide on applicable laws under the UNCITRAL Arbitration

64 For example, Austria-Kuwait BIT (1996); Austria-United Arab Emirates BIT (2001); Belgium/Luxembourg-Kuwait BIT (2000); Netherlands-Zimbabwe BIT (1996); Switzerland-Kuwait BIT (1998).

65 For example, for *ad hoc* tribunals established in accordance with UNCITRAL rules: Austria-India BIT (1999); Belgium/Luxembourg-India BIT (1997); Germany-India BIT (1995); Germany-Qatar BIT (1996); Hungary-India BIT (2003); India-Bosnia and Herzegovina BIT (2006); *India-Ghana BIT (2002)*; India-Indonesia BIT (1999); India-Kazakhstan BIT (1996); India-Korea BIT (1996); India-Mauritius BIT (1998); *India-Mozambique BIT (2009)*; India-Netherlands BIT (1995); India-Oman BIT (1997); *Indonesia-Zimbabwe BIT (1999)*; Italy-Bosnia and Herzegovina BIT (2001); Italy-Congo (Democratic Republic) BIT (1994); *Italy-Nicaragua BIT (2004)*.

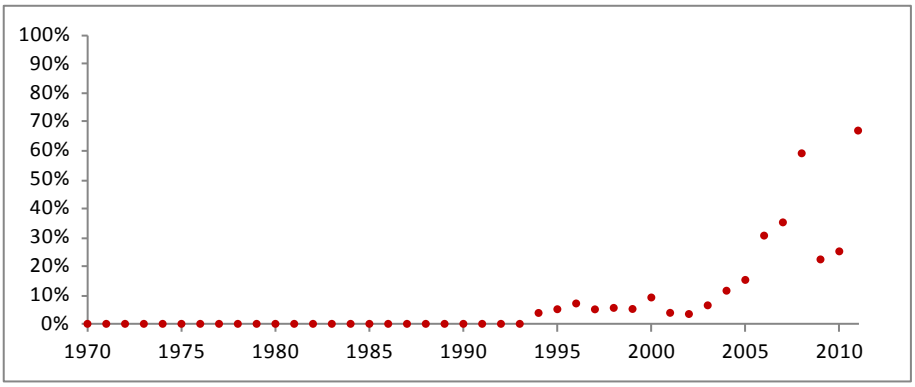
Rules (2010), while domestic law – including rules on conflict of law – as well as rules of international law, are set as applicable laws under the ICSID Convention in the absence of an agreement.[66]

3. Provisional and final remedies

a. Provisional remedies and injunctive relief

Eighty-nine – or 6% of treaties with ISDS language – contain provisions on interim measures or injunctive relief. The first sample treaty to mention injunctive relief was NAFTA (1992), and from 1994 on, the three NAFTA treaty partners have included the issue in their bilateral treaties.[67] The proportion of treaties with language on injunctive relief had increased in the earlier years of the millennium, but such provisions remain a fairly marginal phenomenon (Figure 9).

Figure 9. Proportion of treaties that provide for injunctive relief in treaties with ISDS clauses concluded in a given year



Countries that mention interim measures in their bilateral treaties include, in descending order of proportions in their treaty sample that contain such provisions, Canada, Mexico, the United States, Japan and Colombia. Twenty-one of the countries that participate in the Freedom of Investment process do not have any treaties in the sample that address interim measures.

Interim relief in an ISDS context relies on: i) domestic court systems to provide interim relief, ii) arbitral tribunals;[68] or iii) both i) and ii). Treaties that rely on domestic courts to provide interim relief may specify that investors that seek interim relief from host State courts do not waive their rights to arbitration.

The ICSID Convention and UNCITRAL Arbitration Rules (2010) also contain language on this matter. The ICSID Convention and ICSID Arbitration Rules allow tribunals to "recommend any provisional

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66 Article 42 (1) of the ICSID Convention states:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Article 35 of the UNCITRAL Arbitration Rules (2010) states:

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

67 The first treaties were Canada-Ukraine BIT (1994); *Mexico-Bolivia FTA (1994)*; United States-Georgia BIT (1994); United States-Trinidad and Tobago BIT (1994); and *United States-Uzbekistan BIT (1994)*.

68 See for example the Austria-Kuwait BIT (1996).

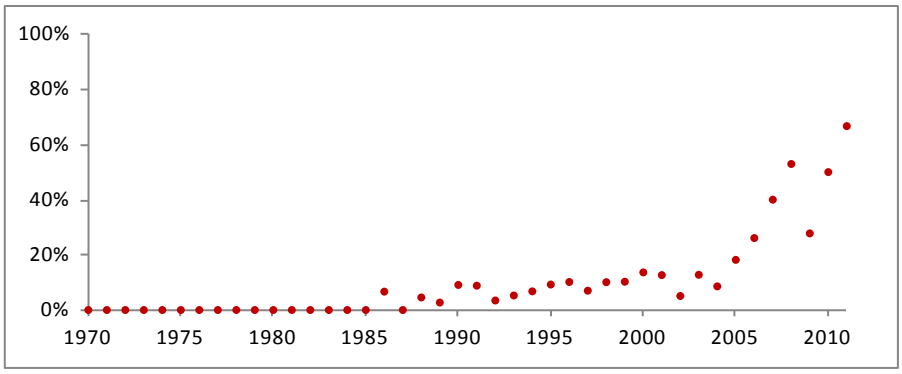
measures which should be taken to preserve the respective rights of either party".[69] Article 26 UNCITRAL Arbitration Rules (2010) allows tribunals to grant interim measures at the request of a party.

b. Final remedies

Only a few sample treaties specify what arbitral tribunals may award. Specifications of the possible content of awards appear for the first time in an IIA concluded in 1988, and despite a recent increase in their frequency, remain rare: slightly fewer than 10% of the treaties in the sample contain language on remedies (Figure 10). Furthermore, neither the UNCITRAL Arbitration Rules (2010) nor the ICSID Convention or the ICSID Arbitration Rules contain provisions or restrictions on remedies.[70]

Provisions on remedies are rare in BITs (8% of the BITs in the sample), and relatively frequent in FTAs and EPAs (74% and 73% respectively).Only a few countries regularly specify the possible remedies in their treaties, including Australia, Austria, Canada, Colombia, Iceland, Mexico and the United States.

Figure 10. Frequency of specification of the contents of arbitral awards in bilateral treaties concluded in given year.



Provisions on the remedies that a tribunal may order use positive or negative lists, or combine both approaches. Positive lists (used in 7% of treaties in the sample) are more common than negative lists (2% in the sample) or the combination of both (2% in the sample). Not all the positive or negative lists appear to be exhaustive.

Positive lists may include the right of tribunals to grant:[71]

- declaratory awards, specifically the declaration of breach of treaty obligations;
- compensation;
- interests;
- an order of specific performance, such as restitution in kind or restitution of property;
- with the agreement of the parties to the dispute: any other form of relief; and
- allocation of costs and fees.

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69 Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules.

70 Article 54 of the ICSID Convention on enforcement of arbitral awards however states that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the *pecuniary* obligations imposed by that award within its territories as if it were a final judgment of a court in that State". This is arguably providing an incentive for investors to seek primary remedies rather than other sorts.

71 Some positive lists also mention that tribunals may provide interim injunctive relief; this matter is dealt with separately below in the section on interim measures (below xxx).

Negative lists – found in some Australian and Canadian treaties, among others – may include prohibitions on tribunals to:

- award anything other than monetary damages;
- award punitive damages;[72]
- grant compensation that exceeds guidelines provided in the treaty;[73] or
- evaluate the legality of the domestic law or regulation of the host State.[74]

4. Regulating diplomatic support and invocation of state immunity

ISDS is conceived as a mechanism to depoliticize a dispute between an investor and a State and solve it through a specially designed procedure. A number of treaties contain provisions to exclude interference with this procedure: one rule prohibits the claimant investor to seek diplomatic support from its home State government, the other prohibits the defendant State from invoking its diplomatic immunity.

a. Regulating diplomatic support

Some treaties specify to what extent and under which conditions diplomatic efforts – including through State-to-State dispute settlement procedures – are allowed or prohibited in parallel to ISDS proceedings.[75] Where those clauses have been found, they prohibit diplomatic efforts beyond facilitation of the dispute settlement procedures, as mentioned in some treaties. Clauses that prohibit diplomatic protection once arbitration has begun first appear in the United Kingdom-Singapore BIT (1975) and have been fairly often used: 21% of the treaties in the sample contain such clauses, and there is no discernable trend with respect to the inclusion of such clauses in treaties (Figure 11).

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72 For example,. in some treaties concluded by NAFTA parties Canada and Mexico such as Argentina-Mexico BIT (1996); Austria-Mexico BIT (1998); *Canada-Chile FTA (1996)*; *Canada-Colombia FTA (2008)*; Czech Republic-Mexico BIT (2002).

73 Some Australian treaties (including in Australia-China BIT (1988); Australia-Czech Republic BIT (1993); Australia-Papua New Guinea BIT (1990); Australia-Poland BIT (1991)) state that

> Nevertheless, a national or company of a Contracting Party involved in such a dispute shall not be entitled to compensation for more than the value, as determined in accordance with Article […], of the investment which is the subject of the dispute, taking into account all sources of compensation within the territory of a Contracting Party liable to pay compensation.

74 *Belgium/Luxembourg-Colombia BIT (2009)* and *China-Colombia BIT (2008)* for instance state:

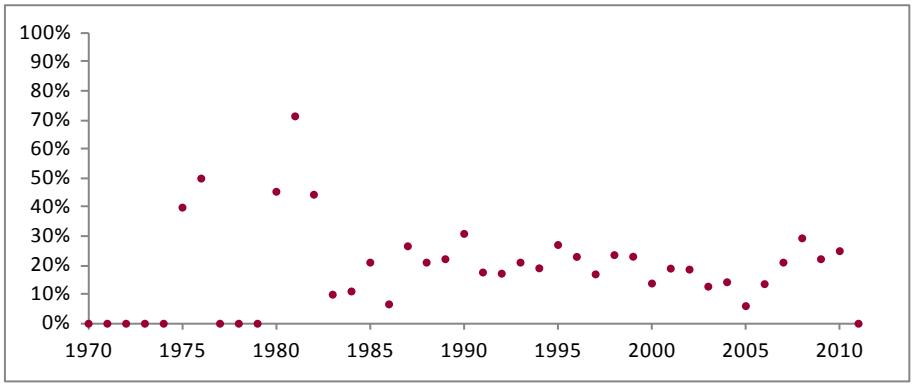
> The tribunal is not competent to review the legality of a domestic law or regulation under the constitutional or legal order of the party concerned.

75 For instance, Slovenia-Bosnia and Herzegovina BIT (2001), Article 8.4:

> Neither Contracting Party shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered in those proceedings.

Art. 27 of the ICSID Convention contains similar rules.

Figure 11. Development of the prevalence of clauses restricting explicitly diplomatic efforts once arbitration has begun in bilateral treaties that contain ISDS provisions in percent in treaties concluded in a given year.



Almost all the treaties that regulate diplomatic support contain exceptions, and allow diplomatic support where a State party to the IIA fails to execute an award obtained against it. Article 27 of the ICSID Convention also contains this rule, while UNCITRAL Arbitration Rules (2010) make no statement on the issue. Additional exceptions, more rarely found, allow diplomatic protection where the arbitral tribunal declares that the dispute falls outside its jurisdiction (7% of treaties in the sample), or once arbitration has been terminated (6% of the treaty sample). Combinations of these exceptions have also been observed.

Most countries in the sample have at least one treaty that deals with this subject, but only four countries, Australia, Chile, Costa Rica, and Malaysia, have included such language in more than two thirds of their treaties.

b. Regulating invocation of state immunity

Some treaties in the sample contain clauses that prevent States from asserting their immunity during an investment dispute.[76] They first appeared in treaties concluded in 1991[77] and have remained marginal: Only 4% of treaties in the sample – 68 in total – feature such clauses (Figure 12).

The propensity to use such clauses varies among the participants in the FOI Roundtable: Switzerland and Romania, which were among the countries to spear-headed the inclusion of such clauses in their treaties, remain the countries that use them most often; Romania has included them in 29% of its treaties, and Switzerland in 28% [78] and with increased frequency since 1992.[79] 24 countries have no treaty with such a clause.

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76 For instance Switzerland-Bosnia and Herzegovina BIT (2003), Article 9.5:

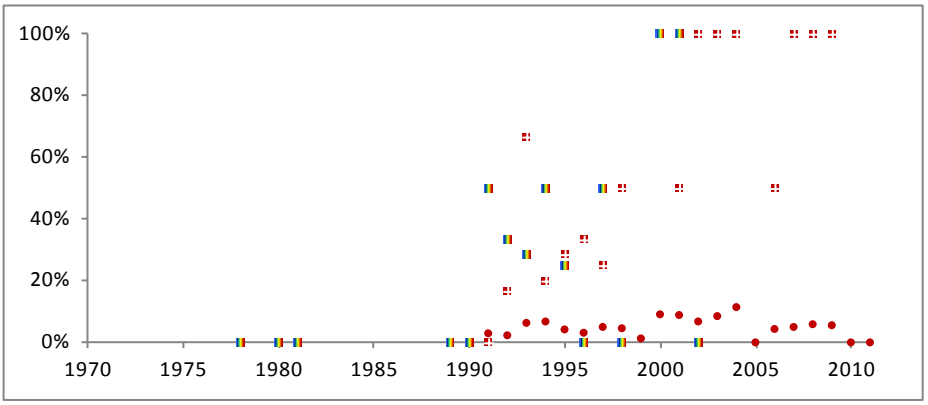
> The Contracting Party which is party to the dispute shall at no time whatsoever during the process assert as a defence its immunity […].

77 Italy-Albania BIT (1991) and Norway-Romania BIT (1991), followed by Jordan-Romania BIT (1992) and Switzerland-Paraguay BIT (1992).

78 Iceland also has such a clause in one out of its four treaties (*Iceland-Lebanon BIT (2004)*), but the low number of Icelandic treaties in the sample – four – makes this finding appear less meaningful.

79 Romania's most recent treaty in the sample was concluded in 2002.

Figure 12. Frequency of clauses preventing States from invoking State immunity in ISDS proceedings in sample of treaties with ISDS clause (round dots=entire sample, Romanian flag dots=Romanian treaty subsample; Swiss flag dots=Swiss treaty subsample).

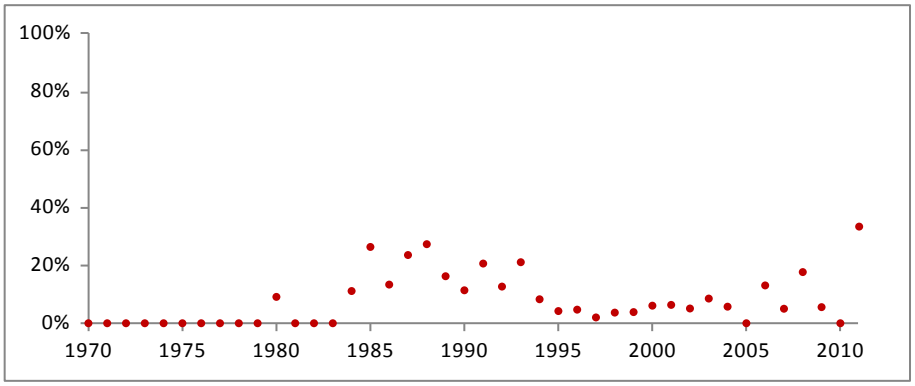


5. Allocation of costs

Arbitration costs are mentioned in a number of treaties. Some treaties restrict such mentions to the remedies section, and refer to applicable arbitration rules as to their allocation. 133 treaties – 9% of the bilateral treaties in the sample –, however, cover the allocation of arbitration costs for all available or specified arbitration fora.

Clauses on the allocation of costs were first found in a treaty concluded in 1980[80] and they have remained relatively rare, albeit at various levels, since then (Figure 13). Countries that frequently address cost allocation in their treaties include China (69% of its treaty population), Colombia (60%), Australia (50%), and Poland (26%).

Figure 13. Proportion of treaties that contain a clause on cost allocation in treaties concluded in a given year.



The substance of these cost allocation rules varies among treaties: Many of the cost allocation rules in treaties make the cost allocation independent from the outcome of the case; the treaties usually state that each party bears its own costs, including the costs of its arbitrator, and that both parties share the remainder of the costs in equal parts. Three treaties in the sample call for a sharing in equal parts of all costs.[81]

[80] Egypt-Finland BIT (1980).

[81] For example, Australia-Chile FTA (2008); Egypt-Finland BIT (1980); Italy-Algeria BIT (1991).

Around 49% of the treaties that establish cost allocation rules re-introduce discretion for the tribunals and allow them to allocate the costs differently. However, only two of these treaties – two recent treaties concluded by Colombia[82] –provide guidance to the tribunal on which rules it must follow in exercising this discretion.

These cost allocation rules differ from the UNCITRAL Arbitration Rules (2010), under which the unsuccessful party pays the costs. When compared to the treatment of cost allocation under the ICSID Convention – which gives discretion to the arbitral tribunal – they limit the discretion of the arbitral tribunal.

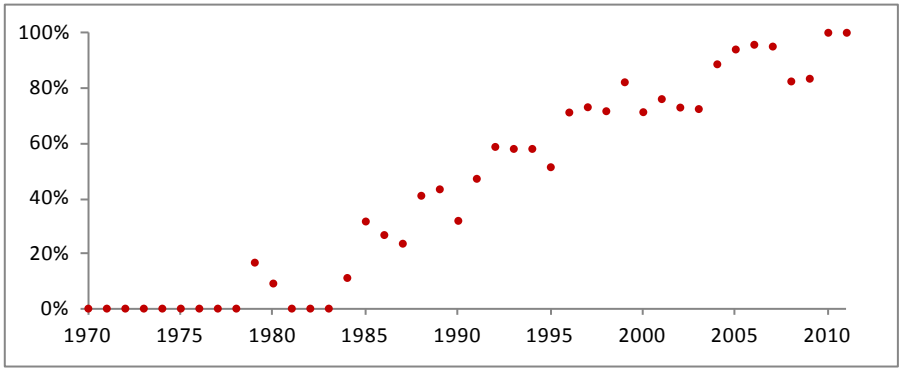
Ten bilateral treaties in the sample,[83] all concluded in or after 2003 by either Colombia or the United States, contain a special cost allocation rule for frivolous claims. These rules require that tribunals shift the costs for frivolous claims to the claimants. The ASEAN Comprehensive Investment Agreement (2009) contains a similar clause.

Only one treaty in the sample alludes to the actual amount of costs and fees.[84] It states that disputing parties may establish rules relating to expenses incurred by the tribunal, including arbitrators' remuneration.

6. Legal status of awards and enforcement

Many treaties – 62% of the sample – specify the legal status of awards rendered by arbitral tribunals. In most cases, it is stated that arbitral awards are final (56% of sample treaties containing language on ISDS) and/or binding (61%). Some treaties add that the award is binding "on the parties and with respect to the particular dispute". Enforcement issues are also frequently tackled, as some bilateral treaties determine under which conditions and legal regime an arbitral award may be enforceable. 55% of the treaties state that the respondent State is to enforce the award, typically under its domestic laws; a few treaties specify that waiting periods need to be respected prior to enforcement. Language on the legal status of the award was first introduced in an IIA in 1979,[85] and the frequency of its inclusion has grown steadily over time (Figure 14).

Figure 14. Proportion of treaties that contain a clause on the legal quality of awards in treaties concluded in a given year.



82 *Belgium/Luxembourg-Colombia BIT (2009)*; *China-Colombia BIT (2008)*.

83 *Belgium/Luxembourg-Colombia BIT (2009)*; Chile-Colombia FTA (2006); *China-Colombia BIT (2008)*; *Colombia-Japan BIT (2011)*; Korea-United States BIT (2007); Morocco-United States FTA (2004); United States-Oman FTA (2006); *United States-Rwanda BIT (2008)*; *United States-Singapore FTA (2003)*.

84 Australia-Chile FTA (2008).

85 *Morocco-Gabon BIT (1979)*.

Both ICSID Convention and UNCITRAL Arbitration Rules (2010) also state that awards are final and binding on the parties.[86]

7. Transparency, accountability and quality

Some ISDS provisions seek to increase the transparency of arbitral proceedings, and enhance the quality of decisions. In the sample, provisions have been found that deal with (a.) public access to procedures and decisions; (b.) involvement of experts, *amici curiae*, and non-disputing parties; and (c.) obligations to motivate arbitral awards. Such provisions, common in many countries' domestic laws, are rare in bilateral treaties.

a. Public access to procedures and outcomes

Only 8 bilateral treaties in the sample contain provisions regarding public access to hearings of arbitral tribunals;[87] all but one of these treaties were concluded by one of the three NAFTA parties; NAFTA (1992) itself does not contain such provisions however. CAFTA (2004),[88] the Investment Agreement for the COMESA Common Investment Area (2007) and the ASEAN Comprehensive Investment Agreement (2009) contain provisions on the openness of hearings to the public.

Likewise, only 35 bilateral treaties provide for publication of awards. By contrast, the Investment Agreement for the COMESA Common Investment Area (2007) requires that a comprehensive list of documents related to arbitration be made public, including through the internet. The notice of intent to arbitrate, any amicable settlement, initiation of arbitration, pleadings, evidence and decisions shall be available to the public. NAFTA (1992) also contains language on the publication of awards; the rules depend on which of the three NAFTA members is respondent in the dispute.

b. Involvement of experts, amici curiae, and non-disputing parties

Only 25 treaties in the sample contain provisions on the participation of non-disputing parties, experts, *amici curiae* or other interested individuals or entities.[89] Provisions on this matter first appear in NAFTA (1992), followed by the first occurrence in a bilateral in 1994[90] (Figure 15).

Such provisions feature almost exclusively in FTAs and EPAs (62% of the FTAs and 22% of the EPAs that contain an ISDS clause, respectively), which typically have very comprehensive ISDS sections, and much less often in BITs (0.7% of the BITs that contain an ISDS clause). Only 7 countries have included such rules in at least 12% of their sample treaties, namely six countries from the Americas – Colombia, Canada, Peru, the United States, Mexico, and Chile – plus Japan, in descending order of frequency. Seven other countries have at least one treaty that contains such provisions, and all of them are concluded with one of the abovementioned countries.

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86 Article 53(1) of the ICSID Convention; Article 34(2) of the UNCITRAL Arbitration Rules (2010). Article 53(1) of the ICSID Convention takes into account the possibility of annulment proceedings possible under the ICSID Convention, a caveat that a few treaties also refer to.

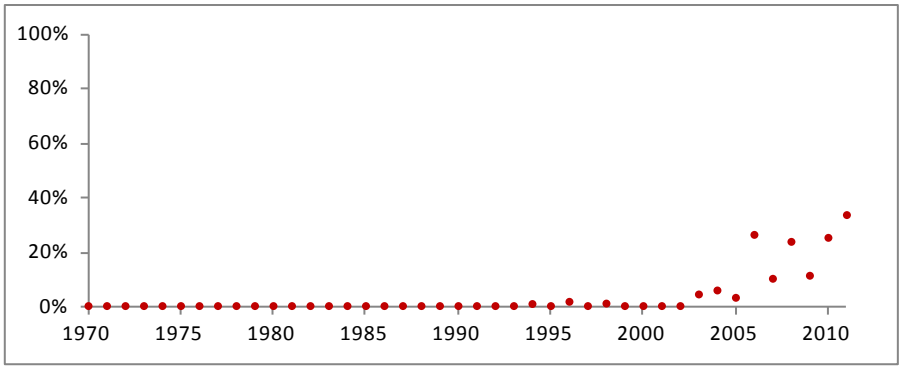
87 Canada-Jordan BIT (2009); *Canada-Panama FTA (2010)*; Canada-Romania BIT (1996); Chile-Colombia FTA (2006); Korea-United States BIT (2007); *Mexico-Switzerland BIT (1995)*; Morocco-United States FTA (2004); Peru-United States FTA (2006).

88 Article 10.21 CAFTA (2004).

89 The Investment Agreement for the COMESA Common Investment Area (2007) also features provisions on submissions of interpretations by non-disputing States that are members of COMESA.

90 *Colombia-Peru BIT (1994)*.

Figure 15. Proportion of treaties concluded in a given year that contain a clause on the involvement of non-disputing parties in arbitration proceedings.



Multilateral agreements contain provisions on these matters more frequently: NAFTA (1992), CAFTA (2004), the ASEAN Comprehensive Investment Agreement (2009), and the Investment Agreement for the COMESA Common Investment Area (2007) for instance allow hearings of experts; the COMESA agreement allows tribunals to call on experts on their own initiative. Moreover, CAFTA (2004) contains dedicated articles on the transmission of documents to non-disputing parties.[91] The Investment Agreement for the COMESA Common Investment Area (2007) also contains broad provisions on this matter, including provisions to facilitate public submissions.[92]

c. Requirement to provide reasons for decisions

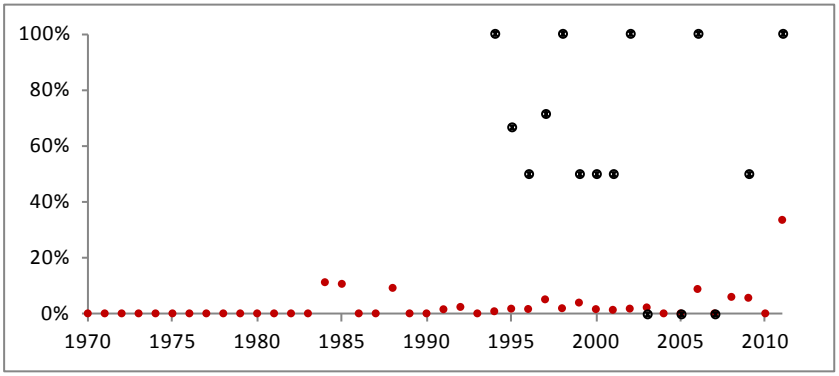
The requirement to provide reasons for decisions is mentioned in only 32 treaties, and its application is often limited to tribunals established under UNCITRAL rules. Also, some treaties only require that reasoning provided only when requested by either party to the dispute.

Clauses that require tribunals to provide reasons for decisions were first introduced in bilateral treaties in 1984. They remained an exclusive feature of treaties concluded by China (6 treaties in the sample) throughout the 1980s, but then other countries began to include such provisions. India has introduced this requirement in 20 of its 34 treaties (59%), and for the first time in 1994. Austria (3 treaties beginning with the Austria-China BIT (1985) and the United States (3 treaties, beginning with the *United States-Singapore FTA (2003)*) have also used this requirement. (Figure 16). Treaty content on providing reasons thus remains exceedingly rare. In total, 19 out of the 54 countries that participate in the FOI Roundtable have at least one treaty with such a clause, and all but 3 of these treaties have been concluded with Austria, China, India or the United States.

91 Article 10.21 CAFTA (2004).

92 Annex A, Article 9(2) Investment Agreement for the COMESA Common Investment Area (2007).

Figure 16. Frequency of requirements to provide reasons for decisions in treaties concluded in a given year in sample of treaties with ISDS clause (full dots=full sample, wheels =India treaty subsample).



KEY FINDINGS

This survey documents the ISDS content of investment treaties. It yields the following key findings:

I. Light regulatory approach -- Most investment treaties deal with a limited set of issues

When ISDS sections emerged in bilateral treaties in the 1970s, they were fairly short and only aimed at providing access to ISDS; they hardly regulated aspects of arbitral proceedings. This remains true of more recent treaties, though there is a trend toward more detailed regulation of ISDS proceedings. On many basic issues (remedies, allocation of costs, applicable law, composition of tribunals) the treaties are often silent and multilateral arbitration rules such as the ICSID Convention, the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules or national arbitration laws provide the rules. Issues that are not regulated in either individual treaties or these frameworks remained unregulated.

II. Only a few issue categories are found in the treaties, but coverage of these issues varies

The number of issues regulated in ISDS provisions of the sample treaties has remained small over the four decades since 1970, despite the large number of treaties and the large number of States that have negotiated bilateral treaties. While 17 issues scored in this analysis are addressed in at least 1% of the treaties, only eight issues appear in at least 10% of the treaties. Only two issues appear in more than half of the sample treaties; and, on average, treaties address fewer than three issues each.

The seventeen categories of issues identified in the ISDS provisions of the sample treaties include, in the order frequency:

- provision on the legal quality of awards (961 occurrences, 61.9% of treaties);
- provision on enforcement (857 occurrences, 55.2% of treaties);
- defendant States may not assert as a defence or the like compensation that the investor has obtained from an insurance or guarantee (631 occurrences, 40.7% of treaties);
- provision on applicable law (499 occurrences, 32.2% of treaties);

- prohibition to grant diplomatic protection once arbitration has begun (323 occurrences, 20.8% of treaties);
- clause on foreign owned domestically incorporated enterprises (303 occurrences, 19.5% of treaties);[93]
- provision on *situs* of arbitration (188 occurrences, 12.1% of treaties);
- provision on cost allocation (173 occurrences, 11.1% of treaties);
- specification of content of awards (149 occurrences, 9.6% of treaties);
- limitation periods (101 occurrences, 6.5% of treaties);
- interim measures (89 occurrences, 5.7% of treaties);
- provision on State immunity (68 occurrences, 4.4% of treaties);
- consolidation of claims (45 occurrences, 2.9% of treaties);
- provision on publication of the award (35 occurrences, 2.3% of treaties);
- motivation of arbitral decisions (32 occurrences, 2.1% of treaties);
- involvement of experts, *amici curiae*, and non-disputing parties (25 occurrences, 1.6% of treaties); and
- a specification of the required qualification of arbitrators (24 occurrences, 1.5% of treaties).

Appearances of these issue categories are unevenly spread over the sample as a whole and in a given country's treaty sample. Only rarely do countries include – or exclude – language on one of these categories and then remain consistent in this choice. There are some exceptions of countries that tend to regulate specific parameters in a fairly consistent fashion: China, for instance tends to include language on cost allocation; India on requiring tribunals to provide reasons for its decisions; Romania and Switzerland on state immunity; and Italy on prohibiting diplomatic support in parallel to arbitration. These issues appear only rarely in other countries' treaties and all five countries just cited regulate relatively few other issue categories in their treaties.

In addition to the low degree of homogeneity in the inclusion of certain categories of ISDS issues within a given country's treaties, there does not seem to be a shared view across countries on which categories should be included. Few issues are systematically addressed by all countries, and there is no indication that a given State's treaty writing practice has inspired other countries to adopt a similar approach.

This is subject to examples of multilateral treaties having an impact on the bilateral treaty writing practice of its members. For instance, the NAFTA (1992) language has arguably influenced Canada, Mexico and the United States' in this respect.

III. Growing detail of ISDS provisions

Recent treaties show that many countries continue to pursue the lean approach to writing ISDS provisions that was characteristic of the very early treaties concluded in the 1970s. Nonetheless, two trends are discernable: the *degree of detail* of ISDS sections has increased over time as more aspects of the ISDS proceedings are being addressed; and, an *increasing number of countries* are moving away from the traditional IIA writing practice by adopting more comprehensive ISDS Sections.

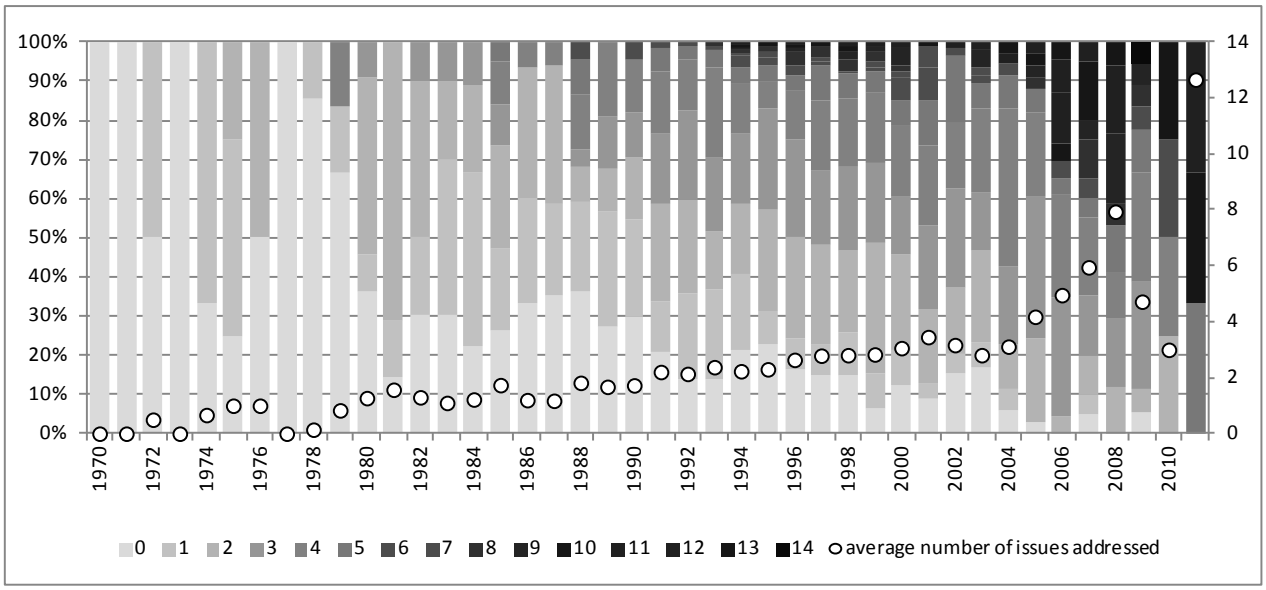
a. The detail of ISDS provisions has increased over time

When adding up the number of issues contained in each of the sample treaties, one finds a marked and almost monotonic increase since the emergence of ISDS sections in bilateral treaties.[94]

[93] As explained above, regulations of this matter may be contained in other sections of the treaties and would thus not be taken into consideration.

Figure 17 documents the trend towards more detailed regulation of ISDS in individual bilateral treaties over time. The figure shows the average number of major ISDS issues in treaties concluded in a given year (white dots) and, per year, the proportion of treaties that regulate a certain number of issues (grey bars).

Figure 17. Average number of issues regulated in ISDS provisions in bilateral treaties concluded in a given year. Distribution (bars, left scale) and calculated average (red dots, right scale).

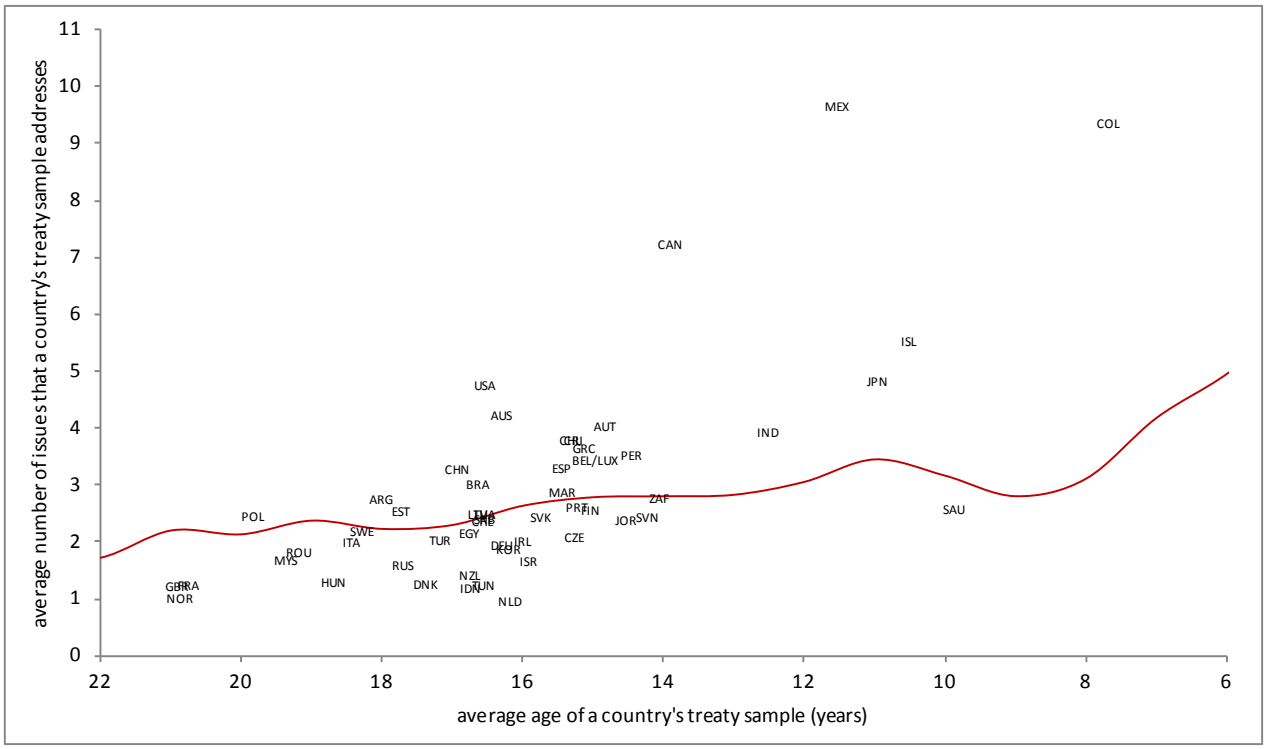


In addition to changes across time in the detail of coverage of ISDS issues, distinct country practices influence the number of issues that are addressed in bilateral treaties. Figure 18 displays the average number of issues addressed in the ISDS sections of a given country's treaties (only treaties that contain an ISDS section are taken into account). The figure shows the variation in detail of ISDS provisions. Mexico, Canada, and Colombia for instance tend to regulate more issues than the sample's global average, while Saudi Arabia and the Netherlands, for instance, regulate fewer issues than the overall sample average at a given time.

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94 The thirteen parameters that have been taken into account for this calculation include: whether a treaty contains a provision dealing explicitly with: the law applicable by arbitral tribunals; the possible content of awards; the sharing of costs of arbitration; whether the host state may invoke insurance payments that the investor has obtained; the legal quality of awards; enforcement; limitation periods; the exclusion of diplomatic protection once arbitration has begun; the standing of foreign controlled domestic enterprises; host State immunity; qualification of arbitrators; consolidation of claims; the lieu of arbitration; and the involvement of non-disputing parties.

Figure 18. Relation between the average age of a given country's treaty sample (x-axis, in years) and the average number of issues regulated in ISDS sections in a given country's bilateral treaty population (y-axis); only treaties that contain ISDS sections were considered. The red line graph shows the average of all countries' treaties at the corresponding time.



b. A few countries adopt a very comprehensive approach to ISDS provisions

In 1994, two years after the conclusion of NAFTA (1992), Mexico signed a BIT and two FTAs with investment chapters. All three treaties contain a comprehensive set of provisions for ISDS.[95] In the same year, Colombia also concluded a BIT with such comprehensive provisions on ISDS.[96] These treaties stand out both in terms of the sheer length of the text on ISDS and in terms of the number of issues they regulate: The ISDS provisions of the Colombia-Peru BIT (1994) cover 23 pages, and the ISDS provisions of the *Peru-United States FTA (2006)* fill 16 pages. These treaties address all issues that are only occasionally regulated in more traditional agreements. In addition, they feature a host of other issues, such as participation of non-disputing parties, rules on transparency and publication of awards, rules on frivolous claims and expedited procedures, and other procedural rules such as service of documents. The *Canada-Colombia FTA (2008)* also contains very detailed ISDS language; for example, it specifies the location for pre-arbitration conciliation attempts in the absence of an agreement by the parties.[97]

At this stage, only a few countries – including Canada, Japan, Mexico, Peru, and the United States – have made regulation of ISDS in their treaties more comprehensive. This appears to be especially true of the United States, Canada, Japan and Mexico – at least 60% of their treaties concluded since the first complex treaty also contain comprehensive ISDS sections.

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95 Australia-Mexico BIT (1994); Mexico-Bolivia FTA (1994); Costa Rica-Mexico FTA (1994).

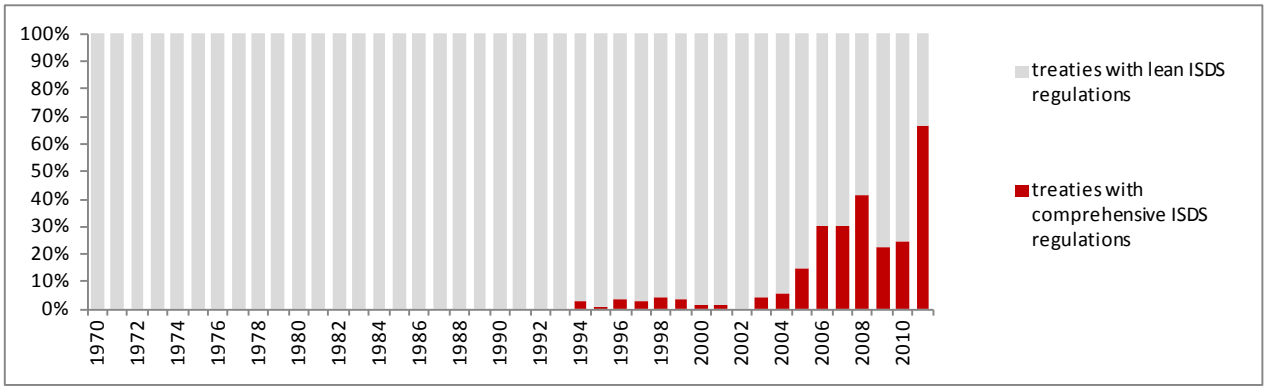
96 Colombia-Peru BIT (1994).

97 Canada-Colombia FTA (2008), Article 821.

FTAs and EPAs most often contain comprehensive sections on ISDS, while only 2% of the BITs in the sample address a comprehensive set of issues. The few multilateral agreements in the sample, including NAFTA (1992) and the Investment Agreement for the COMESA Common Investment Area (2007) also typically feature comprehensive ISDS sections.

The number of treaties with comprehensive ISDS provisions remains low, but since 2005, their proportion in new treaties has grown quickly to about 25% of newly concluded treaties in 2010. Figure 19 shows this development.

Figure 19. Share of treaties with detailed ISDS provisions among treaties concluded in a given year.



IV. Variations in treaty language, big and small

The treaty survey shows a great deal of variation in ISDS language.[98] Examples include:

- definitions of the length of cooling off periods that treaties reserve for attempts of amicable settlement, for instance, include "3 months" and "90 days", "6 months" and "180 days", and also 4 months and 5 months.
- descriptions of how amicable settlement needs to be attempted, to take another example, include settlement through "*negotiations*", "*amicable negotiations*", "*negotiations or consultations*", "*consultations and negotiations*", "*amicable consultations or amicable negotiations*", "*consultations*", "*friendly agreement*", and "*peacefully*".
- there are 28 combinations of bodies of law that tribunals are to apply.
- there are 53 different descriptions of the possible contents of arbitral awards, a matter that only 149 treaties address, and this is without considering the additional editorial variation.

All in all, there are probably more than 1,200 different ISDS clauses in the roughly 1,500 treaties that provide for ISDS through international arbitration. Such variation in the treaty language is likely to both motivate and complicate possible harmonisation of international investment law. It may also affect the apparent consistency of arbitral awards, and increase the costs of arbitration and other dispute settlement, since each difference in language opens an angle for difference in interpretation and consequently different decisions of similar matters. Differences in treaty provisions, even slight differences, invite legal counsel to argue for different treatment, which in turn, requires arbitrators to respond to such legal reasoning, thereby driving up fees for legal counsel and arbitrators alike.

98 This broad idiosyncratic variation in the language used in ISDS clauses echoes a finding of an earlier large-sample survey that analysed international investment agreements for references to environmental concerns. Environmental concerns in international investment agreements: a survey, OECD Working Paper on International Investment, No. 2011/1.

V. Asymmetric provisions

A small number of treaties contain asymmetric ISDS provisions, i.e. provisions that accord different treatment to investors from one treaty partner than that applied to investors from the other treaty partner in like situations. Such asymmetries include:

- Two French treaties in the sample apply only to French investments in the treaty partners, not to investments originating in these countries in France.[99]
- Some treaties set up different ISDS mechanisms depending on the host state,[100] while others only differentiate in relation to the availability or sequencing of domestic review or international arbitration,[101] or contain relatively minor differences, e.g. on what an arbitral tribunal can award.[102]

VI. Legacy of old treaties in a country's treaty population

The analysis of treaty contents has shown that there has been a fairly significant trend in many areas over time. Countries that have embarked early on an investment treaty programme have a number of treaties with provisions that would probably not be negotiated today. For instance, Germany, which is reputed to have favourable views on ISDS through international arbitration, is the country with the largest stock of treaties – and the largest proportion of treaties (36%) – that contain no ISDS provisions whatsoever. This is because many treaties in Germany' stock are quite old and reflect treaty writing practice that prevailed at that time.

VII. Editorial anomalies

A sizeable number of treaties in the sample feature editorial anomalies ranging from missing signature dates in signed treaties, clauses with obvious grammatical errors that leave the meaning cryptic, or a very unusual choice of terminology. Also, where alignment of provisions carries meaning – indents for instance –, some treaty provisions seem to be presented in a fashion that is unlikely to be intentional. It appears that multilateral treaties and non-BIT treaties suffer less from such phenomena.

While editorial shortcomings occur in all kinds of legal documents, the relative frequency of such issues in the treaty sample – of which only a fraction of the overall text has been analysed for the purpose of this study – would seem to exceed the frequency of such shortcomings in such legal texts as national laws or, arguably, many other types of treaty.

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99 *France-Tunisia BIT (1972)*; France-Serbia BIT (1974).

100 *Argentina-China BIT (1992)*; *Australia-New Zealand-ASEAN FTA (2009)*.

101 Costa Rica-Netherlands BIT (1999), Art. 9(5); *Egypt-Croatia BIT (1997)* with respect to the availability of domestic review procedures.

102 Canada-Thailand BIT (1997).

ANNEX 1: METHODOLOGY

The statistical sample for this survey consists of 1,660 treaties, in large majority bilateral investment treaties (BITs) plus a limited number of bilateral free trade agreements with investment provisions. The sample covers bilateral treaties that the 54 countries that participate in the Freedom of Investment Roundtables have concluded with any other county (see footnotes at beginning of paper for full list of countries).[103] The sample includes bilateral investment treaties that were available in December 2011 on the UNCTAD BIT database[104] as well as bilateral free trade agreements that were available on other sites.[105] The sample treaties are also compared with some multilateral investment agreements of which FOI participants are signatories or adherents, including the Energy Charter Treaty (ECT), (1991), CAFTA (2004), NAFTA (1992), the *Investment Agreement for the COMESA Common Investment Area (2007)*, the ASEAN Comprehensive Investment Agreement (2009), and the Australia-New Zealand-ASEAN FTA (2009). Protocols have been taken into account where they were available from the cited sources. The full list of bilateral treaties included in the sample is available in Annex 2.

Treaties that are posted on these sites have been included regardless of whether they are in force given the interest even of superseded treaties for tracing the historical development of treaty practice.[106] A maximum of 12.2 % of the treaty sample might not be in force; this factor of uncertainty may lead to slight overstating of the size of countries' treaty stocks, relative to the true stock of countries in-force treaties. In turn, treaties in languages inaccessible to the Secretariat (Arabic, Russian, and Georgian in particular) have not been analysed. Some treaties, especially those signed just prior or in 2011 may not be posted in the databases used for this survey and are thus not included in this survey. Both these issues are a source of potential bias.

The distribution of treaties over time is uneven, reflecting largely variation in treaty making activity by the countries, and, to some extent, the greater likelihood that very recently concluded treaties are not yet publicly available. Figure 20 shows how many treaties in the sample have been concluded in a given year.

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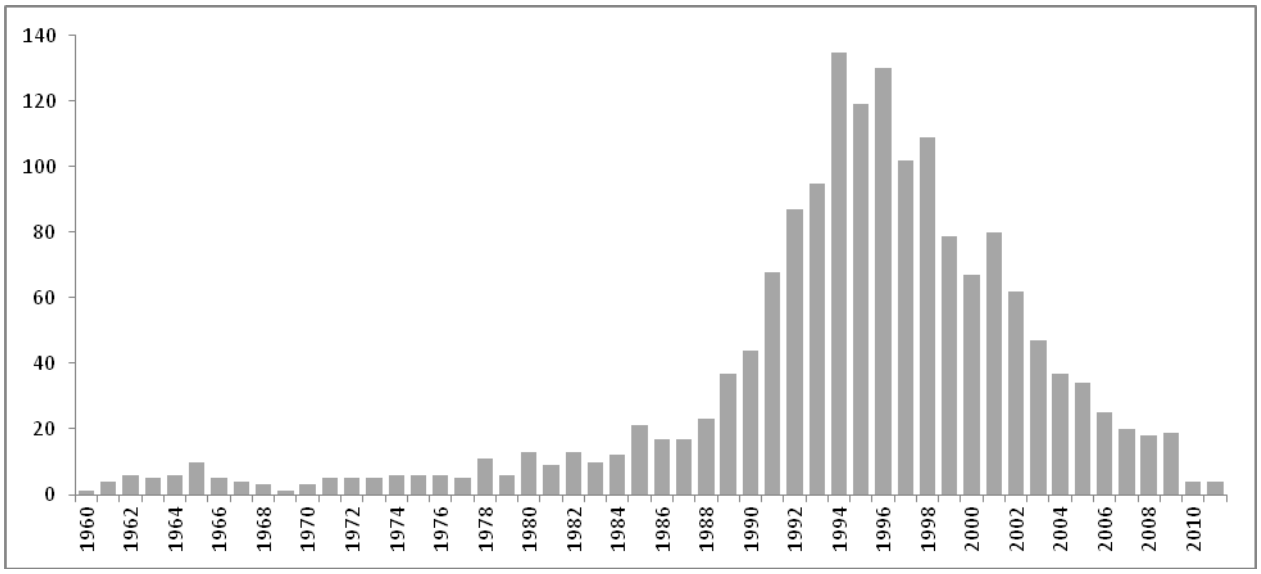
103 The term "country" is used for linguistic ease. Its use does not imply any judgement by the OECD as to the legal or other status of any territorial entity. Belgium and Luxembourg have concluded treaties jointly as the "Belgium-Luxembourg Economic Union"; while they constitute a joint treaty partner, this report counts the Belgium-Luxembourg Economic Union as *two* countries, but counts treaties concluded by the Economic Union only once.

104 A small number of treaties in the UNCTAD database was not analysed where the treaty text was truncated or only available in a language not accessible to the Secretariat.

105 These include dedicated websites of the OAS and the Australian Government, the United States Government, and the legal database of Belgium.

106 Treaties that are not yet in force, were superseded by later treaties, or treaties of which the entry into force could not be determined show in *italics* where they are mentioned in this document.

Figure 20.Number of sample treaties concluded by year in period 1960-2011.



The survey technique involves reading treaty language creating scores for this language and then tabulating these scores. In doing so, the Secretariat considered only the following 2 ISDS provisions: 1) separate ISDS articles or sections of treaties; and 2) ISDS language contained in expropriation clauses. ISDS provisions appear primarily in two places in sample treaties: in clauses or sections on expropriation; and in specific articles or sections dealing on ISDS.

The OECD Secretariat analysed ISDS provisions with respect to a "grid" of characteristics based on language found in the treaty sample. Each treaty was "scored" with respect to all of these characteristics. Several OECD staff were involved in the treaty scoring process, and steps were taken to ensure that all staff scored treaties in the same way. These steps included cross checking and ex-post verification.

ANNEX 2: TREATY SAMPLE

This annex contains the list of the 1,660 bilateral treaties that have been analysed for the purpose of the statistics in the present study. Treaties in italics are, according to publicly available information accessed by the Secretariat, not yet or no longer in force. The treaties are listed in alphabetical order for each country, resulting in a double listing of treaties concluded between Roundtable participants. The electronic version of the present document provides access to the full text of the treaty through a hyperlink under the treaty name.

Argentina-Armenia BIT (1993)
Argentina-Australia BIT (1993)
Argentina-Austria BIT (1993)
Argentina-Belgium/Luxembourg BIT (1993)
Argentina-Bolivia BIT (1994)
Argentina-Bulgaria BIT (1993)
Argentina-Canada BIT (1991)
Argentina-Chile BIT (1991)
Argentina-China BIT (1992)
Argentina-Costa Rica BIT (1997)
Argentina-Croatia BIT (1994)
Argentina-Czech Republic BIT (1996)
Argentina-Ecuador BIT (1994)
Argentina-Egypt BIT (1992)
Argentina-El Salvador BIT (1996)
Argentina-Finland BIT (1993)
Argentina-France BIT (1991)
Argentina-Germany BIT (1991)
Argentina-Greece BIT (1999)
Argentina-Guatemala BIT (1998)
Argentina-Hungary BIT (1993)
Argentina-Italy BIT (1990)
Argentina-Jamaica BIT (1994)
Argentina-Korea BIT (1994)
Argentina-Lithuania BIT (1996)
Argentina-Mexico BIT (1996)
Argentina-Morocco BIT (1996)
Argentina-Netherlands BIT (1992)
Argentina-New Zealand BIT (1999)
Argentina-Nicaragua BIT (1998)
Argentina-Panama BIT (1996)
Argentina-Peru BIT (1994)
Argentina-Philippines BIT (1999)
Argentina-Poland BIT (1991)
Argentina-Portugal BIT (1994)
Argentina-Romania BIT (1993)
Argentina-Russian Federation BIT (1998)
Argentina-South Africa BIT (1998)
Argentina-Spain BIT (1991)
Argentina-Sweden BIT (1991)
Argentina-Switzerland BIT (1991)
Argentina-Thailand BIT (2000)
Argentina-Turkey BIT (1992)
Argentina-United Kingdom BIT (1990)
Argentina-United States BIT (1991)
Argentina-Venezuela BIT (1993)
Australia-Argentina BIT (1993)
Australia-Chile BIT (1996)
Australia-Chile FTA (2008)
Australia-China BIT (1988)
Australia-Czech Republic BIT (1993)
Australia-Egypt BIT (2001)
Australia-Hong Kong, China BIT (1993)
Australia-Hungary BIT (1991)
Australia-India BIT (1999)
Australia-Indonesia BIT (1992)
Australia-Lao PDR BIT (1994)
Australia-Lithuania BIT (1998)
Australia-Mexico BIT (1994)
Australia-New Zealand (ANCERTA Investment Protocol) (2011)
Australia-Pakistan BIT (1998)
Australia-Papua New Guinea BIT (1990)
Australia-Peru BIT (1995)
Australia-Philippines BIT (1995)
Australia-Poland BIT (1991)
Australia-Romania BIT (1993)
Australia-Singapore FTA (2003)
Australia-Thailand FTA (2004)
Australia-United States FTA (2004)
Australia-Uruguay BIT (2001)
Australia-Vietnam BIT (1991)

Austria-Albania BIT (1993)
Austria-Algeria BIT (2003)
Austria-Argentina BIT (1993)
Austria-Armenia BIT (2001)
Austria-Azerbaijan BIT (2000)
Austria-Bangladesh BIT (2000)
Austria-Belarus BIT (2001)
Austria-Belize BIT (2001)
Austria-Bolivia BIT (1997)
Austria-Bosnia and Herzegovina BIT (2000)
Austria-Bulgaria BIT (1997)
Austria-Cape Verde BIT (1991)
Austria-Chile BIT (1997)
Austria-China BIT (1985)
Austria-Croatia BIT (1997)
Austria-Cuba BIT (2000)
Austria-Czech Republic BIT (1990)
Austria-Egypt BIT (2001)
Austria-Estonia BIT (1994)
Austria-Ethiopia BIT (2004)
Austria-FYROM BIT (2001)
Austria-Georgia BIT (2001)
Austria-Hong Kong, China BIT (1996)
Austria-Hungary BIT (1988)
Austria-India BIT (1999)
Austria-Iran BIT (2001)
Austria-Jordan BIT (2001)
Austria-Korea BIT (1991)
Austria-Kuwait BIT (1996)
Austria-Latvia BIT (1994)
Austria-Lebanon BIT (2001)
Austria-Libya BIT (2002)
Austria-Lithuania BIT (1996)
Austria-Malaysia BIT (1985)
Austria-Malta BIT (2002)
Austria-Mexico BIT (1998)
Austria-Moldova BIT (2001)
Austria-Mongolia BIT (2001)
Austria-Morocco BIT (1992)
Austria-Namibia BIT (2003)
Austria-Oman BIT (2001)
Austria-Paraguay BIT (1993)
Austria-Philippines BIT (2002)
Austria-Poland BIT (1988)
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Austria-Russian Federation BIT (1990)
Austria-Saudi Arabia BIT (2001)
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Austria-Tunisia BIT (1995)
Austria-Turkey BIT (1988)
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Austria-United Arab Emirates BIT (2001)
Austria-Uzbekistan BIT (2000)
Austria-Vietnam BIT (1995)
Austria-Yemen BIT (2003)
Belgium/Luxembourg-Albania BIT (1999)
Belgium/Luxembourg-Algeria BIT (1991)
Belgium/Luxembourg-Argentina BIT (1993)
Belgium/Luxembourg-Armenia BIT (2001)
Belgium/Luxembourg-Azerbaijan BIT (2004)
Belgium/Luxembourg-Bangladesh BIT (1981)
Belgium/Luxembourg-Barbados BIT (2009)
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Belgium/Luxembourg-Bosnia and Herzegovina BIT (2004)
Belgium/Luxembourg-Bulgaria BIT (1998)
Belgium/Luxembourg-Burkina Faso BIT (2001)
Belgium/Luxembourg-Burundi BIT (1989)

Belgium/Luxembourg-Cameroon BIT (1980)
Belgium/Luxembourg-Chile BIT (1992)
Belgium/Luxembourg-China BIT (2005)
Belgium/Luxembourg-Colombia BIT (2009)
Belgium/Luxembourg-Comoros BIT (2001)
Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005)
Belgium/Luxembourg-Costa Rica BIT (2002)
Belgium/Luxembourg-Cote d´Ivoire BIT (1999)
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Belgium/Luxembourg-Guatemala BIT (2005)
Belgium/Luxembourg-Hong Kong, China BIT (1996)
Belgium/Luxembourg-Hungary BIT (1986)
Belgium/Luxembourg-India BIT (1997)
Belgium/Luxembourg-Indonesia BIT (1970)
Belgium/Luxembourg-Kazakhstan BIT (1998)
Belgium/Luxembourg-Korea BIT (1974)
Belgium/Luxembourg-Kuwait BIT (2000)
Belgium/Luxembourg-Latvia BIT (1996)
Belgium/Luxembourg-Lebanon BIT (1999)
Belgium/Luxembourg-Libya BIT (2004)
Belgium/Luxembourg-Lithuania BIT (1997)
Belgium/Luxembourg-Madagascar BIT (2005)
Belgium/Luxembourg-Malta BIT (1987)
Belgium/Luxembourg-Mauritius BIT (2005)
Belgium/Luxembourg-Mexico BIT (1998)
Belgium/Luxembourg-Moldova BIT (1996)
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Belgium/Luxembourg-Saudi Arabia BIT (2001)
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Belgium/Luxembourg-South Africa BIT (1998)
Belgium/Luxembourg-Sri Lanka BIT (1982)
Belgium/Luxembourg-Sudan BIT (2005)
Belgium/Luxembourg-Tajikistan BIT (2009)
Belgium/Luxembourg-Thailand BIT (2002)
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Belgium/Luxembourg-Tunisia BIT (1997)
Belgium/Luxembourg-Turkey BIT (1986)
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Belgium/Luxembourg-Venezuela BIT (1998)
Belgium/Luxembourg-Vietnam BIT (1991)
Belgium/Luxembourg-Yemen BIT (2000)
Belgium/Luxembourg-Zambia BIT (2001)
Brazil-Chile BIT (1994)
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Canada-Argentina BIT (1991)
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Canada-Barbados BIT (1996)
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Canada-Jordan BIT (2009)
Canada-Jordan FTA (2009)
Canada-Latvia BIT (2009)
Canada-Lebanon BIT (1997)
Canada-Panama BIT (1996)
Canada-Panama FTA (2010)
Canada-Peru BIT (2006)
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Canada-Romania BIT (1996)
Canada-Russian Federation BIT (1989)
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Canada-South Africa BIT (1995)
Canada-Thailand BIT (1997)
Canada-Trinidad and Tobago BIT (1995)
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Canada-Venezuela BIT (1996)
Chile-Argentina BIT (1991)
Chile-Australia BIT (1996)
Chile-Australia FTA (2008)
Chile-Austria BIT (1997)
Chile-Belgium/Luxembourg BIT (1992)
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Chile-Brazil BIT (1994)
Chile-Canada FTA (1996)
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Chile-Honduras BIT (1996)
Chile-Hungary BIT (1997)
Chile-Iceland BIT (2003)
Chile-Indonesia BIT (1999)
Chile-Japan EPA (2007)
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Chile-Panama BIT (1996)
Chile-Panama FTA (2006)
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Chile-Peru FTA (2006)
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Chile-United Kingdom BIT (1996)
Chile-United States FTA (2003)
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China-Bosnia and Herzegovina BIT (2002)
China-Botswana BIT (2000)
China-Brunei Darussalam BIT (2000)
China-Bulgaria BIT (1989)
China-Cambodia BIT (1996)
China-Cameroon BIT (1997)
China-Chile BIT (1994)
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