Chapter Three

The Performance of Investment Treaty Arbitration

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Introduction

The development of the modern investment treaty regime represents one of the most remarkable extensions of international law in the post-war period. Largely built on a network of over 3,000 bilateral investment treaties (BITs) and regional free trade agreements (FTAs), a handful of plurilateral investment treaties,[1] as well as customary international law, foreign investors are granted beneficiary rights aimed at the protection of their investments. While each international investment agreement (IIA) is a stand-alone agreement with considerable diversity, agreements typically include: prohibition against expropriation without adequate compensation, full protection and security, fair and equitable treatment, national treatment, most-favored nation treatment, free transfer of capital and investor-state dispute settlement (ISDS) provisions. Combined, it has been claimed that 'no other category of private individuals' is 'given such expansive rights in international law as are private actors investing across borders.'[2]

Primarily, however, the development of this regime is not exceptional solely for the expansiveness of the substantive rights granted to foreign investors under IIAs, but is rather the combination of such rights with the robustness of the ISDS mechanisms offered to foreign investors. Investment treaty arbitration (ITA), as permitted under the majority of IIAs in force, grants beneficiary rights to foreign investors for the initiation of arbitral claims against the state hosting their investments without the consent of their home state or the requirement (in almost all cases) to first exhaust domestic remedies.

ITA is thus distinct in relation to many of the other standing international courts presented in this volume; and because of this decentralized structure – combined with a striking number of disputes that have emerged prominently in the last 25 years – it is a system of adjudication that has garnered significant scholarly and critical attention. With close to 900 ITAs registered to date (through 1 August 2017), as well as an unknown number of instances in which the threat of treaty arbitration has been used as a bargaining tool, states hosting foreign investors are increasingly finding themselves having to defend their laws and policies before and in the shadow of investment treaty tribunals.

Many of these ITAs have resulted in sizable compensation awards for actions that states believe are both legitimate and within their exclusive purview as sovereigns;[3] and it is this increasing resort to ITA by aggrieved foreign investors that has led many (including some

[1] Plurilateral treaties include, *inter alia*: the *Energy Charter Treaty*; the *North American Free Trade Agreement*; the *Dominican Republic-Central American Free Trade Agreement;* the *Trans-Pacific Partnership*; the *Organization of the Islamic Conference Agreement for the Promotion, Protection, and Guarantee of Investments*; and the *Association of South-East Asian Nations Comprehensive Investment Agreement*.

[2] B. Simmons, "Bargaining over BITs, arbitrating awards: the regime for protection and promotion of international investment" *World Politics*, 66, no. 1 (2014), 42.

[3] D. Behn, "Legitimacy, evolution and growth in investment treaty arbitration: empirically evaluating the state-of-the-art" *Georgetown Journal of International Law*, 46, no. 2 (2015), 363.

states) in recent years to reassess the utility of such a system of adjudication.[4] At the same time, ITA continues on a growth trajectory, and while mere use does not connote good performance, its practice to date indicates a successful form of dispute settlement by most measures. However, is it possible that ITA is performing too well?

As with any international legal order, the modern IIA regime might serve multiple purposes; but it appears that one purpose stands out as the primary driver for the development and maintenance of the regime as it is currently practiced: providing effective legal remedies to foreign investors in the event a dispute arises in the state hosting their investments (all other purposes are ancillary). From that perspective, ITA appears to be performing this function. This purpose (providing for investment treaty arbitration) is a response to a long-standing historical problem facing foreign investors investing abroad; and this form of adjudication – while arguably flawed – could be seen as providing an alternative, more effective, rule of law promoting, and peaceful form of dispute settlement when compared to previous modes established to solve the problems relating to disputes that arise in the context of foreign investment.

Arguments in support of ITA hold that while this form of adjudication has issues worthy of reform, [5] efforts to dismantle the regime would only do away with treaty-based arbitration, not the underlying disputes (in fact, it might even increase the number of disputes). Therefore, the question is whether alternatives to ITA would not backtrack global governance in this area to a position prior to the advent of investment treaty arbitration: an era that was considered so problematic for foreign investment protection that ITA was developed as a response. However, given ITA's exclusive purpose, the strongest argument against its practice is whether it is needed at all anymore: ie, was the development of this form of adjudication a response to a particular historical problem (inadequate local remedies in weak rule of law states) that is no longer present?

This contribution aims to evaluate the performance of this form of international adjudication in light of this singular purpose thesis. In doing so, this chapter will look at how ITA is performing in terms of its access, outcome, and process performance in individual cases and its performance in the aggregate as a (global) system of adjudication.

The purpose of investment treaty arbitration in historical context

Before attempting to evaluate the performance of ITA, it is important to assess how the international regime on foreign investment has developed across time, what goals it has tried to achieve and what types of problems it has sought (explicitly or implicitly) to overcome.

Investment treaty arbitration is a recent phenomenon. While the practice of ITA has emerged as a prominent form of international adjudication in the past 25 years, it is only in the past 50 years that ITA has even been possible. The first modern IIA was signed in 1959,[6] but the first IIA that included ISDS provisions was not signed until 1967.[7] Prior to this, there was

[4] M. Langford, D. Behn, and O. K. Fauchald, "Backlash and state strategies in international investment law" in T. Gammeltoft-Hansen and T. Aalberts (eds.), *The changing practices of international law: sovereignty, law and politics in a globalizing world* (Cambridge University Press, 2017).

[5] One particularly strong reform measure currently being floated is for the establishment of an international investment court. The purpose of establishing such a court would be to alleviate concerns, not with the utility of having international dispute settlement for foreign investors, but with charges that the structure of arbitration is ill-suited for the resolution of these kinds of disputes. However, it is important to note that the current proposals for an international investment court do not propose a 'court,' but a more institutionalized form of arbitration that includes an appellate review mechanism.

[6] *Pakistan-Germany BIT* (1959).

[7] *Chad-Italy BIT* (1967) (never entered into force). The first BIT with ISDS to enter into force was the *Netherlands-Indonesia BIT* (1969).

no mechanism for ITA as it is currently practiced. While there have long been examples of dispute settlement provisions being embedded in various types of treaties signed by states, the specific type of adjudication permitted in modern IIAs is new.[8]

Most IIAs present a foreign investor with a standing offer to arbitrate a dispute directly with a state hosting their investment should a treaty breach occur, thus bypassing previous requirements of diplomatic espousal under international law. Further, these arbitrations will be composed on an *ad hoc* basis with relative autonomy from other disputes arising out of other IIAs. Combined, these structural characteristics of ITA make it a system of adjudication that is unfamiliar in the history of international law.

In the following sub-sections, the purpose of this system of adjudication will be examined as a means of putting its recent practice in historical context. While the overall practice of ITA is relatively new (from about 1990), the underlying issues concerning the treatment of foreign aliens in the international system are long-standing and can help in understanding why IIAs emerged in the post-war period. The historical development of modern IIAs can be seen as a partial response to two sets of problems grouped broadly into the following categories: (1) providing alternatives to diplomatic espousal and 'gunboat diplomacy;' and (2) providing solutions to problems arising out of commercial contracts with states.

Alternatives to diplomatic espousal

Historically speaking, the modern IIA regime grew out of the broader category of public international law relating to the treatment of foreign aliens. Typically, an alien residing in a foreign sovereign territory will be subject primarily to the laws and customs of the state in which she is residing. However, international legal rules developed so as to protect foreign aliens from domestic rules and procedures that fall below an international minimum standard of treatment.[9] The default rule is that the foreign alien is subject to the law of the state where she is residing unless the application of such laws fall below a minimum standard. However, even if the foreign alien has been treated in a manner below the minimum standard, how does she gain recourse to the law if individuals or companies are not directly subject to international law?

Until very recently, the customary international law on diplomatic protection has provided a good answer for this question. Diplomatic protection permits the home state of a foreign alien to espouse a claim against the state where the foreign alien was injured. In the past two hundred years, diplomatic protection claims have been espoused three ways: (1) directly between the governments of the home state of the foreign alien and the state where the injury occurred; (2) as legal proceedings before the International Court of Justice (ICJ);[10] or (3) through the establishment of international claims commissions.[11] However, in the post-Second World War period, the traditional use of diplomatic protection or espousal for remedying injuries to foreign aliens (particularly the narrower category of foreign investors) has largely been replaced by the ISDS provisions in IIAs. Since the first modern IIA was signed, there have

[8] J. Paulsson, "Arbitration without privity" *ICSID Review*, 10, no. 2 (1995), 232.

[9] E. Root, "The basis of protection to citizens residing abroad" *American Journal of International Law*, 4, no. 3, (1910), 517; E. Borchard, "The minimum standard of treatment of aliens" *Michigan Law Review*, 38, no. 4 (1940), 445.

[10] Also including its predecessor, the Permanent Court of International Justice (PCIJ).

[11] "The Jay Treaty arbitrations marked the beginning of a long line of development, which reached its high noon around the year 1900 and continued until well after World War I. During this period, *ad hoc* inter-state arbitration became the dominant method of resolving international claims. In a comprehensive survey, A. M. Sruyt has catalogued around 380 international arbitrations that were conducted during the period 1776-1925." V. Heiskanen, "Arbitrating mass investor claims: lessons of international claims commissions" in B. Macmahon (ed.), *Multiple party actions in international arbitration* (Oxford University Press, 2009), 299.

only been three foreign investment related cases involving diplomatic espousal brought before the ICJ.[12]

The ISDS provisions in IIAs represent a significant shift away from the traditional model of diplomatic espousal and can be seen as one of the underlying structural objectives or goals of IIAs: states choosing to allow direct rights of action to foreign investors for breaches to the underlying IIA. The exact reasons as to why states have chosen this option is not entirely clear historically, but is often attributed to the perceived benefits of 'de-politicizing' international disputes and the political and economic efficiencies that can be gained when an international dispute involving a foreign alien can be directly resolved with the state where the injury occurred without directly involving the foreign alien's home state.

In the past, disputes requiring diplomatic espousal of foreign alien claims have – at times – escalated into what has been called 'gunboat diplomacy,' whereby the home state of the foreign alien threatens or uses force against the state where the foreign alien was injured.[13] Many of these examples of gunboat diplomacy occurred in states that had already declared independence in the nineteenth century (ie, Latin American states); and without sufficient international legal remedies (none had been sufficiently developed prior to the First World War), imperial powers frequently used their military prowess to intimidate or pressure certain states into providing remedies for injured foreign aliens. The post-Second World War international legal developments that provides an alternative to gunboat diplomacy (ie, ITA) has been seen by some states as a beneficial alternative.

In historical terms then, one of the performance criteria that could be used to evaluate ITA is whether the move away from diplomatic espousal for these types of international disputes has actually improved relations between states and the extent to which the robustness of legal dispute resolution for conflicts between foreigners and the states in which they invest has reduced the real or potential risk of gunboat diplomacy.

Alternatives to commercial arbitration with states

One additional goal of the modern IIA regime can be identified by looking at the history of colonialism and the contractual arrangements between foreign investors and states that emerged in the period before and after decolonization. There is an argument that the emergence of IIAs can be largely attributed to the geopolitics associated with the process of decolonization and the perceived lack of legal protections for foreign investors in newly independent states.[14] During the colonial era, imperial states were able to protect the investments of their citizens by extending their sovereign control over colonial territories. Foreign investment in the colonies was not really foreign at all (at least not foreign capital initiating in the imperial state of that colony). There was little need for international legal protections that were distinct from the legal protections already available to foreign aliens (ie, citizens of the imperial state) operating within the territory of the colony.

However, as states began to decolonize in the post-Second World War period, some foreign investors were placed in a vulnerable position: many newly independent states sought

[12] These include: *Barcelona Traction* (*Belgium v. Spain*), 1970 I.C.J. Reports 3; *ELSI* (*US v. Italy*) 1989 I.C.J. Reports 15; and *Diallo* (*Guinea v. DRC*) 2012 I.C.J. Reports 324.

[13] Great Britain intervened militarily in Latin American states on at least 40 occasions between 1820 and 1914.

[14] However, considering that most early BITs did not include ISDS provisions, it is more likely that early IIA practice was little more than a signaling of friendly relations between developing and developed economies, with little expectation from developing states that they would become subject to investment treaty disputes. There is a good argument that some of these early IIAs were intended to develop relationships between former colonial powers and potential markets that had been closed to them previously (ie, the colonies of other colonial powers). Of the 403 IIAs signed before 1990, over half (207) were signed between a colonial power and a former colony. However, only 16 IIAs were signed by a colonial power and *their* former colony.

to denounce historical oppression from the colonial powers by declaring that foreigners residing or investing within the sovereign territory of these newly formed states would not be afforded any special rights independent of the rights granted to nationals.

At the international level, this policy was initially pursued at the United Nations (UN) through declarations on permanent sovereignty over natural resources (PSNR)[15] in what later came to be described as the new international economic order (NIEO).[16] These declarations asserted, *inter alia*, that sovereign states had the autonomy to shape their own policies on how foreign investors would be treated within their territory. Many of the former colonies were (are) rich in resources, and they believed that – as newly independent states – those resources were exclusively theirs to exploit and the nationalization of natural resource operations was legal and did not require compensation commensurate with the customary international law standard.

During this period, many newly independent states pursued nationalization policies (especially in the extractive industries). The practice of nationalization signaled two problems for foreign investment protection. The first problem was that some foreign investors found that the nationalization of their assets might not be compensated at the level required by customary international law. The second problem was that even if their contracts or concessions with states included strong dispute settlement mechanisms calling for international arbitration, enforcing a favorable award against a state was not always a straightforward process. Many arbitrations that did result from nationalizations in the 1950s through the 1970s demonstrated that there would be considerable difficulty at the enforcement stage of the proceedings.

So, while some newly independent states made broad declarations on the international stage through the PSNR and NIEO declarations, nationalized their natural resource operations, and signaled that contract-based arbitration might not be a viable means to protect foreign investments, many of these same states also knew that they would not be able to develop their economies without foreign capital and expertise. The main question to arise in this context was how these states could convince foreign investors that their investments would be adequately protected. For some investors and states, the continued practice of signing contracts and concessions with arbitration clauses would be sufficient. However, for others, more robust solutions would have to develop; and two did: (1) the signing of the International Centre for Settlement of Investment Disputes (ICSID) Convention; and (2) the signing of BITs between capital-exporting and capital-importing states.

As to the first solution, the ICSID Convention was ratified in 1965. The ICSID Convention does two things of critical significance: (1) it allows for contracts to be 'internationalized,' thus overcoming the perceived problem during the NIEO that contracts would be subject to national expropriation laws (and their significantly lower rates of compensation); and (2) it requires that final arbitral awards be directly enforceable against states without the requirement of further enforcement procedures in domestic courts. It was thought that the inclusion of an ICSID arbitration clause in a contract with a state could remedy both of these issues.

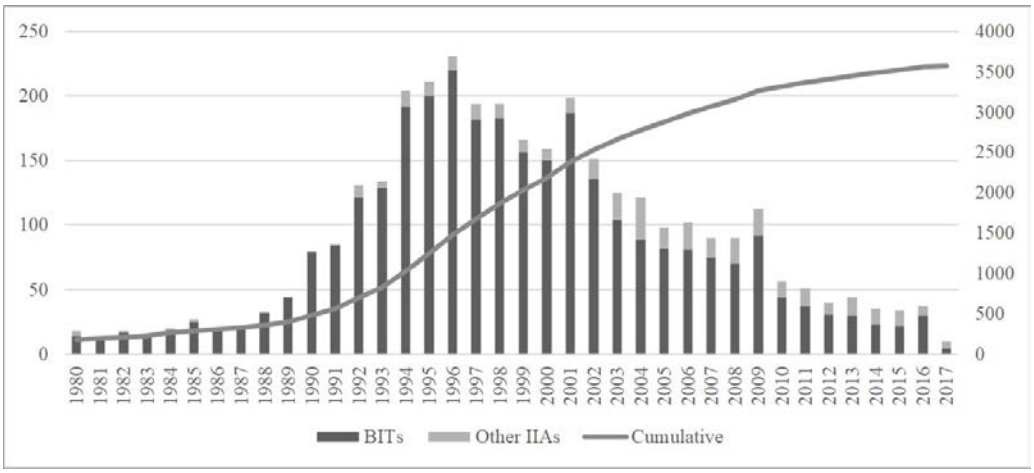
The second solution was for some capital-exporting states to sign BITs with capital-importing states. While it remains unclear whether these early BITs were only pursued as a response to the problems of foreign asset protection that emerged after decolonization, some have argued that these agreements emerged as a means of defecting from the broader policy

[15] *Right to Exploit Freely Natural Wealth and Resources*, UNGA Resolution 626 (21 December 1952); *Permanent Sovereignty Over Natural Resources*, UNGA Resolution 1803 (14 December 1962); *Permanent Sovereignty Over Natural Resources*, UNGA Resolution 3171 (17 December 1973).

[16] *Declaration on the Establishment of a New International Economic Order*, UNGA Resolution 3201 (1 May 1974).

objectives pursued at the international level through the PSNR and NIEO declarations.[17] Regardless of exact reasons, IIAs became increasingly popular between the 1960s and the 1980s and would explode in the 1990s following the collapse of the Soviet Union and the rise of the so-called 'Washington consensus.' By the end of the first decade of the twenty-first century, over 3,000 of these agreements had been signed (see figure 3.1).

Figure 3.1 IIAs signed by year (1980-2017)



Source: UNCTAD IIA database <http://investmentpolicyhub.unctad.org/IIA> accessed 1 August 2017

These agreements form the jurisdictional basis of investment treaty arbitral tribunals, and while the contemporary practice of these tribunals has exposed some serious problems, they can also be seen as alternatives to many of the previous attempts to protect foreign investments that have just been highlighted. Even if this historical narrative is incomplete, there is a case to be made that ITA – at a minimum – can be viewed as an alternative to other forms of dispute settlement (ie, national courts, international commercial arbitration, and diplomatic espousal) and as a peaceful alternative to various historical incarnations of gunboat diplomacy or neo-colonial occupation.

Assessing the performance of investment treaty arbitration

In the following three-sub-sections, the performance of ITA will be considered given the historical narrative discussed in the previous section. Investment treaty arbitration differs significantly in both structure and function to many of the other judicial institutions presented in this volume. To that end, assessing the performance of ITA might present particular challenges that are taken for granted in the context of standing international courts. ITA remains a largely decentralized institution for three key reasons; and it is this structure that may make a holistic evaluation of its access, outcome, and process performance difficult to ascertain.

First, the jurisdiction of an investment treaty arbitral tribunal is based on a patchwork of thousands of mostly bilateral IIAs. While many of these IIAs share similar substantive provisions, there remains significant diversity among the agreements; and it is this diversity that can often explain differences in outcomes and the procedural and substantive application of the relevant law across tribunals. In terms of assessing ITA's contribution to the stabilization of international legal expectations and in the efficient and consistent resolution of disputes, the

[17] A. Guzman, "Why LDCs sign treaties that hurt them: explaining the popularity of bilateral investment treaties" *Virginia Journal of International Law*, 38 (1997), 639.

practice to date appears to be somewhat mixed: there does seem to be a *jurisprudence constante* emerging among some legal rules, but others remain subject to varying interpretations and outcomes.

A full assessment of how ITA tribunals have assisted in the development of international law is beyond the scope of this contribution, but there are a few examples that may provide some insight. Overall, the development of almost all of the *lex specialis* substantive standards in IIAs has been significantly clarified through the practice of ITA.[18] Of particular note are claims about the shifts in the sensitivity that investment treaty arbitral tribunals have towards the balancing of interests; between the needs of the respondent state to regulate in the public interest (ie, in the interest of the environment and human rights) and the needs of foreign investors to be provided with a legally stable investment climate. Recent studies show that arbitrators in ITAs are becoming significantly more nuanced in approaching environmental issues in the context of foreign investment protection.[19] However, while the practice of ITA is definitely assisting in the clarification of the legal standards in IIAs, it is having much less of an impact on general international law and customary international law (with the possible exception of the customary international law minimum standard of treatment and the level of compensation required in cases of expropriation). There is very little evidence of other international courts and tribunals citing to ITA awards.

A partial explanation for this limited influence on other areas of international law is likely the result of what can be considered the second distinct attribute of ITA vis-a-vis other international judicial institutions: the *ad hoc*, one-off constitution of tribunals for particular disputes.[20] While it is increasingly apparent that recent ITA tribunals are constituted with a core group of prominent and repeatedly appointed arbitrators[21] that apply the law in a relatively coherent manner,[22] the structure of ITA as an *ad hoc* institution based on party-appointed arbitrators means that the precedential value of individual cases may be lacking.

A third reason as to why ITA differs structurally from many other international courts is that tribunals can be constituted under a wide array of arbitral institutions (or no institution at all, as in the case of *ad hoc* tribunals constituted under the United Nations Conference on International Trade Law (UNCITRAL) arbitration rules). Each of these institutions provides its own set of procedural rules and institutional support structure for disputes. The most significant caseload for ITA remains at ICSID, but other commercial arbitration centers such as the Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC), and the London Court of International Arbitration (LCIA) all have treaty-based arbitrations on their dockets. Further, the Permanent Court of Arbitration (PCA), who handled very few cases in the later part of the twentieth century has had a significant rebirth and now lists a caseload of 76

[18] See eg R. Dolzer, "Fair and equitable treatment: today's contours" *Santa Clara Journal of International Law*, 12, no. 1 (2014), 7; J. Maupin, "MFN-based jurisdiction in investor-state arbitration: is there any hope for a consistent approach" *Journal of International Economic Law*, 14, no. 1 (2011), 157; S. Alexandrov, "The evolution of the full protection and security standard" in Meg Kinnear *et al* (eds.), *Building international investment law: the first 50 years of ICSID* (Kluwer, 2015), 319; C. Henckels, "Indirect expropriation and the right to regulate: revisiting proportionality analysis and the standard of review in investor-state arbitration" *Journal of International Economic Law*, 15, no. 1 (2012), 223.

[19] D. Behn and M. Langford, "Trumping the environment? An empirical perspective on the legitimacy of investment treaty arbitration" *Journal of World Investment and Trade*, 18 (2017); J. Viñuales, "foreign investment and the environment in international law: the current state of play" in K. Miles (ed.), *Research handbook on environment and investment law* (Cambridge University Press, 2017).

[20] A. Björklund, "Private rights and public international law: why competition among international economic law tribunals is not working" *Hastings Law Journal*, 59 (2007), 241.

[21] S. Puig, "Social capital in the arbitration market" *European Journal of International Law*, 25, no. 2 (2014), 387.

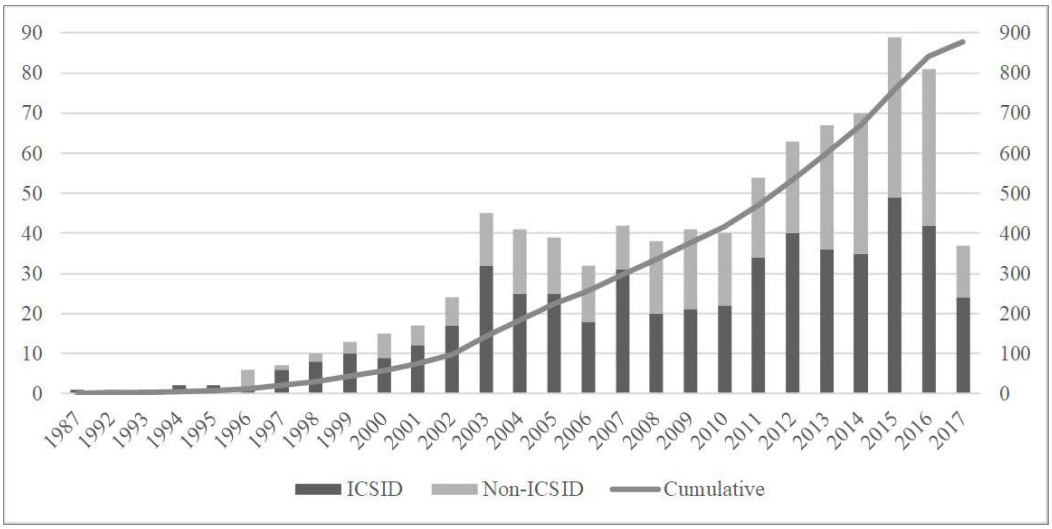
[22] O. K. Fauchald, "The legal reasoning of ICSID tribunals: an empirical analysis" *European Journal of International Law*, 19, no. 2 (2008), 301.

pending ITAs as of 1 August 2017. The differences among tribunals as constituted across these various institutions can be significant.

These three reasons provide a basis for justifying ITA as a potentially discrete form of international adjudication when compared to other international judicial institutions. However, there are also reasons to believe that ITA is capable of assessment as a collective system of legal adjudication. Given ITA's decentralized structure, it may be somewhat surprising to note that there is relatively high level of organic, informal coordination among tribunals and institutions that has resulted considerable coherence in their practice. As such, it is not uncommon to see the universe of IIAs and the disputes that arise under them to be referred to as the 'international investment regime.'[23]

Whether there is really such a coherent regime remains open to debate, but for the purposes of this contribution it may be helpful to view ITA as part of an international regime whose performance can be analyzed and evaluated as collective system of law that shares common purposes and functions. With hundreds of treaty-based arbitrations that have been lodged to date, there is a significant caseload that can provide a sound basis for systematic evaluation of the performance of investment treaty arbitration overall.

Figure 3.2 ITAs initiated by year (1987-2017)



Source: PluriCourts Investment Treaty and Arbitration Database (PITAD) through 1 August 2017

There are 878 known ITA cases that have been registered as of 1 August 2017: 298 of which remain pending.[24] The majority of the cases (523 or 59%) have been initiated according to the ICSID Convention. The remaining two-fifths (355 or 41%) are primarily *ad hoc cases* based on the UNCITRAL arbitration rules (many of which are being administered by the PCA; and to a lesser degree, cases filed at commercial arbitration centers such as the SCC, ICC, and LCIA. Of the 878 cases that have been filed, approximately 50 cases were filed before 2000 and over 800 have been filed in the period of 2000 through 2017. 91% of all the cases ever filed have come in the past 15 years; 71% have been filed in the last 10 years; and 42% of all cases have come in just the past five years (see figure 3.2). By any measure, this is a remarkable growth trajectory.

[23] J. Salacuse, "The emerging global regime for investment" *Harvard International Law Journal*, 51, no. 2 (2010), 427.

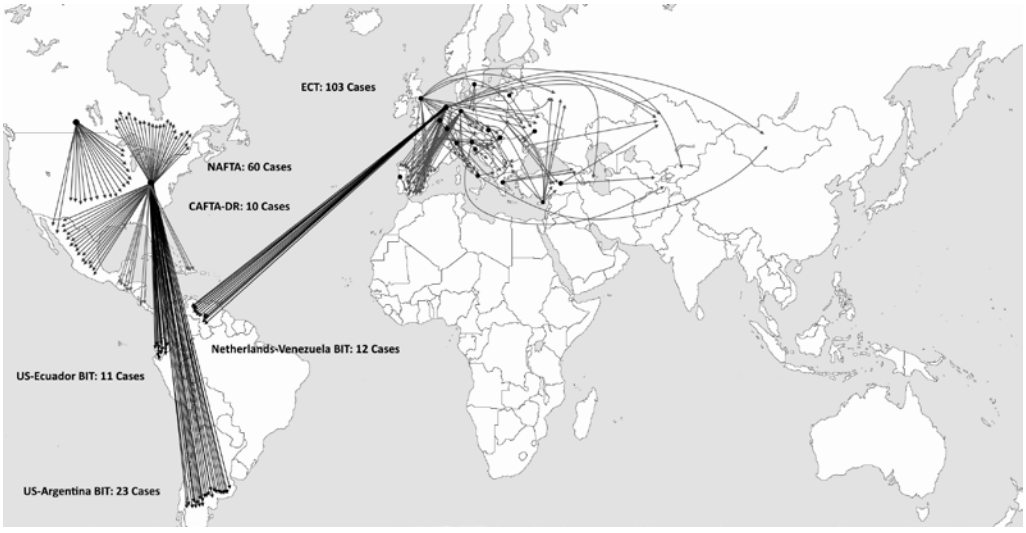
[24] There are likely to be a small percentage that remain undiscovered, but would estimate this number in decline as ITA cases are increasingly difficult to keep out of the public domain in their entirety. Estimates are that about 5% of ITA cases are not publicly known.

Access performance

While the current caseload of ITA appears quite significant when compared to some other international judicial institutions such as the ICJ or the World Trade Organization (WTO), it appears less impressive when compared with the caseload of the European Court of Human Rights (ECtHR) or international commercial arbitrations initiated by, for example, the ICC's International Court of Arbitration; and in fact, the number of treaty-based arbitrations filed to date might be just a small fraction of potential claims. Furthermore, one of the biggest issues in regard to performance at the individual case level relates to *access* to ITA rather than its processes or outcomes. As a largely bilateral treaty regime, the coverage of treaties allowing for ITA is limited to those states that have agreed to such bilateral relationships. If an assessment of the performance of ITA refers to the number of cases that have arisen to date, an equally relevant assessment is the number of cases that have not arisen because of issues relating to access to this form of adjudication. Two points on this issue of access are illustrative.

First, one must put the number of IIAs into perspective. While 3,327 IIAs have been signed (through 1 August 2017), 3,171 of which are current,[25] significantly fewer agreements have been ratified and are in force: a total of 2,673. [26] Furthermore, if one were to take the number of bilateral relationships represented by the WTO agreements with its current membership of 162 states, there would have to be 13,041[27] BITs to reach the same amount of coverage. Without taking into consideration the vast differences between foreign investment flows between states and the fact that some plurilateral investment agreements provide much more coverage than a single BIT,[28] the number of IIAs currently in force covers approximately 20% of bilateral state relationships in comparison with the WTO agreements. This means that the number of cases that have been initiated to date have done so as based on very limited geographical scope. A multilateral arrangement for the protection of foreign investment would dramatically increase the potential claims that could be filed.

Figure 3.3 Most frequently invoked IIAs in ITA



Source: PITAD through 1 August 2017

[25] 156 of signed IIAs have been terminated.
[26] 654 IIAs that have been signed but are not force.
[27] (162*161)/2
[28] For example, the recently signed – but not yet ratified (and may never be ratified following the US withdrawal in January 2017) – *Trans-Pacific Partnership* covers 12 states which alone would count as the equivalent of 66 bilateral agreements.

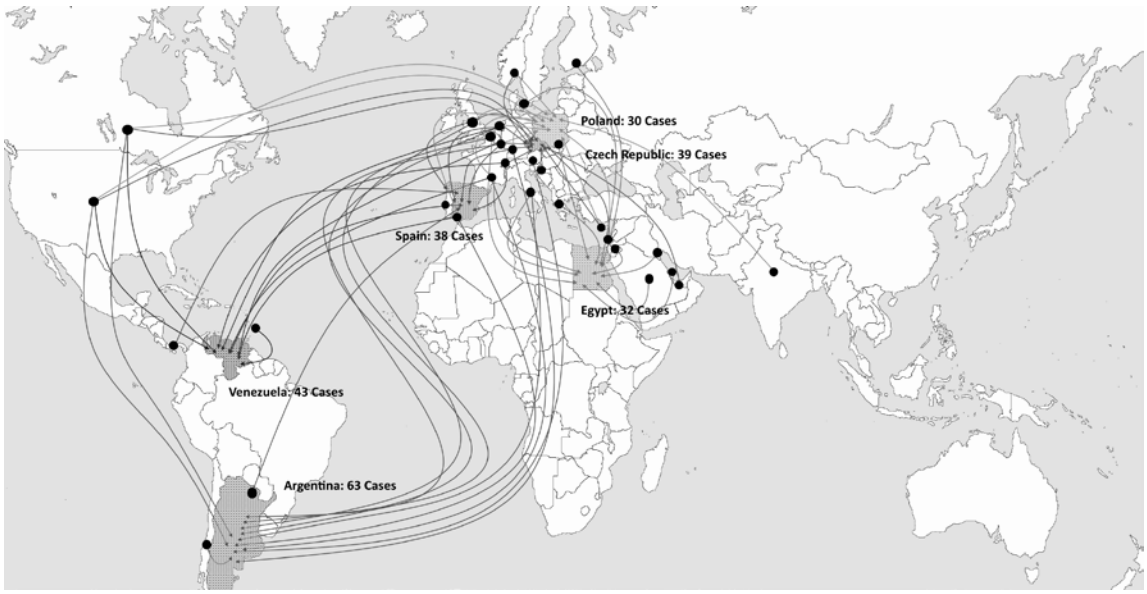
A second point relating to access is the modest number of IIAs that have been used in all of the disputes that have been initiated to date. While there are 2,673 IIAs in force around the world, the 878 disputes to date have applied a mere 375 IIAs. While the current number of IIAs in the world only covers approximately 20% of potential bilateral pairings (at least in terms of gaining the same coverage as the WTO), only 14% of IIAs in force have been used in actual ITA cases. For critics of the use of ITA, this type of limited access may be a positive restriction. But if one is to assess this in terms of performance, one could easily argue that the current structure of investment treaty arbitration is so restrictive and selective that it leaves vast swaths of foreign investors without treaty protections and also disproportionately targets specific states that have been repeat respondent states in investment treaty arbitrations under the same treaty. For example, figure 3.3 shows the most frequently invoked treaties in ITA.[29] Remarkably, just six IIAs have been used in 25% (219 cases) of all ITAs registered to date.

The limited number of IIAs that have been used in ITA – and the high instances of a small number of treaties being invoked multiple times – demonstrates the uneven coverage and the uneven use of these agreements. In addition to issue of access, the pattern of use also raises a number of performance-related questions. Are certain respondent states being targeted? Are IIAs used reciprocally? And if not, what types of states are frequently sued in investment treaty arbitration?

On the issue of targeting, one can deduce from the data that the use of ITA tends to cluster around a small number of states. While there have been 111 different states as respondents in ITA cases, only 30 of those states have been sued once. The remaining 81 states have all received more than one claim. 15 states have between five and nine claims against them and 23 states have 10 or more.

As figure 3.4 demonstrates, the top six respondent states in ITA constitute 26% of all claims initiated to date (225 cases). While some of the clustering of states can be explained by particular events (Argentina) or policy choices (Venezuela, Ecuador, and Spain), others are less obvious as to why they have attracted so many claims (Egypt, Czech Republic, and Poland).

Figure 3.4 Most frequent respondent states in ITA



Source: PITAD through 1 August 2017

[29] *Ibid*.

While it is possible that the fact that Egypt, Czech Republic, and Poland have attracted a high number of ITA claims is explained by significant number of IIAs that these states have ratified, there are a number of other states with high numbers of IIAs that have received relatively few (or no) disputes (eg, Turkey, China, Belarus, Iran, Malaysia, and Vietnam). Looking at those states that have been sued most frequently, there is one final consideration: particular treaties or types of treaties. Cases arising under the NAFTA explain nearly all of the cases against Canada (25 out of 26 cases), the US (18 out of 18 cases), and Mexico (19 out of 26 cases). Further, in the case of Poland, Spain, and the Czech Republic, 87 out of 107 of the cases that have been filed against these states arise under the Energy Charter Treaty (ECT) or an intra-European Union (EU) BIT.

While all IIAs, especially BITs, are designed to be reciprocal, in operation they are used primarily uni-directionally. For example, of the 878 registered cases, there is only one treaty that has been invoked reciprocally.[30] Further, ITA disputes tend to be brought by investors from a capital-exporting state against a capital-importing state; this pattern correlates with the development status of states. In other words, the vast majority of ITAs brought to date have been initiated by claimant-investors from states with a higher development status than the respondent state. For example, table 1 below shows that 87% of the 878 cases initiated have been brought by claimant-investors from a high income state (as measured by the World Bank income categories). Further, there are only 26 cases where the development status of the home state of the claimant-investor is lower than the development status of the respondent host state.

On the respondent side of the dispute, the development status of states is distributed more evenly, with the highest percentage of respondent states falling in the upper middle income group. Interestingly, there are very few cases brought against low income states. While this challenges many perceptions that ITA is used by powerful economic actors from the developed world against poorer developing states, the reality is more nuanced. Very poor states tend to be excluded from many forms of international economic governance and investment treaty arbitration is no exception. There is no evidence of targeting against low income states, primarily because foreign investment flowing into these states is very low in the first place. However, there is an issue of targeting in ITA, but to date the targeting has been against more developed states (see figure 3.4). The exceptions in this regard are Egypt and Ecuador.

Table 3.1 Registered ITA cases by host and home state World Bank income groups

		Claimant-investor home state				
		High income	Upper middle income	Lower middle income	Low income	Sum (878 cases)
Respondent state	High income	229 *25.9 %*	21 *2.4 %*	5 *1.0 %*	0 *0.0 %*	255 *28.9%*
	Upper middle income	336 *38.3 %*	43 *4.9 %*	0 *0.0 %*	0 *0.0 %*	385 *43.8%*
	Lower middle income	174 19.8 %	40 4.5 %	2 0.1 %	0 0.0 %	216 24.7%
	Low income	21 *2.4 %*	2 *0.1 %*	0 *0.0 %*	0 *0.0 %*	23 *2.7%*
	Sum (878 cases)	760 *86.5 %*	106 *12.1 %*	12 *1.4 %*	0 *0.0 %*	878 *100.0%*

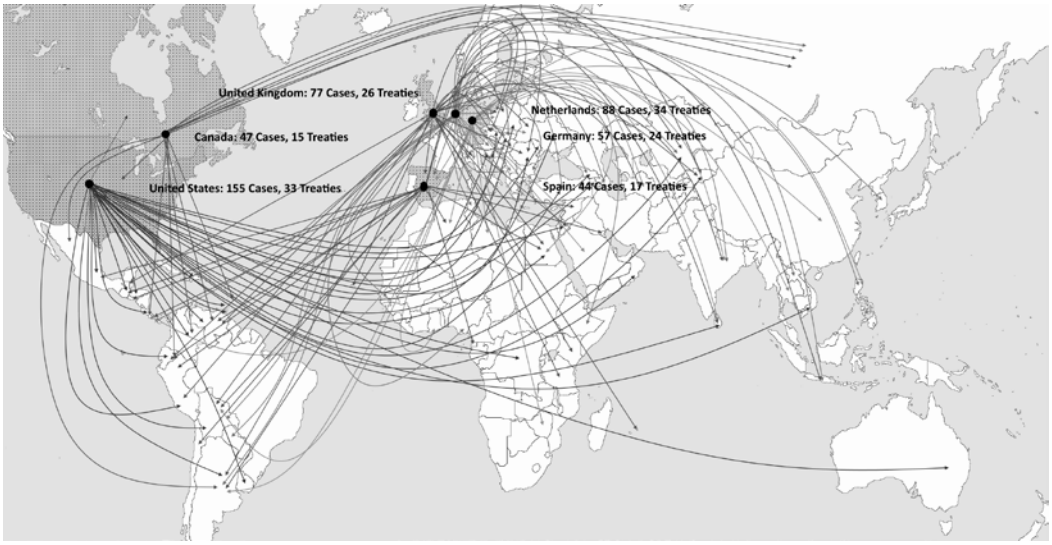
Source: PITAD through 1 August 2017

[30] *Spain-Argentina BIT* (1992).

Overall, one can say that ITA has been used by claimant-investors in well developed economies against respondents from slightly less developed – but not low income – states. In many ways, this makes sense. The signing of IIAs over the past 60 years reflects this pattern. If the purpose of IIAs was to provide legal protections for foreign investors in capital-exporting states who are investing in capital-importing states, the performance of ITA to date supports this pattern. It is an entirely different question, however, as to whether this *should* be the way that ITA is performing.

Even when claimant-investors have access to ITA they tend to use it sparingly; and the majority of cases that have been brought to date appear to be claims of last resort. For example, the global number of registered multinationals and their subsidiaries in 2007 stood at least 858,000.[31] This means that the 878 cases to date may be a mere fraction of potential claims. This fact may foster additional instability for the regime as ITA becomes more popular and well-known as a means for adjudicating international disputes. There is a potential for thousands of cases entering the pipeline in the coming decades. Take a further example on the limited number of cases filed to date: there are currently 38 investment treaty arbitrations (all based on the ECT) that have been filed against Spain (three have been concluded) in relation to the incentivization of renewable energy. However, one source claims that there have been over 650,000 domestic court cases that have been filed in relation to the same issues being litigated in the treaty-based arbitrations.[32]

Figure 3.5 Most frequent investor home states in ITA



Source: PITAD through 1 August 2017

Further, while there are a number of home states of claimant-investors that use ITA frequently (see figure 3.5), there are very few examples of repeat claimant-investors. The top six home states of claimant-investors accounts for 54% of all cases initiated to date (468 cases). On the issue of repeat claimant-investors, 771 cases (out of 878) were brought by a foreign investor that had never brought an ITA case before. Of the remaining 107 cases, there are a number of examples of entities using ITA more than once; and a few examples of entities using ITA repeatedly against the same state (eg, Yukos shareholders – Russia, Uzan family claims – Turkey, and Bogdanov family claims – Moldova) and against multiple states (eg, SGS,

[31] UNCTAD, *World Investment Report* (2007).
[32] D. Behn and O. K. Fauchald, "Governments under cross-fire: renewable energy and international economic tribunals" *Manchester Journal of International Economic Law*, 12, no. 2 (2015), 117.

Impregilo, Phillip Morris, ExxonMobil, ConocoPhillips, EDF, Vivendi, France Telecom, AES, and RSM).

The conclusion that these illustrations capture is that ITA as it is currently practiced represents a small fraction of potential cases and the limitations in treaty coverage have resulted in a small number of states having to respond to a disproportionately high number of cases (and repeatedly in many instances). In terms of performance deficits, the clearest issue for ITA relates to the fact that many foreign investors do not have access to ITA and those that do have access appear to bring suits disproportionately against a small number of targeted states.

Outcome performance

Moving from patterns of use to patterns of outcomes, this section will assess the performance of ITA in relation to outcomes in specific cases. Given the number of cases that have been filed to date, how has ITA performed in terms of its ability to resolve particular disputes? Further, what performance deficits can be identified, and are they able to be improved?

While ITA has been on a growth trajectory, the early days of ITA were fairly modest. There was a 30-year gap between the signing of the first BIT and the first treaty-based arbitration. The first treaty-based investment dispute was initiated in the late-1980s and rendered an award in 1990.[33] Before this date, there were a number of ICSID arbitrations but they were all based on ICSID arbitration clauses in investment contracts with states or in a host state's foreign investment law that included recourse to ICSID arbitration in the event of a dispute. While there continues to be some practice of foreign investment law-based or contract-based ICISD arbitrations, they are now in the distinct minority when compared to treaty-based arbitrations.

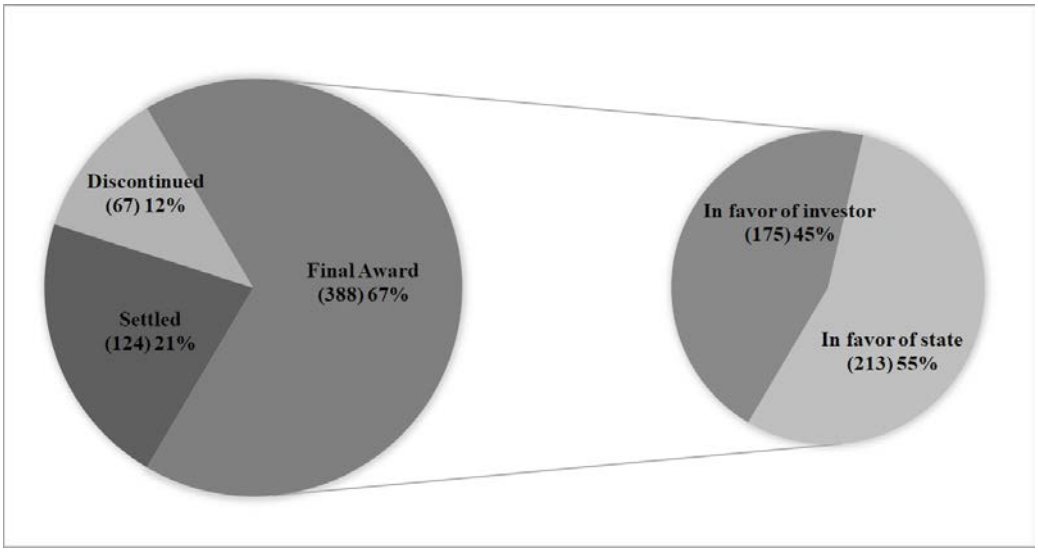
Through the 1990s, there were only a handful of ITA cases that were initiated and an even smaller number that reached final awards. Almost all of these cases were arbitrations administered according to the ICSID Convention. However, there were a few *ad hoc* tribunals established under the UNCITRAL arbitration rules during this decade as well. The first known UNCITRAL treaty-based arbitration issued an award in 1995.[34] Towards the end of the 1990s, a number of cases based on NAFTA were also initiated. Most of these early cases were brought by US investors against Mexico, but there were also a few important cases brought by Canadian investors against the US, and by US investors against Canada.

By the turn of the twenty-first century, there were approximately 43 ITA that had been initiated, and after 2000 the annual number of initiated claims starts to increase substantially. The 2000s saw an additional 334 cases registered; and the period of 2010 through the present added 501. Overall, of the 878 registered ITA cases, 388 cases have reached final awards, 124 cases have settled, 67 cases were discontinued, and 299 cases remain pending. From this dataset, we see that the cases resolved through final decisions in the first instance (ie, not including annulments at ICSID or set-aside proceedings in domestic courts) found in favor of the claimant-investor in 175 instances and found in favor of the respondent state in 213 instances (see figure 3.6).

Including just these cases that were resolved in the form of final awards in the first instance, the win-loss rate does not appear problematic on its face. Claimant-investors win 45% of the time. However, we can assume a significant number of settled were resolved in favor of the claimant-investor, even if the investor did not secure its preferred or ideal remedy in these cases. Taking the settled cases as representing (at least partial) win for the claimant-investor, the win rates rise from 45% to approximately 67%.

[33] *Asian Agricultural Products Limited (AAPL) v Sri Lanka* (ICSID Case No. ARB/87/3).
[34] *Saar Papier v. Poland* (UNCITRAL) 1994.

Figure 3.6 Finally resolved ITA cases (1990-2017)



Source: PITAD through August 1 2017

Before briefly turning to some of the critiques relating to outcomes and structural bias in the ITA regime, it is interesting to divide up the cases between jurisdictional decisions and merits decisions. In doing so, we see that tribunals in an ITA case accept jurisdiction in 72% of disputes (278 out of 388 cases ending in a final award).

There are a number of reasons why tribunals accept jurisdiction in the vast number of claims brought before them: some are probably completely benign, others may be less so. In many ways, the nature of investment treaty arbitration means that cases of this type are often brought as last resort, and given the seriousness of a private entity bringing suit against a foreign state (the 'seriousness' thesis), a high number of cases of questionable jurisdiction are not entering into the system in the first place. However, an alternative argument – of the less benign type – is that tribunals have been systematically expanding their jurisdiction in ITAs across time (in order to benefit from more cases and more arbitral appointments) by defining key terms such as what constitutes an eligible 'foreign investor' and 'foreign investment' in a liberal manner (the 'expansiveness' thesis).

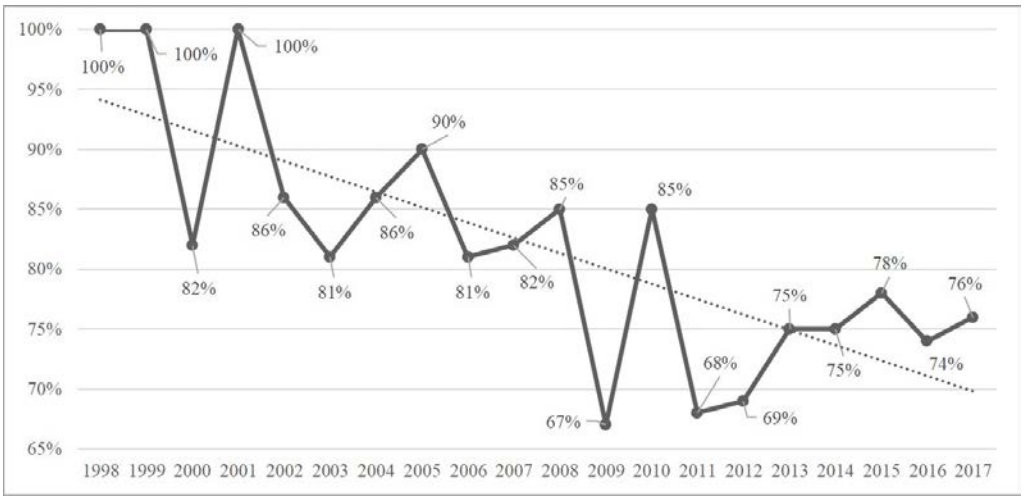
A study, using content analysis to assess the jurisdictional aspects of early ITAs, supports the expansiveness thesis.[35] However, figure 3.7 shows that the expansiveness thesis does not hold across time. Tribunals before 2005 accepted jurisdiction on average in about 85%% of the cases, while case brought in the last 10 years drop to about 70%. The conclusions that can be drawn from these numbers is that there may have been some early expansiveness in interpretations on jurisdictional issues, but that the more recent trend is that tribunals may either be restricting their jurisdictional interpretations (the opposite of the 'expansiveness' thesis) or that there are more dubious cases entering the system (the opposite of the 'seriousness' thesis).

In addition to the issues of jurisdiction, one of the fundamental critiques against ITA outcomes is that there is a pro-investor bias, reflected in in claimant-investors winning a high percentage of claims. While there appears to be a near 45% to 55% split in favor of respondent states overall (see figure 3.6), the chances of a claimant-investor winning at the merits stage of the dispute (ie, after jurisdiction has been accepted) shifts back in favor of the claimant-investor. Out of 288 cases where an ITA tribunal accepts jurisdiction and decides on the merits of the

[35] G. Van Harten, "Arbitrator behavior in asymmetrical adjudication: an empirical study of investment treaty arbitration" *Osgoode Hall Law Journal*, 50, no. 1 (2012), 211.

dispute, claimant-investors have succeeded in 161 out of 288 cases (55% success rate). While the success rates at the merits stage of the dispute do surpass the 50% mark, it is not readily apparent (in terms of raw numbers) of a systemic pro-investor bias in ITA. However, if one is to assess the success rates in ITA compared with those at the ECtHR or with domestic administrative review courts, the success rate for claimant-investors may indeed be disproportionately high.

Figure 3.7 Jurisdictional decisions in finally resolved cases (across time)



Source: PITAD through 1 August 2017

While the pro-investor bias claims are still made (mostly by non-experts), the perception that there is an anti-developing state bias is gaining more traction in scholarly literature of late. Prior to the mid-2000s, there were not a sufficient number of ITAs to warrant systematic empirical analysis of the types of states being sued, the type of claimants bringing suit, and the outcomes of these cases. However, from the mid-2000s onwards, a number of critiques emerged in the context of investment treaty disputes. In response, earlier studies indicated that there was not a statistically significant relationship between outcomes and the development status of the respondent state.[36] One of the key caveats with these studies is that there were not many cases against developed states in the early jurisprudence.

More recent studies bring some of these early results into question.[37] As more cases enter the system and as more developed (and emerging economy) states are sued, the universe of ITAs that have reached a final award (388) has significantly expanded. This is a large increase over the approximately 140 cases included in earlier studies. Using a dataset of all cases reaching a final award in the first instance, a recent study shows that there is a statistically significant relationship between the gross domestic product (GDP) per capita of the state being sued and its likelihood to lose a case.[38] This correlation indicates that the poorer the state is the more likely it is to lose an ITA. This is troubling in regard to issues relating to the legitimacy of ITA but also raise questions about its performance. If a system of adjudication produces a systemic bias against respondent states on the basis of their relative wealth, we should certainly be concerned. Anecdotally, it is interesting to note that the US (a high income state) has

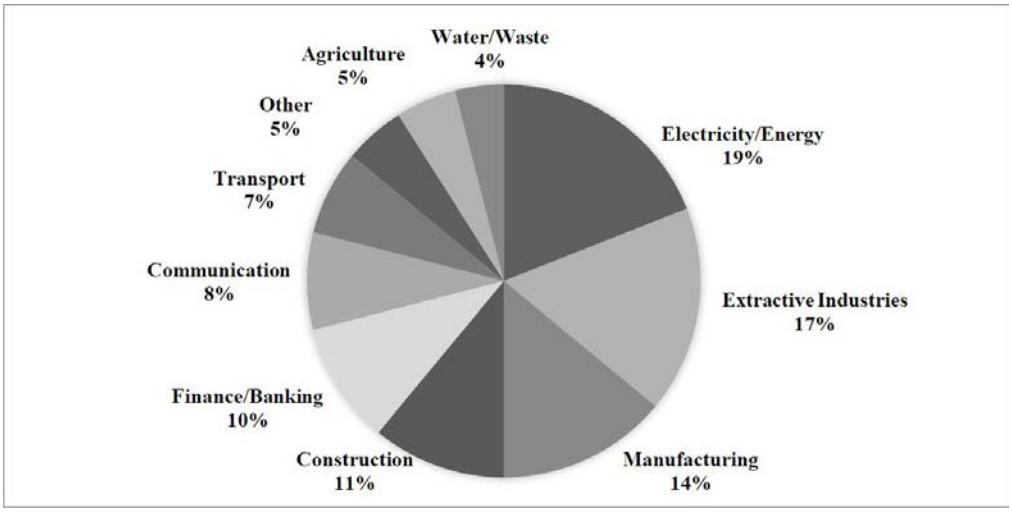
[36] S. Franck, "Conflating politics and development: examining investment treaty outcomes" *Virginia Journal of International Law*, 55 (2014), 55.
[37] D. Behn, T. Berge and M. Langford, "Poor states or poor governance: explaining outcomes in investment treaty arbitration" *Northwestern Journal of International Law and Business* (forthcoming 2017).
[38] *Ibid.*

famously never lost an ITA case, while Zimbabwe and Burundi (low income states) have never defeated an investor claim.[39]

Before turning to issues of process performance, there are a few additional issues relating to outcome performance that are worthy of mention. These include issues of a lack of diversity in the subject-matter of cases, the exorbitant size of compensation awards, and the losing state's lack of compliance with monetary awards. To test these claims and to assess them in regard to outcome performance, we look to see if there are any aggregate patterns in outcomes across these selective issues areas.

The subject-matter of ITAs brought before 2000 were largely related (but certainly not exclusively) to projects in the extractive industries. However, in more recent years there has been a significant diversification of the types of cases.[40] This can be viewed as a positive or negative development depending on one's perspectives. It is positive in the sense that, as a general system of adjudication, ITA looks less and less like a system that is tailor-made for the energy and extractive industries. It might be viewed as a negative development, however, as more and more cases arise out of foreign investments that were not originally envisioned as the types of investments that should be eligible for protections under IIAs. For example, there is a trend towards disputes involving the financial services sector and other service industries.

Figure 3.8 Economic sector distribution for all registered ITA cases (1990-2017)



Source: PITAD through 1 August 2017

Looking at all ITA cases registered to date (878), we see a considerable diversity of the types of cases that have been resolved. Figure 3.8 shows the distribution and subject-matter diversity for all registered. Despite this diversification, the extractive industry and energy sector disputes are still the two most represented economic sectors using ITA (17% for the extractive industries and 19% for electricity/energy cases). And there is still the perception that claimant-investors tend to do disproportionately well in these types of cases in terms of win percentages and the monetary compensation awarded. However, it is important to note, that the manufacturing, construction and finance sectors now each constitute a double digit percentage of the caseload, which is a dramatic shift if compared with the early ITA caseload where the percentages for these sectors were either negligible or in the low single digits.

In terms of outcomes, there are a few interesting patterns worth noting that largely confirm the aforementioned perceptions. If we look at the win-loss ratios for all finally resolved

[39] PITAD.
[40] Behn, "Legitimacy, evolution and growth in investment treaty arbitration"

ITA cases in the extractive industry and electricity/energy generation sectors versus cases involving all other economic sectors, there are two striking differences in the outcomes. First, ITAs involving the extractive industries or energy sectors are much more likely to settle; and second, in these cases, the respondent state has a much lower chance of successfully defending itself against a claim (in comparison to outcomes in the other economic sectors). For extractive industry and electricity/ energy generation cases that have been fully resolved (182 cases), claimant-investors win 35% of the time, lose 31%, settle 25%, and discontinue 9%. For all other economic sectors (397 cases), claimant-investors win 28% of the time, lose 39%, settle 20%, and discontinue 13%.

However, it is not very surprising that cases in these two sectors are more likely to settle and that the state is less likely to succeed in defending itself against such claims. This is because many of these cases concern very large projects (with massive sunk costs) that become subject to various types of nationalizations/expropriations where the issue in dispute is more in relation to the level of compensation than to whether the state is liable. In regards to performance, the difference in outcome patterns between these two sectors and all other economic sectors is not very problematic; however, ITA cases in the extractive industry and electricity/energy generation sectors do tend to be more visible and high profile than others, and as such, these cases (where states lose or settle much more often than they win) might contribute to creating perceptions that the ITA system is unbalanced in favor of claimant-investors.

Turning to the amounts of compensation awarded to successful claimant-investors in ITAs, there are a number of patterns worth noting. The issue of compensation levels has been one of the more controversial areas in ITA. With a number of high-profile cases awarding claimant-investors in excess of one billion US dollars (USD),[41] questions about the fairness and reasonableness of such compensation has continually entered the discourse. However, looking at the awards to date with the highest dollar amounts attached to them, they are all relating to expropriations in the extractive industries. These cases, with the exception of the three Yukos awards (which were found to be indirect expropriations by Russia), were all *direct* expropriations where the respondent states (Ecuador and Venezuela, respectively) likely knew that they would be found liable for breaches to the relevant IIA because they had not offered adequate compensation for the direct expropriations according to the standards of international law.

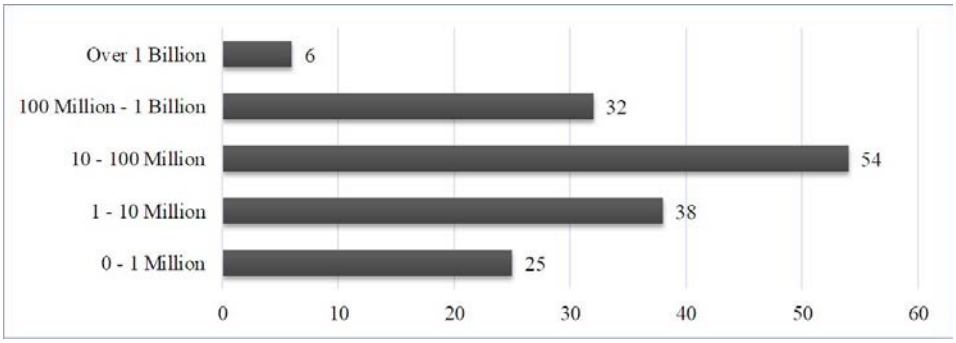
While the massive monetary awards are the ones that have grabbed the headlines, the overall levels of compensation awarded to winning claimant-investors are considerably more modest in the aggregate. This does not discount the fact that some cases have awarded compensation awards to winning cases where the USD amount of the award is significant in terms of the annual GDP of a particular state (eg, a 935 million USD award against Libya or a 266 million USD award against Lebanon), these awards remain the distinct minority in ITA. Of the 175 cases to date where the claimant-investor has won at the liability/merits stage of the proceedings, there are 10 cases where the amount of damages awarded remains pending (only a liability award has been rendered to date) and 10 cases where the amount awarded is unknown. Thus, of the 155 cases where a claimant-investor has won on the merits and the amount of compensation awarded is known (see figure 3.9), the distribution is highest in the 10 to 100

[41] There are six cases where the claimant-investor was awarded in excess of one billion USD: *Hulley Enterprises v. Russia* (PCA UNCITRAL) (40 billion USD); *Veteran Petroleum v. Russia* (PCA UNCITRAL) 2014 (8.2 billion USD); *Yukos Universal v. Russia* (PCA UNCITRAL) 2014 (1.8 billion USD); *Occidental v. Ecuador* (ICSID Case No. ARB/06/11) (1.8 billion USD) 2014; *Venezuela Holdings v. Venezuela* (ICSID Case No. ARB/07/27) 2015 (1.6 billion USD); *Crystallex v. Venezuela* (ICSID Case No. ARB(AF)/11/2) 2016 (1.4 billion USD). However, it is equally important to note that annulment committees have significantly reduced the amount of compensation awarded in *Occidental* and *Venezuela Holdings*, and the three *Yuko*s awards have been set-aside in the courts of the Netherlands (pending high court review).

million USD range with 54 awards fitting into that category. However, there are also 63 awards totaling less than 10 million.

Interestingly, of the 25 awards where the claimant-investor is awarded less than one million USD, there are five cases where the tribunal found a breach of the IIA but awarded no compensation to the claimant-investor. Taking out the six awards where over one billion USD was awarded and the five awards where no compensation was awarded, the average compensation (149 awards) amounts to approximately 72.8 million USD and the grand total awarded equals approximately10.2 billion USD in total across the entire universe of ITAs. While this number sounds substantial for sure, it may appear slightly more modest if reflecting the trillions and trillions of foreign direct investment (FDI) flows that have occurred global since the first ITA award was rendered in 1990. In other words, the amount of compensation awarded to claimant-investors might be found to be egregious in particular cases, but in the aggregate the amounts awarded to date do not appear to be particularly troubling.

Figure 3.9 ITA compensation ranges in USD (155 cases)



Source: PITAD through 1 August 2017

The final issue to be discussed in terms of outcome performance is that of compliance with awards rendered against respondent states in ITA. As discussed in the first section of this chapter, the difficulty in compelling a state to satisfy an international arbitral award against it is a long-standing problem. While the New York Convention has been in place for over 60 years and has been very effective in enforcing and recognizing international commercial arbitration awards, its effectiveness in enforcing treaty-based arbitration awards has been a bit more mixed due to the complexities associated with issues of sovereignty when the award is being enforced against a state. The ICSID Convention sought to overcome the problems associated with enforcing an award against a state: Article 53 of the ICSID Convention bypasses the need for national court recognition under the New York Convention. For the early ICSID cases, this innovation seemed to be working as many early awards were paid without significant challenge. The direct enforceability of awards under the ICSID Convention was systemically challenged for the first time following Argentina's financial collapse in 2001.

Argentina has been steadfast in refusing to enforce ICSID awards, arguing that despite reference to the direct enforceability of awards in the ICSID Convention, the Argentinian constitution requires all payments out of the state treasury to be first authorized through a court judgment. Given the high number of ICSID awards against Argentina in the past 10 years, this non-compliance has put considerable strain on the regime overall. While Argentina has recently satisfied many of its outstanding awards through negotiated settlements, some final awards remain unsatisfied.

In addition to the Argentinian cases, Zimbabwe, Russia, Kyrgyzstan, and Thailand have all refused to comply with any awards rendered against them.[42] In addition, a number of respondent states delayed or refused enforcement in individual cases: Guatemala, Kazakhstan, Mexico, and Venezuela.[43] These states have a record of complying with some awards and rigorously fighting enforcement in others.

Interestingly, in the Russian case, many of the awards rendered against the state have been fought in domestic courts through set-aside proceedings, and with substantial success to date. So far, all of the awards rendered against Russia in the Yukos saga have been set-aside in the domestic courts of Sweden and the Netherlands (the seats of these arbitrations). This appears to be an increasingly popular strategy by losing respondent states in ITA: challenge any award rendered against it in the domestic courts at the enforcement state of the proceedings. As the legitimacy of ITA continues to be questioned, domestic courts are playing an increasing role in policing the enforceability of ITA awards that many respondent states believe they should not be obligated to pay. As more and more awards enter the pipeline, one could predict that the challenge to awards in domestic courts at the enforcement stage of the proceedings will continue to increase.

Process performance

The process of ITA has been the subject of intense debate. Many critics are concerned that arbitration is not the appropriate model of adjudication for the type of public law disputes arbitrators in ITA are asked to resolve. The argument against arbitration claims that courts with tenured judges provide more institutional safeguards than do *ad hoc* arbitrators;[44] and that these safeguards help ensure that international legal disputes of this type are not as susceptible to particular forms of bias or other structural incentives that might favor private investors over measures taken by the state in the public interest.

One of the proposed solutions to this critique would be to establish an international investment court that would have many design features of the dispute settlement understanding (DSU) of the WTO. In September 2015, the European Commission proposed such a solution as a substitute to ISDS provisions in future IIAs it signs with third states.[45] Such a court-style mechanism has now made its way into the *EU-Vietnam FTA*, the *EU-Canada FTA* (CETA), and has been proposed as part of the ongoing negotiations over the *Trans-Atlantic Trade and Investment Partnership* (TTIP) between the EU and the US. What this investment court system (ICS) seeks to accomplish is to do away with the system of party-appointed arbitrators (a process that critics claim results in a pro-investor bias due to the perverse incentives that such a system creates) and to add an appellate review system that will help reduce the perceived inconsistency of investment treaty outcomes. While such a court-type system could possible replace ITA in the long-run, there are a number of institutional difficulties that will prevent a quick transition to such a system from taking place.[46]

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[42] The cases listed in this section only include treaty-based awards (and may not be exhaustive). In addition to the states listed, there are a few states that have not complied with contract-based ICSID awards or settlement agreements. Primarily, these include: Lao PDR, Dominican Republic, Democratic Republic of Congo, Ukraine, and Turkmenistan. See Langford, Behn, and Fauchald, "Backlash and state strategies in international investment law."

[43] *Ibid*.

[44] See eg, G. Van Harten, *Investment treaty arbitration and public law* (Oxford University Press, 2007).

[45] European Commission, "Commission Draft Text TTIP – Investment" 16 September 2015 <http://trade.ec.europa.eu/doclib/html/153807.htm> accessed 1 August 2017.

[46] Primarily, there are significant costs that will be imposed on states in establishing a standing court for each agreement (mostly bilateral) that a state signs. One of the benefits of investment treaty arbitration is that the costs for individual cases can be high, but they are significantly less so than the establishment of a permanent court

While the proposal for an ICS is garnering significant attention of late, more pragmatic considerations in the immediate future might be to reform particular aspects of the processes associated with ITA. To assess what these reforms might be, and how they might assist in increasing the performance of ITA, this section will look at a few features of treaty-based arbitration that have been variously viewed as problematic: (1) issues relating to transparency; (2) issues relating to the length of proceedings; and (3) issues relating to a system that favors repeat arbitrators.

Looking first at issues of transparency, there is a significant perception that ITA is a secretive process that is conducted behind closed doors with low levels of transparency. This critique of the process of ITA has been around for a long time and is premised on the fact that many of the institutional design features of investment treaty arbitration are borrowed from international commercial arbitration where the default rule is one of confidentiality. Transparency in ITA can be divided into two major categories: (1) transparency in the proceedings (ie, open hearings); and (2) transparency in the existence of a dispute and in the awards rendered. While there are some examples of tribunals opening up their hearings to the public (mostly in the context of NAFTA and CAFTA-DR cases), it remains a fairly rare occurrence. On the other hand, transparency through publicly available awards is something that has been changing rapidly in ITA in recent years.[47] The default assumption of confidentiality and secrecy is no longer accurate.

In regard to the transparency of ITA, it turns out that the likelihood that parties will seek to keep proceedings and awards secret is a product of the institutional setting of the arbitration. Looking specifically at the institutional distribution of cases, one can see that the majority of ITAs registered to date (878 cases) have been administered by ICSID (59%). However, non-ICSID cases are encroaching on ICSID's market dominance. It is now that 41% of all ITA cases have either been administered with no institutional backing (181 *ad hoc* UNCITRAL tribunals) or they have been administered by either the PCA (94 cases) or a regional international commercial arbitration center (76 cases).[48]

If an ITA case is administered by ICSID, there is a presumption of transparency and in fact there are only about 9% of all ICSID cases that have been resolved to date where the final award remains confidential. Furthermore, ICSID also provides a publicly available registry that logs all of the cases that have been initiated and resolved. This means for ICSID cases, there is public knowledge of the existence of a dispute and the awards in almost all cases are also publicly available. The picture of transparency in non-ICSID cases is certainly more opaque and without any legal requirement that even the occurrence of a dispute be known to the public, there is a much higher likelihood in non-ICSID cases that some disputes will not even be known, let alone that an award will be made publicly available. While the number of confidential ICSID awards currently hovers around 10%, approximately one-third of all non-ICSID cases are not publicly available.

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system that might not have many disputes brought before. For example, it may make sense to establish a permanent court for the TTIP, but less so under a Norway-Mozambique BIT. A long-term alternative to bilateral court system would be to establish a multilateral framework that would cover all existing IIAs.

[47] As of April 2014, the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* came into effect (but will only cover arbitrations based on IIAs signed after 1 April 2014) <www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html> accessed 1 August 2017. Further, in March 2015, the *Mauritius Convention on Transparency* opened for signatures. As of 1 August 2017, 18 states have signed the convention (with only one ratification) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html> accessed 1 August 2017.

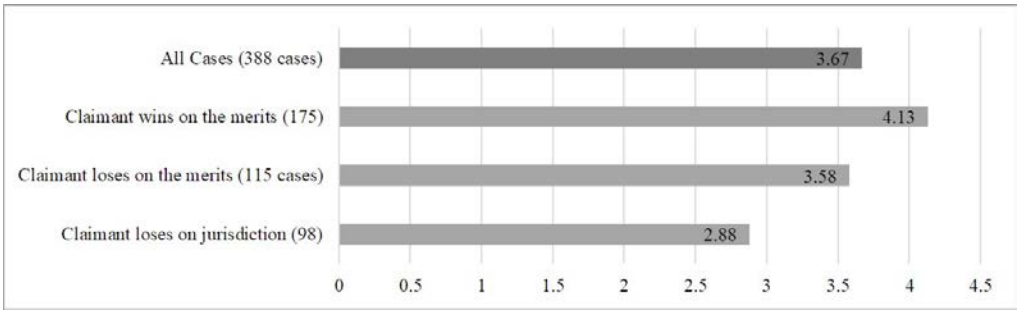
[48] The SCC is the most frequently used international commercial arbitration center (41 fully resolved disputes), followed by the ICC (four fully resolved disputes), the LCIA (four fully resolved disputes), the Moscow Chamber of Commerce and Industry (MCCI) (three fully resolved disputes), and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) (two fully resolved disputes).

Overall, out of the 388 ITA cases that have reached a final award, 76% (or 294 awards) are publicly available. However, this is only the number for known cases. In other words, there may be a number of non-ICSID cases that are not even known (because there is no formal registry for these cases). The chances of this being a large number is fairly low though; knowledge about most cases (and who won the case), even if the awards are not made public, increasingly get leaked into the public domain at some point.

One issue in relation to transparency that is interesting to look at is which parties might be seeking to keep awards in particular cases confidential. Of the 24% of cases whose awards remain confidential (94 cases), the claimant-investors won 62 of these cases (66%) and lost in 32 cases. Of the 76% of cases that are publicly available, the claimant-investor won 137 of these cases (46%) and lost in 157 cases. These descriptive statistics suggest that cases where the claimant-investor wins are, on average, more likely to be kept confidential. Without investigating the circumstances of these cases more closely, one could speculate that confidentiality in ITA may not be driven by claimant-investors but by respondent states seeking to keep awards in losing cases confidential.[49] Respondent states may want to minimize the fallout that could come from the details of a loss becoming public knowledge.

The next procedural performance issue to discuss is the length of proceedings in ITA. Examining figure 3.10, it becomes readily apparent that these disputes take a long time to resolve. On average, ITAs take over three and a half years to resolve in the first instance. This does not include the amount of time that is often spent at the enforcement stage of the proceedings in domestic courts (which can take upwards of five years depending on the number of appellate review stages that are possible in a particular domestic system) or through the annulment process in ICSID cases (average of about two years). Further, if an ICSID case is annulled by an *ad hoc* annulment committee, it is possible for the case to be re-submitted again as a first instance tribunal. There are a number of examples of ITAs of this type taking in excess of 10 years to become finally resolved. It is unknown whether an ICS as proposed by the European Commission would reduce the length of proceedings in investment treaty cases because the current ITA system does not have a formal appellate review process. Adding such a process through a court system would theoretically add significant time to any dispute.

Figure 3.10 Average length of ITA proceedings (in years)



Source: PITAD through 1 August 2017

Further, those who believe that ITA should be a faster alternative to using domestic courts charge that the amount of time taken to resolve a dispute is problematic. Certainly, it is difficult to argue that ITA is faster than many domestic courts. However, making such analogies

[49] The assumption here is that a winning claimant-investor has a lower incentive to keep a case confidential and that given the overall win rate for claimant-investors in cases where awards remain confidential is significantly higher (66%) than the overall win rate for claimant-investors (45%) in all cases, it may be that respondent states do not want to make these awards publicly available.

is a possible misnomer because ITA has very little in common with the types of arbitration that tend to be more efficient and faster than domestic courts (ie, employment arbitration or consumer contract arbitration). In fact, ITA cases can often be more complex and time intensive than the vast majority of domestic court litigation. Many ITAs produce thousands of pages of factual evidence and awards can easily run into the hundreds of pages. It is therefore unsurprising that typically ITA cases take a long time to resolve. However, the type of disputes that ITA appears to favor (large, complex litigation) undermines the possibility for any type of small claims mechanism to develop. In terms of performance and legitimacy, ITA would benefit from a process that would allow relatively small investments and investors to use the system. Currently, ITA – for reasons of both time and expense – is *de facto* foreclosed to foreign investors with claims smaller than about 10 million USD.

The final issue relating to the process performance of ITA is to empirically assess the system of party-appointments and the repeat appointment of a small cadre of arbitrators. ITA is built, procedurally, on the system developed in the context of international commercial arbitration. The default rule is that each party to the dispute appoints an arbitrator and the president of the tribunal is then appointed by agreement of either the two co-arbitrators or the parties. For most cases, this default rule works well. However, such a process is often charged as being incapable of impartiality because the very nature of an appointment-based system is to appoint an arbitrator that the party believes is most likely to support her version of the case. But what most critics fail to realize is that one party to the dispute is not picking all three arbitrators on a tribunal; rather they only get to pick one. This means that actually there is very little possibility for one of the party-appointed arbitrators on a tribunal to excessively influence the outcome. Further, and in practice, it is the president of the tribunal that is tasked with making the ultimate decision in a particular dispute.

As such, the party-appointed arbitrators may play less of a role in the final outcome than is often assumed. Nonetheless, one of the biggest complaints about ITA is its system of party-appointed arbitrators. The alternative to such a system is to either convert to a court-style system with permanent tenured judges resolving disputes or for a system of institutional appointments

In addition to problems with the system of party-appointed arbitrators is the system of repeat appointments. ITA is increasingly dominated by a small group of elite arbitrators that are repeatedly selected by parties in the vast majority of disputes. To date, in the 878 cases that have been registered, there have been 652 different arbitrators that have accepted appointments in these cases (this does not include the 152 pending cases where no arbitrators have been selected yet). Of these 652 different arbitrators, over half (350) of them have sat in only one case. However, while these one-time arbitrators are in the clear majority, it is the numbers of repeat-appointed arbitrators that is interesting. There is a large percentage of arbitrators (32%), constituting 208 individuals, who have been appointed between two and nine times in ITA cases; and there are 63 arbitrators that have 10 or more appointments. The most fantastic statistic in this regard is that these 63 arbitrators have taken 58% of all possible appointments in fully constituted ITA cases to date (722 cases). It is clear that there is a core group of arbitrators that dominate in investment treaty arbitration.[50]

One of the main issues with the high clustering of repeat arbitrators in ITAs is that charge that there is a dearth of diversity among those gaining repeat appointments. Of the 652 arbitrators appointed to date, 68% of them have nationalities from states in either North America or Western Europe. Further, only 4% of all arbitrators are women.[51] Considering that the majority of ITA cases are against states in the developing world, the fact that so many arbitrators are from the global North and so few are women is problematic. Overall, it appears

[50] The two most often appointed ITA arbitrators are Gabrielle Kaufmann-Kohler (48) and Brigitte Stern (87).

[51] The irony here is that only 38 women have been appointed as arbitrators in ITA cases but the two most often appointed arbitrators (accounting for 135 appointments combined) are women.

that ITA does in fact have a diversity problem, but it is unclear how a structural shift to a court system or a system of institutional appointments would improve the diversity of the system. In fact, it may even exasperate the problem by drastically reducing the number of individuals eligible to sit on investment treaty tribunals (ie, the ICS proposal calls for 15 individuals to accept permanent appointments).

Conclusions

Assessing the overall performance of an entire system of adjudication within the confines of a short book chapter is no easy task. What this contribution has sought to provide is an overview of the entire system of ITA as it has been practiced to date. The effect of such an exercise was to highlight some of the performance deficits that have occurred in its practice and to objectively assess (with empirical evidence) the overall performance of ITA in terms of its historical purpose.

One of the problems with objectively assessing the performance of ITA is that it is a system of adjudication with a high degree of normative polarization whereby most issues are evaluated through a normative lens. For many, ITA has been in a legitimacy crisis for the past decade and debates about the use and legitimacy (and performance) of ITA often turn into heated exchanges about issues of unfairness and unjustness in global economic governance more generally. For critics of the regime, no performance benchmarks are worthy: the system is rotten and should be dismantled. For those with more moderate views, ITA does in fact seem to be performing its functions fairly well, especially when viewed in terms of historical purpose.

In fact, this contribution highlights that one area where ITA could improve its performance is through increased access. One of the main deficits identified is that there are too few foreign investors with access to legal protections that can be enforced through binding arbitration. Such a finding would actually call for an expansion of ITA, not its constriction. In terms of the process of ITA, this chapter identified that while becoming increasingly transparent, disputes take a long time to resolve and that there appears to be a severe lack of diversity among the arbitrators appointed to sit on tribunals. In terms of outcomes, the most problematic issue in regards to its performance is that, while the win-loss ratios overall appear fairly balanced, there seems to be a bias against developing states that is unlikely to be justifiable.

Overall, assessing ITA in terms of its performance has provided a neutral framework for evaluating a system of adjudication on objective, empirically-based terms. Such an approach is valuable in identifying where ITA can be improved. While arguably flawed in certain respects, investment treaty arbitration does seem to be serving a valuable function and should be worthy of reform. Such reforms might eventually lead to a system of adjudication that takes the form of a standing international court or one that is based on a multilateral treaty where issues of access and balance between states and investors can be fine-tuned and improved. However, given the problems that ITA has sought to address in the aggregate (ie, the historical problem of enforcing rights for foreign aliens investing abroad), ITA does appear to be performing commensurate with its historic purpose.