Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art

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1. Introduction

The use of investment treaty arbitration as a means of adjudicating international disputes continues on a growth trajectory despite increasing calls for deep reform. What then can account for this apparent dissatisfaction with the status quo in investment treaty arbitration on the one hand and its increasing popularity as a means of resolving disputes between foreign investors and the states hosting their investments on the other? To answer this puzzle, another question needs to be asked: who is dissatisfied? As a claimant-investor driven system of adjudication, the growth in investment treaty arbitration is likely attributable to investor satisfaction with the system. In other words, dissatisfaction with the status quo is coming primarily from the respondent side of the dispute: the host state. Interestingly, this highlights one of the main foci of this article: does investment treaty arbitration favor particular types of disputes brought by particular types of claimant-investors against particular respondent-states? If this is so, and investment treaty arbitration

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2 Approximately 67 percent of all known disputes have been resolved in the last five years.


4 From a legitimacy perspective, the dissatisfaction with investment treaty arbitration has to be assessed in terms of whether there are structural flaws in the design of this type of adjudication that has led to such widespread dissatisfaction by respondent states; or whether the dissatisfaction is merely documenting displeasure in having to defend against investment treaty claims that are being legitimately pursued by foreign investors.
is billed as a general system of adjudication, does a lack of diversity among claimants and respondents contribute to its perceived legitimacy deficits? In looking at this particular issue, this article will empirically evaluate investment treaty arbitrations partially or fully resolved in the past three years against many of the legitimacy issues currently discussed in the discourse: with special attention to ideas of diversification and fair distribution of claims.

The article will proceed in three sections. Section two will look at investment treaty arbitration in general with a specific focus on the legitimacy issues surrounding the proliferation of investment treaty arbitration. Section three will provide empirical evidence from investment treaty arbitrations that were partially or fully resolved between September 2011 and September 2014. The purpose of this section is to derive basic empirical indicators as to why, when, where, and how investment treaty arbitration has been used in recent years; and to analyze how this empirical evidence supports or contradicts the legitimacy critiques lodged against the regime. Section four will summarize the findings, evaluate evidence-based approaches to investment treaty arbitration research, and propose an agenda for future studies of this type.

2. The Legitimacy Debates in Investment Treaty Arbitration

Through mid-2014, approximately 550 known investment treaty arbitrations have been initiated: a significant jump from the total of 100 known investment disputes that had been initiated prior to 1990. It is therefore only in the past 25 years that the initiation of investment treaty disputes has ramped up as a prominent means of adjudicating foreign investment disputes. Preliminarily speaking, these rough numbers correlate with the history of International Investment Agreement (IIA) negotiations over the past fifty years. The majority of all IIAs currently in force have been signed only in the last 25 years, and one is now – predictably – seeing a rise in the invocation of these treaties as based on post-protection disputes (i.e. disputes relating to investments deployed after the signing of a relevant IIA). Is this growth in recourse to investment treaty arbitration problematic for the regime or is it a sign of its success? It may be both; but from a legitimacy perspective, one must also look, inter alia, at the conditions under which the actual disputes arise and are resolved: who are bringing suits, against what kinds of states, is there an outcome bias in

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5 One of the research limitations, and legitimacy challenges, for investment treaty arbitration relates to the lack of public disclosure of all arbitral awards. And in cases not involving the International Centre for the Settlement of Investment Disputes (ICSID), there is even the problem that the dispute itself will not be known. The research for this article has made substantial effort in providing a comprehensive set of the cases partially or fully resolved in the last three years. While it is increasingly difficult to keep a dispute of this type completely confidential, there remains a good chance that there are a few cases resolved in the past three years that remain publicly unknown and are thus not included here.


7 Up through 1990, there were 500 IIAs that had been signed. There are now over 3000 of these agreements. IIAs primarily include bilateral investment treaties (BITs), plurilateral investment treaties (PITs), and free trade agreements (FTAs) with investment chapters.
favor of investors, is there evidence of abusive or frivolous cases being brought, and are particular types of states or regions being targeted?

While answers to the aforementioned questions do not address all of the legitimacy issues facing investment treaty arbitration, they can assist in assessing one perception that continues to resonate among critics of the regime: investment treaty arbitration is rigged in favor of corporate property rights at the expense of developing states and their need to regulate in the public interest. But where does this perception derive? The legitimacy debates in investment treaty arbitration primarily derive from general anti-globalization movements in the mid-1990s, and more specific events such as the failed Organization for Economic Cooperation and Development (OECD) Draft Multilateral Agreement on Investment (Draft MAI) and resistance to early North American Free Trade Agreement (NAFTA) cases against the United States (US) and Canada.

While there were investment treaty awards prior to these events, they attracted limited attention and were the focus of only a handful of international lawyers. These aforementioned events, however, brought significant attention to the idea of investment treaty arbitration and highlighted some of the potential problems that can arise when foreign investors are given special protections and direct access to arbitration against sovereign states under international law. Centrally, these events of the mid-1990s demonstrated that the substantive protections in IIAs (including strong dispute settlement provisions) have significant bite (with potentially negative effects on the sovereign autonomy of states). Since that time, the legitimacy debates in investment treaty arbitration have spread both substantively and geographically: many developing states, and some developed states (including non-governmental organizations (NGOs) and critical scholars), are increasingly questioning the merits of granting foreign investors (especially large corporations) special protections and the right to sue sovereign states (especially developing states) on public law issues through a private system of adjudication.

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10 See i.e. Loewen v US (ICSID); Mondev International v US (ICSID).
At its most fundamental level, the legitimacy debates in international investment treaty arbitration produce a critical perspective as to whether or not foreign investment disputes should be resolved by international arbitral tribunals at all. Some focus on the ‘international’ part by claiming that foreign investment disputes are better resolved in the domestic context; others focus on the ‘arbitral’ part by claiming that ad hoc, party-appointed arbitrators cannot adequately resolve public law disputes against sovereigns. These two meta-issues are related to dispute system design and provide the basis for many, if not all, the legitimacy challenges facing investment treaty arbitration to date.

José Alvarez has recently distilled the current legitimacy issues in investment treaty law broadly to include the following six major issues. First, investment treaty arbitral tribunals produce inconsistent decisions over time and this defeats the primary objective of the regime in producing a stable and predictable legal environment for foreign direct investment. Second, investment treaty arbitration awards are a threat to national sovereignty and they are insufficiently deferential to national law and the need for sovereign states to be able to regulate in the public interest. Third, investment treaty arbitral tribunals fail to respect the rights of states to take national emergency action in response to a fundamental national security threat. Fourth, investment treaty arbitration awards are skewed in favor of investors and investment treaty arbitration is essentially a ‘one trick pony’ that protects investment at the expense of all other policy goals. Fifth, investment treaty arbitration falls on the wrong side of the public-private divide and these arbitral awards erroneously privatize disputes that should only be heard in public forums. And sixth, investment treaty arbitration awards are a species of global administrative law that fails to reflect the rule of law values found in national administrative and constitutional law. He goes on to say that all of these six legitimacy critiques can be reduced to an underlying singularity: “the investment regime is the enemy of the state” (something to which Alvarez does not agree).

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16 Id.
In the context of this article, the empirical research will not focus on all aspects of legitimacy discussed above. Primarily, the focus here will be on the second and fourth issues identified by Alvarez, which relate directly to the users of investment treaty arbitration. These issues pertain to the threat to sovereignty posed by investment treaty arbitration and the perceived bias that favors investors in investment treaty arbitration. In terms of the legitimacy debate, the perceived lack of deference towards national sovereignty and the perceived bias toward foreign investors likely stems from the concentration of particular types of claimant-investors and respondent-states in investment treaty arbitrations. In other words, the uneven distribution of claimants and respondents has led to the perception that investment treaty arbitration is unfairly rigged in favor of large companies from developed states against the less powerful developing states hosting their investments.

While the empirical evidence generally supports the uneven distribution thesis, it does not support the unfairly biased thesis. The percentage of cases where the claimant-investor wins remains relatively low, but the majority of cases continue to be between developed state claimants and developing state respondents. However, this is not necessarily a signal that investment treaty arbitration is illegitimate. In fact, the design of investment treaty arbitration – although considered a reciprocal and general system of adjudication – was actually promulgated to protect developed state investors from political and economic risk in developing states (in order to encourage foreign direct investment in those states). So, while investment treaty arbitration appears to be fulfilling its function in this regard (at least in terms of providing protections to foreign investors), the question to be asked in terms of its legitimacy is whether this type of dispute settlement mechanism was fundamentally unfair in its initial design.

There are essentially two ways that these legitimacy issues are being approached in the discourse. The first approach is evolutionary: investment treaty arbitration is experiencing adolescent ‘growing pains’ but its overall structure is sound and that many of the particular legitimacy challenges facing this system of adjudication can be resolved over time. The


18 This is what is cited as the purpose of investment treaties in general and investment treaty arbitration in particular. This so-called grand bargain was designed to provide protection for foreign investments as a means for promoting increased flows of foreign investment into states with high investment risks. See i.e. Salacuse, Jeswald & Nicholas Sullivan (2005). Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain, Harvard International Law Journal, vol. 46, p. 67.

second approach is revolutionary: investment treaty arbitration is ‘off the rails’ and its overall structure is so deeply flawed that no tweaks or reforms to the system can correct its fundamental legitimacy deficits. From an evolutionary perspective, the answer to whether investment treaty arbitration is based on a flawed design would be no: investment treaty arbitration – despite its current lopsided use – can be made fairer by reducing the number of cases overall, increasing the diversity of the type of claimants who bring claims (i.e. more small claims) and increasing the distribution of the type of states acting as respondent states (i.e. less developing states). However, from a revolutionary perspective, the answer to this question posed above would be a clear yes: investment treaty arbitration is structurally flawed and will therefore never be capable of resolving these kinds of disputes no matter how fair the distribution of claimants and respondents are.

3. An Empirical Evaluation of Recent Decisions

This section will empirically evaluate a comprehensive data set of 147 cases that have been partially or fully resolved in the past three years (September 2011 through September 2014) (the data set), and identify various patterns that emerge in the context of the ongoing legitimacy debates in investment treaty arbitration. The data set will look at the types of claimants bringing claims, the types of disputes being arbitrated, the geographic distribution of both claimants and respondents, the development status of claimants and respondents, and the types of treaties and institutions being used in these disputes.

The data set will also look at a few procedural issues that pertain specifically to the types of claimants and the types of disputes being brought. These include issues of bifurcation of proceedings, instances of annulment proceedings, involvement of non-disputing third parties, the transparency of awards, and the length of proceedings. The purpose in looking at these particular issues is to analyze and assess whether recent resort to investment treaty arbitration is indicating a shift in the diversification and distribution of its users in a way that

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22 See e.g. “We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.” Public Statement on the International Investment Regime, supra note 8.

23 A definition of investment treaty arbitration decisions partially or fully resolved in the past three years (September 2011 through September 2014) include: cases discontinued, cases settled, jurisdictional decisions, liability decisions, merits decisions, and annulment committee decisions. The data set does not evaluate interim orders or provisional measures.
could indicate that the evolutionary approach to reform is working and that some of the earlier claims against the regime’s legitimacy are being resolved over time.

A. Decision and Outcome Overview

Of the 147 cases (in the data set), there were 155 decisions (in total). Of these 155 decisions, 36 decisions came in 33 cases that were either discontinued (19 cases, 20 decisions) or settled (14 cases, 16 decisions). Subtracting these cases and decisions leaves 119 decisions issued in 114 cases. These decisions fit one of four basic types: 1) jurisdictional awards, 2) liability awards, 3) merits awards, and 4) annulment committee decisions. Of these 119 decisions, 23 of them came in 22 cases that remain pending. This leaves 77 fully resolved cases (81 decisions) and 15 annulment committee decisions (15 decisions). The finality of these cases comes with one caveat: of these final awards, 16 of them have been referred to annulment committees.

Table 1: Data Set Decisions by Type (155 Decisions in Total)

<table>
<thead>
<tr>
<th>Type</th>
<th>Number</th>
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<tbody>
<tr>
<td>Discontinued</td>
<td>19</td>
</tr>
<tr>
<td>Jurisdictional Awards</td>
<td>45</td>
</tr>
<tr>
<td>Liability Awards</td>
<td>14</td>
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<tr>
<td>Merits Awards</td>
<td>52</td>
</tr>
<tr>
<td>Annulment Decisions</td>
<td>11</td>
</tr>
</tbody>
</table>

Looking at the 77 cases that were fully resolved in the data set, one finds that the outcomes of these cases fit into one of three general types: 1) awards declining jurisdiction, 2) awards dismissing claims on the merits, and 3) awards upholding claims on the merits. There were 25 awards declining jurisdiction (33 percent), 18 awards dismissing the merits (24 percent), and 34 awards upholding claims on the merits (43 percent).

24 There are a total of 147 cases, but in eight cases there are multiple decisions: three final awards have previous jurisdictional award rendered in the time period of the data set, one final award has previous liability award, one discontinued case has previous jurisdictional award, two settled cases have previous jurisdictional awards, and one pending case has both a jurisdictional award and a partial liability award rendered in the time period of the data set.

25 This means that these 22 tribunals either issued a jurisdictional award upholding jurisdiction (17 decisions), a partial merits award finding liability but deferring on the issue of quantum for a latter proceeding (five decisions), or a partial merits award on potential liability (one decision).

26 These are cases where the claimant was granted some kind of damage award. This does not, however, mean that the claimant was awarded 100 percent of what was claimed. In fact, in most cases where the claimant ‘wins,’ the award amounts to only a fraction of what was initially being claimed. See Franck, supra note 17.
Table 2: Data Set Cases with Final Awards (77 Cases)

In addition to an overview of the cases in the data set, it might be useful to benchmark this information against historical numbers. According to the most recent statistical report issued by ICISD (ICSID Caseload),\(^{27}\) the win/lose percentages (on jurisdiction or the merits) for claimants in ICSID disputes through mid-2014 are (with a comparison of the percentages in the data set in parentheses): claimant wins in 46 percent (43 percent) of cases, claimant loses on jurisdiction in 26 percent (33 percent) of cases, and claimant loses on the merits in 28 percent (24 percent) of cases.\(^{28}\)

Table 3: Data Set Outcome Percentages Compared to ICSID Caseload (77 Cases)

In regards to some of the legitimacy debates, the outcome percentages over the past three years do not appear to indicate a pro-investor bias among tribunals. Less than half of claims were successful, and this number does not deviate significantly from the overall percentage of successful claims according to the ICSID Caseload. The most interesting differences between the data set and the ICSID Caseload is the increase in cases where the tribunal denies jurisdiction (from 26 to 33 percent of the total). From an evolutionary perspective, it may be that tribunals are increasing their scrutiny over the threshold issues allowing for jurisdiction over a claim (i.e. the definition of an investor and an investment). An alternative explanation could be that there is an increase in weak or frivolous cases being initiated and that these cases are being screened out at the jurisdictional stage.

\(^{27}\) However, this comparison with the ICSID Caseload has some important limitations. The ICSID Caseload is both under-inclusive and over-inclusive in the context of the data set: 1) it covers all ICSID cases, but not cases from other institutions (under-inclusive); 2) it includes all registered ICSID cases (the data set only includes decisions) (over-inclusive); and 3) it includes ICSID cases based on national investment laws and contracts, which the data set excludes (over-inclusive).

By including the 33 cases that were either discontinued or settled (not including the five discontinued annulment committees) in the data set, the following percentages emerge (a total of 110 cases): 29 percent upholding claims on the merits (34 cases), 23 percent declining jurisdiction (25 cases), 17 percent dismissing claims on the merits (18 cases), 18 percent discontinued (19 cases), and 13 percent settled (14 cases).

In terms of outcomes and the amount of damages awarded, there were 34 cases in the data set where the claimant won on the merits (in four cases the amount of the damage awarded is not known). There was a total of 54.22 billion US dollars (USD) awarded in these 30 cases (not including costs or interest). While this a large number, 96 percent of this total came in four extraordinary cases. In the remaining 26 cases, the damage awards are considerably more modest: in 10 cases the claimant was awarded less than 10 million USD (average per award is 2.7 million USD), in 10 cases the claimant was awarded between 10 and 100 million USD (average per award is 34.6 million USD), and in six cases the claimant was awarded between 100 million and one billion USD (average per award is 204.8 million USD).

One caveat to these numbers is that at least 13 of the damage awards are pending annulment (seven cases) or set-aside proceedings in domestic courts (at least six cases). Of the known damage awards in the data set, 99 percent of the total amounts awarded have not been satisfied because payment on the awards have been stayed pending the annulment or set-aside proceedings (it is possible for some of these awards to remain unsatisfied after an unsuccessful annulment or set-aside proceedings given the increasing difficulty in enforcing investment treaty arbitration awards). For example, a number of...
awards rendered against the Kyrgyzstan remain unsatisfied even after unsuccessful set-aside proceedings (initiated by Kyrgyzstan) in the domestic courts of the seat of the arbitration.\textsuperscript{31} In one case, the European Union (EU) Commission has ordered Romania to stay enforcement of an ICSID award pending a state aid inquiry.\textsuperscript{32} In the Yukos cases, enforcement against Russia will be a protracted battle inside and outside of domestic courts for the foreseeable future.\textsuperscript{33} What these percentages and examples seek to identify is that the age-old issue of enforcement of arbitral awards against sovereigns continues to present problems and that this trend may be increasing in cases where there are a number of damage awards rendered against a particular state or where the damage awards are very high in monetary value.

B. Procedural Issues

Before turning to a deeper analysis of the types of claimants and respondents using investment treaty arbitration over the past three years, it may be useful to look at some of the procedural and institutional issues that have been presented in the context of legitimacy debates and to correlate some of these claims to the information gleaned from the data set. While there are many issues that may be discussed under the heading of procedure, this article will focus on two main categories: 1) length of proceedings and 2) the transparency of proceedings.

In regards to issues relating to the length of proceedings, there is a perception that investment treaty arbitrations take a long time to resolve. In terms of investment treaty arbitration’s legitimacy, the length of proceedings raises concerns regarding costs, but it also brings into question the advantage of investment treaty arbitration over other forms of adjudication or mediation that might take less time to resolve. In this context, the prevalence of ICSID annulment proceedings and the trend towards proceeding bifurcation and trifurcation can enforce the perception that the process of investment treaty arbitration is excessively lengthy.

Table 6: Average Length in Months to Final Award or Annulment Decision (92 Cases)

<table>
<thead>
<tr>
<th>All Cases</th>
<th>Cases Where Claimant Loses on Jurisdiction</th>
<th>Cases Where Claimant Loses on Merits</th>
<th>Cases Where Claimant Wins on Merits</th>
<th>Annulment Committee Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>48.9</td>
<td>38.7</td>
<td>24.4</td>
<td>51.6</td>
<td>55</td>
</tr>
</tbody>
</table>

Of the 77 fully resolved cases in the data set, there are five averages on the length of proceedings: 1) the overall average for all 77 cases is 48.9 months, 2) the average for the 34

\textsuperscript{31} OKKV v Kyrgyzstan (MCCI); Lee John Beck v Kyrgyzstan (MCCI); Stans Energy v Kyrgyzstan (MCCI).

\textsuperscript{32} Micula v Romania (ICSID). It is likely that in the short-term, the move by the EU Commission is redundant because Romania has sought annulment of the award and stays of enforcement are generally granted under ICSID annulment procedures.

\textsuperscript{33} In the immediate aftermath of the issuance of the award in the three Yukos cases (Hulley, Veteran, Yukos), Russia announced the illegitimacy of the award and indicated that it would seek to ‘appeal.’
cases where the claimant won on the merits is 55 months, 3) the average for the 18 cases where the claimant lost on the merits is 51.6 months, 4) the average for the 25 cases where the claimant lost on jurisdiction is 38.7 months, and 5) the average for the 11 cases where an annulment decision was rendered is 24.4 months. Besides the fact that cases in the data set take an average of four years to resolve, it is interesting to note that the averages for cases that go through to the merits are not affected by whether the claimant wins or loses. In terms of extremes, the longest case (in the data set of 77 cases where a final award was rendered) took 129 months to resolve.\(^{34}\) The shortest case was a treaty-based arbitration administered by the Moscow Chamber of Commerce and Industry (MCCI) that took a mere six months to reach a final award on the merits.\(^{35}\)

In addition to these raw averages on the length of proceedings, there are two structural issues relating to procedure worth exploring: 1) the prevalence of proceeding furcation and 2) the prevalence of annulment proceedings brought by the losing party in ICSID cases. As to the first issue, the data set of 99 cases (77 cases with final awards and 22 pending cases) shows that there are 36 cases that bifurcated the proceedings into a jurisdictional and merits phase. There are also five cases bifurcated between a liability phase and a damages phase; and two cases that have been trifurcated (jurisdiction, liability, and damages).\(^{36}\) This means that 43 percent (42 out of 98 cases) of the cases in the data set (where an award was rendered) were furcated. However, an analysis of the frequency of furcation can be a bit difficult because it will only manifest itself in awards that succeed on jurisdiction. If one adds in the cases where the tribunal declined jurisdiction, the percentage goes up to 68 percent (67 out of 99 cases). It is unclear if these cases would have been furcated had the tribunal found jurisdiction, but it may give a better indication of the frequency by which tribunals are looking at jurisdictional and merits issues distinctly.

Of these 67 furcated cases in the data set, the jurisdictional phase (or liability phase) found jurisdiction in 42 of the cases and declined jurisdiction in 25 of the cases. Twenty-two out of the 42 cases that have found jurisdiction in furcated proceeding remain pending. In the other 20 cases, the claimant won 13 cases and lost seven cases. Compared with the overall win rate of 65 percent in data set cases where the tribunal found jurisdiction (claimant wins on the merits in 34 cases and loses on the merits in 18 cases), the win rate in furcated proceedings where jurisdiction is upheld is also 65 percent. While these percentages only refer to a very small data sample (20 cases), one might infer that proceeding furcation does not have much systemic effect on outcomes. If this is the case, then one might argue that

\(^{34}\) Antoine Goetz v Burundi (ICSID).
\(^{35}\) OKKV v Kyrgyzstan (MCCI).
\(^{36}\) While tribunals often use the word ‘liability,’ the term ‘responsibility’ might be more applicable in treaty cases involving states. See generally Crawford, James (2002). The International Law Commission’s Draft Articles on State Responsibility, Cambridge, CUP.
\(^{37}\) Tribunals often use the words ‘damages’ and ‘quantum’ interchangeably.
\(^{38}\) One of these currently trifurcated case is Chevron v Ecuador (Chevron II) (PCA UNCITRAL), and it will likely be furcated into a fourth and fifth phase as the proceedings mature.
proceeding furcation unnecessarily slows down proceedings and that it should only be granted by tribunals in cases when it is likely that jurisdictional questions are likely to be outcome determinative (i.e. in cases where the claimant has a challengeable case in regard to jurisdiction).

The second structural process issue relates to the referral of ICSID awards to *ad hoc* annulment committees; and the perception that there is increased use of annulment by losing parties in ICSID cases. Of the 77 fully resolved cases in the data set, 45 awards came from ICSID tribunals and 16 of these cases (36 percent) have been referred to ICSID annulment committees. In addition to the 16 pending annulment cases, there are 15 annulment committee decisions in the data set. Nine of these decisions upheld the underlying award and one decision partially annulled the underlying award. No annulment committee decision fully annulled the underlying award; and five annulment committees were discontinued.

According to the *ICSID Caseload*, there have been 189 final awards rendered through ICSID mid-2014. Of these awards, 53 annulments of the underlying award have been sought (28 percent of all ICSID cases where a final award was rendered). This is lower than the percentage of awards referred to annulment in the data set (36 percent), and could indicate that there is an increase in resort to annulment in ICSID cases.

In terms of annulment outcomes in the data set, there could also be an increase in the percentage of committees refusing to annul awards. Of the 53 annulment applications registered at ICSID to date, 13 have been annulled in part or full (25 percent), 25 have been rejected (47 percent), and 15 have been discontinued (28 percent). Of the 15 annulment decisions in the data set (not including the 16 that are pending), nine were rejected (60 percent), one award was annulled in part (seven percent), and five were discontinued (33 percent). These numbers could indicate that: 1) *ad hoc* annulment committees are increasing the threshold required to annul an ICSID award or 2) the underlying awards are become less challengeable as the regime evolves and arbitrators become more experienced with this specialized type of dispute resolution.

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39 This perception may correlate with the fact that there has been a dramatic increase in ICSID awards over the past few years and that one would also expect an increase in annulment applications as well.
40 However, in this case of partial annulment, the entire damage award was annulled. The only part of the award that was not annulled was the cost award. See *Victor Pey Casado v Chile* (ICSID).
41 See *ICSID Caseload*, supra note 29.
42 However, the caveat here is that there were only 10 cases in the data set where an annulment decision was issued. This number of annulment decisions is too small to infer any general trends with certainty.
Table 7: Data Set Annulment Outcome Percentages Compared to ICSID Statistics (15 Cases)

<table>
<thead>
<tr>
<th>Annulment Discontinued</th>
<th>Data Set</th>
<th>ICSID Statistics</th>
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<tbody>
<tr>
<td></td>
<td>28</td>
<td>33</td>
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</table>

<table>
<thead>
<tr>
<th>Annulment Rejected</th>
<th>Data Set</th>
<th>ICSID Statistics</th>
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<tr>
<td></td>
<td>7</td>
<td>47</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Annulled in Full or Part</th>
<th>Data Set</th>
<th>ICSID Statistics</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>25</td>
<td>60</td>
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In regards to the transparency of investment treaty arbitration proceedings, it is its continued opaqueness that raises legitimacy concerns. While there has been a trend towards more open proceedings and towards the inclusion of non-disputing party intervention through *amicus curiae* submissions, a surprising number of awards rendered in the last three years remain confidential. As to the publication of investment treaty arbitration awards, there are a few key issues. There continues to be no legal requirement that investment treaty arbitration awards be made public, and in non-ICSID cases, there is not even a requirement that the occurrence of a dispute be known. While the data set attempted to be as comprehensive as possible, there is a high likelihood that there are a number of unknown non-ICSID cases where a decision was rendered in the last three years. This is because only ICSID provides a publicly available registry that logs all of the cases that have been initiated and resolved. It is interesting to note that while ICSID has a public registry, it does mean that awards will also be publically available.

Of the 147 cases in the data set, there are 98 ICSID cases (89 ICSID claims and nine ICSID additional facility (AF) claims), 39 cases brought according to the UNCITRAL arbitration rules, and 10 cases brought at commercial arbitration centers. Overall, ICSID claims constituted 67 percent of the claims in the data set, and non-ICSID cases constituted 33 percent. Of the 82 ICSID cases in the data set where some kind of award was issued, 59 (72 percent) of the awards are publically available and 23 (28 percent) of the awards are not. This number, however, is still considerably lower than the percentage of known non-ICSID cases. This may be changing. As of April 1, 2014, new United Nations (UN) Commission on International Trade Law (UNCITRAL) transparency rules for investment treaty arbitrations came into effect (but will only cover arbitrations based on treaties signed after April 1, 2014). However, in July 2014 UNCITRAL agreed on a draft convention on transparency in investment treaty arbitrations that will be presented to the UN General Assembly for signature in September 2014. If ratified, this convention will apply to all treaty-based UNCITRAL arbitrations.

For example, on the website for the Permanent Court of Arbitration (PCA), there are 39 investment treaty arbitrations that have been registered by the PCA but to which there is no further information available. See PCA, available at: pca-cpa.org/showpage.asp?pag_id=1029 (last accessed September 15, 2014).

Sixteen of these cases are administered by the PCA.

Four Stockholm Chamber of Commerce (SCC) cases; three Moscow Chamber of Commerce & Industry (MCCI) cases; two International Chamber of Commerce (ICC) cases; one Cairo Regional Center for International Commercial Arbitration (CRCICA) case.

This number includes jurisdictional awards in pending cases and decisions by annulment committees, but it does not include discontinued or settled cases.
cases that remain confidential. Of the 40 non-ICSID cases in the data set where some kind of award was issued, 25 (63 percent) of them are not publically available. Overall, this means that 48 out of the 122 (39 percent) awards in the data set are not publically available.

**Table 8: Institutional Distribution (147 Cases)**

Additionally, it also appears that the outcome is a determinant on whether the award is made publically available. In the 77 fully resolved cases in the data set, 25 awards (32 percent) remain confidential. In the 34 cases where the claimant won, nine awards (26 percent) remain confidential. However, in the 43 cases where the claimant lost, 16 of the awards (37 percent) remain confidential.

From the data, one might infer that ICSID awards are more likely to be made public than non-ICSID awards; and that awards where the claimant won are more likely to be made public than when the claimant lost the case. This second finding indicates that it might be the claimant, and not the respondent, that is more reluctant to release awards to the public (especially when they are the losers). While there has been considerable discussion about the evolution towards increased transparency in investment treaty arbitration, the practice continues to be relatively non-transparent overall. With 39 percent of the final awards in the data set not publically available, the continued concealment of awards for an evolving legal order is certainly problematic from a legitimacy point of view.

**Table 9: Availability of Decisions (82 ICSID Cases and 40 Non-ICSID Cases)**

In regard to third party intervention and more general public participation in investment treaty disputes, the data set identifies that there are certain types of disputes that are more likely to involve the public interest than others. In these types of public interest disputes, it is increasingly likely for third parties to request *amicus curiae* intervention. However, these types of high-profile public interest disputes remain a distinct minority in terms of the overall caseload in investment treaty arbitration. In the data set there were three cases with *amicus curiae* submissions, but in all three cases, the *amicus curiae* submissions were rejected by the tribunal.\(^49\) Interestingly, there were two high-profile disputes in the data set that do not appear to have attracted third party interveners: the tobacco case against Uruguay and one of the sovereign bondholder mass claims against Argentina.\(^50\) Despite the possibility of third party intervention in investment treaty arbitration, it remains infrequently used.

While *amicus curiae* intervention was infrequently invoked in cases in the data set, there were slightly more instances of non-disputing state party intervention in disputes based on the following two plurilateral investment treaties (PITs): the NAFTA\(^51\) and the *Central American-Dominican Republic Free Trade Agreement (CAFTA-DR)*.\(^52\) Both treaties provide explicit provisions for non-disputing state party intervention. In addition to civil society *amicus curiae* submissions and non-disputing party interventions in PITs, there were also cases where the EU Commission attempted to intervene. The EU Commission is neither a state nor a civil society actor, but has shown increasing interest in investment treaty arbitrations following the passage of the *Lisbon Treaty* in 2007.\(^53\) In the data set, there are three cases where the EU Commission attempted to intervene in an investment treaty arbitration proceeding.\(^54\) Overall, the data set confirms that third party submissions are seldom invoked in investment treaty arbitration and that state interventions (as opposed to private third parties such as civil society actors) are more likely to be accepted.\(^55\) The cases involving third parties in the data set suggest that if states want submissions by non-disputing parties, it is in their interest to provide explicit provisions in future treaties.

\(^49\) *Chevron II* (*amicus curiae* submission by the IISD: application rejected); *Apotex v US (Apotex I)* (UNCITRAL) (*amicus curiae* submission by the Study Centre for Sustainable Finance: application rejected); *Apotex v US (Apotex II)* (ICSID) (*amicus curiae* submission by the Centre for Sustainable Finance and Barry Appleton: both applications rejected).

\(^50\) *Ambiente Ufficio v Argentina* (ICSID); *Phillip Morris v Uruguay* (ICSID).

\(^51\) *Mobil v Canada* (ICSID).

\(^52\) *Commerce Group & San Sebastian v El Salvador* (ICSID); *Pac Rim Cayman v El Salvador* (ICSID); *Railroad Development v Guatemala* (ICSID); *TECO v Guatemala* (ICSID).


\(^54\) *Micula v Romania* (ICSID) (*amicus curiae* submission by the EU Commission: application accepted); *Electrabel v Hungary* (ICSID) (*amicus curiae* submission by the EU Commission: application accepted); *Iberdrola v Guatemala* (ICSID) (*amicus curiae* submission by the EU Commission: application rejected).

\(^55\) In the case of the CAFTA-DR and the NAFTA, there are special provisions allowing for non-disputing states to submit briefs.
C. Claimant-Investors

Moving from a general analysis of the data set in terms of process and outcome, the remaining sections will look specifically at the users of investment treaty arbitration. Investment treaty arbitrations are initiated by (one type of party) a foreign investor; and therefore, analysis of the claimant side of a dispute is concerned with entities that have transferred capital (and in most cases, know-how) from one state to another. In this period of globalization, there are a multitude of diverse entities that could be involved in such activity (however, this obviously does not mean that every cross-border investment is going to result in a dispute). This article seeks not only to assess the types of claimants who are using investment treaty arbitration and to identify patterns among these users, but to also identify those types of entities that are absent from this form of international dispute settlement.

The first area of analysis below will identify the size (category one) and type (category two) of the claimant-investors in the data set. The legitimacy issues relating to claimants who initiate investment treaty arbitrations primarily concern the large size (and financial power) of many corporate entities, the relative absence of very small corporate claimants (and individuals), treaty shopping through holding companies, the nationality-residency distinction in claims brought by individuals, and the possibility that dispute outcomes favor certain sizes and types of claimants.

The first category of claimant size will be divided into the following sub-categories: 1) small and medium-sized enterprises (SMEs),\(^{56}\) 2) large multinational enterprises (MNEs),\(^{57}\) 3) extra-large MNEs,\(^{58}\) 4) 2014 Fortune Global 500 (Global 500) companies,\(^{59}\) and 5) states.\(^{60}\)

When looking at the claimants in the data set, it might be assumed that the majority of enterprises bringing claims are large or extra-large MNEs; and for the most part, this assumption appears correct: 119 of the 147 cases in the data set were brought by companies categorized as large or extra-large MNEs. Of the 147 cases, claimant is a SME in 27 cases, claimant is a large MNE in 58 cases, claimant is an extra-large MNE in 37 cases, claimant is a Global 500 company in 24 cases.

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56 SMEs have less than 15 million USD per year in revenue. This is the definition of SMEs used by the World Bank.

57 Large MNEs are defined as companies with revenue between 15 million and one billion USD per year.

58 Extra-large MNEs are defined as companies with revenues exceeding one billion USD per year.

59 The 2014 Fortune Global 500 (Global 500) lists the largest companies in the world by revenue (ranging from 20 to 500 billion USD for 2013), available at: fortune.com/global500 (last accessed September 15, 2014).

60 There is only one case in the data set where the state acted as claimant. However, this case, Ecuador v US (PCA UNCITRAL), was not an investment claim, but rather a state-to-state dispute.
In terms of outcomes, there are a few distinguishable patterns in relation to the size of the entity bringing the claim. Of the 110 fully resolved cases in the data set, the most interesting patterns relate to the overall win rates. The overall success rate for claimants in the data set is 30 percent: SMEs won 36 percent of their cases, large MNEs won 24 percent of their cases, extra-large MNEs won 29 percent of their cases, and Global 500 claimants won 50 percent of their cases. These numbers give a somewhat mixed pattern as to whether size of the claimant has any relation to the outcome of the dispute. It appears that the smallest (SMEs) claimants and the largest (Global 500) claimants in the data set have a higher success rate than large and extra-large MNE claimants.

Of the cases where the claimant discontinued or settled their cases, it appears that extra-large MNEs settled or discontinued cases at a higher rate than other categories of claimants. One possible explanation for this could be that very large claimants have more negotiating power with states and therefore these cases are more likely to find resolution through non-adjudicatory means. At the same time, the number of Global 500 companies that discontinued or settled their cases is almost identical to the average for all resolved cases in the data set. Overall, the pattern in regard to claimant size and outcome is that there is no clear pattern. It could be concluded from the data that the size of the claimant alone has minimal influence on outcome.

Table 11: Win/Lose Percentage by Claimant Size (110 Cases)

One of the key legitimacy issues in this area is not necessarily whether the size of the claimant has a bearing on success rates, (although this can be problematic if certain types of entities are systemically more likely to succeed than others), but rather is related to the potential lack of diversity in the different types of claimants initiating disputes. There is
evidence in the data set that, while the types of claimants are fairly diverse, the majority of claims are being initiated by large and extra-large MNEs; and that SMEs remain a minority in claim initiation. This evidence reinforces the idea that investment treaty arbitration is primarily geared for a very specific type of foreign investor: the large or extra-large MNE. This fact is likely attributable to the resources that these large entities have when it comes to bringing international legal claims. Investment treaty arbitration is very expensive and bringing a claim will cost many millions of dollars if it goes through to the merits. SMEs and individuals are less likely to resort to investment treaty arbitration because of this cost barrier. If an SME is defined as an entity with less than 15 million USD in revenue a year, it is unlikely that such entities would have a claim large enough to justify the significant outlay of financial resources needed to bring a claim.  

While smaller claims are possible, the costs of investment treaty arbitration often make a claim of less than five million USD unfeasible. The second category is that of claimant type, and will be divided into the following sub-categories: 1) companies and subsidiaries, 2) project-specific entities, 3) holding companies and investment funds, 4) individuals, and 5) states. Of the 147 cases in the data set, the majority of claims are initiated by a home state company or a (locally or non-locally incorporated) subsidiary. This type of claimant accounts for more than 60 percent of the cases in the data set (93 out of the 147 cases). Of the remaining 54 cases, six of the cases are brought by project-specific entities, 22 of the cases are initiated by holding companies or investment funds, 25 of the cases are brought by individuals, and there is one case brought by a state party.

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62 A project-specific entity is defined as an enterprise whose primary activities are related to a specific foreign project that is the subject-matter of the dispute. For example, in *Oxus Gold v Uzbekistan* (UNCITRAL), Oxus Gold is a company set-up in London whose only asset is a mining license for the Amantaytau Goldfields in Uzbekistan.

63 These can be subsidiaries that are incorporated in the same home state as the parent company or they can be locally-incorporated subsidiaries of a home state parent company in the host state.

64 Eighteen out of the 147 cases in the data set include a claimant that is a subsidiary of a larger home state parent. Fourteen cases include a claimant that is a non-locally incorporated subsidiary of a home state parent company, and four cases in a claimant that is a locally incorporated subsidiary of a home state parent company.
Table 12: Claimant Type (147 cases)

In terms of outcomes, the type of claimant bringing cases does not appear to demonstrate success rates that seriously deviate from the overall average for all resolved cases in the data set. In regard to claimant type, individual claimants have a slightly higher incidence of success than other types of claimants. Holding companies and project-specific entities only represent a small percentage of the overall caseload (21 cases), but these types of legal entities do appear to be less successful than individuals and companies.

Table 13: Win/Lose Percentage by Claimant Type (110 Cases)

From a legitimacy perspective, the type of claimant raises some important issues in regard to the purpose of investor-state dispute settlement (ISDS) in the context of IIAs. While most of the cases in the data set are brought by home state entities that are clearly foreign, there are a significant number of cases brought by claimants whose connection with the home state IIA partner might be brought into question. There are 28 cases where the claimant is some kind of holding company or entity that was established for a particular foreign project. While some of these cases appear to be legal structures designed by entities that are foreign (the capital is originating outside the host state of the investment), there are also some cases where the investor and the investment is not clearly foreign.\(^65\)

Cases where an entity is established in a foreign jurisdiction for the purpose of gaining protections under an IIA are often identifiable as a form of ‘treaty shopping’.\(^66\) These types of cases can be problematic in regard to one of the fundamental purposes in providing ISDS in treaties: to encourage foreign investment. In theory, this is one of the key reasons why

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\(^65\) This classically became an issue in *Tokio Tokeles v Ukraine* (ICSID) where arbitrator Prosper Weil dissented against a jurisdictional award because the claimant was not really foreign.

\(^66\) See e.g. *Oxus Gold v Uzbekistan* (UNCITRAL) and *KT Asia v Kazakhstan* (ICSID).
foreign investors are given treaty protections. While the idea of protecting national investors at the international level is worthy of discussion, the current system of IIAs and ISDS was not established for such purposes; and therefore, use of investment treaty arbitration in contravention of its core purpose can reduce the legitimacy of the regime overall.67

The claims brought by individual claimants are also particularly interesting from a legitimacy perspective. There are examples in the data set of cases brought by individuals that may not really be foreign investors. While it is well established that these types of claimants can have standing in investment treaty arbitration, it is a type of claimant where a *de facto* domestic investor (who is a long-term resident in the host state) might be able to gain *de jure* international protections by showing foreign nationality.68 To highlight the risks associated with such possibilities, take the following example. In *Ivanishvili v Georgia*, a case in the data set that was discontinued not long after it was initiated, the claimant, Bidzina Ivanishvili brought a claim against Georgia for alleged violations of the French-Georgia BIT. Bidzina Ivanishvili is Georgian, but also holds a French passport. He also happened to be the prime minister of Georgia in 2012 and 2013. He initiated this ICSID claim in the run up to his election as prime minister, claiming that the Georgian state was illegally interfering with his businesses in Georgia as a means of political reprisal. Ivanishvili dropped the ICSID case soon after becoming prime minister. Under the current system, investor eligibility is based on nationality, not residency; however, this case – among others – identifies the potential problems that might arise when a claim is based on an individual’s nationality.

One final issue relating to claimant type is one that can cut across all the different categories: the minority owner or shareholder. This type of claimant normally manifests itself as a foreign entity who purchases a non-controlling interest in a company incorporated in the host state of the investment. However, there are also cases arising out of sovereign bonds purchased by foreign entities and individuals. There is one case in the data set (there are currently a total of five bondholder cases that have been registered) classified as a bondholder case: *Ambiente Ufficio v Argentina*. There are a number of legitimacy questions that have arisen in context of bondholder cases in particular.69 While it is difficult to fully assess the incidence of minority shareholder cases in the data set, an estimate is that approximately 32 of the cases in the data set involved a foreign company that had invested a minority stake in a locally incorporated entity (in the respondent state).70

67 However, use of ISDS by national investors through a foreign holding company have not always been successful. See e.g. *KT Asia v Kazakhstan* (ICSID).
70 Considering that not all of the awards in the data set are publicly available, it is difficult to provide detailed analysis on the exact nature of the investment made by the claimant.
D. Dispute Subject-Matter

As to the subject-matter of disputes, investment treaty arbitration has historically been used primarily in cases involving the extractive industries. The reason for this is that these types of projects are typically large, long-term, expensive, and tied to the state where the project occurs. This means that these types of investments frequently have large sunk costs that diminishes the bargaining power of the foreign investor as the project progresses. In some cases, this shift in bargaining position has allowed host states to make midstream changes to the regulatory and legislative regime governing a particular foreign project. These types of cases (in the extractive industries sector) still represent a large percentage of the case load in the data set. However, there is also a significant increase in cases arising out of the manufacturing and service sectors. Diversification into these types of disputes can assist in contributing to the legitimacy of investment treaty arbitration by signaling that it is not a system of adjudication designed for use by particular economic sectors (especially such sovereignty-sensitive sectors as the extractive industries).

Using the same coding as the ICSID Caseload, the data set shows the following distribution of disputes types: of the 147 cases, there are four cases in agriculture, fishing, and forestry; eight cases in construction; 20 cases in electric power; nine cases in finance; five cases in information and communication, 37 cases in the extractive industries; 21 cases in other industries; 23 cases in services and trade; five cases in tourism; seven cases in transportation; and eight cases in water and waste.

Table 14: Dispute Subject-Matter by Economic Sector (147 Cases)

<table>
<thead>
<tr>
<th>Economic Sector</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>4%</td>
</tr>
<tr>
<td>Construction</td>
<td>6%</td>
</tr>
<tr>
<td>Electricity</td>
<td>14%</td>
</tr>
<tr>
<td>Services</td>
<td>15%</td>
</tr>
<tr>
<td>Water</td>
<td>6%</td>
</tr>
<tr>
<td>Agriculture, fishing, and forestry</td>
<td>4%</td>
</tr>
<tr>
<td>Construction</td>
<td>12%</td>
</tr>
<tr>
<td>Electric power</td>
<td>12%</td>
</tr>
<tr>
<td>Finance</td>
<td>7%</td>
</tr>
<tr>
<td>Information and communication</td>
<td>3%</td>
</tr>
<tr>
<td>Extractive industries</td>
<td>25%</td>
</tr>
<tr>
<td>Other industries</td>
<td>14%</td>
</tr>
<tr>
<td>Transportation</td>
<td>5%</td>
</tr>
<tr>
<td>Communication</td>
<td>3%</td>
</tr>
<tr>
<td>Finance</td>
<td>6%</td>
</tr>
</tbody>
</table>

According to the most recent ICSID Caseload, the percentage of different subject-matter disputes in all ICSID cases initiated through mid-2014 equals (with a comparison of the percentages in the data set in parentheses): four percent (three percent) in agriculture, fishing, and forestry; seven percent (seven percent) in construction; 13 percent (12 percent) in electric power; seven percent (11 percent) in finance; six percent (four percent) in information and communication; 26 percent (23 percent) in the extractive industries; 13 percent (12 percent) in other industries; four percent (11 percent) in services and trade; four percent (two percent) in tourism; 10 percent (seven percent) in transportation; and six percent (six percent) in water and waste.

71 See ICSID Caseload, supra note 29.
Table 15: Dispute Subject-Matter by Percentage of Caseload (147 Cases)

The percentages of different subject-matter types of disputes in the data set are remarkably close to those in the *ICSID Caseload*. However, there is one key exception. There is a noticeable increase in disputes in the services and trade sectors; and it is in this area that may indicate some diversification of the types of disputes being adjudication in recent investment treaty arbitration cases. This category of investments is not one that has featured historically as prototypical foreign direct investment disputes. The rise in service and trade sector disputes over the past few years could be attributable to macro-factors like increased interdependence and globalization, or it could be attributable to factors associated with investment treaty arbitration specifically.\(^{72}\)

Regardless of the exact reasons for this increased diversification, there are both negative and positive legitimacy issues that could arise. On the positive side, dispute type diversification may signal that there is less evidence of structural bias in favor of particular types of disputes (e.g. those in the extractive industries). On the negative side, dispute type diversification could signal an expansion of investment treaty arbitration at a time when states may be attempting to reduce this type of dispute resolution in newly negotiated IIAs.\(^{73}\)

While there does appear to be an increase in service and trade sector disputes in the data set, there continues to be a large percentage of cases in the extractive industries sector and in the electric power sector. Combined, these two sectors constitute 57 of the 147 (39 percent) disputes in the data set, which is identical to the historical percentages indicated in the latest *ICSID Caseload*. In addition to the frequency of cases in these two sectors, it may also be relevant to note that 32 out of the 57 disputes (56 percent) in these two sectors were brought by extra-large MNEs; and that 17 of the 24 disputes (71 percent) involving companies on the Global 500 list are in the extractive industries or electric power sectors.

To summarize, a majority of the largest companies to bring disputes in the data set are energy and extractive industry companies, and the majority of disputes in these two sectors

\(^{72}\) For example, companies in the service and trade sectors might be becoming more aware of investment treaty arbitration or it may be that arbitral tribunals are accepting jurisdiction over a wider range of disputes.  
are being initiated by some of the largest companies in the world. While this empirical evidence is likely to be viewed as unsurprising, it does indicate that there continues to be a diversity issue in investment treaty arbitration in regard to both the size of claimants and the economic sector in which these companies operate.

Table 16: Claimant Win/Lose Percentage by Dispute Subject-Matter (110 Cases)

In regards to outcomes, there are a few identifiable deviations from the average success rates for all resolved cases in the data set. While tourism and transportation cases only account for eight cases in the data set, there combined success rate is 75 percent. These two sectors appear to have been very successful in litigating investment treaty cases (at least among the eight cases in the data set). It also appears that cases in the extractive industries are more successful (42 percent) than the overall win rate among all cases in the data set (30 percent). In terms of less successful claimant sectors, the construction sector did not win a single case in the data set and cases arising out of the finance and banking sectors were successful in only one out of nine cases in the data set.

Finally, it is interesting to note the sectors that may be more or less prone to discontinuing or settling cases. In cases arising out of the communication and information sector, three out of the four cases settled (75 percent); and in cases arising out of the finance and banking sectors, 45 percent of the cases were either discontinued or settled, which is higher than the overall average in the data set (30 percent). Overall, it does appear that cases arising out of distinct economic sectors may be more or less likely to be successful. However, the main caveat here is the limited size of the data set and that it is difficult to make sweeping conclusions about some sectors that were only represented by a few cases in the data set.

E. Geographic Distribution

Discussions about the geographic distribution of investment treaty arbitration disputes have often acted as a proxy for issues relating to the development status of states having to respondent to IIA claims. It is a proxy because, for the most part, most early (pre-2000) investment treaty arbitrations were brought by companies or individuals in the developed world against states in the developing world. Due to the fact that there are few developed states outside of Western Europe and North America, most of the claims originate in these two regions; and while there is a greater opportunity for diversity in the geographic
distribution of respondent states, there is a perception that investment treaty claims are targeting developing states, but only developing states in certain parts of the world. From a legitimacy perspective, the targeting of particular regions or states by claimant-investors can be problematic. In the case of South America, perceived targeting can result in exit from the regime altogether; and in the case of Ecuador, Argentina, Bolivia, and Venezuela, this is exactly what appears to be happening.\footnote{Bolivia, Ecuador, and Venezuela have all denounced the ICSID Convention in recent years. Argentina has made numerous threats about exiting the ICSID Convention. Ecuador, Venezuela, and most recently Indonesia, have also terminated a number of their BITs.}

While a diversification in the geographic distribution of states responding to investment treaty arbitration claims is possible, diversification away from claimants in Western Europe and North America may be more difficult. It will be more difficult because of the structure of investment treaty arbitration as it is currently practiced. IIAs have traditionally been signed between one developed state and one developing state. While there are exceptions to this rule,\footnote{See e.g. UNCTAD (2005). \textit{South-South Cooperation in International Investment Arrangements}, Geneva, UNCTAD; Poulsen, Lauge (2010). \textit{The Significance of South-South BITs for the International Investment Regime: A Quantitative Analysis}, Northwestern Journal of International Law & Business, vol. 30, p. 101.} this type of arrangement constitute the majority of IIAs in force. Due to the fact that the amount of outward investment between these two types of states developed capital-exporting state to developing capital-importing states) is stark, the reciprocal nature of IIAs is largely theoretical. From a legitimacy perspective, these numbers on geographic distribution in the data set indicate that investment treaty arbitration is a system of adjudication that is being used primarily by claimants from a few regions (Western Europe and North America) against states from a few (albeit different) regions.\footnote{Primarily, Latin America (South America and Central America and the Caribbean) and Eastern Europe and Central Asia.} This kind of limited geographic scope in investment treaty arbitration can lead to the perception that this is not a general system of adjudication, but rather is designed in a way that provides remedies only for claimants originating in certain parts of the world (i.e. companies in Western Europe and North America) against certain respondent states (i.e. less developed states).

\textbf{Table 17: Claimant State Geographic Region (147 Cases)}

<table>
<thead>
<tr>
<th>Geographic Region</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Europe</td>
<td>56 %</td>
</tr>
<tr>
<td>South America</td>
<td>1 %</td>
</tr>
<tr>
<td>Central America &amp; the Carribean</td>
<td>1 %</td>
</tr>
<tr>
<td>South &amp; East Asia &amp; the Pacific</td>
<td>3 %</td>
</tr>
<tr>
<td>Middle East &amp; North Africa</td>
<td>9 %</td>
</tr>
<tr>
<td>North America</td>
<td>25 %</td>
</tr>
<tr>
<td>Sub-Saharan Africa</td>
<td>0 %</td>
</tr>
<tr>
<td>Eastern Europe &amp; Central Asia</td>
<td>5 %</td>
</tr>
<tr>
<td>South &amp; East Asia &amp; the Pacific</td>
<td>3 %</td>
</tr>
<tr>
<td>Middle East &amp; North Africa</td>
<td>9 %</td>
</tr>
<tr>
<td>North America</td>
<td>25 %</td>
</tr>
</tbody>
</table>
Of the 147 cases in the data set, the claimants come from 33 different states, and the majority of claimants come from Western Europe and North America: there are 82 claimants from Western Europe, 36 claimants from North America, 13 claimants from the Middle East and North Africa, eight claimants from Eastern Europe and Central Asia, five claimants from South and East Asia and the Pacific, two claimants from South America, one claimant from Central America and the Caribbean, and no claimants from Sub-Saharan Africa.

Table 18: Claimant Win/Lose Percentage by Home State Geographic Region (110 Cases)

In terms of outcomes, there are a couple patterns worth noting. Cases involving Western European claimants are almost identical to the overall averages for all resolved cases in the data set. In other words, even though Western European claimants represent a majority of all resolved cases in the data set, they do not seem to be more or less likely to succeed in cases when compared with claimants from all other geographic regions. On the other hand, claimants from North America and the Middle East appear to have been less successful than claimants from other geographical regions (21 percent and 20 percent respectively, and in comparison with the overall win rate among all claimants in the data set of 30 percent).

The picture from the side of the respondent state is slightly more diverse than the geographic distribution of the claimant-investor. Overall, there were 48 different states who acted as respondents in cases from the data set. Of the 147 cases in the data set, the respondents came from the following regions: 66 from Eastern Europe and Central Asia, 39 from South America, 12 from the Middle East and North Africa, 12 from South and East Asia and the Pacific, six from Central America and the Caribbean, eight from North America, three from Sub-Saharan Africa, and none from Western Europe.

77 Combined, claimants from North America and Western Europe accounted for 118 out of the 147 (81 percent) of all the cases in the data set.
78 32 out of the 48 (67 percent) different respondent states in the data set defended multiple claims: there were 16 cases against Argentina; eight cases against Venezuela; seven cases against Slovakia; six cases against Ecuador and Kazakhstan; five cases against Georgia, Kyrgyzstan, Poland, Turkmenistan, and Turkey; four cases against Indonesia, Romania, Russia, and Ukraine; three cases against Canada, Czech Republic, Egypt, Guatemala, Hungary, Moldova, and the US; two cases against Albania, Algeria, Bulgaria, El Salvador, Lao, Lithuania, Macedonia, Mexico, Paraguay, Peru, and Uzbekistan.
According to the most recent ICSID Caseload, the geographic distribution of all respondent states in ICSID cases initiated through mid-2014 is fairly similar to the numbers in the data set with a few exceptions (a comparison of the percentages in the data set is given in parentheses): South America, 27 percent (27 percent); Eastern Europe and Central Asia, 24 percent (45 percent); Sub-Saharan Africa, 16 percent (two percent); Middle East and North Africa, 11 percent (nine percent); South and East Asia and the Pacific, eight percent (eight percent); Central America and the Caribbean, six percent (four percent); North America, five percent (five percent); Western Europe, three percent (zero percent).

This comparison identifies two significant shifts: 1) there is a large increase in claims against Eastern European and Central Asian states and 2) there is a significant decrease in claims against Sub-Saharan African states. The percentages for all other regions have remained relatively constant (see Table 20 above).

In terms of outcomes, there is one significant pattern that stand outs. It appears that Middle Eastern and North American respondent states have been very successful in defending claims against investors (see Table 21 below). Claimant-investors lost 67 percent (Middle East) and 57 percent (North America) of cases against respondents from these two regions in comparison with the overall loss rate of 40 percent for all cases in the data set. What is interesting here is that in the previous section on claimants geographic region, it was noted that claimants from the Middle East and North America were less likely to succeed in cases than claimants from other geographic regions.

79 See ICSID Caseload, supra note 29.
80 It is interesting to note that the ICSID Caseload does not provide information on claimant home state origins.
When compared with the fact that respondent states from these two regions were more likely to successfully defend a claim than respondents from other regions, one might assume a correlation. The correlation is that these two regions might have a high proportion of intra-regional disputes, and that respondent states in these regions are successfully defending cases against claimants from the same region. The empirical data supports this correlation. Of the seven cases against North American respondent states, a majority of the cases were brought against claimants from North American home states. Likewise, of the nine cases in the data set brought against Middle Eastern respondent states, a majority of the cases were brought against claimants from Middle Eastern home states. The North American cases can be explained by the NAFTA and the unsuccessful cases brought by Canadian investors against the US (the US to date has not lost a NAFTA claim). The Middle Eastern cases are less clear as to their cause. It could be that foreign investment in this region is more likely to be inter-regional as opposed to international; but this is merely speculative and requires further research.

From the basic analysis of geographic distribution of claimants and respondents, four major patterns emerge: 1) the prevalence of claimants from North America and Western Europe home states and their relative absence as respondent states; 2) the prevalence of disputes against Eastern European and Central Asian respondents; 3) the prevalence of disputes between Western European and North American claimants against Latin American (South America and Central America and the Caribbean) respondent states; and 4) the prevalence of disputes between EU Member States that flow exclusively from west to east.

Table 22: Geographic Distribution of Claimant/Respondent by Percentage (147 Cases)
As to the first pattern, 118 of the 147 claimants in the data set came from North America and Western Europe; and with exception of multiple claims from Turkey, Russia, and Kuwait, all of the repeat claimant home states are from North America or Western Europe.\textsuperscript{81} While North American states acted as respondents in eight cases, there are no cases in the data set where a Western European state acted as respondent. These numbers indicate that investment treaty arbitration continues to be dominated primarily by Western European and North America claimants with limited perceived risk of being sued as a respondent.\textsuperscript{82}

The second pattern concerns the large number of cases against Eastern European and Central Asian states. Sixty-six out of 147 cases in the data set were brought against states from Eastern Europe and Central Asia. This accounts for 45 percent of all cases in the data set and is the most heavily represented region in terms of respondent states. Not only do these cases represent a large percentage of the caseload in the data set, they also represent a major increase when compared with historical numbers from ICSID.\textsuperscript{83} However, explaining this upsurge in cases from this region may not be straightforward: 1) there does not seem to be any particular states that are being singled out or targeted (unlike the situation in Latin America where Venezuela, Ecuador, and Argentina constitute the majority of cases brought in that region), and 2) the cases in this region are being brought by claimants from a fairly diverse set of home states.\textsuperscript{84} Given this situation, one might speculate that the cause for such a dramatic increase in resort to investment treaty arbitration in this region is attributable to an increased awareness and promotion of the investment treaty regime among counsel representing claimants who have invested in this region.

The third pattern focuses on the high percentage of cases in the data set between North American and Western European claimants against Latin American (South America and Central America and the Caribbean) respondent states. While Latin American claimants brought only three claims, they defended 45 claims.\textsuperscript{85} However, in addition to the frequency

\textsuperscript{81} There are 31 claimants from the US; 17 from the Netherlands; 11 from Germany; nine from Spain and the United Kingdom (UK); seven from France; six from Italy, Switzerland, and Turkey; five from Russia, Canada, and Cyprus; four from Belgium-Luxembourg; three from Austria; two from Greece, Kuwait, and Australia.

\textsuperscript{82} This may be changing however. While there are no cases with Western European states as respondent in the data set, there are a number of treaty-based arbitration that have been initiated against Germany, Spain, and Italy in the last few years that remain pending. See e.g. Blusun \textit{v} Italy (ICSID); Vattenfall \textit{v} Germany (ICSID); Masdar Solar \textit{v} Spain (ICSID); Eiser Infrastructure \textit{v} Spain (ICSID); Antin Infrastructure \textit{v} Spain (ICSID); RREEF Infrastructure \textit{v} Spain (ICSID); CSP Equity \textit{v} Spain (SCC); Isolux Infrastructure \textit{v} Spain (SCC); Charanne \textit{v} Spain (SCC); PV Investors \textit{v} Spain (UNCITRAL); RENERGY \textit{v} Spain (ICSID); Infrared \textit{v} Spain (ICSID); Nextra \textit{v} Spain (ICSID).

\textsuperscript{83} From 24 percent in the \textit{ICSID Caseload} to 45 percent of the overall caseload in the data set. This is a major shift away from the previously dominant region of Latin America.

\textsuperscript{84} While there is more diversity of claimant home state regions in cases against Eastern European and Central Asian respondents relative to other respondent state regions, most of the claims are being brought by claimants from Western European or North American home states (48 out of 66 cases).

\textsuperscript{85} All of the claimants not from North America or Western Europe are from within the Latin American region (Barbados, Chile, Ecuador).
of Latin American cases brought by Western European and North American investors, the size of these claimants also appears relevant in this context. Of the 45 cases in the data set where a Latin American state acted as respondent, 26 are cases initiated by extra-large MNEs (11 cases) and Global 500 companies (15 cases). 86 A hypothesis for why so many extra-large MNE claimants are concentrated in cases from Latin America is that these cases largely arise out of major shifts in political ideology that result in non-negotiable policy shifts in attitudes towards foreign investors. Where extra-large MNEs – in many cases – might have been able to use their power, size and financial resources to resolve disputes outside of formal adjudication in the past, the cases that have arisen in states such as Venezuela and Ecuador appear to be challenging such assumptions.

The fourth and final pattern concerns the issue of investment treaty arbitration claims based on intra-EU BITs or the ECT. Of the 66 cases from Eastern Europe and Central Asia, 19 of the cases are between a claimant and respondent from within the EU and based on an intra-EU BIT or the ECT. Since there are no cases in the data set against Western European respondents, it is safe to conclude that all 19 of the intra-EU disputes were unidirectional (with claimants exclusively from Western Europe and respondents exclusively from Eastern Europe). 87 While these cases do not represent a significant percentage of the caseload in the data set (13 percent), they may represent a type of dispute that is increasingly likely to be challenged by another international legal order, namely the EU. Despite EU Commission interventions in cases based on intra-EU BITs and a position holding that arbitral tribunals constituted under intra-EU BITs do not have jurisdiction to adjudicate claims, it appears that EU Member States are continuing to invoke intra-EU BITs and the ECT despite post-Lisbon Treaty EU competence over foreign investment. Given that arbitral tribunals have not had any problem upholding jurisdiction over claims based on intra-EU BITs, the EU Commission’s latest strategy is to issue injunctions against the enforcement of investment treaty arbitration awards rendered against Member States. 88

F. Development Status

The development status of claimant home states and respondent host states in investment treaty arbitration is a legitimacy issue frequently discussed in the discourse. 89 While most first generation or early BITs were promoted by developed states to protect foreign direct investment in less developed states, it is then unsurprising that most of these instruments continue to generate disputes with developed state claimants against less developed state

86 Of the 24 cases in the data set involving Global 500 companies, 15 are against Latin American states.
87 It is of course possible to have cases between two Eastern European states (that are both members of the EU), but there are no such disputes in the data set.
88 See i.e. Micula v Romania (ICSID). The EU Commission issued an injunction against Romania in August 2014 staying enforcement of an ICSID award pending a state aid investigation.
respondents. From a legitimacy perspective, the question is whether this phenomenon should continue to persist and whether there is a means for reducing the unidirectional trend. While there are cases between developing states and cases between developed states, they remain a distinct minority. In terms of the diversification of disputes, the issue of development status is one of the more profound difficulties for investment treaty arbitration. There is a continuing negative perception among critics that investment treaty arbitration is designed exclusively for companies in the developed world, and that these companies are only suing developing world states. While this perception is generally validated by the numbers in the data set, there a number of key nuances that are relevant.

Table 23: Claimant State Development Status (147 Cases)

<table>
<thead>
<tr>
<th>Development Status</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Developed states</td>
<td>131</td>
</tr>
<tr>
<td>Emerging Economy states</td>
<td>9</td>
</tr>
<tr>
<td>Developing states</td>
<td>7</td>
</tr>
<tr>
<td>Least developed countries</td>
<td>0</td>
</tr>
</tbody>
</table>

For the purposes of this empirical study, the development status of claimant home states and respondent host states will be divided into four categories: 1) developed states; 2) emerging economy states; 3) developing states; and 4) least developed countries (LDCs). Overall, claimants from developed states account for 131 out of the 147 cases in the data set. Developed states acted as respondents in 17 cases. There is a total of eight claimants and 63 respondents from an emerging economy state, eight claimants and 64 respondents from a developing state, and no claimants and three respondents from an LDC.

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90 Developed states are those that the International Monetary Fund (IMF) categorize as advanced economies: Australia, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, UK, US.

91 Emerging Economy states are categorized by the IMF as the following states: Argentina, Brazil, Bulgaria, Chile, China, Colombia, Hungary, India, Indonesia, Latvia, Lithuania, Malaysia, Mexico, Pakistan, Peru, Philippines, Poland, Romania, Russia, South Africa, Thailand, Turkey, Ukraine, Venezuela.

92 Developing are those that are not spelled out in the other three categories.

93 The UN categorizes LDCs and they include the following states: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, São Tomé & Príncipe, Samoa, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Togo, Tanzania, Tuvalu Uganda, Vanuatu, Yemen, Zambia.
From this information, there is a clear pattern: 1) developed states act as claimants in an overwhelming majority of cases, 2) these developed state claimants are bringing suit against respondents from developing and emerging economy states, and 3) LDCs are largely excluded from cases in the data set. The one nuance in the data set is the evidence that, while developed states are not defending many claims, the number of emerging economy states defending claims is significant (43 percent); and the number of LDCs in the data set is very limited. This may support a claim that investment treaty arbitration is being used against developing states, but that these developing states are actually fairly well-developed in economic terms (i.e. BRICS\textsuperscript{94} and MIST\textsuperscript{95} states).

Table 25: Development Status of Claimant/Respondent by Number of Cases (147 Cases)

From these four categorizations of development status, the data set of 147 cases is captured by nine different combinations (out of a total of 16 possible combinations). The majority of cases are between a developed state claimant and an emerging economy or developing state respondent. These two types of cases accounted for 121 out of the 147 cases (82 percent) in the data set. Table 25 above details all of the cases according to the development status of the claimant state and the respondent state.

Since the vast majority of the cases in the data set are initiated by developed state claimants, it is thus unsurprising that the vast majority of the outcome categories are dominated by developed state claimants. Of the 34 cases where the claimant won on the merits, 30 of these cases (88 percent) were initiated by claimants from developed states. Of the 43 cases where the claimant lost on jurisdiction or the merits, 39 of the cases (91 percent) were initiated by developed states.

\textsuperscript{94} Brazil, Russia, India, China, South Africa.

\textsuperscript{95} Mexico, Indonesia, South Korea, Turkey.
percent) were initiated by claimants from developing states. While it may be concerning that investment treaty arbitration is so dominated by developed state claimants, it does not appear that these claimants are winning or losing cases disproportionately with their overall involvement in cases (89 percent).  

**Table 26: Claimant Win/Lose Percentages by Home State Development Status (110 Cases)**

When looking at comparisons between win/lose ratios according to claimant home state development status (Table 26 above), it appears that in the few cases involving claimants from emerging economy or developing home states (12 cases), claimants actually have a slightly better chance of succeeding on a claim than the overall average for all cases (42 percent versus 30 percent). This might indicate that slight variations in development status do have an impact on outcomes; but in this case, the evidence actually supports a somewhat counterintuitive proposition: claimants from an emerging economy or developing state actually has a high chance of succeeding on a claim than does a claimant from a developed state.

While the claimant side of the dispute is quite one dimensional in terms of development status, the development status of the respondent is more varied and may be of particular importance in terms of outcomes. Of the 110 fully resolved cases in the data set, the outcomes related to the respondent’s development status are as follows:  

1. where respondent is a developed state, the claimant wins 13 percent of the time;  
2. where respondent is an emerging economy state, the claimant wins 30 percent of the time;  
3. where respondent is a developing state, the claimant wins 37 percent of the time; and  
4. where respondent is an LDC, the claimant wins 34 percent of the time (see Table 27 below).

From these numbers, there is one pattern that is very telling: developed state respondents do not lose as many cases as other types of states. In the data set, a developed state respondent only lost two cases and in both of these cases the respondent was a developed state from Eastern Europe (Lithuania and Slovakia). In the last three years (the data set), no developed states from North America or Western Europe have lost an investment treaty arbitration. There are at least two explanations for this phenomenon:  

96 This is a similar finding to an earlier empirical study: see Franck, supra note 17; but compare with Van Harten, supra note 17.  

97 For reference, overall percentages for the 110 fully resolved cases in the data set: claimant wins (30 percent), claimant loses (40 percent), and claimant discontinues or settles (30 percent).
have stronger regulatory governance structures (i.e. due process, transparency, nondiscrimination, etcetera) than developing states and therefore it is less likely for a treaty violation to be found, or 2) developed states have more capacity (legal, bureaucratic, and financial) to successfully defend investment treaty claims. Either way, there does seem to be a strong correlation between level of economic development and the likelihood of successfully defending an investment treaty claim.

Table 27: Claimant Win/Lose Percentages by Respondent Development Status (110 Cases)

Of all the empirical evidence presented in this article, the fact that developed states only infrequently lose investment treaty claims is highly concerning from a legitimacy perspective. It indicates that governance and capacity are a major determinant in outcome in investment treaty arbitration. This means that any respondent state that does not meet a certain governance standard will be at a distinct disadvantage in any investment treaty arbitration even where the alleged violation of the relevant treaty may be both legitimate and reasonable. The question for investment treaty arbitration is whether developing states are held to the same standard of governance as a developed state or whether there should be differentiated standards in evaluating treaty breaches that are sensitive to development status.98

Overall, the data set supports a number of findings in regard to the economic development indicators of states: 1) the vast majority of claimants come from developed states, 2) developed state respondents constitute a small percentage of cases in the data set (but they also do not lose many of these cases), 3) LDCs have not been significantly involved in investment treaty cases over the past three years, 4) developing and emerging economy states are the vast majority of respondents in cases in the data set, and 5) claimants from developed state are not winning cases disproportionately to their overall involvement in cases in the data set. In regards to legitimacy issues, it may be problematic from a legal capacity perspective if developed states are more likely to successfully defend a claim than a developing state.99

98 See Kriebaum, supra note 89.
99 While one explanation for the fact that developing states are less likely to successfully defend an investment treaty claim could be an issue of governance (i.e. developing state legal and regulatory processes may give rise to more IIA violations), another explanation is that developing state legal capacity is the problem and that legal
Before concluding this section on development status, a brief examination of human development status as compared with economic development status of claimant home states and respondent host states will be presented. This section will look at the UN’s 2014 Human Development Index (HDI) in relation to home and host state involvement in investment treaty arbitration. The HDI ranks states according to four levels of human development: 1) very high human development, 2) high human development, 3) medium human development, and 4) low human development.

**Table 28: Claimant State HDI Score (147 Cases)**

![Pie chart showing the distribution of claimant state HDI scores](chart.png)

Overall, a correlation of HDI scores with state involvement in investment treaty arbitration does not deviate significantly from indicators based on a state’s economic development status. While it does appear that economic development status may have some impact on outcome, it likewise appears that human development status also affects outcome. Generally speaking, the vast majority of claims in the data set are brought by claimants from very high development states against less developed respondent states; and respondent states with very high human development status are more likely to successfully defend claims than less developed respondent states.

When referenced against the data set, the following correlations emerge: 1) very high development scores equal 128 claimant home states and 43 respondent host states, 2) high development scores equal 17 claimant home states and 53 respondent host states, 3) medium development equals two claimant home states and 47 respondent host states, and 4) low development scores equal zero claimant home states and four respondent host states.


101 It is interesting to note that the HDI are largely decoupled from many of the policy issues relating to development status classification of states (which focus on the economic development of states) and yet a comparison between the HDI and the claimant and respondent states in the data set demonstrate that human development and economic development status correlate strongly.
Table 29: Respondent State HDI Score (147 Cases)

<table>
<thead>
<tr>
<th>HDI Score</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very High</td>
<td>45</td>
</tr>
<tr>
<td>High</td>
<td>41</td>
</tr>
<tr>
<td>Medium</td>
<td>39</td>
</tr>
<tr>
<td>Low</td>
<td>8</td>
</tr>
</tbody>
</table>

The major difference between human development scores and economic development status when compared to state involvement in investment treaty arbitration is on the respondent side of the dispute. Table 30 below shows how much more diverse the respondent states are in terms of human development scores (compare with Table 23 above). Where economic development status shows a high percentage of cases from emerging economy and developing states, human development scores are evenly distributed between very high, high, and medium human development scoring states.

Table 30: HDI Score of Claimant/Respondent by Number of Cases (147 Cases)

In general, the correlations show that in 97 percent of the cases (142 out of 147 cases) the claimant had a home state human development score higher or equal to that of the respondent host state. This percentage is only slightly lower than the 99 percent of the cases (144 out of 147 cases) where the claimant host state had an economic development status higher or equal to that of the host state. It is clear from these numbers that investment treaty arbitration is used almost exclusively by claimant-investors coming from a state whose development status is higher than that of the respondent state. Overall, this comparison supports the view that investment treaty arbitration is a primarily a unidirectional system of adjudication in regard to both human and economic development status: more developed claimant home states versus less developed respondent host states.

In terms of outcomes on the claimant side of the dispute, the HDI score of the home state is so dominated by states with very high development status that drawing any conclusions about win/lose ratios for claimants coming from less developed home states will not be helpful or representative (see Table 31 below). The only percentage that is slightly out of sync with overall percentages is in cases where the claimant home state had a high HDI score. In these 15 cases, it appears that the claimant discontinued or settled their cases at a
high rate than the overall average (46 percent as opposed to an overall percentage of 30 percent).

Table 31: Claimant Win/Lose Percentages by Home State HDI Score (110 Cases)

<table>
<thead>
<tr>
<th>Home State HDI Score</th>
<th>Win</th>
<th>Lose</th>
<th>Dis/Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very High (93 Cases)</td>
<td>30</td>
<td>42</td>
<td>28</td>
</tr>
<tr>
<td>High (15 Cases)</td>
<td>27</td>
<td>27</td>
<td>46</td>
</tr>
<tr>
<td>Medium (2 Cases)</td>
<td>50</td>
<td>50</td>
<td>0</td>
</tr>
<tr>
<td>Low (0 Cases)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>All Cases (110 Cases)</td>
<td>30</td>
<td>40</td>
<td>30</td>
</tr>
</tbody>
</table>

When looking at win/loss percentages on the respondent side of the dispute, two interesting patterns are relevant. First, and consistent with the respondent state’s economic development status, respondent states with a very high HDI score are more likely to successfully defend an investment treaty claim than respondent states with lower HDI scores. In fact, if one looks at Table 32 below, the lower the HDI score, the more likely that respondent state will lose an investment treaty case.

Table 32: Claimant Win/Lose Percentages by Respondent HDI Score (110 Cases)

<table>
<thead>
<tr>
<th>Respondent HDI Score</th>
<th>Win</th>
<th>Lose</th>
<th>Dis/Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very High (32 Cases)</td>
<td>22</td>
<td>50</td>
<td>28</td>
</tr>
<tr>
<td>High (40 Cases)</td>
<td>35</td>
<td>40</td>
<td>25</td>
</tr>
<tr>
<td>Medium (35 Cases)</td>
<td>34</td>
<td>34</td>
<td>32</td>
</tr>
<tr>
<td>Low (3 Cases)</td>
<td>33</td>
<td>33</td>
<td>34</td>
</tr>
<tr>
<td>All Cases (110 Cases)</td>
<td>30</td>
<td>40</td>
<td>30</td>
</tr>
</tbody>
</table>

In concluding this section and before moving to the future of empirical research in investment treaty arbitration, a few remarks on the legitimacy of investment treaty arbitration in relation to the perceived targeting of particular states and geographic regions, the financial and legal capacity to defend claims,¹⁰² and the development status of respondent states is warranted. There is a perception that the majority of investment treaty claims are initiated by developed state companies against less developed states hosting their investment; and for the most part this perception reflects reality. Despite the apparent diversification in the types (subject-matter) of disputes being brought,¹⁰³ there does not appear to be a corresponding diversity in the types of respondent states. Holistically speaking, investment treaty arbitration is used against developing states. This kind of


¹⁰³ See Section 2D above.
perceived targeting – whether it be a structural problem or not\textsuperscript{104} – detracts from the legitimacy of investment treaty arbitration. There remain a number of specific states in Latin America that are frequently sued,\textsuperscript{105} and it is these same states that are attempting to remove themselves from the investment treaty regime altogether.

4. Future Evidence-Based Research in Investment Treaty Arbitration

This article attempted to provide an evaluation of the state-of-the-art in investment treaty arbitration through an empirical analysis of recent decisions. While there has been voluminous scholarly attention to this area of law over the past decade, the amount of empirical research being conducted on investment treaty arbitration specifically (and international law generally), only accounts for a very small percentage of this output. The largely decentralized structure of investment treaty arbitration can provide many challenges to its empirical study; but it also means that qualitative and quantitative empirical studies have the potential to be particularly valuable and insightful in providing a comprehensive picture of this rapidly evolving and institutionally fragmented field of international law.

The empirical data collected for this study sought to analyze investment treaty arbitration practice from the last three years. While the evidence from the data set does indicate that there is some diversity in the types of cases being brought, there continue to be a large number of cases that raise questions of legitimacy in the context of diversity: a large number of cases focused on particular economic sectors,\textsuperscript{106} a large number of cases against particular states and geographic regions,\textsuperscript{107} a large number of cases brought by corporations from the developed world,\textsuperscript{108} and the majority of cases continue to be between developed state claimants and developing state respondents.\textsuperscript{109} In terms of legitimacy, investment treaty arbitration could benefit from increased diversification, especially in regard to small-scale investors and investors from developing states (on the claimant side) and in regards to developed states and geographically diverse states (on the respondent side).

While this article highlighted some of the issues that continue to challenge investment treaty arbitration, it also highlighted some of the challenges for scholars pursuing evidence-based research in this specialized field of international law. The issue of transparency and public availability of awards is improving slightly but continues to present significant challenges. Part of the problem here stems from the decentralized and largely non-

\textsuperscript{104} The structural problem here refers to the fact that the majority of IIAs in force are between a developed state (in North America and Western Europe) and a developing state. However, there are exceptions to this general pattern: 1) there are an increasing number of so-called south-south IIAs being negotiated and 2) China has one of the largest BIT programs in the world (though these BITs have not resulted in many disputes to date).

\textsuperscript{105} Argentina, Venezuela, Bolivia, and Ecuador.

\textsuperscript{106} Cases continue to be dominated by the extractive industry sector and the electric power sector.

\textsuperscript{107} Venezuela, Ecuador, and Argentina continue to act as respondents in a high number of cases. Eastern European and Central Asian states are becoming increasingly frequent respondents.

\textsuperscript{108} The majority of cases in the data set are from large companies located in North America or Western Europe.

\textsuperscript{109} Cases of this type account for over 76 percent of all cases in the data set.
institutionalized structure of investment treaty arbitration. There is no single institution that can provide a collective registry of all cases: they remain scattered among a number of institutions (in some cases, they are not governed by any institution at all).\(^{110}\) However, the entire problem of transparency cannot be blamed on this decentralized structure alone. Institutions such as ICSID and the PCA have done little to promote increased transparency. In fact, the recent work by UNCITRAL and its new rules on investment treaty arbitration transparency far exceeds any efforts made by either ICSID, the PCA, or other commercial arbitration centers (such as the SCC). Treaty-based arbitrations ought to be known and publicly available; and institutions ought to make every effort to ensure that this happens.

As to empirical research itself, scholars face a number of challenges. First of all, political scientists working this field to date have focused almost exclusively on IIAs and not the actual disputes.\(^{111}\) And while institutions such as the OECD and UNCTAD do some empirical research (on the disputes), their work to date has been selective and not comprehensive. ICSID keeps statistics of its cases, but they are lacking in their usefulness for scholarly research;\(^{112}\) and the very useful website, Investment Treaty Arbitration, provides a clearinghouse for all published awards, but it is not a coded database.\(^{113}\)

Of the scholars doing empirical-based research on investment treaty arbitration, there are few scholars whose primary interest has been on the empirical evaluation of investment treaty arbitration.\(^{114}\) With that said, much of the earlier empirical work on investment treaty

\(^{110}\) While some UNCITRAL arbitrations are administered by institutions such as the PCA, many UNCITRAL arbitrations are completely \textit{ad hoc} and unrelated to any arbitral institution.


\(^{112}\) The \textit{ICSID Caseload} is very limited and can only be used as basic indicators in empirical studies.


So, while there are good examples of scholars turning to the empirical study of investment treaty arbitration, there remains a lot of work to be done. Investment treaty arbitration research continues to lack a comprehensive data set of all disputes to date. This is limiting and also means that scholars working in this field are having to create their own databases for their work. This has created a perception that the empirical studies themselves might be biased and that they are being pursued as a basis for particular ideological agendas.\footnote{Giorgetti, Chiara (2013). *Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration*, Santa Clara Journal of International Law, vol. 12, p. 263.} Going forward, empirical scholars working on investment treaty arbitration ought to collaborate more frequently and pool information so that perceptions of bias can be minimized.