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THINK

POLICY BRIEF

REFORMING INVESTOR-STATE DISPUTE SETTLEMENT AND PROMOTION OF TRADE AND INVESTMENT COOPERATION

Task Force 1
TRADE, INVESTMENT AND GROWTH

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موجز السياسة

إصلاح تسوية المنازعات بين المستثمرين والدول وتعزيز التعاون التجاري والاستثماري

فريق العمل الأول

التجارة والاستثمار والنمو

المؤلفون

البروفيسور لوكاس مستليز، الدكتور فيصل الفضل، البروفيسور أنتون أسوسكوف، الدكتورة كرينا بالتاج، البروفيسور جيمس كلاكستن، البروفيسور مارك فيلدمان، الدكتور روبرتو كاسترو دي فيجويريدو، الدكتور كابير دوجال، البروفيسور سيرجيو بويغ، جياماركو راو، البروفيسور (العميد) وينهوا شان، البروفيسور أتيلا تانزي

ABSTRACT

The fragmentation of international investment agreements (IIAs) is an urgent issue for reform because fragmentation results in divergent levels of protection and inconsistencies in applying and interpreting treaty provisions.

This brief suggests that reducing fragmentation and enacting a multilateral or plurilateral investment agreement covering jurisdiction, substantive protection, and procedure, would increase investment and empower small and medium size enterprises (SMEs) to invest. Reforms must go beyond mere investment/investor protection to a more comprehensive set of objectives including sustainable development, dispute prevention, environmental protection, and protecting SME investments.

A second recommendation relates to a new “institutionalization” by proposing that any new institution is headquartered in an emerging market outside traditional Investor-State Dispute Settlement (ISDS) centers.

يصنِّف هذا الموجز السياسي مشكلةَ تجزّؤ اتفاقيات الاستثمار الدولية كمشكلة رئيسية بحاجة إلى إصلاح عاجل، وذلك لما لها من عواقب في تباين مستويات الحماية، وعدم الاتساق في تطبيق أحكام المعاهدات وتفسيرها. ويقترح هذا الموجز إلى الحد من التجزئة، وأن تُستبدل باتفاقية استثمار جماعية أو متعددة الأطراف، تشمل الولاية القضائية والإجراءات والحماية الموضوعية. وسيكون لهذاالاقتراح تأثير إيجابي في تسهيل الاستثمار، وسيُمكِّن كذلك الشركات الصغيرة والمتوسطة من الاستثمار. ومن الأهمية بمكان إعادة تحديد معايير تركيز الاهتمام وتحويله من مجرد حماية الاستثمار/المستثمرين إلى شبكة أهداف متعددة الجوانب، تشمل التنمية المستدامة، وتسهيل الاستثمار وتعزيزه، ومنع حدوث النزاعات، وتعزيز المسؤولية الاجتماعية للشركات ومسؤولية المستثمرين، وحماية البيئة، وتسهيل وصول الشركات الصغيرة والمتوسطة لحماية الاستثمار. كما أن هناك توصية ثانية تخص "إضفاء الطابع المؤسسي" الجديد، وذلك من خلال ضمان أن يكون المقر الرئيسي لأي مؤسسة جديدة في سوق ناشئة خارج المراكز التقليدية لتسوية المنازعات بين المستثمرين والدول (ISDS).

CHALLENGE

The legitimacy of the existing system of international investment law has been debated in recent years because it relies on Investor-State Dispute Settlements (ISDS), a system based on international commercial arbitration. Several international stakeholders propose significant reforms either within the existing system (e.g., the International Centre for the Settlement of Investment Disputes [ICSID]), or potentially more substantial and radical reforms (e.g., within the United Nations Commission on International Trade Law [UNCITRAL]), which could lead to the abolition of the current arbitration regime and its replacement with a Multilateral Investment Court.

The main advantage of the current regime is its neutrality and non-political character. However, some current reform discussions exhibit a return to nationalist populism and politicization, as new disputes often become domestic political controversies. A new system might safeguard neutrality and support depoliticization, but could also affect investor perceptions and foreign direct investment (FDI) flows[1]. In that case, reverting to national courts may be a tempting solution, but risks further fragmentation of the system, which would lead to gross inconsistencies. It is essential to have international investment agreements (IIAs) interpreted and applied by internationally minded adjudicators who respect the origin and application of IIA norms, emancipated from domestic notions and prejudices.

It is pertinent to explore all possible solutions involving both procedural and substantive law to ensure multilateralism and upholding of the rule of law, as well as enhance investment protection and promotion. Investment flows and sustainable FDI are key objectives of all countries, both developed and developing. While it is inevitable that investment flows are unevenly distributed in the global economy, with some countries being net FDI importers and others being net FDI exporters (UNCTAD n.d.), facilitation of investment flows is beneficial for both. FDI exporters are also major FDI importers, and FDI flows contribute to global financial growth.

1. We also want to point out the empirical uncertainty about whether the existing system has resulted in an increase in FDI flows.

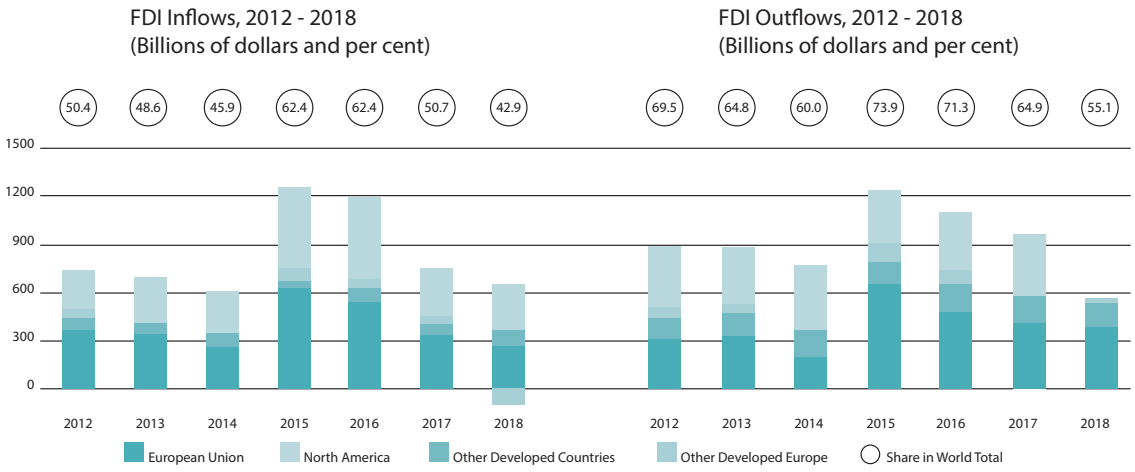

Figure 1: **Figures from the United Nations Conference on Trade and Development (UNCTAD 2018a, 2018b)**

The fragmentation of IIAs is an urgent issue for reform because fragmentation results in divergent levels of protection and inconsistencies in applying and interpreting treaty provisions.

This brief suggests that reducing fragmentation and enacting a multilateral or plurilateral investment agreement covering jurisdiction, substantive protection, and procedure would increase investment and empower small and medium enterprises (SMEs) to invest. Reforms must go beyond mere investment/investor protection to a more comprehensive set of objectives including sustainable development, dispute prevention, environmental protection, and protecting SME investments.

A second recommendation relates to a new "institutionalization" by proposing that any new institution is headquartered in an emerging market outside traditional ISDS centers.

Challenges to be addressed include:
(a) Tackling global trade imbalances and protectionism,
(b) Attracting sustainable FDI,
(c) Fostering a supportive, open, and inclusive trade and investment system,
(d) Enhancing trade policies and agreements, and
(e) Confronting challenges for SMEs.

The objective is to **include recommendations that form policy guidelines** in order to enact **a multilateral or plurilateral investment agreement (MIA or PIA)** covering both substantive law and procedural law matters, and addressing jurisdictional concerns. Such comprehensive reform would ensure both a new global covenant for international investment and that foreign investment is effectively promoted and protected.

It is also critical to have recommendations for **dispute avoidance** and **dispute prevention,** as dispute settlement mechanisms ought to be a last resort. It is critical to involve both developed and developing countries in working conferences; countries with diverse socio-economic backgrounds and cultures; as well as various stakeholders, including legal representatives.

The current system is highly fragmented, with more than 3,000 IIAs (bilateral investment treaties [BITs]), several free trade agreements (FTAs), and a series of regional or sectoral multilateral investment agreements. There are various ways of addressing fragmentation, but a compelling option would be enactment of an MIA or a PIA, which would not only address inconsistencies and fragmentation, but would also create a level playing field. Such an agreement would eliminate the need to resort to mechanisms such as most-favored-nation clauses. The drafting of a new MIA or a PIA aligned with the current objectives of sustainable development would provide a better framework for investment facilitation, regulation, promotion, and protection. This would enable developing countries to better formulate their objectives, not only as FDI recipients, but also as potential FDI exporters, while balancing their own needs with the objectives of developed economies. An MIA or a PIA would build upon the G20 Guiding Principles for Global Investment Policymaking developed in 2016. A new MIA or a PIA must be supported by a new institution that should be located in a G20 country that is an emerging market, and not a traditional ISDS center. Placing the new institution outside a traditional ISDS center would stimulate regional interest and foster FDI growth while building capacity.

This policy brief aligns with the G20 “Empowering People” agenda and the objectives of Task Force 1, as it deals with financial nationalism: attracting sustainable FDI; fostering a supportive, open, and inclusive trade and investment system; enhancing trade policies and agreements; and supporting SMEs. The G20 provides a unique forum for idea exchange and policy promotion. The aftermath of the COVID-19 pandemic will also impact FDI flows, claims contemplated by investors, and the prospect of such claims when states impose restrictions as they reopen.

PROPOSAL

1. Introduction

This policy brief identifies the persistent fragmentation of IIAs as an urgent issue for reform. This is true in both the BIT and FTA forms, resulting in divergent levels of protection and inconsistencies in the application and interpretation of the provisions of these treaties, mainly by arbitral tribunals[2].

This brief suggests that **reducing fragmentation** or even abolishing the current investment regime and replacing it with an MIA or a PIA covering jurisdiction, substantive protection, and procedure, will have a positive impact on investment facilitation and, with adequate protections, would empower SMEs to invest.

During the reform process, it is essential to expand the system's objectives from mere protection of investments and investors to more comprehensive objectives that include sustainable development; investment facilitation and promotion; dispute avoidance and prevention; protecting corporate social responsibility, investor responsibility, and the environment; and facilitating access of SMEs to investment protection.

An additional suggestion proposes a new "institutionalization," while ensuring that any new institution has its headquarters in an emerging market and outside the traditional ISDS centers.

2. Historical Approach

2.1. ISDS and Investment Protection

International investment law developed as a system of legal protections for investors from developed states that invested in less developed states. Proponents of the system maintained that it encouraged the flow of capital, technology, and management expertise to states where they were most needed. From this origin, the system has diversified to protect investments originating from and destined for both developed and developing states.

2. This is part of the larger picture of fragmentation of public international law. See International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission UN Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected UN Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi).

Legal protections for investments were first introduced into state contracts (Quak 2018, 2–3) in the late 19th century, and later into bilateral and multilateral treaties with investment protections. The current regime took shape during the early 1960s[3]. A common feature of current investment treaties is that they place obligations on states but not on investors. Attempts to conclude a multilateral instrument with substantive protections that would attract broad membership, as the General Agreement on Tariffs and Trade has achieved for trade, have proven unsuccessful (with some notable exceptions, like the CP-TPP) (2018). There are now more than 3,280 treaties (with 34 treaty terminations and 22 new treaties in 2019) and no fewer than 2,654 IIAs in force that specify investment protections. Developed, developing, and transitional economies have all been active in concluding IIAs. The obligations in those instruments tend to be similar in substance but are expressed in broad and sometimes ambiguous terms.

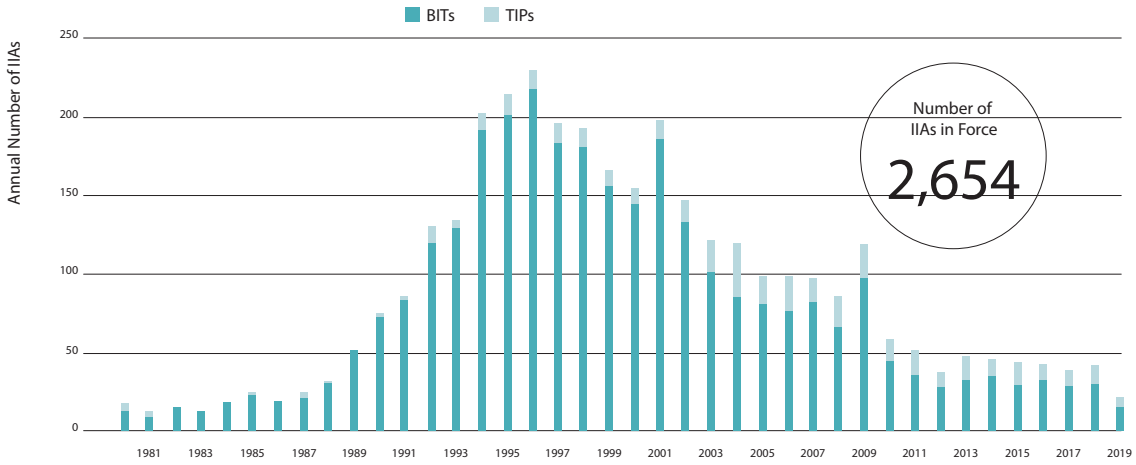

Figure 1: **Figures from UNCTAD (2020)**

Source: **UNCTAD, IIA Navigator**

3. The BIT between Germany and Pakistan which entered into force in 1961 was the first of the new generation of BITs. Treaty between The Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Germ.-Pak., November 25, 1959, UNTS Bd 457 S 23.

Individuals and businesses mistreated by their host states abroad have historically relied on their home states to pursue remedies through international diplomacy, which effectively shifts the control over the outcomes of investors' activities to states. In contrast, investment instruments have established the right of investors to bring international arbitration claims directly against the states hosting their investments. Typical disputes would arise out of direct or indirect expropriation without compensation, treatment which falls short of the practices specified by the fair and equitable treatment standard, and discriminatory conduct by states, notably in the form of taxation, refusal of certain benefits, or prevention of market access by refusal to issue licenses. The arbitrators in these proceedings are chosen by the parties, and at times, with assistance from institutions. The awards from proceedings are typically published, and tend not to be subject to appeal on grounds of mistakes of law or misinterpretation of facts by tribunals.

The increase in foreign investment beginning after World War II, combined with the growth in the number of investment treaties in the early 1990s, resulted in a rapid increase in investor-state arbitrations that began in the late 1990s[4]. It is estimated that there have been at least 1,000 investor-state arbitrations since then (IIA 2019,1). The growth in the number of arbitrations and the imprecise expressions of state commitments in treaties have resulted in a shift of responsibility for interpreting state commitments in treaties from the state treaty parties to arbitrators. Meanwhile, the lack of a formal system of precedent and the substantial fragmentation of international treaties means that arbitrators have sometimes interpreted identical or similar provisions differently.

The ICSID was established in 1966 to facilitate international investment dispute settlement. The ICSID provides procedural rules and administrative services for this purpose and has overseen about 70% of investor-state arbitrations[5]. Among other dispute-resolution processes, the ICSID administers self-contained arbitration proceedings, independent of any place of arbitration, to disputants that qualify under the ICSID Convention. This process has treaty-based procedures for challenging arbitrators and arbitral awards, and enforcing arbitral awards.

4. See IIA 2019 (reporting 942 cumulative arbitrations including ICSID and non-ICSID cases through 2018), and the ICSID website (reporting 80 registered cases from January 1, 2019 to April 6, 2020).
5. ICSID, Guide to Membership in the ICSID Convention, 1, https://icsid.worldbank.org/en/Documents/about/Guide%20to%20Membership%20in%20the%20ICSID%20Convention%20-%20EN.pdf.

Investor-state arbitrations have also been administered by other institutions, including the Permanent Court of Arbitration[6], and heard in ad hoc proceedings without institutional support. Non-ICSID arbitrations commonly proceed under the arbitration rules of the UNCITRAL[7]. Like commercial arbitrations, proceedings outside of the ICSID Convention have a designated place of arbitration whose courts may be called on to support the proceedings. Awards issued from these arbitrations are enforced under the New York Convention, concluded in 1958 (United Nations 1958), primarily for the benefit of commercial awards. The New York Convention served as a model for a similar enforcement treaty that governs mediation. In September 2020, the United Nations Convention on International Settlement Agreements Resulting from Mediation will come into force with the purpose of facilitating the enforcement of settlement agreements that result from mediation (2020).

There are two specific concerns about the current fragmented systems.

a. **Absolute Treatment Standards.** State commitments that are not contingent on outside events or state treatment of other investors. These commitments are grouped under two standards:

- The "full protection and security" standard[8]
- The "fair and equitable treatment" (FET) standard[9]. A recurring and divisive issue in arbitral decisions is whether the FET provision demands a higher standard of

6. Founding Conventions of the Permanent Court of Arbitration are: the Convention for the Pacific Settlement of International Disputes, July 29, 1989, https://docs.pca-cpa.org/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf; Convention for the Pacific Settlement of International Disputes, October 18, 1907, https://docs.pca-cpa.org/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf.
7. The United Nations Commission on International Trade Law was established by the UN General Assembly, Resolution 2205(XXI) UNCITRAL, Establishment of the United Nations Commission on International Trade Law, December 17, 1966, https://undocs.org/en/A/RES/2205(XXI). See United Nations (1958).
8. For example, Article 3(1) of the Germany-Turkey BIT: "[i]nvestments... shall enjoy protection and security in the territory of the other Contracting Party'"; Treaty Between the Federal Republic of Germany and the Republic of Turkey Concerning the Reciprocal Promotion and Reciprocal Protection of Investment, Ger.-Tur., June 20, 1962, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1438/download. Treaties cited in this paper can be viewed on the Investment Policy Hub of the UNCTAD website, https://investmentpolicy.unctad.org.
9. For example, Article VII(1) of the Netherlands-Singapore BIT (1972): "[e]ach Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party"). Agreement on Economic Cooperation Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Singapore, Neth.-Sing., May 16, 1972, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2079/download.

treatment than the minimum standard owed to foreigners by states under customary international law[10], with the new generation of IIAs delimiting definitions of the FET[11].

b. **Relative Treatment Standards** which seek to prevent discrimination among investors. Compared to absolute standards, they require a comparison of treatment given to claimant investors and other investors. Such treatment is of two broad types:

- "national treatment" (NT)[12]
- "most-favored-nation (MFN) treatment.[13]" A contentious issue for the past two decades has been whether MFN treatment can be used by investors to improve access to arbitration[14]. One reason for the controversy, according to many commentators, is that this application of the standard interferes with both party consent and the jurisdiction of arbitral tribunals.

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10. Compare the 2009 award in Cargill v Mexico, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 para. 284 (interpreting FET to prevent egregious state conduct) https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf; and the 2010 award in Merrill v Canada, ICSID Case No. UNCT/07/1, Award, March 31, 2010, para 210, (interpreting the FET standard to prevent unreasonable state conduct) https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf; awards and decisions referred to in this brief are available at https://www.italaw.com.
11. See, for example, the Comprehensive Economic Trade Agreement, EU-Canada, October 30, 2016, 8.10:
    2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
    (a) denial of justice in criminal, civil or administrative proceedings;
    (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
    (c) manifest arbitrariness;
    (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
    (e) abusive treatment of investors, such as coercion, duress and harassment; or
    (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
    4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.
12. For example, Article 3(1) of the Germany-Namibia BIT (1994): "[n]either Contracting Party shall subject investments...to treatment less favourable than it accords to investments of its own nationals or companies." Treaty between the Federal Republic of Germany and the Republic of Namibia concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Nam., January 21, 1994 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1377/download.
13. For example, Article 4 of the Nigeria-Singapore BIT (2016): "[e]ach Party shall accord to investors of the other Party and to covered investments, with respect to the operation of the covered investments, treatment no less favourable than the treatment it accords, in like situations, to investors of a third country and their investments." Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore, Nig.-Sing., April 11, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5410/download.

2.2. IIAs—BITs and FTAs

IIAs have become the basis of significant jurisprudence, with more than 1,000 known cases (2020b), and the subject of much scholarly writing. We present some of the key issues in outline form:

a. Jurisdictional issues include:

- **The notion of "foreign" investment** and issues associated with investment structuring and restructuring. Under ISDS jurisprudence, investors can structure their investments by establishing companies in countries with favorable investment protection regimes with the host state (Dolzer and Schreuer 2012, 52[15]). This is because most treaties only require "incorporation" as a criterion to establish a tribunal's jurisdiction, and as long as a company is validly incorporated, treaty requirements are met. Such "nationality planning" or "treaty shopping" is not considered illegal. Nevertheless, it would likely be undesirable from a host state's perspective, and many tribunals have upheld corporate nationality thus obtained[16]. The situation is different if an investor attempts to restructure their investment in order to obtain the benefit of an IIA[17]. To curtail treaty shopping, however, states have begun incorporating denial of benefits' clauses into treaties[18], and have considered restricting definitions of "investors" and "investments" (Chaisse 2015, 289). This is happening in many modern IIAs. For example, some states now require "substantial business activities" in addition to incorporation to determine corporate nationality.

14. Compare the 2000 decision in Emilio Agustin Maffezini. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000, paras 54–56 https://www.italaw.com/sites/default/files/case-documents/ita0479.pdf (deciding that MFN treatment could shorten a waiting period for arbitration and avoid recourse to local courts in Spain) and the 2005 decision in Plama Consortium Limited. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, paras 207–223 (deciding that MFN treatment could not be used to replace ad hoc arbitration with arbitration administered by ICSID) (esp.), https://www.italaw.com/sites/default/files/case-documents/ita0669.pdf.
15. See Aguas del Tunari v Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, October 21, 2005, paras 160–180, https://www.italaw.com/sites/default/files/case-documents/italaw10957_0.pdf.
16. Banro v Congo, ICSID Case No. ARB/98/7, Award, 1 September, 2000), excerpts in (2002) 17 ICSID REVIEW FILJ 380 and https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf (2016 World Investment Report: Investor Nationality: Policy Challenges).
17. See, for example, Energy Charter Treaty, Art 17.1 (December 1994):"Each Contracting Party reserves the right to deny the advantage of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised." Energy Charter Treaty, December 12, 1994, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/download. See also, Mistelis and Baltag (2018).
18. Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, December 7, 2011, para 328, https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf.

- **Shareholders' claims and reflective loss.** One issue is whether shareholders should be able to bring claims independent from those by the company in which they have invested. Another is whether the right to make claims should be limited to majority shareholders or also include minority shareholders (Arato et al. 2019, 12).

b. Substantive standards issues include:

- **Expropriation.** States have the right to lawfully expropriate property under customary international law (Dolzer and Schreuer 2012, 98; Cox 2019, 11). Treaty law confirms this right and specifies conditions for lawful expropriations (Dolzer and Schreuer 2012, 100). The appropriate standard for establishing expropriation is substantial deprivation of "the economic use and enjoyment"[19] of the investment that "must be permanent and irreversible.[20]"

- **Umbrella clauses and contract claims.** Umbrella clauses are designed to bring commitments made by host states to foreign investors, usually in contractual agreements, under the protective umbrella of the investment treaty (Schreuer 2004). Questions have been raised on whether the effect of the clause is to elevate a contractual breach to a breach of the BIT under international law. In practice, in SGS. Pakistan, the first case to interpret an umbrella clause, the tribunal concluded that contractual breaches could not per se amount to a breach of the BIT[21]. In SGS. Philippines, the tribunal concluded that the effect of the umbrella clause was to make a contractual breach a breach of the BIT "[without converting it] into an issue of international law[22]."

19. See Técnicas Medioambientales Tecmed, S.A. The United Mexican States, ICSID Case No. ARB/(AF)/00/2, Award, May 29, 2003, para 116, https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.
20. SGS Société Générale de Surveillance, S.A. Pakistan, ICSID case No ARB/01/13, Decision on Jurisdiction, August 6, 2003, para 168, https://www.italaw.com/sites/default/files/case-documents/ita0779.pdf.
21. SGS Société Générale de Surveillance S.A. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction and Separate Declaration, January 29, 2004, para 128, https://www.italaw.com/sites/default/files/case-documents/ita0782.pdf.
22. All four drafts have received comments from the public, but, more importantly, from the Contracting States -- see https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/January%202019/States.aspx.

- **State defenses and counterclaims.** The primary concern is that traditional IIAs have been designed to provide investor remedies without balancing the obligations on states with clearly developed state defenses and capacity for counterclaims. This is being gradually addressed in contemporary IIAs.

2.3. ISDS procedural reforms

In the last few years, a number of reform projects have focused on procedure. The ICSID has started modernizing various sets of procedural rules, and for the first time has promulgated mediation rules[23]. In 2018, UNCITRAL embarked on a large-scale project of addressing legitimacy concerns[24]. A paper by the Center for International Dispute Settlement (Kaufmann and Potestà 2016) has been the springboard for the UNCITRAL agenda, and this process has been enhanced by papers produced, inter alia, by governments[25], the ISDS Academic Forum, and the Corporate Counsel International Arbitration Group (CCIAG) (2019). Queen Mary University of London and the CCIAG also conducted the first-ever empirical survey canvassing the views of investors on the UNCITRAL reform agenda[26]. Key issues addressed by the current reform agenda include:

a. Efficiency (Mistelis 2020).

b. **Transparency.** The ISDS is facing an increased demand for transparency "to enhance [its] effectiveness and continued [public] acceptance," (OECD 2005, 11) given the public interest. In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-Based Investor-State Arbitration which applies to all treaties concluded on or after April 1, 2014 that specify UNCITRAL arbitration. This was followed by the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) (2015a).

c. **Third party participation.** One concern relating to transparency is the participation of third parties in ISDS, either as amici or as non-disputing parties (NDP) in the case of states (Mistelis 2005, 169-199). The ICSID Arbitration Rule 37(2) permits tribunals to accept submissions by non-disputing parties after consulting with both parties[27].

23. See Working Group III: Investor-State Dispute Settlement Reform https://uncitral.un.org/en/working_groups/3/investor-state.
24. See Working Group III: Investor-State Dispute Settlement Reform https://uncitral.un.org/en/working_groups/3/investor-state.
25. Forthcoming at http://www.arbitration.qmul.ac.uk/research/.
26. SADC 2012; Indian Model BIT, Art 15 (2) (2015).
27. See the Comprehensive Economic Trade Agreement, Art. 8.29, EU-Canada, October 30, 2016.

Rule 32(2) of the ICSID allows the tribunal to let third parties observe all or part of any hearings, subject to logistical arrangements. A survey of the ICSID cases has revealed that amici and NDP submissions are not used to their full potential by tribunals (Butler 2019). The Mauritius Convention simply extends the application of the Rules on Transparency to all investor-state disputes (United Nations 2015a). The Rules on Transparency deal with NDP participation, and do not differ significantly from the regime under the ICSID Arbitration Rules.

d. **Pre-conditions/alternatives to arbitration.** States have increasingly considered preconditions to ISDS, such as exhaustion of local remedies[28], or pursued alternatives to ISDS, such as an Investment Court System (ICS)[29]. An increased reliance on domestic courts through exhaustion of local remedies, along with support for states with less developed legal systems, can strengthen rule of law and consistency of domestic jurisprudence while also reducing the cost of dispute resolution (UNCTAD 2015, 149). Rule of law concerns respect for fundamental rights, formal legality (Schultz and Dupont 2014, 1163), and substantive justice[30]. In the context of investment law and ISDS, the application of the law by arbitral tribunals in a competent and impartial manner (Schultz and Dupont[31] 2014, 1163), as well as the predictability and transparency of the rules and of the adjudication system, are of high relevance. Meanwhile, the challenge in substituting ISDS with an ICS is to overcome its shortcomings while building on its strengths, such as neutrality, enforceability, and manageability (Kingdom of Bahrain 2019, 1). However, criticisms leveled against the European ICS provisions suggest that they fall short on the counts of finality, efficiency, and enforceability. At the same time, there is a significant drive to promote investor-state mediation, mediation in general, and dispute prevention mechanisms. Legal scholars have written recently, “All institutional processes are imperfect, and all of them are imperfect in different ways given the dynamics of participation within them” (Puig and Shaffer 2018).

e. **Introduction of an appellate mechanism.** One of the most important proposals to reduce inconsistency in ISDS is to introduce an appellate mechanism. China, the EU, USA and other countries have expressed support for this mechanism. The nature and scope of such an appellate mechanism, however, are being debated.

28. See, UN General Assembly, "Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at National and International Level", Resolution No. 67/1, UN Doc. A/Res/67/1, September 24, 2012.
29. G20 Guiding Principles for Global Investment Policymaking, 2016, para V.
30. Ibid, para VIII.
31. Forthcoming in http://www.arbitration.qmul.ac.uk/research/.

3. Fostering and Enhancing Investment Protections

3.1. Methods

There are many different approaches to fostering investment facilitation and enhancing investment protection, through investment regulation at the domestic or global level. Possible methods include:

(a) Drafting a new MIA or PIA covering procedure, issues of jurisdiction, and substantive protection.
(b) Investment guidelines or another soft instrument, possibly a model law regulating investment promotion, regulation, and protection.
(c) Institution and capacity building by encouraging the creation of a new center in an emerging economy, ideally within a G20 country, but outside the traditional ISDS centers.

For all options, there is the question of which international organization should take the lead to effect developments. There are arguments both for and against existing intergovernmental agencies (e.g, UNCITRAL, UNCTAD or ICSID) playing this role. Another option is a political initiative by the G20 to build adequate consensus; then the project can be transferred either to an existing intergovernmental agency, or a new agency can be created (Shan 2018).

3.2. Scope (substance, procedure, jurisdiction or combinations)

Defining the scope of reform is essential for the success of any reform project, and any discussion in this policy brief is without prejudice to any work currently undertaken by organizations such as ICSID and UNCITRAL. Further, the scope must be tailored to work hand-in-hand with other methods and objectives.

An MIA or aPIA, or any guidelines or model law, could cover:
(a) Substantive protection and investment promotion and regulation only;
(b) Substantive protection, and investment promotion and regulation, together with ISDS procedures and dispute avoidance and prevention mechanisms (but without covering issues of jurisdiction);
(c) Substantive protection and investment promotion and regulation, together with ISDS procedures; dispute avoidance and prevention mechanisms; and issues of jurisdiction.

The broader the scope of the reform, the greater the uniformity and elimination of fragmentation, but the longer the process to achieve consensus and the higher the level of compromise in order to reach consensus. The narrower the scope of the reform, the lower the uniformity and elimination of fragmentation, but the quicker the process of consensus.

There is also the option of other types of reform, either de novo reform (a blank canvas approach) or reform based on existing documents, treaties, and international customary law.

3.3. Objectives (sustainability, protecting social responsibility and environment)

The international legal regime concerning FDI should play a significant role in fostering a **healthy regulatory climate for investment**. Investment is a primary driver of the UN 2030 Agenda on Sustainable Development (2015b), which requires robust flows of capital, technology, and skills across borders. In the wake of pressing global economic, environmental, and social challenges, policymakers are increasingly expected to focus on the qualitative dimension of FDI.

The need for **improved coherence in international investment policymaking** is emerging from various quarters. It is possible to reconcile the private interests protected by international investment law with global interests such as human rights, the environment, and the fight against climate change. This can be done through coherent law-making and systemic integration in the process of interpretation and application of IIAs.

In this respect, UNCTAD has formulated a comprehensive set of principles for investment policymaking that provide guidance for investment policies that foster sustainable development (2015a). Similarly, the G20 Guiding Principles for Global Investment Policymaking of 2016 encourage investment policies that are "consistent… with sustainable development and inclusive growth (G20 2016, ¶V)[32]", and "promote and facilitate the observance by investors of international best practices (G20 2016, ¶VIII)[33]."

Against this backdrop, an increasing number of model investment agreements and actual agreements contain "non-lowering of standards" clauses, provisions **preserving states' regulatory autonomy**, and clauses encouraging or **requiring investors' upfront compliance with human rights and environmental standards**.

International normative consistency on investors' obligations could benefit from drawing from the due diligence standards increasingly adopted under domestic legislations.

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32. International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy.
33. Ibid, para VIII.

3.4. Institutions and capacity building

The last of our proposals in this policy brief addresses **global capacity building** to facilitate investment flows, **empower SMEs**, and **enhance investment promotion, regulation, and protection.** The current proposals at UNCITRAL for anadvisory center are yet to be developed fully. The investor survey by Queen Mary University of London and CCIAG suggests that creation of such a center would be a positive step[34]. However, the question remains whether the current reform work would culminate in such a capacity building center and whether something different may be needed.

If the ISDS, **dispute prevention and avoidance**, as well as investor-state mediation are involved in current reforms, a new ISDS institution might be needed, perhaps located in a G20 country but outside traditional ISDS centers. Such an institution would have immunity and a headquarters agreement with the country in which it is situated. It could alleviate the need for a BRICS center, which has been discussed for years.

4. Recommendations

The current COVID-19 pandemic affects every aspect of human behavior and economic activity, and has resulted in an inevitable and unprecedented fall in global trade and investment. Any solution must result from co-operation and ultimately be global, as is the crisis. Hence, the pandemic provides an excellent opportunity to rethink globalization and global solutions. The current fragmentation in investment agreements is no longer tenable. We should strive for a comprehensive multilateral investment agreement covering both substantive law and procedural law matters while addressing jurisdictional concerns. We should also consider the creation of an institution to support such a multilateral agreement. Multilateralism and global cooperation are not just objectives: they are an urgent necessity.

Arguably, the most important lesson from the pandemic is that global issues require global cooperation and coordination in terms of solutions. For example, even if a vaccine is developed by a team of researchers in China, the UK, the USA or elsewhere, it is important to note that: (a) such teams are international in their composition; (b) tests will have to be carried out in several countries; and (c) ultimately, the commercial development and distribution of a vaccine will require global efforts.

34. Forthcoming in http://www.arbitration.qmul.ac.uk/research/.

In the same vein, this policy brief proposes that reducing fragmentation and replacing it with a **(global) MIA or PIA covering jurisdiction, substantive protections, and procedures** would have an undisputedly positive impact on investment facilitation and encourage SMEs to invest.

A global MIA or PIA would require an **open dialogue** and debate bringing together businesses, states, and academia, while taking into account the needs and peculiarities of developed and developing states. A great deal of background work has already been done. It is essential, however, to recalibrate the focus of attention from mere investment or investor protection to a more comprehensive set of objectives, namely investment regulation, promotion, and protection; sustainable development; investment facilitation and promotion; dispute prevention; promotion of corporate social responsibility and investor responsibility; as well as protecting the environment (climate change objectives) and facilitating access of SMEs to investment protection. The focus should now shift to investment promotion and regulation rather than investor protection, and solutions must provide fair access to investment for SMEs.

A second recommendation relates to **new "institutionalization."** A new MIA or PIA should be supported by a new institution to be located in a G20 country that is both an emerging market and not a traditional ISDS center. Such an institution could be either entirely independent or work in conjunction with the ICSID and Permanent Court of Arbitration (PCA) or the International Chamber of Commerce (ICC) Court of International Arbitration. It could equally provide policy advisory work, capacity building and training, and a hearing center where ISDS cases can be heard. It would not compete with other institutions but act in concordance and co-operation. It could even host a multilateral investment court if the current arbitration regime were to be reformed in that way.

In summary, we propose that:

- The G20 issue a call for an MIA or a PIA covering both substantive law and procedural law matters and addressing jurisdictional concerns, together with a work plan for the future.
- The G20 support the creation of a new institution in an emerging economy, ideally within a G20 country, but, outside the traditional ISDS centers.

Disclaimer

This policy brief was developed and written by the authors and has undergone a peer review process. The views and opinions expressed in this policy brief are those of the authors and do not necessarily reflect the official policy or position of the authors' organizations or the T20 Secretariat.

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APPENDIX A

IIAs by Economy[35]			
No.	**Name**	***TOTAL BITs**	***TOTAL TIPs**
1	Germany	129 (127 in force)	71 (56 in force)
2	China	125 (107 in force)	23 (19 in force)
3	Switzerland	112 (111 in force)	37 (34 in force)
4	Turkey	109 (76 in force)	20 (16 in force)
5	Egypt	100 (72 in force)	13 (11 in force)
6	United Kingdom	100 (91 in force)	72 (56 in force)
7	France	98 (94 in force)	71 (56 in force)
8	Korea, Republic of	94 (89 in force)	20 (18 in force)
9	Belgium	92 (72 in force)	71 (56 in force)
10	Luxembourg	92 (71 in force)	71 (56 in force)
11	Netherlands	90 (87 in force)	71 (56 in force)
12	United Arab Emirates	87 (52 in force)	12 (6 in force)
13	Kuwait	84 (68 in force)	12 (6 in force)
14	Russian Federation	79 (64 in force)	6 (6 in force)
15	Romania	78 (76 in force)	71 (56 in force)
16	Czechia	76 (74 in force)	71 (56 in force)
17	Spain	76 (70 in force)	71 (56 in force)
18	Morocco	72 (50 in force)	9 (8 in force)
19	Ukraine	72 (65 in force)	6 (5 in force)
20	Iran, Islamic Republic of	70 (58 in force)	2 (1 in force)
21	Finland	69 (65 in force)	71 (56 in force)
22	Italy	67 (55 in force)	70 (55 in force)
23	Belarus	66 (56 in force)	8 (7 in force)
24	Malaysia	66 (54 in force)	25 (22 in force)
25	Bulgaria	65 (58 in force)	71 (56 in force)
26	Sweden	65 (63 in force)	71 (56 in force)
27	Austria	60 (57 in force)	71 (56 in force)
28	Qatar	59 (26 in force)	12 (6 in force)
29	Cuba	58 (40 in force)	3 (3 in force)
30	Hungary	57 (56 in force)	71 (56 in force)
31	Jordan	56 (49 in force)	8 (8 in force)
32	Argentina	55 (49 in force)	18 (14 in force)
33	Lithuania	55 (53 in force)	71 (56 in force)
34	Tunisia	55 (39 in force)	8 (7 in force)
35	Croatia	54 (47 in force)	71 (56 in force)
36	Portugal	53 (44 in force)	71 (56 in force)
37	Slovakia	53 (54 in force)	71 (56 in force)
38	Serbia	52 (48 in force)	4 (4 in force)

35. International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements/by-economy.

No.	Name	*TOTAL BITs	*TOTAL TIPs
39	Uzbekistan	51 (46 in force)	5 (4 in force)
40	Azerbaijan	50 (44 in force)	4 (3 in force)
41	Denmark	50 (46 in force)	71 (56 in force)
42	Lebanon	50 (42 in force)	7 (5 in force)
43	Kazakhstan	47 (43 in force)	11 (10 in force)
44	Chile	46 (34 in force)	33 (27 in force)
45	Mauritius	46 (28 in force)	10 (7 in force)
46	Pakistan	46 (32 in force)	7 (6 in force)
47	Algeria	45 (29 in force)	7 (5 in force)
48	United States of America	45 (39 in force)	68 (50 in force)
49	Albania	44 (39 in force)	7 (7 in force)
50	Greece	43 (41 in force)	71 (56 in force)
51	Indonesia	42 (26 in force)	19 (15 in force)
52	Moldova, Republic of	42 (39 in force)	4 (4 in force)
53	Mongolia	42 (36 in force)	4 (4 in force)
54	Armenia	41 (38 in force)	8 (5 in force)
55	Viet Nam	41 (48 in force)	24 (19 in force)
56	Syrian Arab Republic	40 (34 in force)	4 (4 in force)
57	Latvia	39 (42 in force)	71 (56 in force)
58	North Macedonia	39 (37 in force)	5 (5 in force)
59	South Africa	39 (12 in force)	10 (8 in force)
60	Thailand	39 (36 in force)	23 (21 in force)
61	Poland	38 (40 in force)	71 (56 in force)
62	Israel	37 (35 in force)	5 (4 in force)
63	Libya	37 (25 in force)	10 (7 in force)
64	Philippines	37 (32 in force)	16 (15 in force)
65	Bosnia and Herzegovina	36 (36 in force)	5 (4 in force)
66	Yemen	36 (22 in force)	5 (5 in force)
67	Slovenia	35 (34 in force)	71 (56 in force)
68	Tajikistan	35 (24 in force)	7 (6 in force)
69	Georgia	34 (32 in force)	6 (5 in force)
70	Oman	34 (28 in force)	12 (7 in force)
71	Singapore	34 (38 in force)	35 (31 in force)
72	Japan	33 (29 in force)	20 (19 in force)
73	Kyrgyzstan	33 (23 in force)	9 (8 in force)
74	Zimbabwe	33 (10 in force)	8 (6 in force)
75	Canada	32 (37 in force)	20 (17 in force)
76	Ethiopia	32 (21 in force)	5 (4 in force)
77	Bahrain	31 (25 in force)	13 (8 in force)
78	Mexico	31 (29 in force)	16 (15 in force)
79	Uruguay	31 (30 in force)	19 (15 in force)
80	Sudan	30 (14 in force)	8 (7 in force)
81	Bangladesh	29 (24 in force)	4 (3 in force)

No.	Name	*TOTAL BITs	*TOTAL TIPs
82	Nigeria	29 (15 in force)	9 (7 in force)
83	Senegal	28 (18 in force)	10 (8 in force)
84	Estonia	27 (27 in force)	72 (57 in force)
85	Ghana	27 (9 in force)	8 (6 in force)
86	Mozambique	27 (20 in force)	8 (6 in force)
87	Peru	27 (27 in force)	30 (23 in force)
88	Turkmenistan	27 (20 in force)	7 (5 in force)
89	Venezuela, Bolivarian Republic of	27 (25 in force)	5 (5 in force)
90	Brazil	26 (1 in force)	19 (14 in force)
91	Cambodia	26 (16 in force)	15 (14 in force)
92	Sri Lanka	26 (24 in force)	6 (5 in force)
93	Cyprus	25 (24 in force)	71 (56 in force)
94	Montenegro	25 (23 in force)	6 (6 in force)
95	Paraguay	25 (22 in force)	17 (13 in force)
96	Guinea	24 (9 in force)	8 (6 in force)
97	Korea, Dem. People's Rep. of	24 (15 in force)	0
98	Panama	24 (20 in force)	12 (11 in force)
99	Saudi Arabia	24 (21 in force)	13 (8 in force)
100	Taiwan Province of China	24 (16 in force)	6 (6 in force)
101	Lao People's Democratic Republic	23 (21 in force)	16 (14 in force)
102	Mali	22 (8 in force)	9 (7 in force)
103	Malta	22 (19 in force)	72 (57 in force)
104	Mauritania	22 (10 in force)	6 (5 in force)
105	Costa Rica	21 (14 in force)	17 (16 in force)
106	El Salvador	21 (18 in force)	10 (9 in force)
107	Guatemala	20 (18 in force)	11 (9 in force)
108	Hong Kong, China SAR	19 (19 in force)	7 (7 in force)
109	India	19 (14 in force)	13 (9 in force)
110	Benin	18 (8 in force)	10 (8 in force)
111	Cameroon	18 (11 in force)	7 (6 in force)
112	Kenya	18 (11 in force)	7 (6 in force)
113	Nicaragua	18 (13 in force)	10 (9 in force)
114	Tanzania, United Republic of	18 (10 in force)	6 (6 in force)
115	Burkina Faso	17 (14 in force)	10 (8 in force)
116	Gambia	17 (5 in force)	8 (6 in force)
117	Jamaica	17 (11 in force)	10 (9 in force)
118	Australia	16 (16 in force)	22 (19 in force)
119	Colombia	16 (6 in force)	20 (16 in force)
120	Congo	15 (8 in force)	5 (5 in force)
121	Congo, Democratic Republic of the	15 (4 in force)	9 (8 in force)

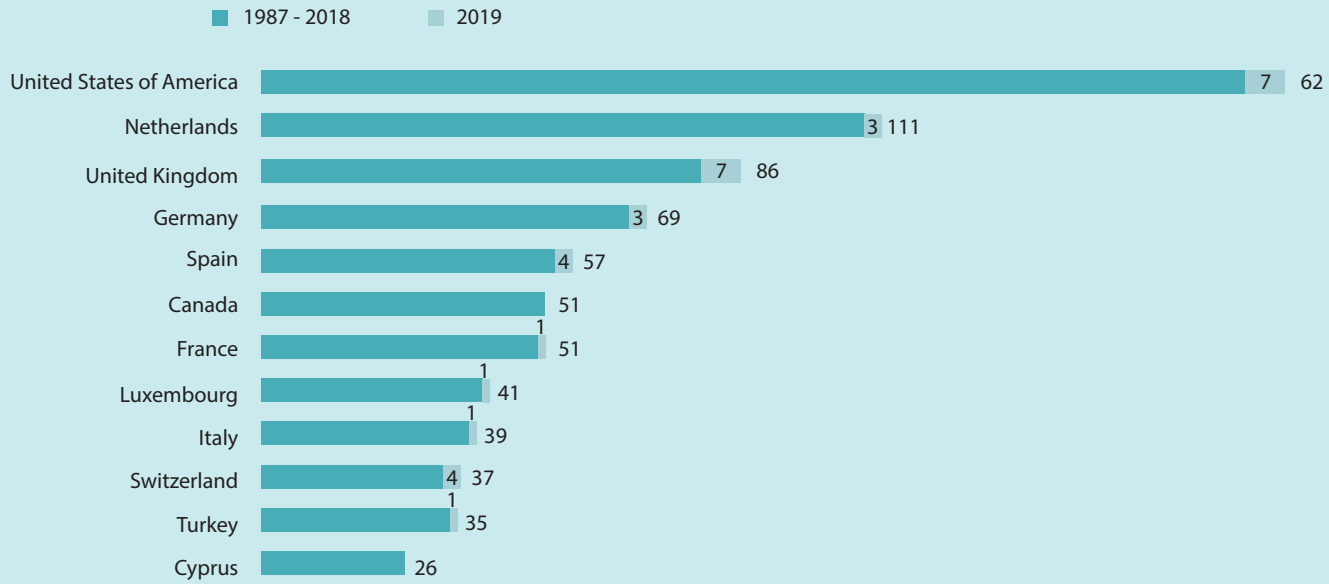
No.	Name	*TOTAL BITs	*TOTAL TIPs
122	Gabon	15 (8 in force)	7 (7 in force)
123	Namibia	15 (9 in force)	7 (6 in force)
124	Norway	15 (14 in force)	32 (29 in force)
125	Uganda	15 (6 in force)	8 (7 in force)
126	Zambia	15 (6 in force)	7 (6 in force)
127	Angola	14 (6 in force)	6 (5 in force)
128	Chad	14 (3 in force)	6 (6 in force)
129	Côte d'Ivoire	14 (7 in force)	11 (8 in force)
130	Dominican Republic	14 (11 in force)	6 (5 in force)
131	Trinidad and Tobago	12 (12 in force)	10 (9 in force)
132	Barbados	11 (9 in force)	10 (9 in force)
133	Honduras	11 (9 in force)	12 (11 in force)
134	Burundi	10 (6 in force)	9 (8 in force)
135	Cabo Verde	10 (7 in force)	7 (5 in force)
136	Equatorial Guinea	10 (4 in force)	5 (5 in force)
137	Myanmar	10 (8 in force)	15 (13 in force)
138	Rwanda	10 (4 in force)	11 (10 in force)
139	San Marino	10 (6 in force)	0
140	Botswana	9 (2 in force)	8 (6 in force)
141	Guyana	9 (5 in force)	11 (10 in force)
142	Madagascar	9 (8 in force)	5 (3 in force)
143	Belize	8 (5 in force)	10 (9 in force)
144	Brunei Darussalam	8 (6 in force)	20 (18 in force)
145	Djibouti	8 (3 in force)	8 (7 in force)
146	Haiti	8 (3 in force)	10 (9 in force)
147	Iceland	8 (7 in force)	34 (30 in force)
148	Iraq	8 (4 in force)	5 (3 in force)
149	Bolivia, Plurinational State of	7 (6 in force)	10 (6 in force)
150	Comoros	7 (3 in force)	9 (7 in force)
151	Malawi	7 (3 in force)	7 (6 in force)
152	Eswatini	6 (2 in force)	11 (8 in force)
153	Papua New Guinea	6 (5 in force)	3 (3 in force)
154	Ecuador	5 (2 in force)	10 (7 in force)
155	Nepal	5 (4 in force)	3 (3 in force)
156	Niger	5 (2 in force)	10 (8 in force)
157	State of Palestine	5 (3 in force)	6 (6 in force)
158	Afghanistan	4 (3 in force)	5 (4 in force)
159	Central African Republic	4 (2 in force)	5 (5 in force)
160	Eritrea	4 (1 in force)	5 (4 in force)
161	Liberia	4 (3 in force)	8 (6 in force)
162	New Zealand	4 (2 in force)	16 (14 in force)
163	Seychelles	4 (2 in force)	8 (6 in force)

No.	Name	*TOTAL BITs	*TOTAL TIPs
164	Suriname	4 (1 in force)	11 (10 in force)
165	Togo	4 (3 in force)	10 (8 in force)
166	Antigua and Barbuda	3 (2 in force)	10 (9 in force)
167	Guinea-Bissau	3 (1 in force)	9 (7 in force)
168	Lesotho	3 (3 in force)	8 (6 in force)
169	Sierra Leone	3 (2 in force)	8 (6 in force)
170	Somalia	3 (2 in force)	4 (4 in force)
171	Timor-Leste	3 (1 in force)	1 (1 in force)
172	Dominica	2 (2 in force)	10 (9 in force)
173	Grenada	2 (2 in force)	10 (9 in force)
174	Macao, China SAR	2 (2 in force)	3 (2 in force)
175	Saint Lucia	2 (2 in force)	10 (9 in force)
176	Saint Vincent and the Grenadines	2 (2 in force)	10 (9 in force)
177	Sao Tome and Principe	2 (0 in force)	3 (3 in force)
178	Vanuatu	2 (0 in force)	2 (1 in force)
179	Andorra	1 (1 in force)	0
180	Bahamas	1 (0 in force)	10 (9 in force)
181	Maldives	1 (0 in force)	3 (3 in force)
182	Marshall Islands	1 (0 in force)	2 (1 in force)
183	Saint Kitts and Nevis	1 (0 in force)	9 (9 in force)
184	South Sudan	1 (0 in force)	1 (1 in force)
185	Tonga	1 (1 in force)	3 (2 in force)
186	Yugoslavia (former)	1 (1 in force)	0
187	Anguilla	0	1 (1 in force)
188	Aruba	0	1 (1 in force)
189	Bermuda	0	1 (1 in force)
190	Bhutan	0	2 (2 in force)
191	British Virgin Islands	0	1 (1 in force)
192	Cayman Islands	0	1 (1 in force)
193	Channel Islands	0	0
194	Christmas Island	0	0
195	Cocos (Keeling) Islands	0	0
196	Cook Islands	0	3 (2 in force)
197	Curaçao	0	1 (1 in force)
198	Faroe Islands	0	0
199	Falkland Islands (Malvinas)	0	1 (1 in force)
200	Fiji	0	3 (3 in force)
201	French Guiana	0	0
202	French Polynesia	0	1 (1 in force)
203	Gibraltar	0	0
204	Greenland	0	1 (1 in force)
205	Guadeloupe	0	0

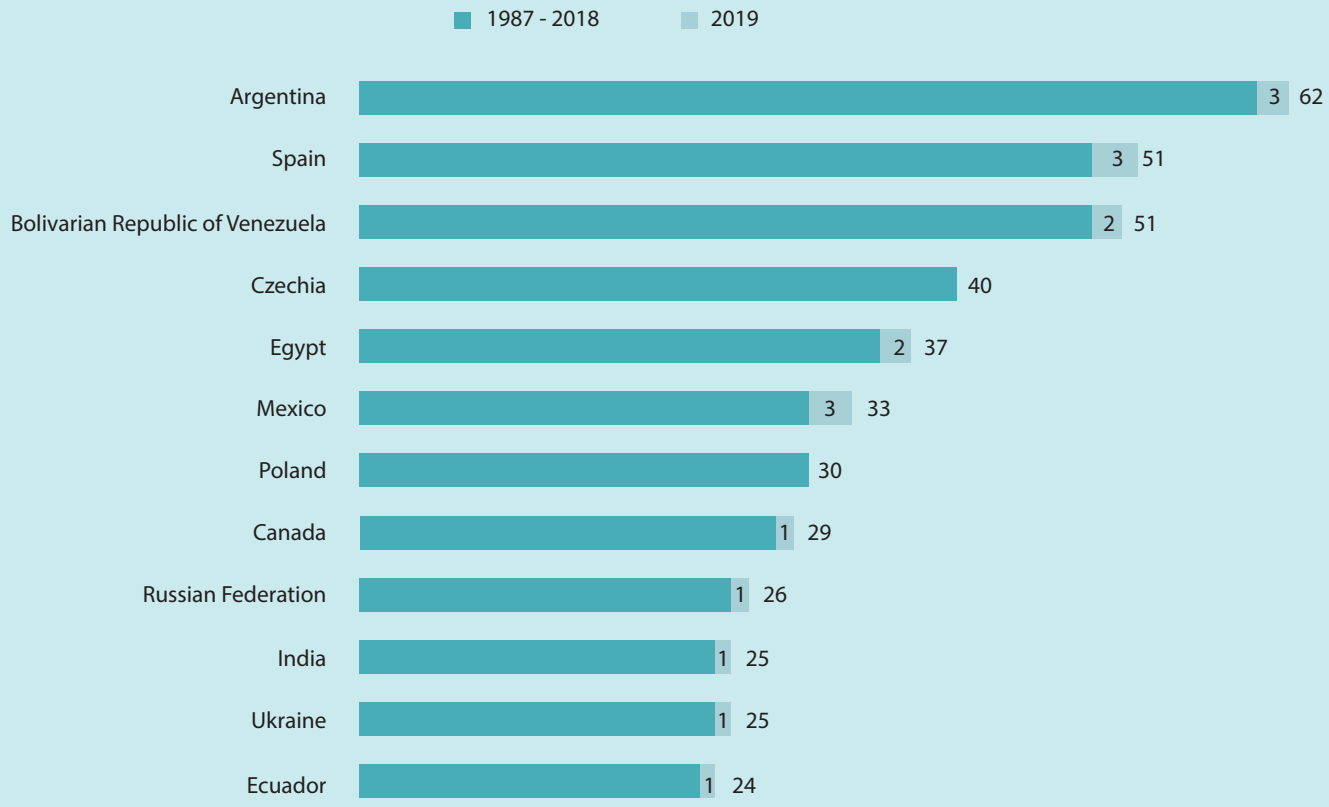
No.	Name	*TOTAL BITs	*TOTAL TIPs
206	Guam	0	0
207	Holy See	0	0
208	Ireland	0	71 (56 in force)
209	Isle of Man	0	0
210	Kiribati	0	3 (2 in force)
211	Liechtenstein	0	1 (1 in force)
212	Martinique	0	0
213	Mayotte	0	1 (1 in force)
214	Micronesia, Federated States of	0	2 (1 in force)
215	Monaco	0	0
216	Montserrat	0	9 (9 in force)
217	Nauru	0	3 (2 in force)
218	New Caledonia	0	1 (1 in force)
219	Niue	0	3 (2 in force)
220	Norfolk Island	0	0
221	Northern Mariana Islands	0	0
222	Palau	0	2 (1 in force)
223	Pitcairn	0	0
224	Puerto Rico	0	0
225	Réunion	0	0
226	Saint Helena	0	1 (1 in force)
227	Saint Pierre and Miquelon	0	1 (1 in force)
228	Samoa	0	3 (2 in force)
229	Solomon Islands	0	3 (2 in force)
230	Tokelau	0	0
231	Turks and Caicos Islands	0	1 (1 in force)
232	Tuvalu	0	3 (2 in force)
233	United States Virgin Islands	0	0
234	Wallis and Futuna Islands	0	1 (1 in force)

APPENDIX B

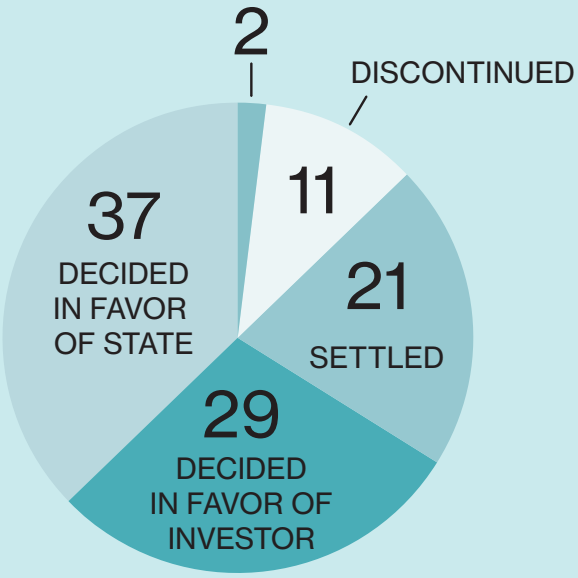
DATA from UNCTAD Investment Policy Hub (IIA 2020b)



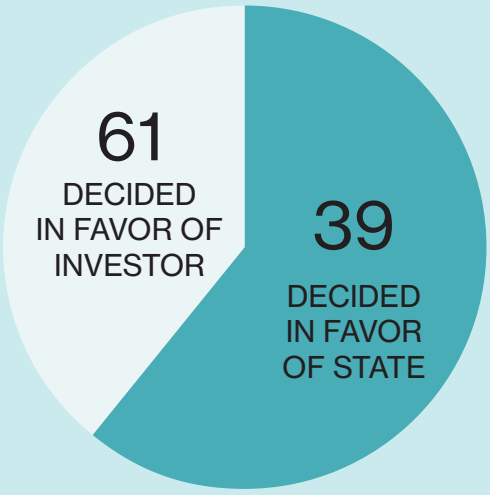
Most frequent respondent states, 1987 - 2019 (Number of known cases)



Most frequent home states of claimants, 1987 - 2019 (Number of known cases)



Results of concluded cases, 1987 - 2019 (per cent)



Results of decisions on the merits, 1987 - 2019 (per Cent)

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