

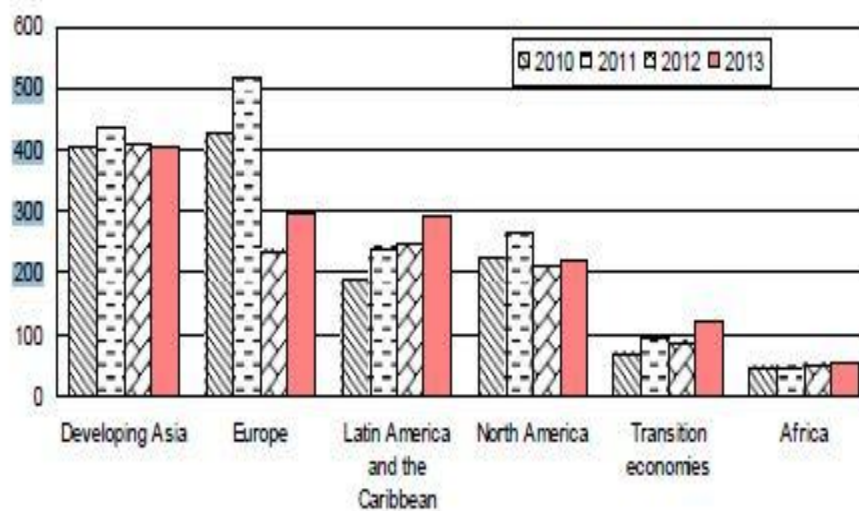
Reform of Investor-State arbitration: Is there a need?

GEORGE BURN

7 November 2014

FDI flows

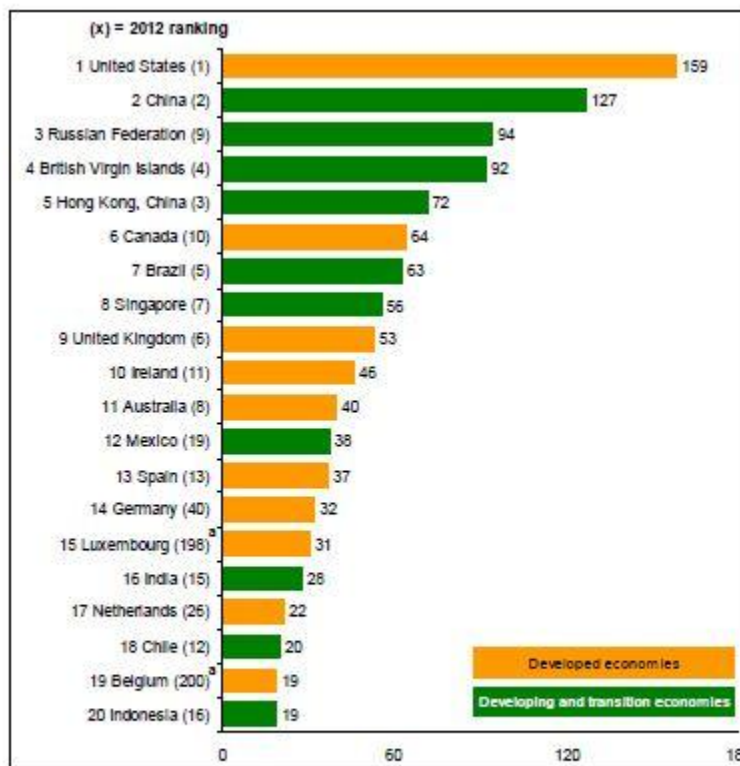
Figure 1: FDI Inflows, by region, 2010-2013 (Billions of US Dollars)



Source: UNCTAD.

FDI flows

Figure 2. FDI Inflows: Top 20 Host Economies, 2013 (Billions of US Dollars)

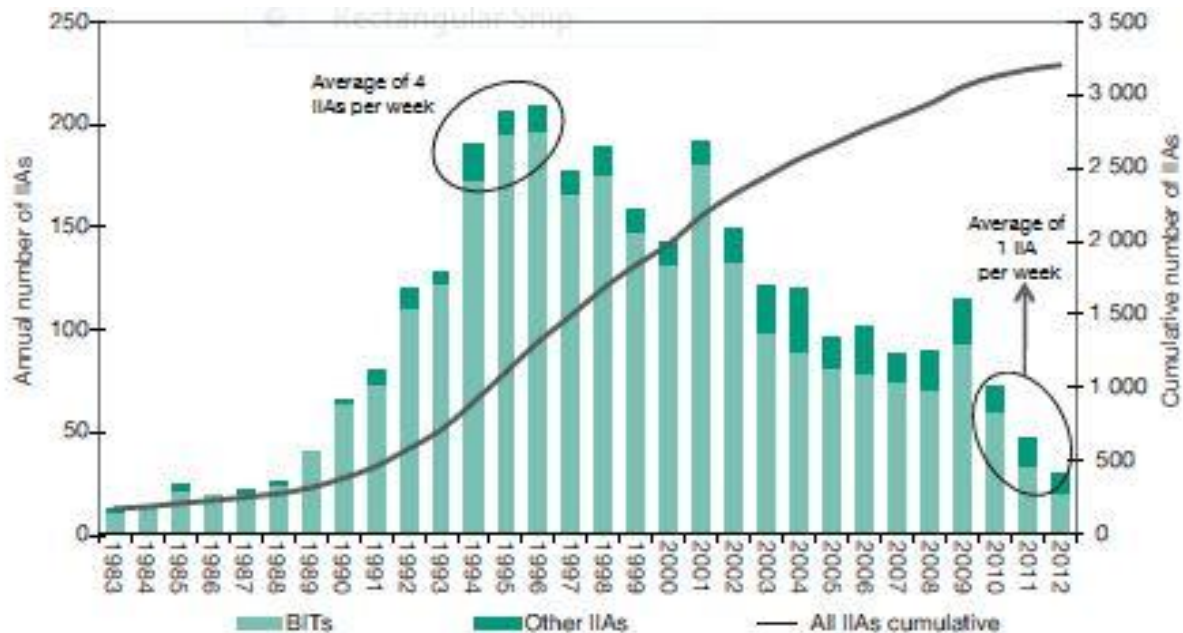


Source: UNCTAD.

^a Negative flows in 2012.

Proliferation of BITs

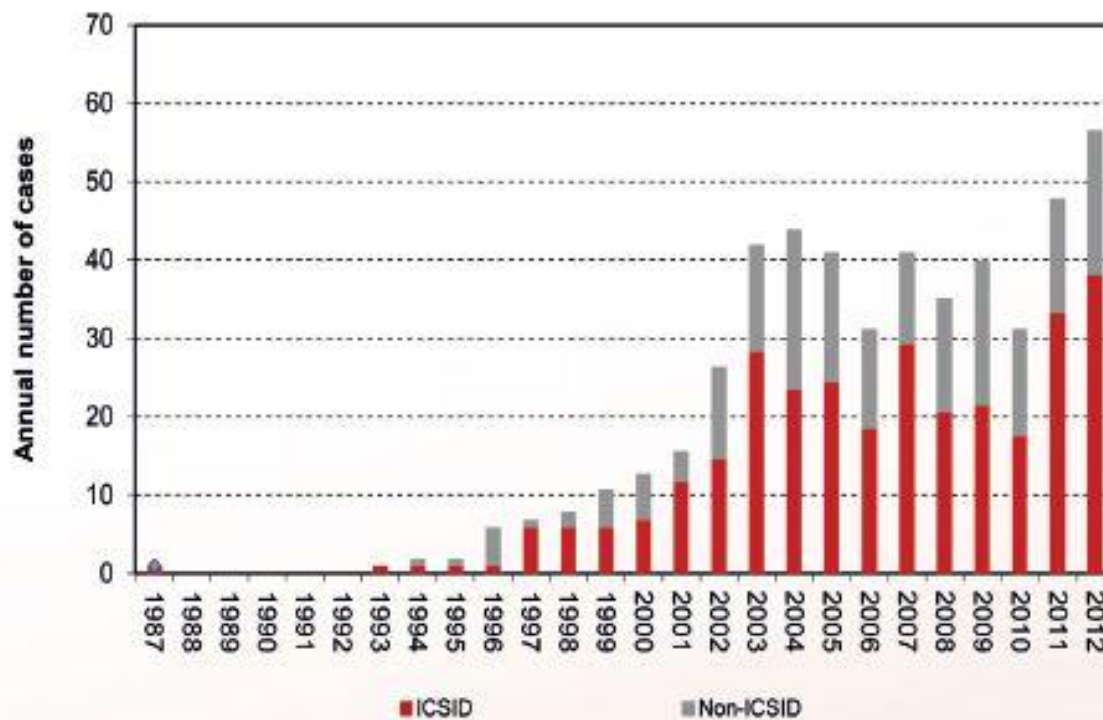
Figure 3: Number of BITs and other International Investment Agreements concluded, cumulative and year by year, 1983-2012



Source: World Investment Report 2013

Investor-State arbitrations

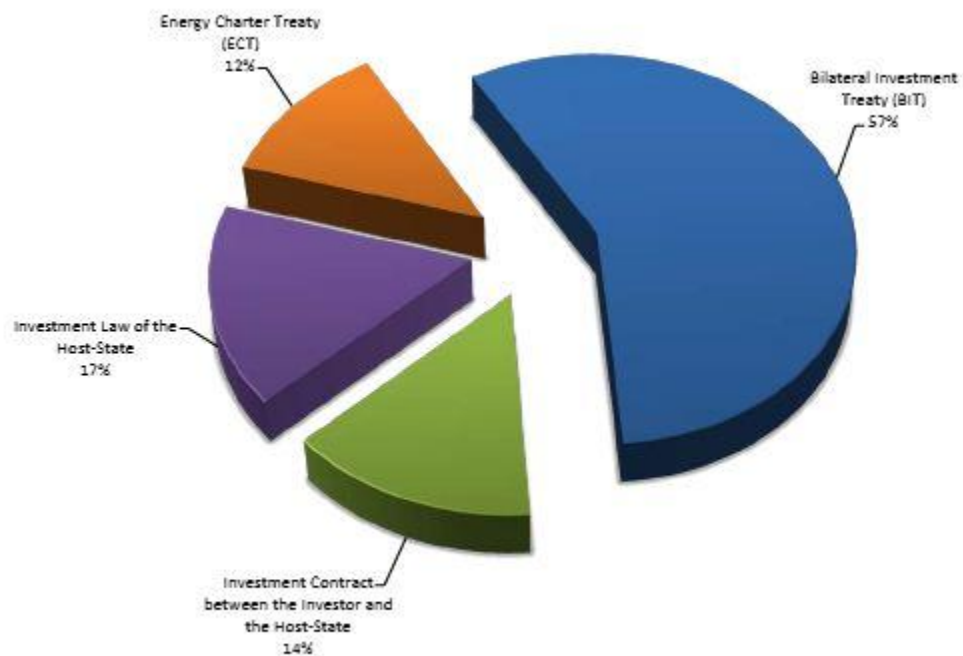
Figure 4. Known Investor-State Arbitration Cases



Source: UNCTAD

ICSID caseload

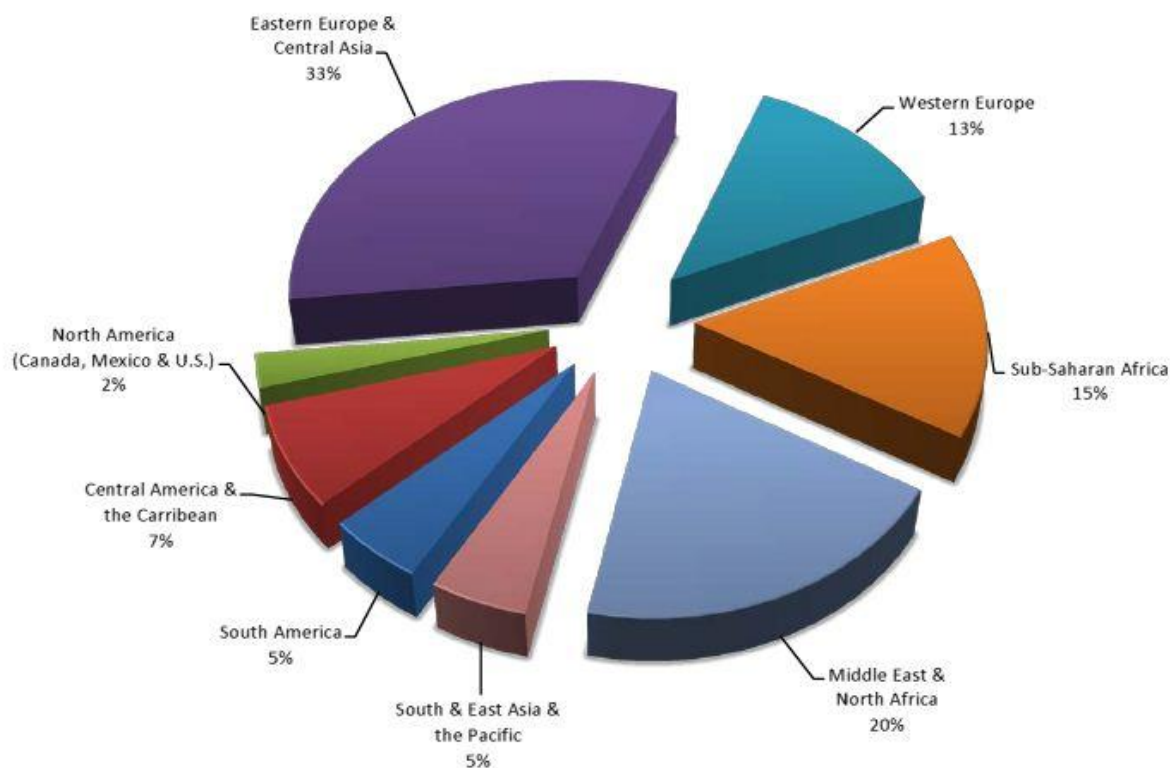
Figure 5: Basis of Consent for New Cases Registered in 2013



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ICSID caseload

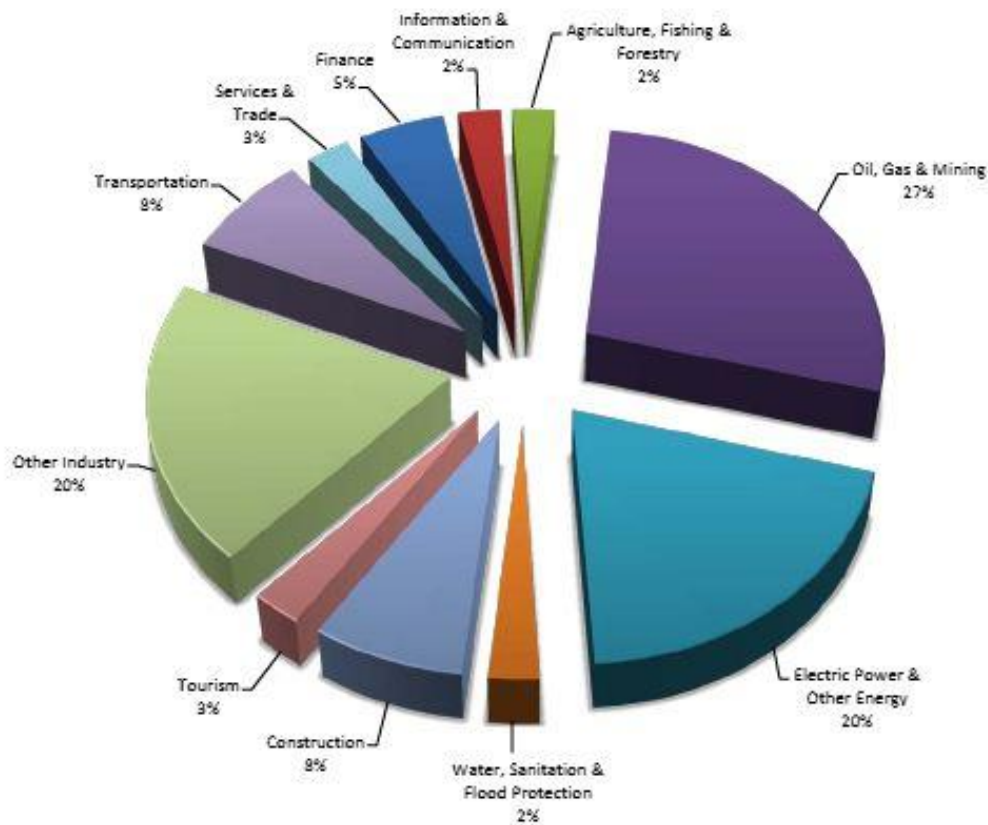
Figure 6: Geographic Distribution of New ICSID Cases Registered in 2013, by State Party Involved



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ICSID caseload

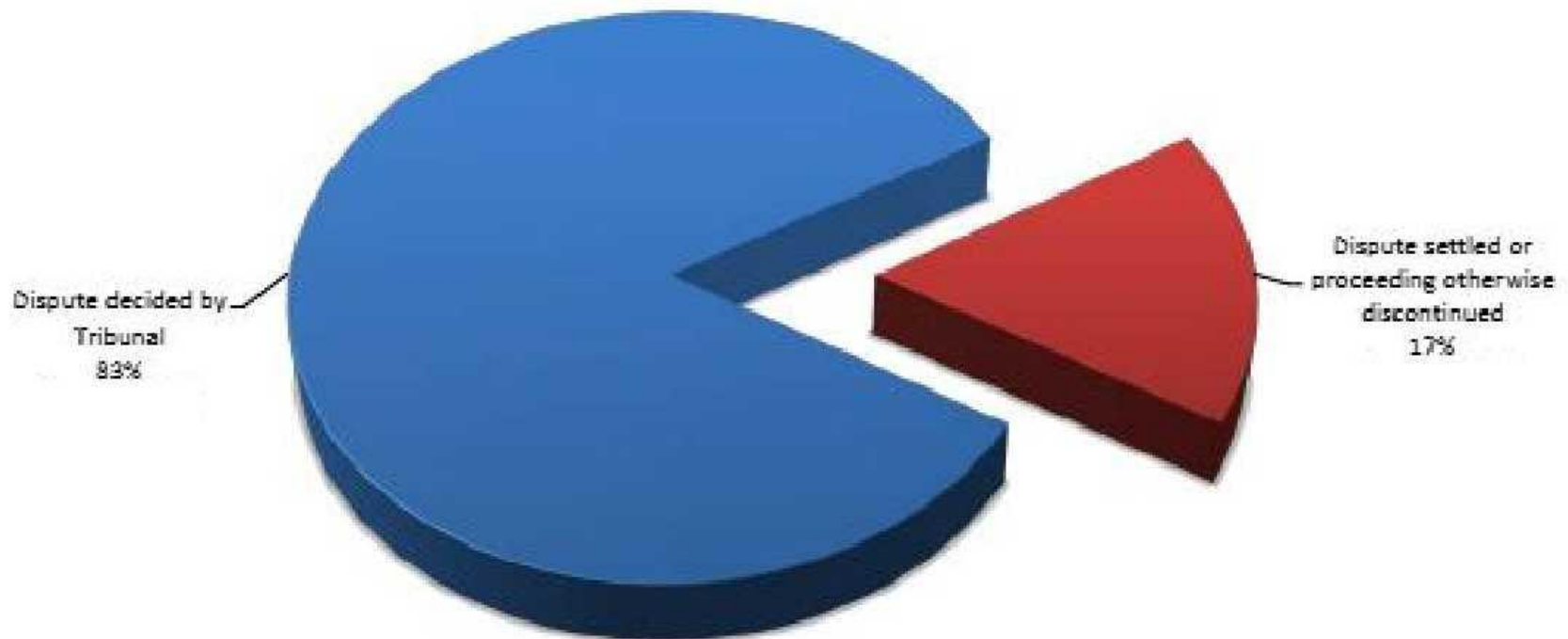
Figure 7: Distribution of New ICSID Cases Registered in 2013, by Economic Sector



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ICSID caseload

Figure 8: ICSID Arbitration Proceedings Concluded in 2013- Outcome



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Changes in landscape

- South African Government Proposes New Bill to Promote Investment
 - Draft Promotion and Protection of Investment Bill
 - Changes standard for compensating expropriation from “fair market value” standard to “just and equitable” standard

- No general right to international arbitration for foreign investors
- To resolve disputes with the state, foreign investors would have to rely upon mediation with the Department of Trade and Industry, local courts or arbitration under the South African Arbitration Act 42 of 1995
- Nationals of states with a BIT with South Africa, nationals of South African Development Community (“SADC”) states, and investors with contractual agreements that include international arbitration provisions would likely be unaffected.

Changes in landscape

- Australia

- Government denounced investor-state arbitration in 2011
 - In April 2011, Labor Party government headed by Julia Gillard released a Trade Policy Statement, stating that in BITs, it would no longer include mechanisms for investors to institute international arbitration proceedings against the state.
- Reverses position against investor-state arbitration in 2013
 - In December 2013, Liberal Party government headed by Tony Abbott signed a BIT with South Korea that includes such a mechanism. The government, however, insists that the mechanism contains sufficient carve-outs and safeguards in areas such as public welfare, health, and the environment.

The attacks on Investor-State arbitration

- “It’s rigged against States”
- “States are outspent by rich multinationals”
- “Arbitral tribunals are too male, too white and above all too Western”
- “There is no appeal process”
- “It lacks transparency”

“It’s rigged against States”

- Who wins treaty cases?
 - Investors win 35.78%[2013] [2007: 38.5%]
 - States win 54.7% [57.7%]
 - Settled with award/discontinued 9.4% [3.9%]
- How much do winning Investors get?
 - All cases (average): \$622m claimed vs \$16m awarded
 - Cases where Investor wins (average): \$171m vs \$45m

“States are outspent by rich multinationals”^{V&E}

- How much does Investor-State arbitration cost?
 - Lawyer costs: average total \$9.8m (\$4.9m investor, \$4.6m)
 - Arbitrator costs: average \$800k
- Costs shifting:
 - More often than not, no costs shifting
 - But when investors win, costs are shifted in favour of investors
- See studies of Prof Susan Franck, Washington & Lee University

Vinson & Elkins Locations

