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Introduction: The Legitimacy Crisis and the Empirical Turn

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1.1 Introduction

The development of the modern investment treaty regime represents one of the most remarkable and swift expansions of international law in the post-war period. In just 30 years, the regime has developed from a small subsect of international law to one of its most prominent, with over 3,500 signed treaties\(^1\) and over 1,100 investor-state arbitrations registered.\(^2\) The significance of the regime is attributable to the largely bilateral treaty network, and to the tremendous growth in the use of the investor–state dispute settlement (ISDS) mechanisms embedded in the vast majority of all international investment agreements (IIA) currently in force.\(^3\)

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\(^1\) UNCTAD IIA Navigator <investmentpolicy.unctad.org/international-investment-agreements> data through 1 January 2020.

\(^2\) PITAD database <pitad.org> data to 1 January 2020.

\(^3\) UNCTAD IIA Navigator (n. 1). See ch. 2 for our updated mapping of ISDS clauses in IIAs. See also Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, ‘Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey’ OECD Working Papers on International Investment 2012/02 (96% of the 1,660 BITs surveyed contained ISDS language).
The ISDS\textsuperscript{4} system – the focus of this volume – provides ad hoc, one-off international arbitration for prospective disputes that can be initiated by an individual or corporate foreign investor against the state hosting its investment. Starting with the first treaty-based ISDS case in 1987,\textsuperscript{5} it has grown from a few cases into a sprawling network of international adjudication, which we analyse closely in the following chapter. As Figure 1.1 indicates, we have seen an upwards growth trajectory over the past two decades with the past five years flattening off at about 80–100 new treaty-based ISDS cases being registered annually. Given that treaty-based ISDS cases take an average of 3.74 years from registration to final award\textsuperscript{6} and that about a third of all cases are settled or discontinued,\textsuperscript{7} approximately 40–50 final awards are currently being rendered each year,\textsuperscript{8} and 400 treaty-based ISDS cases are pending at any given time.\textsuperscript{9}

Putting this evolution in comparative perspective, it is difficult to find other areas of international legal practice that have generated such a caseload in both quantity and case complexity in a relatively short period of time.\textsuperscript{10} For example, the World Trade Organization (WTO) and its state-to-state Dispute Settlement Understanding (DSU) generated a comparable caseload to the investment treaty regime in the late 1990s and 2000s, but by 2012 new ISDS cases were outpacing WTO cases three to

\textsuperscript{4} The term ISDS can be used to label the provisions in an IIA that permit foreign investors to initiate claims against states hosting their investments for alleged breaches of the investment protections standards provided in the relevant IIA. ISDS can also refer to individual arbitrations brought according to an ISDS provision in an investment treaty (and ISDS can be even broader, including contract or foreign direct investment law (FDI) law-based arbitrations against states or state entities; or even non-arbitral processes between investors and states such as mediation or conciliation). For the purpose of this chapter, we will use ISDS to refer primarily to the individual arbitration cases that arise directly out of an investment treaty. In addition to ISDS, such cases are also variously interchangeably called investment treaty arbitration, investor–state arbitration, international arbitration, investment arbitration, or international investment arbitration.


\textsuperscript{7} PITAD (n. 2).

\textsuperscript{8} Ibid.

\textsuperscript{9} Ibid.

\textsuperscript{10} As of 1 January 2020, a total of 751 cases were concluded with 373 cases pending (1,126 ISDS cases registered). Cases are listed by the year registered and whether the case has concluded (a final award rendered or case settled or discontinued). Post-award proceedings are not considered.
one.11 With many supporters,12 it remains one of the most actively litigated areas of international law today. Moreover, as the caseload grew – over the past few decades – a considerable amount of jurisprudence through arbitral awards has emerged as well as an entirely new industry of investment arbitration experts, practitioners, government officials, and academics.13

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11 As of 1 January 2020, ISDS cases almost double those of the WTO. The WTO records 593 disputes compared with 1,126 ISDS cases registered. For WTO cases see WTO DSU <wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.


This growth, however, has not come without a cost. ISDS cases are and have been controversial. As a decentralized system of one-off dispute settlement decided by party-appointed arbitrators who are typically tasked with balancing the private interests of a foreign investor from the global North against the public interests of a state in the global South, it is little wonder that the ISDS system has been embroiled in a legitimacy crisis for nearly 20 years now with virtually every aspect of the system being challenged and critiqued. Less critical responses to the legitimacy crisis tend to focus on the desirability of specific targeted reforms from inside the system, making claims about the evolutionary nature of international legal practice and how the system can and does become more legitimate over time. Stronger critiques of the system tend to target

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broader, more systemic issues that are less likely to be reformed from within over time. This type of critical perspectives about the regime is often characterized by systemic claims, for example that ISDS is afflicted by varying degrees of bias,\(^\text{16}\) is excessively costly and lengthy,\(^\text{17}\) with

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conflicting and inconsistent jurisprudence, a lack transparency and diversity in decision-making, a system that rewards private over public interests; and that all told, these aspects among others demonstrate that


the game is rigged against poorer states, stifling economic development, not promoting it.21

From the early 2000s onwards, this mountain of critical scholarship and civil society reports22 on the legitimacy crisis could be placed in two broad categories: critiques of the investment treaties and their substantive rules; and critiques of the process of resolving investment disputes, that is, ISDS.23 By the mid-2010s, both sets of critiques reached a degree of maturity, as the debate on the legitimacy of ISDS moved clearly into the public sphere, and a diverse group of states – from South Africa, India and Venezuela to the United States (US) and the Czech Republic – initiated unilateral and bilateral reforms to substantive and procedural provisions of their IIAs. This policy reform movement turned multilateral in the late 2010s with UNCTAD’s initiation of an Investment Policy Framework for Sustainable Development in 2015,24 the Proposals for Amendment of the ICSID Rules,25 and the emergence of UNCITRAL Working Group III (WG III) on ISDS Reform in 2017.26 The systemic and multilateral reform projects that had seemed so politically

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23 We analyse this literature closely in Chapter 2.


infeasible\textsuperscript{27} became a possibility once again.\textsuperscript{28} Regardless of what is achieved, at a minimum, the mandate of WG III provides a signal that a transition from a crisis period to a multilateral reform period could be occurring.\textsuperscript{29}

While most critique of ISDS has been normative and doctrinal in nature, empirical research has been central in identifying and measuring the significance of certain concerns. Assisted by the empirical turn in international legal scholarship about a decade ago,\textsuperscript{30} there is now a critical mass of empirical legal scholars and social scientists focusing Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), UN Doc. No. A/CN.9/930/Rev.1 (19 December 2017). The ISDS reform process emerged gradually in 2015, when the UNCITRAL Secretariat commissioned a study to the Geneva Center for International Dispute Settlement (CIDS) to review whether the Mauritius Convention on Transparency could provide a useful model for possible reforms in the field of ISDS. See Gabrielle Kaufmann-Kohler and Michele Potesta, \textit{Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a permanent investment tribunal or an Appeal Mechanism? Analysis and Roadmap} (CIDS, 2016) <uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf>. In 2017, the UNCITRAL Secretariat commissioned a further study from CIDS: see Gabrielle Kaufmann-Kohler and Michele Potesta, \textit{The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards} (CIDS, 2017) <uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf>.\textsuperscript{27}

Many previous post-Second World War attempts to multilateralize the international investment law did not produce binding treaties, including: the Havana Charter (1948); the Abs-Shawcross Draft Convention on Investments Abroad (1959); Louis B. Sohn and Richard R. Baxter, 'Draft Convention on the International Responsibility of States for Injuries to Aliens' (1961) 55(3) \textit{AJIL} 548; the OECD Draft Convention on the Protection of Foreign Property (1967); the OECD Draft Multilateral Agreement on Investment (1998).\textsuperscript{28}

In addition, there are at least two other major initiatives: the ICSID Rule Amendment Project <icsid.worldbank.org/en/amendments>; and the Energy Charter Treaty Modernization Project <energychartertreaty.org/modernisation-of-the-treaty>.\textsuperscript{29}

Feldman (n. 18); Stephan W. Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20(3) \textit{JIEL} 649; Stone Sweet and Grisel (n. 15); Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112(3) \textit{AJIL} 361.\textsuperscript{30}

specifically on investor-state arbitration: a substantial increase over a virtually non-existent field of study as late as 2004,\textsuperscript{31} when almost all empirical research on the regime was still focused on measuring the effects of investment treaties,\textsuperscript{32} and the few early empirical pieces on ISDS that did emerge were hampered by small sample size. Today, this critical mass of empirical legal scholars and social scientists\textsuperscript{33} focusing on


\textsuperscript{33} Examples include the use of empirics to support a theoretical claim (by political scientists): Poulsen and Aisbett (n. 21), and the use of empirics to test changes in treaty design
ISDS reflects the emergence of a burgeoning field: scholars have already used a range of methods and approaches – quantitative,\textsuperscript{34} qualitative,\textsuperscript{35} longitudinal,\textsuperscript{36} surveys,\textsuperscript{37} interviews,\textsuperscript{38} archival,\textsuperscript{39} network\textsuperscript{40} and computational\textsuperscript{41} – to analyse the ISDS system, probe its origins, its functioning and effects, and to address doctrinal questions.

The effects of this empirical turn are clear in a number of the debates on ISDS. For example, quantitative and economic research assessing potential pro-investor bias,\textsuperscript{42} excessive damages awards,\textsuperscript{43} correctness (by legal scholars): Wolfgang Alschner, ‘The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality’ (2017) 42(1) Yale J. Int’l L. 1.

\textsuperscript{34}See above (nn. 16–20).


\textsuperscript{36}Malcolm Langford and Daniel Behn, ‘Managing Backlash: The Evolving Investment Arbitrator?’ (2018) 29(2) EJIL 551; Schultz and Dupont, Promoting the Rule of Law (n. 16).

\textsuperscript{37}Franck et al. (n. 19); see also Maria Laura Marceddu, ‘What’s Wrong with Investment Arbitration?’ Reforming International Investment Arbitration, ISDS Academic Forum, PluriCourts Centre for Excellence (LEGINVEST) and the Forum for Law and Social Science, University of Oslo, 1–2 February 2019.

\textsuperscript{38}Stavros Brekoulakis et al., ‘Impartiality and Personal Values in Arbitral Decision-Making’, research project at Centre for Commercial Law Studies, Queen Mary University of London, 2019–2023; Todd Tucker, ‘Inside the Black Box: Collegial Patterns on Investment Tribunals’ (2016) 7(1) JIDS 183.


\textsuperscript{40}Puig (n. 13); Langford, Behn and Lie (n. 13).


\textsuperscript{42}Franck et al. (n. 19).