



IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



SPECIAL UPDATE ON INVESTOR–STATE DISPUTE SETTLEMENT: FACTS AND FIGURES

H I G H L I G H T S

- During the first 7 months of this year, investors initiated at least 35 treaty-based investor–State dispute settlement (ISDS) cases, bringing the total number of known cases to 817.
- As new information came in, the number of known cases for 2016 was adjusted to 69. In 2015, investors filed a record high of 77 known investor-State arbitrations pursuant to international investment agreements (IIAs).
- The new ISDS cases in 2017 were commenced against 32 countries. Five countries and economies – Bahrain, Benin, Iraq, Kuwait and Taiwan Province of China – faced their first (known) ISDS claims. Developed-country investors brought about two thirds of the 35 known cases.
- About 80 per cent of investment arbitrations in 2017 were brought under bilateral investment treaties (BITs). The remaining 20 per cent were based on treaties with investment provisions (TIPs). The majority of the IIAs invoked in 2017 date back to the 1990s.
- Looking at the overall outcomes of some 530 cases concluded as of 31 July 2017, about one third were decided in favour of the State and one quarter in favour of the investor (the remaining cases were settled, discontinued or decided in favour of neither party).
- Sixty-one per cent of all known cases were filed with the International Centre for Settlement of Investment Disputes (ICSID), either under the ICSID Convention or the ICSID Additional Facility Rules. The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) were the second most used procedural basis, followed by the Arbitration Rules of the Stockholm Chamber of Commerce (SCC) Arbitration Institute.
- On average, a successful claimant was awarded some \$522 million, corresponding to about 40 per cent of the amount claimed.
- Claimants alleged breaches of fair and equitable treatment (FET) in about 80 per cent of ISDS cases for which such information was available, followed by indirect expropriation with 75 per cent. In the decisions holding the State liable, ISDS tribunals most frequently found breaches of the FET and indirect expropriation provisions.

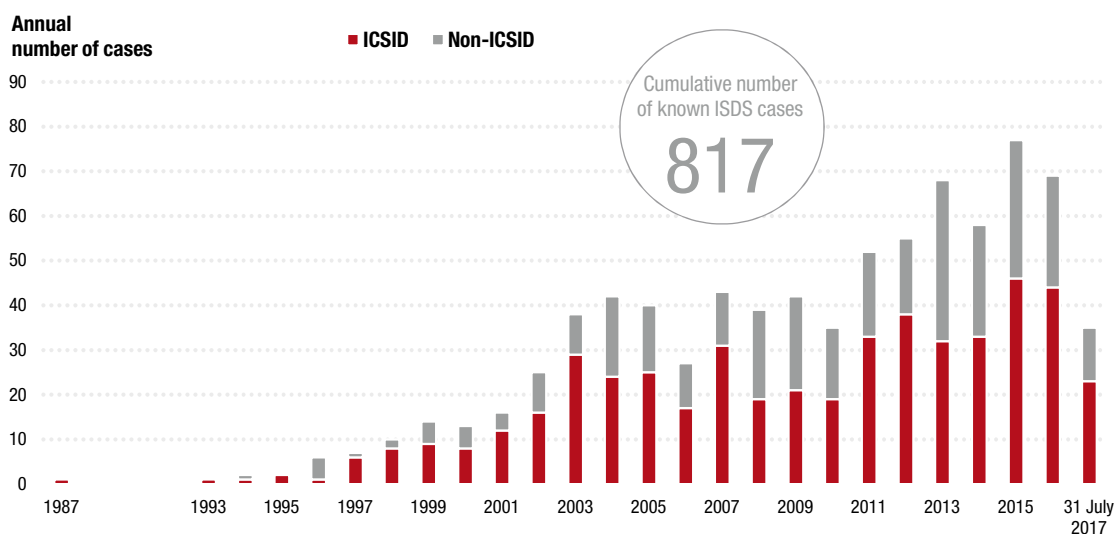
1. Trends in investor–State dispute settlement

a. New cases initiated in 2017

In the first 7 months of 2017, investors initiated 35 known ISDS cases pursuant to IIAs (figure 1). As new information came in, the number of known cases for 2016 was adjusted to 69. With 77 known treaty-based arbitrations, 2015 remains the year with the highest number of cases filed.

As of 31 July 2017, the total number of publicly known ISDS claims had reached 817. So far, 114 countries have been respondents to one or more known ISDS claims. As arbitrations can be kept confidential under certain circumstances, the actual number of disputes filed for this and previous years is likely to be higher.

Figure 1. Trends in known treaty-based ISDS cases, 1987–31 July 2017



Source: ©UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.

Respondent States

The new ISDS cases in 2017 were commenced against 32 countries. With two known cases each, Algeria, Chile and Iraq were the most frequent respondents in the first 7 months of this year. Five countries and economies – Bahrain, Benin, Iraq, Kuwait and Taiwan Province of China – faced their first (known) ISDS claims. Looking at the overall trend, the three most frequent respondent States were Argentina, Venezuela and Spain (figure 2).

Home States of claimants

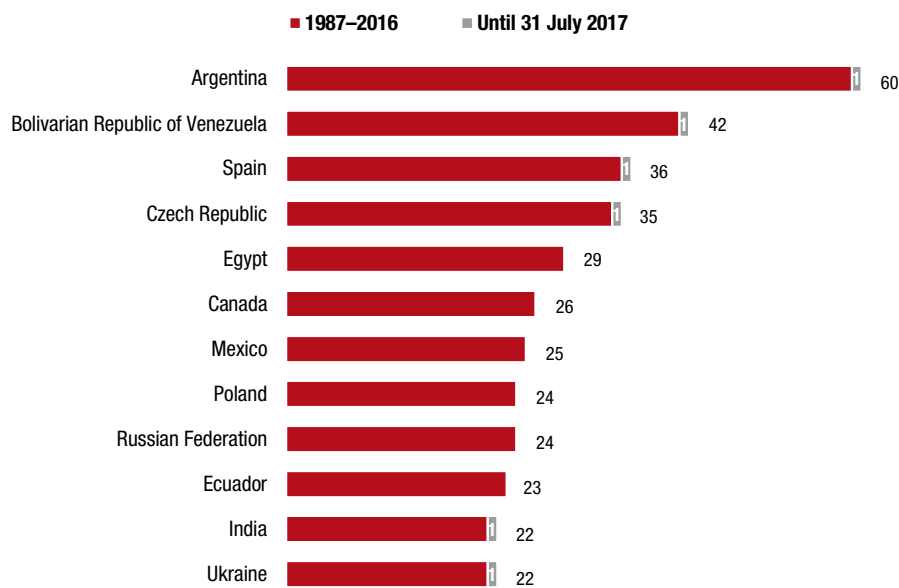
Developed-country investors brought about two thirds of the 35 known cases, while investors from developing and transition economies initiated the remaining cases. Investors from Spain (with 5 cases), Italy, Turkey and the United States (3 cases each) were the most active claimants. Overall, the three most frequent home States of claimants were the United States, the Netherlands and the United Kingdom (figure 3).

Intra-EU disputes

Three intra-EU disputes were initiated in the first 7 months of this year.¹ The overall number of known intra-EU investment arbitrations initiated by an investor from one EU member State against another member State totalled 153 as of 31 July 2017, i.e. approximately 19 per cent of all known cases globally.

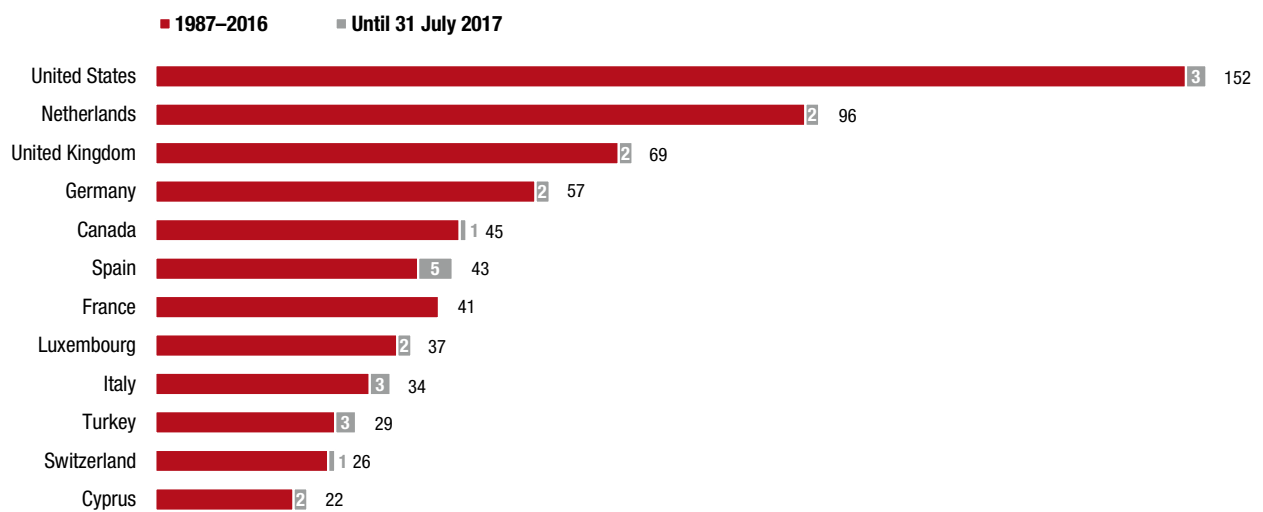
¹ Less than 10 per cent of the 35 known cases filed so far are intra-EU disputes. If this share persists for all cases filed in the year 2017, the share of intra-EU disputes will be significantly lower than in 2016 (20 per cent).

Figure 2. Most frequent respondent States, 1987–31 July 2017 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Figure 3. Most frequent home States of claimants, 1987–31 July 2017 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Applicable investment treaties

About 80 per cent of investment arbitrations in 2017 were brought under BITs. The remaining 20 per cent were based on TIPs. The Energy Charter Treaty (ECT) was the most frequently invoked IIA in 2017 (with three cases). The majority of the IIAs invoked this year date back to the 1990s.

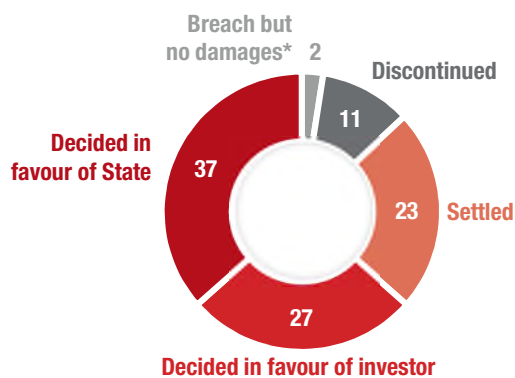
b. ISDS outcomes

Overall outcomes

As of 31 July 2017, about 530 ISDS proceedings had been concluded. About one third of concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one quarter were decided in favour of the investor, with monetary compensation awarded (figure 4). A quarter of cases were settled; in most, the specific terms of settlements remain confidential. In the remaining proceedings, the cases were either discontinued or the tribunal found a treaty breach but did not award monetary compensation.

Of the cases that ended in favour of the State, about half were dismissed for lack of jurisdiction.² Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged measure breached any of the IIA's substantive obligations), about 60 per cent were decided in favour of the investor and 40 per cent in favour of the State (figure 5).

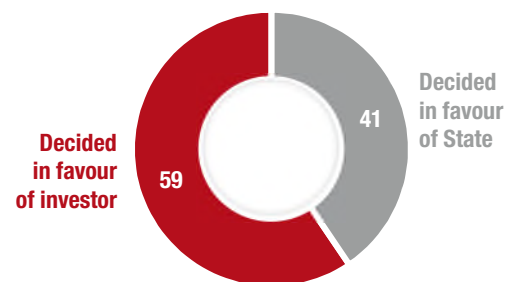
Figure 4. Results of concluded cases, 1987–31 July 2017 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

* Decided in favour of neither party (liability found but no damages awarded).

Figure 5. Results of decisions on the merits, 1987–31 July 2017 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

Note: Excluding cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons), and (iv) decided in favour of neither party (liability found but no damages awarded).

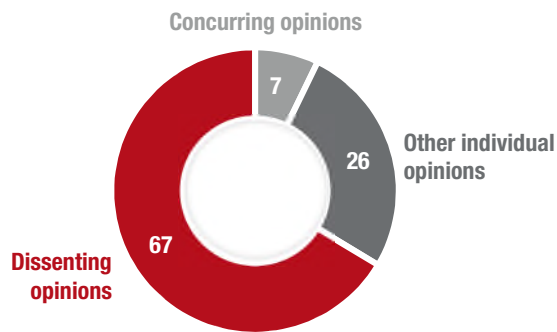
c. ISDS facts and figures

Unanimous decisions and dissenting opinions

Most decisions and awards were rendered unanimously, whereas in about 20 per cent of cases arbitrators issued one or more separate opinions (concurring, dissenting and other individual opinions). A large share of the opinions were filed as dissents (figure 6).

² These are cases in which a tribunal found, for example, the following: (i) the asset or transaction did not constitute a "covered investment", (ii) the claimant was not a "covered investor", (iii) that the dispute arose before the treaty entered into force or fell outside the scope of the ISDS clause, (iv) the investor had failed to comply with certain IIA-imposed conditions (e.g. the mandatory local litigation requirement), or other reasons that deprived the tribunal of the competence to decide the case on the merits.

Figure 6. Separate opinions attached to ISDS awards and decisions, 1987–31 July 2017 (Per cent)



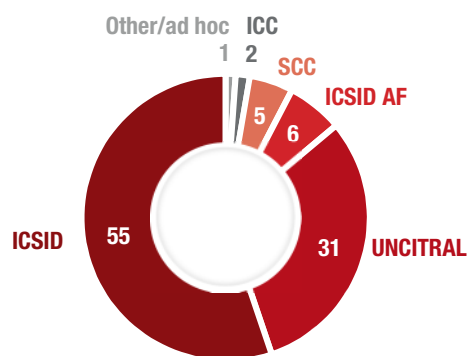
Source: ©UNCTAD, ISDS Navigator.

Note: Categorization based on the title of the statement issued by the respective arbitrator.

Arbitral forums and rules

Sixty-one per cent of all known cases have been filed under the ICSID Convention or the ICSID Additional Facility Rules (figure 7). The UNCITRAL Arbitration Rules were the second most used procedural basis, followed by the Arbitration Rules of the SCC Arbitration Institute.³

Figure 7. Known ISDS cases filed by arbitral rules, 1987–31 July 2017 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

Note: Excluding five cases on which such information was not available.

Average amounts claimed and awarded

On average, successful claimants were awarded about 40 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was \$1.35 billion and the median \$113 million. The average amount awarded was \$522 million and the median \$19 million.⁴

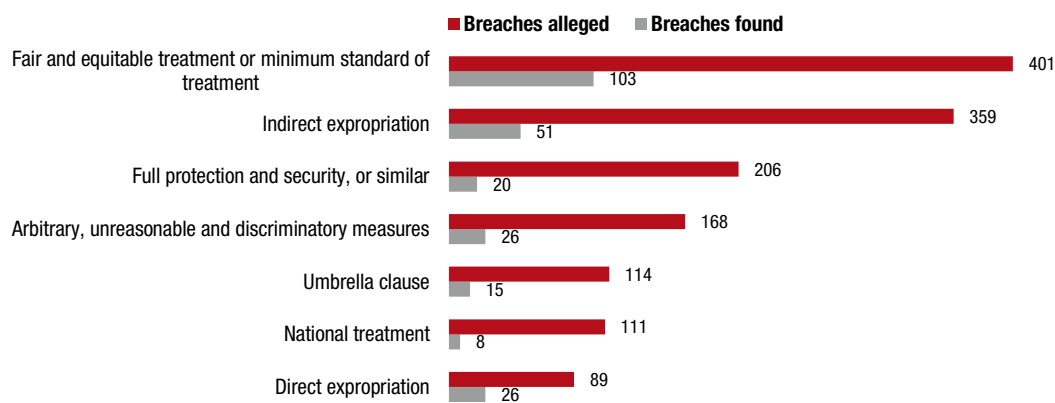
Breaches of IIA provisions alleged and found

The FET provision was invoked by claimants in about 80 per cent of ISDS cases for which information on breaches alleged was available, followed by indirect expropriation with 75 per cent (figure 8). ISDS tribunals most frequently found breaches of FET (65 per cent) and indirect expropriation (32 per cent) in cases decided in favour of the investor or decided in favour of neither party (liability found but no damages awarded).

³ ICSID maintains a public list of cases that allows the determination of the exact number of treaty-based cases filed under the ICSID Convention and the Additional Facility Rules. The actual number of cases filed under other arbitration rules is likely to be higher than the *known* number of cases. This is due to the absence of a complete, public record of treaty-based cases conducted under non-ICSID rules.

⁴ The amount claimed or awarded refers to the amount of monetary compensation awarded by the arbitral tribunal to the claimant(s), excluding interest, legal costs or costs of arbitration.

Figure 8. Breaches most frequently alleged and found, 1987–31 July 2017 (Number of known cases)



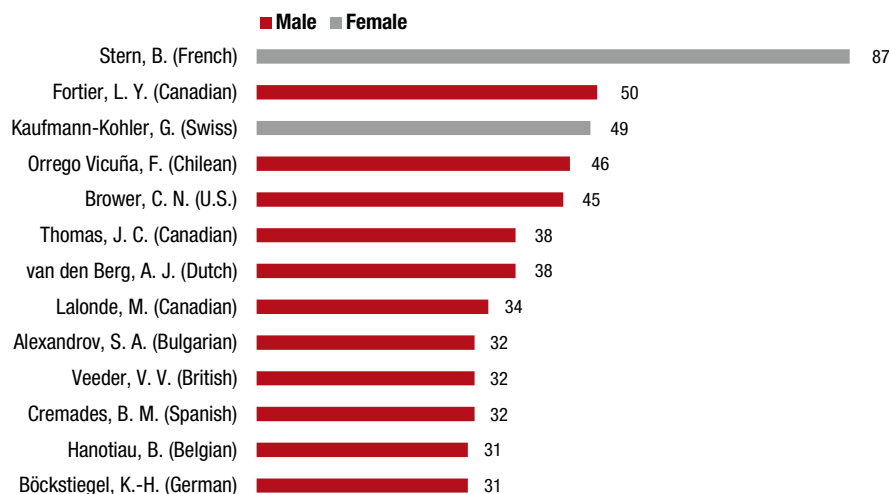
Source: ©UNCTAD, ISDS Navigator.

Note: Based on the number of cases for which such information was available.

Appointments of arbitrators and ICSID annulment committee members

About 500 individuals have been appointed as arbitrators in known ISDS cases (original proceedings). About half have served on more than one known case. A small number of individuals have been appointed to over 30 cases each (figure 9). Brigitte Stern, L. Yves Fortier and Gabrielle Kaufmann-Kohler received most appointments.

Figure 9. Most frequently appointed arbitrators, 1987–31 July 2017 (Number of appointments)

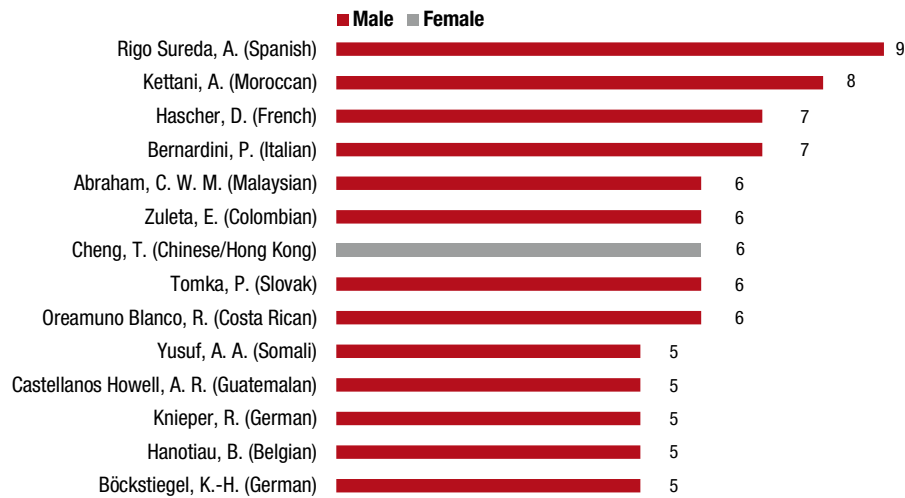


Source: ©UNCTAD, ISDS Navigator.

Note: Information on nationality and gender compiled based on ICSID's database of arbitrators, conciliators and ad hoc Committee members.

In ICSID annulment proceedings related to treaty-based ISDS cases, a total of 95 individuals have been appointed. Andrés Rigo Sureda, Azzedine Kettani, Dominique Hascher and Piero Bernardini head the list of appointments to ICSID annulment committees (figure 10).

Figure 10. Most frequently appointed ICSID annulment committee members, 1987–31 July 2017
(Number of appointments)



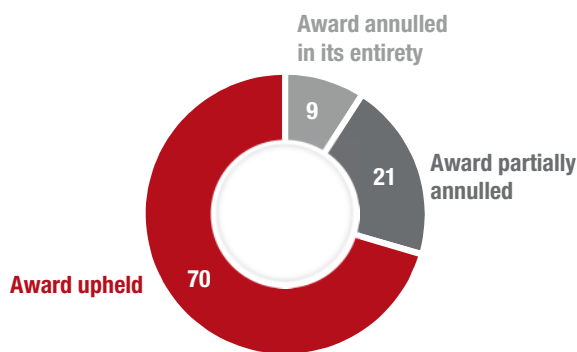
Source: ©UNCTAD, ISDS Navigator.

Note: Number of appointments to ICSID annulment committees related to treaty-based ISDS cases. Information on nationality and gender compiled based on ICSID's database of arbitrators, conciliators and ad hoc Committee members.

ICSID annulment proceedings and judicial review by national courts

Disputing parties initiated annulment proceedings in about 45 per cent of concluded ISDS cases conducted under the ICSID Convention (82 cases).⁵ About 25 per cent of the annulment proceedings are currently pending, while another 25 per cent were discontinued. In the remaining 44 proceedings, the annulment committee rendered a decision and, in the majority of these cases, upheld the original award (figure 11).

Figure 11. Results of ICSID annulment applications, 1987–31 July 2017 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

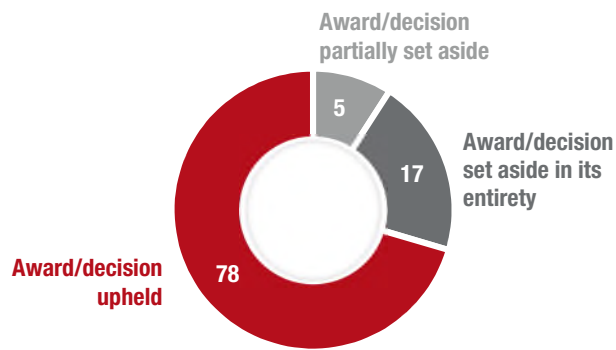
Note: Outcomes of ICSID annulment proceedings related to treaty-based ISDS cases, excluding discontinued annulment applications.

A third of the time, disputing parties initiated domestic set-aside proceedings in non-ICSID Convention cases in which (at least) one decision or award was rendered (71 cases).⁶ About 17 per cent of the set-aside proceedings are currently pending and two per cent were discontinued. In the majority of the 58 cases in which a set-aside decision was rendered, the original decision or award was upheld (figure 12).

⁵ As of 31 July 2017, 179 ISDS cases under the ICSID Convention had been decided in favour of the State, in favour of the investor or in favour of neither party (liability found but no damages awarded).

⁶ Based on the number of known set-aside proceedings; not all enter the public domain.

Figure 12. Results of set-aside applications in national courts, 1987– 31 July 2017 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015 version)

http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

Road Map for IIA Reform (World Investment Report 2015, Chapter IV)

http://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf

Phase 2 of IIA Reform (World Investment Report 2017, Chapter III)

http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf

Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties (IIA Issues Note, No. 2, June 2017)

<http://investmentpolicyhub.unctad.org/Publications/Details/173>

Global Action Menu for Investment Facilitation (2016)

<http://investmentpolicyhub.unctad.org/Publications/Details/148>

Recent Policy Developments and Key Issues: International Investment Policies (World Investment Report 2017, Chapter III)

http://unctad.org/en/PublicationChapters/wir2017ch3_en.pdf

Investor-State Dispute Settlement: Review of Developments in 2016 (IIA Issues Note, No. 1, May 2017)

<http://investmentpolicyhub.unctad.org/Publications/Details/172>

UNCTAD Investment Policy Online Databases

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Investment Dispute Settlement Navigator

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