

Investment Dispute Settlement

Lessons learned

Paula Baldini Miranda da Cruz | 3 June 2021



**Universiteit
Leiden**
The Netherlands

International investment law



Goals

Developed between states to increase investment flows and cooperation

Premise

That states are able to foster investment by adopting rules that make their markets more attractive to foreign investors

Composition

Bilateral and multilateral agreements that are negotiated individually

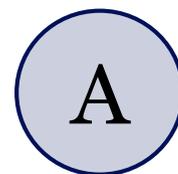
Adjudicating investment disputes

Interstate DS

- General international law mechanism where states settle disputes with each other
- Includes cases filed on behalf of foreign investors (diplomatic protection)

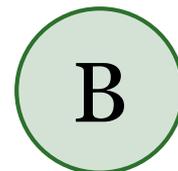
Investor-state DS (ISDS)

- Form of investor protection
- Allows foreign investors to file claims against host states internationally without the need of direct support from host states



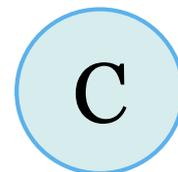
MULTIPLE DS OPTIONS

It is normal for IIAs to have both, interstate and investor-state dispute settlement



ISDS POPULARITY

ISDS is, today, widely popular and cases have far surpassed the numbers of interstate DS



TRIBUNALS

Tribunals themselves have also favored ISDS, limiting states' options to file interstate claims



STATE COMPLAINTS

Despite its popularity among many key players, there are several complaints against that put the future of ISDS at stake

Common ISDS complaints

STATE POWERS V ISDS POWERS

States did not anticipate that ISDS could exercise such big impact over their domestic policies and economies



CRITICS

Unexpectedness should be interpreted as arbitrators overstepping their powers and state consent



DEFENDERS

ISDS is not perfect, but arbitrators are, in the end, doing what they were supposed to be doing



IN PRACTICE

Tribunals have apparently responded to complaints (Langford and Behn 2018) by issuing more constrained decisions, but there is only so much they can do without systemic reform

01

Inconsistency

Unjustified variations in interpretation prevent states from being able to reduce liability by planning their actions

02

Arbitrators

Biased arbitrators who overstep their attributions

03

Compatibilization

Tribunals favor states' duty to protect foreign investors over other relevant international obligations (environmental, human rights)

04

Regulatory chill

The high risks carried by ISDS intimidates states into not adopting relevant and necessary regulations

05

Developing states

Developing states do not draw as much benefit from ISDS as expected, throwing into doubt whether it is worth having it at all

ISDS Reform options



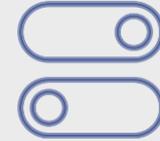
Individual

States can bilaterally modify agreements to make terms clearer



ISDS

Reform ISDS rules to tackle specific complaints



SYSTEMIC

Revamp the whole system (permanent ISDS courts, etc)



DISCARD

Ditch ISDS for an alternative (interstate, ombudsmen, etc)



INDIVIDUAL FIX
No need for states to coordinate



POWER IMBALANCE
Not every state is able to (re)negotiate



INCONSISTENCY
Variations between IIAs may fuel more inconsistency



EFFICIENCY
Does not require renegotiating every treaty



SLOW
Potential impact of the change may extend negotiations beyond what is desired



IS IT ENOUGH?
Limited capacity of addressing systemic issues



EFFECTIVE
Might be the only alternative that addresses systemic concerns



VERY SLOW
Might not move fast enough, especially since treaties may have to be replaced



UNCERTAIN
We don't know if it will work



RESET
Give control over DS back to states

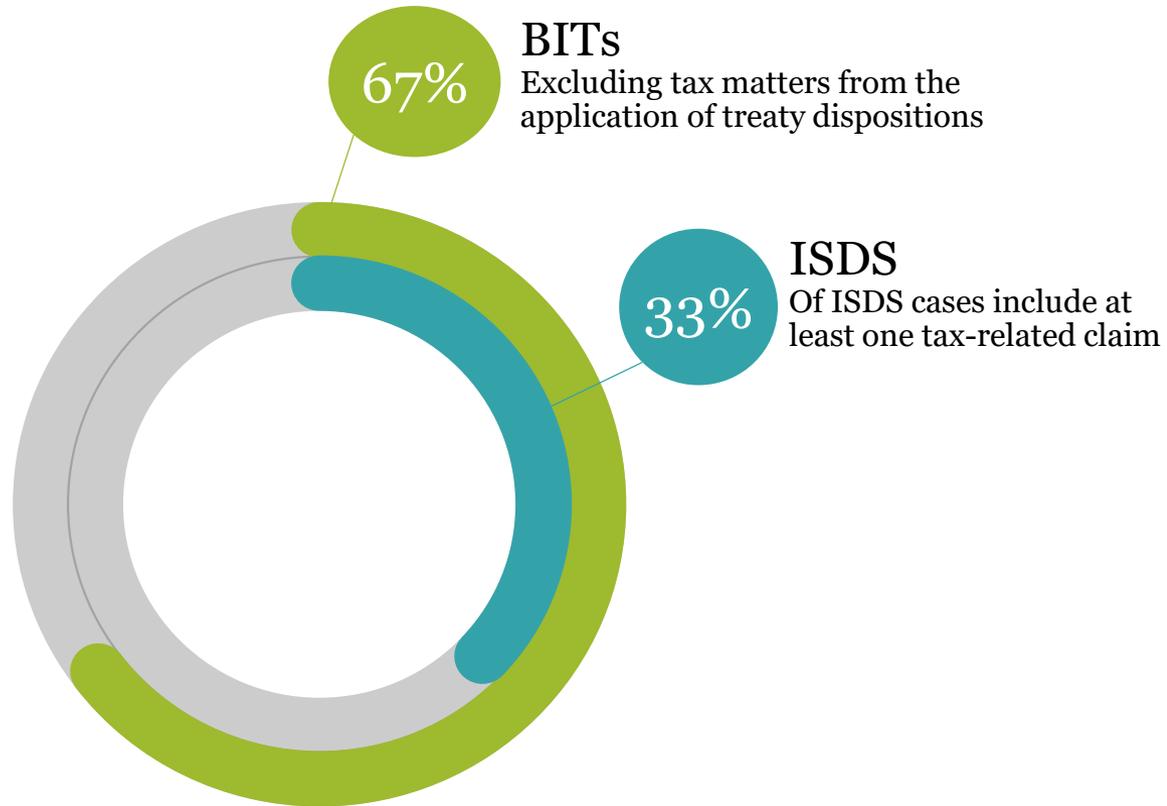


POLITICIZATION
Alternatives depend on the political will of home states



LESSER EVIL?
Alternatives may increase complaints

What about tax?



* Based on two random samples of 300 BITs and 200 cases

01

Economic sovereignty
Particularly sensitive to developing states

02

Exceptions and carve-outs
States have shown that tax is one of their key concerns in IIL through IIA exceptions

03

Disputes
Tax rules and enforcement are still a common topic in ISDS cases

Thank you



Universiteit
Leiden
The Netherlands