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The Investor-State Dispute Settlement (ISDS) Debate: Do Savings Provisions Influence Arbitration Outcomes?

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The Investor-State Dispute Settlement (ISDS) Debate:
Do Savings Provisions Influence Arbitration Outcomes?

by

Ryan Manning Moore

A thesis submitted in partial fulfillment of the
requirements for the degree of

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in
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Abstract

Investor-State Dispute Settlement (ISDS), an instrument of international trade and investment law, today leads perceptions regarding the integrity of international dispute resolution and its administration. If confidence in international economic institutions to render judgements which are impartial to political influences become suspect, then their durability will erode. This inquiry investigates whether or not power imbalances are reflected inordinately within ISDS arbitration outcomes between host nations and their foreign investors. Although there have been clear instances which question any observer's view of ISDS impartiality, these outcomes have also served to distort a complicated fabric of case results that have changed and evolved both in time and place. By comparing results from the United Nations Conference on Trade and Development's (UNCTAD) International Investment Database with the newly created International Investment Agreement (IIA) Mapping Project, it is now possible to test for correlational evidence between ISDS decisions and the presence of savings provision clauses. These clauses have been presented by ISDS proponents as a corrective measure with the power to restore legal faith in international judicial outcomes. With the creation of a nearly comprehensive and originally curated dataset, analysis reveals a modest but measurable correlation between the presence of savings provisions and the decision of ISDS arbitration to be decided in favor of a state. These findings and the additional qualitative analysis given here, bolster support for the inclusion of savings provisions as a meaningful improvement in investor-state contractual defense and the maintenance of international confidence regarding the durability of international economic institutions.

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Chapter One – Introduction to Study

1.1 Inquiry Introduction

Proponents of institutionalism have argued since the end of the Second World War that global cooperation and the establishment of shared institutions- particularly those that administer trade and investment, facilitate collective-action solutions in a more constructive and sustainable way. As the next decade begins, our international legal and financial institutions have seen significant failures in confidence. A growing sense of distrust and fears of manipulation by the powerful have aided this erosion in trust. As the World Trade Organization (WTO) nears global inclusion, the United States has begun to discuss its abandonment. Have international institutions delivered on a lasting framework for sovereign states to seek positive sum gains, uniting their economic interdependence in ways that reduce uncertainty and prevent conflict? Or do today's anti-globalist, anti-institutionalist and anti-corporate sentiments illustrate that the project can no longer meaningfully deliver? This paper analyzes one major debate regarding the durability of international governance in the realm of investment and trade: the efficacy of contractual language in alleviating bias associated with Investor State Dispute Settlement (ISDS) arbitration.

ISDS, a little-known clause that exists within the majority of International Investment Agreements (IIAs), provides foreign investors an arbitrational alternative to host country court systems when disputes arise. As a crucial component of international investment and trade governance, the study of ISDS administration provides a measure by which to gauge the validity of grievances contributing to declines in confidence.

As the debate grows around whether or not justice is being fairly served by global institutions such as the United Nations, World Bank or WTO, all of which offer their own version of ISDS facilitation, the risks increase for decreased participation. However, if in spite of national power and political economy imbalances, international trade and investment administration and judicial outcomes are seen to fairly adjudicate disputes and protect the sovereign rights of states, such as the right to regulate in the public interest, then participation within these institutions may remain robust. Recent concerns derailing the Trans-Pacific Partnership (TPP) and the delaying of the Comprehensive Economic and Trade Agreement (CETA) have illustrated that these debates are resulting in significant economic disruption.

Proponents of ISDS who champion the positive effects it can help facilitate, see it as a necessary mechanism by which a 'private right of action' can take place to safeguard and therefore encourage foreign investment. They charge that concerns over expediency, particularly with regards to regulatory chilling effects (RCE), are vastly overstated and that a lack of adequate 'savings provision' inclusions are to blame. Proponents, notably Dr. Gary Hufbauer of the Peterson Institute, have stated that the more recent inclusion of adequate savings provisions within agreements has largely rectified any previous cause for concern. Detractors have claimed these clauses are irrelevant, as the real issue exists within economic power disparity and its delegitimizing influence on any established legalism claimed by the administering courts. Christian Côté of the London School of Economics has provided recent evidence for this, which has been cited widely by detractors as proof ISDS is irreversibly flawed.

Compounding the growing distrust of these international arbitration mechanisms and their courts, are the popular detracting arguments which have more widely found their way into the media. In 2014, the Economist had this to say about ISDS:

IF YOU wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as “investor-state dispute settlement”, or ISDS. (para. 1)

In order to decipher whether or not regulatory influence and concerns of international legal durability will ultimately doom the future of third-party arbitration and the potential gains it brings, it is critical to determine the actual effect of savings provisions on regulatory freedoms and their impact on case outcomes.

If savings provisions can indeed be shown to adequately empower a state’s ability to defend itself legally in an international tribunal, regardless of economic wealth disparity, then proponents of international legalism and investment administration have solid ground to stand on. If they are not adequately shown to provide sufficient protection however, and in fact the outcomes of ISDS disputes are due instead largely to macro-power dynamics, then it will be worth concluding that savings provisions do not protect countries adequately and that international legalism does indeed still struggle with influences it cannot control. If international arbitration tribunals are not seen to provide equitable protection to host nations in this regard, then international institutionalism itself will suffer a loss in confidence as a result- as less and not more countries will choose to

weave themselves into the expanding global and legal framework that fosters the positive-sum aspirations which brought it about in the first place.

This paper seeks to demonstrate the effects of introducing more defined provisions within International Investment Agreements (IIAs), Bilateral Investment Treaties (BITs) and Multilateral Trade Agreements (MTAs), such as the North American Free Trade Agreement (NAFTA), the Comprehensive Economic and Trade Agreement (CETA) or the Energy Charter Treaty (ECT). By comparing the arbitral outcomes of all 2,443 ISDS cases in which savings provisions were found to either be present in or not, this paper looks to identify if a correlation exists between the presence of contractual language invoking a 'right to regulate' (a savings provision) and the distribution of cases decided in favor of States over investors.

In building upon work that has already demonstrated a measurable link between the Gross Domestic Product (GDP) of a home respondent state and the arbitral outcome, this study specifically investigates whether or not an interactive relationship exists between the difference in respondent-state wealth vs. plaintiff-state wealth in the year arbitration was initiated, and the presence of a savings provision described in either the preamble or elsewhere in the body of the agreement being invoked. By providing thorough descriptive and historical context, a wide and current literature review, a qualitative and quantitative analysis of cases, this thesis provides a clearer picture of the ISDS debate and supplies findings which speak to its future as a bellwether for international legalism.

1.2 Reason for this study

Empirical evidence analyzing the record of ISDS cases available have provided new quantitative insights to the discussions around regulatory effects and ISDS. Work done by Christine Côté and others offer compelling evidence to support the theory that economic disparity does indeed play some role in adjudicated outcomes (Côté, 2014). Gary Hufbauer and proponents of ISDS's viability, in terms of fairness of treatment during arbitration outcome, suggest instead that previous inadequacies stemmed from the lack of sufficient contractual design needed to prevent exploitation. These contractual design protections have been specifically identified as the inclusion of savings provisions (Hufbauer, 2015; 2019). According to Hufbauer's assessment, the current multitude of recorded outcomes in cases now reflect this change, as seen in the decline of abuses described by Côté and others. While there is evidence of this when examined along a temporal progression of cases, the ability now to quantify cases in a comprehensive manner using data provided by the newly created UNCTAD IIA Mapping Project, a testable component to this evaluation now presents itself.

Two major concerns over ISDS have emerged and are analyzed here. The first is whether or not ISDS disputes are adjudicated fairly, regardless of political economy; and second, whether or not the inclusion of a savings provision provides measurable effects in the outcome of ISDS disputes. In a comprehensive analysis of nearly all current ISDS cases publicly available, this study addresses both concerns by analyzing two major variables: discrepancies in GDP between plaintiff and respondent states, and the presence of a savings provision clause. The findings here conclude that national wealth imbalances

may play an extremely small role in predicting ISDS case outcomes, but outside the accepted statistically significant ranges. Secondly, it finds that the presence of a savings provision clause significantly affects both the outcome of an ISDS dispute, as well as drastically reducing the number of challenges a treaty containing such clauses may face. Of specific note, is that the Average Marginal Effects (AMEs) reveal a negative association to savings provision inclusion. This may be explainable in terms of performing a hard test on the variable that does not take fully into account the impact of those cases deterred entirely from arbitration by savings provisions. The findings here thus contribute overall to a more nuanced understanding of the strengths and weaknesses regarding international institutionalism, as it concerns international trade and investment practices.

Chapter Two – Introduction to Topic

2.1 Introduction to ISDS Arbitration

The following section serves to provide a general Investor State Dispute Settlement (ISDS) overview. ISDS itself is best defined as a legal mechanism embedded within contracts to serve as a previously agreed upon resolution process, and as such can take many different forms. The forms ISDS can take vary depending on the legal frameworks chosen- either as designed and utilized from prior frameworks, or on an *ad hoc* basis.

2.2 The Actors Involved

Investors

Multinational corporations (MNCs), small to medium enterprises (SMEs) and private investors are just some of the interested parties who seek investor protection abroad. These investors seek to include protectionist mechanisms such as ISDS in various international trade and investment agreements, mainly as a means of trying to safeguard property rights (Hufbauer, 2015). Local court arbitration involving the expropriation of property owned by foreign entities, are not always deemed as impartial. Evidence for or against these sentiments is likewise not deemed impartial, relegating most qualitative evidence as anecdotal opinion.¹

¹ Further investigation/reading on the topic, the book examines Latin American country abuse by foreign investors. Collins, David. (2013, March 14). The BRIC States and Outward Foreign Direct Investment. OUP, Oxford.

States

States often concede to ISDS third party international judicial systems with the belief that in doing so, they will generate greater investment from abroad². It is with this interest in mind, that more than 150 countries around the world have signed the ICSID Convention. There are only a few states which have not signed treaties which include some form of an ISDS arbitration mechanism. There are, however, some states which have refused ISDS clauses but who still secure sizable foreign investment. The two biggest examples for this include Brazil and Japan. Overall though, FTAs and BITs that allow investors to seek redress through private right of action courts such as ISDS are by far the norm in international investing. These ISDS bound treaties today number around 3,000 worldwide (European Commission, 2015).

The North American Free Trade Agreement (NAFTA) has contributed substantially to the record of cases brought through ISDS, in terms of both applicable members and sheer volume of cases that have been generated through its Chapter 11. The United States, for its part, has alone been a party to more than 50 direct agreements which include ISDS (USTR, 2015). The countries for whom ISDS is invoked against the most include Colombia, India and Spain. According to the Stockholm Chamber of Commerce (SCC) ISDS blog, Colombia, India and Spain have been the most recurring respondents to date for the occurrence of ISDS activation (SCC, 2016). However, it must be noted that today Canada is the most sued nation by these tribunals (Freeman, 2015). The US

² There is some challenging academic research against this, including the investment history of Brazil which often excludes ISDS from IIAs.

and the Netherlands are the most common home States from which investors have launched cases (SCC, 2016).

Court

The World Bank's International Centre for Settlement of Investment Disputes (ICSID) is the international arbitration institution of choice for most ISDS cases heard, and currently facilitates the vast majority of these (SCC, 2016). ICSID was created in 1965 and established to operate as a part of the World Bank. It was generated with the creation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (known as the ICSID Convention or Washington Convention). ICSID is described as being an "impartial international forum providing facilities for arbitration of international investment disputes," and one that "does not by itself arbitrate disputes but provides the rules and procedures for independent arbitration tribunals to resolve disputes," ad hoc (Latham & Watkins, 2017).

Judicial Body

Judicial bodies exist as three member tribunals within ICSID; each party chooses one judicial member, while a third is chosen by both the plaintiff and respondent party. A preselected list of arbiters is often made available for selection from a World Bank panel, a source of criticism by ISDS detractors. Arbiters can be independently chosen by either party involved however, as long as requirements are met. Most often professional corporate lawyers serve in these roles, often from a small and rotating pool of colleagues with familiarity with the ICSID procedural process.

Defense

Representation during arbitration itself is often handled by legal teams who represent states and investors separately. Adequate representation in ISDS disputes frequently costs between \$600 - \$800 (USD)/hour, and thereby contributes greatly to the overall cost incurred (Economist, 2014). The specificity required by ICSID standards for representation, which include strict rules concerning an arbiter's nationality and qualifications, consequently maintains these high costs for participants. Restrictions for representation and judicial selection are described in the ICSID charter's section 4 as follows.

Section 4 of Charter, 'The Panels'

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13

(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce,

industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

The arbiters/lawyers are permitted to rotate between positions and can serve many different roles at the same time. There has been criticism that this frequently allows for conflicts of interest and incentivizes arbiters to elongate their cases (Wellhausen, 2016). Proponents of the selection process, instead, stress that the design intent seeks to achieve the highest level of neutrality for the benefit of all parties involved (Hufbauer, 2015).

2.3 Definitions

Regulatory Chilling

The Regulatory Chilling Effect (RCE) refers to an instance in which the threat of a potential ISDS dispute influences an actual decision on policy creation, often thereby deterring policy creation for fear of reprisal. This is seen in the cancellation, or great depreciation of, any government policy intended for the public interest or good. Eric Neumayer, of the London School of Economics and Political Science, has described the phenomenon in terms of environmental policy as a situation in which a developing country either lowers environmental standards or fails to raise them for fear that internationally mobile capital might move to countries with lower standards (2001). Also worth mentioning, are international trade and environment scholars Kevin Grey and Duncan Brack, who outline in an OECD report RCE as when, “countries refrain from enacting stricter environmental standards in response to fears of losing a competitive edge” (2002).

Investor-State Dispute Settlement (ISDS)

ISDS is an avenue for external judicial arbitration designed exclusively for use by foreign investors, enabling them to bring legal suits against foreign governments on the basis of FTAs and BITs signed by the relevant parties and which have legally prescribed 'fair and equitable treatment' practices. They also enable compensation to investors for 'indirect expropriation,' pertaining often to losses of potential revenues as well as tangible losses (Ankersmit & Hill, 2015). ISDS decisions are considered final, not based on precedent and are currently not open to any type of appeals process (Joubin-Bret, 2015). Though ISDS is invoked often as a catch-all term for a variety of dispute settlement clauses, there are differences in its application depending on the international institution administering its process and the specific treaty through which it is being activated. The basic conceptual purpose and effects are largely congruent; ISDS exists in its most simple form as an investor's tool for which to utilize a pre-arranged and contractual third-party judicial option. This option is separate from any localized system and may be chosen for reasons of protecting property and guaranteeing impartiality. The United States government describes its own attitudes concerning ISDS by stating, "[ISDS] provides a neutral international forum to resolve investment disputes under international law [and] mitigates conflicts and protects [our] citizens" (USTR, 2015).

Gary Hufbauer, who served as the deputy assistant secretary of international trade and investment policy for the US Treasury from 1977-1979 and is currently a nonresident senior fellow with the Peterson Institute for International Economics (PIIE), has frequently voiced support for this kind of mechanism. In offering reasons for ISDS,

Hufbauer has articulated what he views as the three basic provisions which ISDS clauses in general seek to protect. These provisions are:

1. “A country should not expropriate the property of a foreign investor without paying compensation; and it shouldn’t expropriate it except for a public purpose, in other words, you’re not supposed to take away property and give it to a private owner”

(Hufbauer, 2015).

2. “Foreign investors who come to a country should get the same treatment as local firms investing in that country, that’s called national treatment” (2015).

3. “There’s kind of a catch-all provision, saying that governments should give foreign investors fair and equitable treatment. That language [as I said] has been used thousands of times” (2015).

This interpretation of ISDS is largely mirrored by the US government. The World Bank’s ICSID, where ISDS cases are most frequently arbitrated, is itself a major post WWII institution. The design of these institutions, to solidify U.S.’s economic systems globally, has been the provision of both the World Bank and the IMF.³ In the United States, FTAs and BITs include ISDS mechanisms specifically designed to protect investors in foreign countries with the following four basic protections from foreign governments, according to the Office of the U.S Trade Representative.

1. ‘Freedom from discrimination: An assurance that Americans doing business abroad will face a level playing field and will not be treated less favorably than local investors or competitors from third countries’ (USTR, 2015).

³ Departments and purposes further explained by World Bank at <https://icsid.worldbank.org/en/Pages/about/ICSID%20And%20The%20World%20Bank%20Group.aspx>

2. ‘Protection against uncompensated expropriation of property: An assurance that the property of investors will not be seized by the government without the payment of just compensation’ (2015).

3. ‘Protection against denial of justice: An assurance that investors will not be denied justice in criminal, civil, or administrative adjudicatory proceedings’ (2015).

4. ‘Right to transfer capital: An assurance that investors will be able to move capital relating to their investments freely, subject to safeguards to provide governments flexibility, including to respond to financial crises and to ensure the integrity and stability of the financial system’ (2015).

Of considerable note in evaluating what ISDS is and how it functions globally, is evaluating its role in what can be seen as the removal of the investor’s home-state apparatus from investor-disputes all together. As noted, states from which investors have won sizable awards through ISDS arbitration, are not always willing to abide by specific rulings. In these instances, an investor’s home state can be called upon to assist, in one fashion or another, often using diplomatic or economic coercive techniques (Posner, 2016).

Ted Posner, a lawyer who was part of the trade counsel for the U.S. Senate Finance Committee from 2001-2002, and is currently a partner with the International Trade Group and the International Dispute Resolution Group, described how the removal of the state from these disputes may have been intended, but is not entirely the current reality. In a paper concerning the potential addition of appellate mechanisms for ISDS, Posner explains how with ISDS, “it is not a part of an institution that is essentially diplomatic and negotiation-oriented in character. Quite the contrary. When a host Party

consents to allow an investor of another party, rather than the other party itself, to vindicate rights under the agreement it is consenting to removal of the dispute from the realm of diplomacy” (Posner, 2016).

In a conference presented at the Wilson Center, Posner contributed to a panel examining practicalities and suggestions for reform in the current system of ISDS. In this talk, Posner first examined the traditional story ISDS presents, which is that it’s the solution to the diplomatic entanglements that the home state of investors wished originally to remove itself from. Often, firms could entangle their governments in foreign investment battles that they wished not to fight. Posner explains however, how this transition was never fully realized- and how it potentially never will. Posner sees the role of the investor’s home state as encompassing three different roles throughout the entire arbitration process. He describes these roles as ‘enforcer, gatekeeper and alternative claimant’ (2016). The role of enforcer, he says, is simply the state’s role in “helping the investor to enforce its award in the event that there is an arbitral award in favor of the investor” (2016). Second, Posner describes the state as gatekeeper, which is to say that the state operates essentially the final say in trade negotiations anyway. Third, the state as an alternative claimant examines, “state to state dispute settlement, ala the WTO, [which] may be preferable to resolving a dispute [as opposed] to investor-to-state dispute settlement” (2016).

Cases of this nature often include and lead with Argentina- a source of well-known cases where US investors in particular found final resolution of payment through actions taken by their U.S. home state. To aid the investors in the collection of their settlement, the U.S. used its economic leverage and pulled Argentina off a preferred

trading list, ultimately coercing Argentina into a final payment it otherwise had sought to avoid (Zivkovic, 2016).

Global cases brought forward vary in terms of their industry, but of particular note is that “at least one in three cases at ICSID is related to oil, mining or gas” (Van der Pas & Damanik, 2014). The United Nations Conference on Trade and Development (UNCTAD), reported in 2013 that 70% of claims had originated from the services sector. These included the supply of gas and electricity, construction, banking and retail trade. In 2014 UNCTAD reported that 61% of its new cases were in service, 28% in industry and 11% based on investments within manufacturing (2014).

2.4 History and Trends

First Appearances & Current Trends

Investors have long sought property rights protection abroad, fearing foreign courts would not provide the necessary impartiality required to deliver fair justice or compensation following acts of expropriation. Evidence of this has been suggested as far back as 800 years, beginning with the Magna Carta (USTR, 2015). Another historical example is the US ‘American Jay Treaty,’ established by the first US Chief Justice, who ensured that “investors received ‘full compensation for [their] losses and damages’ where those could not be obtained ‘in the ordinary course of justice’⁴ (USTR, 2015). Even in those times, states such as the US sought to assure foreign investors of their property

⁴Many thoughts on ISDS from direct U.S. Gov. opinion located on this detailed site exploring FTAs and BITs. <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>

rights in order to assure their continued capital inflows. Post revolution, the US and other countries experimented with over a 100 different types of investor-state arbitration methods. Of great concern during this early process was how to deal with Mexico, where everything from cattle theft to denials of general justice had become contentious on both sides (USTR, 2015). More modern legal forms resembling the ISDS mechanisms of today, first occurred sometime around the year 1960. A suggested premier case is between Germany and Pakistan in 1959 (Economist, 2014). Other early examples include Switzerland in '61, the Netherlands in '63, Italy in '64 and Sweden in '65 (SCC, 2016). Today, EU member states account for nearly half of the roughly 3,000 total known cases (European Commission, 2017).

State-to-state interaction had previously dominated the investor-to-state process, with diplomatic channels handling the processes and helping to mediate the outcomes (Posner, 2016). One reason that the number of cases has increased so markedly, may be due to the fact that now investors can use the ISDS clause to directly challenge a state, without the requirement of any state involvement. There has recently been a drastic increase in the number of cases globally, since sometime during the early 1990's (see graph). In 2011 there was 56 cases, 59 cases in 2012 and then 70 cases in 2015⁵. ISDS cases globally have increased “from 38 cases in 1996 to 514 known cases (registered at ICSID) in 2012” alone (Economist, 2014).⁶

⁵ 2015 projection: <https://www.law360.com/articles/804975/un-says-investor-state-dispute-settlement-cases-growing>

⁶<https://www.tni.org/en/briefing/netherlands-indonesia-bit-rolls-back-implementation-new-indonesian-mining-law>

2.5 Facility Details

Since ISDS arbitration is largely held through the World Bank's ICSID, many of the proceedings are subsequently held at their main office headquarters located in Washington D.C. States and investors may choose to hold proceedings elsewhere,⁷ although do so with less regularity. Other venues include the International Centre for Dispute Resolution (ICDR), London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC) or the United Nations Commission on International Trade Law (UNCITRAL).

2.6 Origin of Necessity

Local Courts & Concerns of Impartiality

ISDS is primarily a response to investors' fear of local courts' expected impartiality or inability to deliver adequate judgements. Reasons vary, but most investors discuss a lack of 'maturity' in the legal structure and doubt openly that impartiality will be rendered fairly during arbitration (Wellhausen, 2016). According to the U.S. government, "while countries with weak legal institutions are frequent respondents in ISDS cases, American investors have also faced cases of bias or insufficient legal remedies in countries with well-developed legal institutions." It continues by saying, "ISDS can be of particular benefit to small and medium-sized enterprises (SMEs), which often lack the resources or expertise to navigate foreign legal systems and seek redress for injury at the hands of a foreign government. Indeed, SMEs and individuals have

⁷ Other locations provided: <http://internationalarbitrationlaw.com>

accounted for about half of all cases brought under international arbitration” (USTR, 2015).

In terms of why ISDS is included within FTAs and BITs between developed countries, whose legal systems are not in question, the answer may be more geopolitical. ISDS and the general structure of investment dispute settlement is an attempt at maintaining a status quo for western economic leadership, while ISDS is seen often specifically as a means of solidifying this legalist structure. It can often be seen as a kind of template for all future world trade, with specific thought to establish legal precedents written by western lawmakers before China takes full leadership and control of this arena (World Trade Law, 2016).

2.7 Process, Costs and Outcomes

Enforcement

Apart from directly appealing to their home governments for assistance, investors typically have limited options when it comes to collecting funds or recouping assets if host states refuse to comply with settlement awards. If acceptance of results is not adhered to, penalties such as fines or other means of coercion are utilized until parties may eventually comply. Currently there have been few recorded instances of states refusing to adhere to ISDS judgements, and while states have occasionally resisted the payments of awards to investors, the threat of losing future investment often encourages compliance. When nonpayment of awards does occur, investors can attempt to claim or freeze a respondent country’s assets. International banking institutions will in some instances then assist with this freezing of assets. If necessary, investors can then turn to

home governments and request that the “right of diplomatic protection [be] reactivated,” and thus “the home state of the investor can use all legitimate public international law tools to force the host state to 'pay up'” (Zivkovic, 2015). A well-known example of this occurring was Argentina’s refusal to pay awarded damages to US investors, and its subsequent removal from the U.S. list of preferred trading partners. This loss of preferential trading status resulted in massive losses in investments, which contributed to Argentina’s eventual compliance and payment of the awards in question (Zivkovic, 2015).

Cost Associated with Proceedings

In terms of how expensive an ISDS case can be, settlements themselves have climbed from the millions into billions (USD) as of recently. Arbitration alone, without the inclusion of a settlement award, can be costly. According to the World Bank, “depending on the complexity of the case as well as the number of pleadings and oral hearings, costs could be substantial” (ICSID, 2017). Research by the OECD states the average legal cost for arbitration to be \$8 million (USD) on behalf of the claimant (Gaukrodger & Gordon 2012). The main costs associated with arbitration when using ICSID are broken down into the following three parts.

I. Parties’ Legal Fees and Expenses

According to the World Bank, “a tribunal or ad hoc committee has discretion to order” that legal fees can be reimbursed by the winning party. These legal fees will vary depending on the counsel chosen by either party but can be substantial due also to the length of average ICSID cases, which can last on *average 3.6 years* (ICSID, 2017).

II. Advance Payments to ICSID

The cost of the tribunals at ICSID vary, but there are some standard costs associated with arbitration. According to ICSID, an “advance payment of \$100,000.00 (USD) – \$150,000.00 (US) per party for the purpose of establishing” a tribunal is required. Some of the included particulars of this overall fee are as follows:

- A fee of \$3,000.00 (USD) per day for meetings or other work performed in connection with the proceedings, corresponding to \$375.00 (USD)/hour (ICSID, 2017).
- The center does not charge the parties for its services by the hour but charges an annual fee, currently \$32,000.00 (USD). The fee covers time spent by all members of the dedicated case team, including the assistance of the Secretary at hearings and the financial management of the case account. This fee is usually divided equally between the parties (2017).

III. Lodging Fee

If a party requests either the “institution of conciliation, arbitration or fact-finding proceedings under the ICSID Convention or the Additional Facility,” or requests an annulment of a previous award which has been rendered, a non-refundable fee of \$25,000 (USD) will be charged. If a party requests a “supplementary decision to or rectification of an award under the Convention,” or requests the “interpretation or revision of an award under the Convention, requests the “re-submission of a dispute to a new Tribunal after the annulment of an award under the Convention,” or requests the “supplementary decision to, or the correction or interpretation of, an award under the Additional Facility

Rules (Administrative and Financial Regulation 16, Schedule of Fees),” then a non-refundable fee of \$10,000 (USD) will be charged (2017).

Awards and Totals

Of total costs associated with arbitration, 82% is accumulated solely by the cost of counsel and experts by each side. The arbitrator fees total an average of 16%, while institutional costs payable to the organizations that administer arbitration generally amount to about 2% (European Commission, 2015). These figures help to appreciate the ways in which costs of arbitration might average such a high figure.

Not to be excluded from the cost of arbitration, are the actual amounts awarded. Average ISDS claims run \$622.6 million (USD), while the average award is \$16.6 million (USD) (Franck, 2011). This number reflects the actual amount transferred by governments, but because of transparency complications this amount may not entirely account for all total expenditures.

Chapter Three – Literature Review

3.1 Literature Review Introduction

This literature review section covers the principal objections and support for ISDS within the framework of international investment, covering both clearly visible concerns as well as the more nuanced disagreements. The main thrust of this review will focus on ISDS arbitration and the debates regarding the influence of economic power dynamics on case outcomes. As concerns over RCEs and the wider threat to an established legalism by economic power imbalances cause disturbances in confidence for international investment, the debate about whether these concerns can be alleviated through further legalism has become wide ranging. This debate therefore encourages or discourages actual investment for both parties, as uncertainty around the viability of international administering bodies disrupts the faith necessary to facilitate what is often substantial investment.

The central question being asked in this paper, is not whether ISDS can provide security for foreign investment, it most certainly does, but whether or not it can maintain the international confidence in administrative outcomes necessary to satisfy parties who utilize it for securing investment in the first place. If faith in its ability to render judgements impartial to political influences becomes suspect, then its use will begin to erode. Relevant to the point of whether or not ISDS will remain a feature of international investment moving forward, this again is important due to current US domestic concerns regarding states' sovereign right to regulate. As mentioned, there were significant criticisms and concerns regarding California's potential to lose regulatory freedom during

TPP trade negotiations, which ultimately contributed to that negotiation's failure. This concern, real or imagined, and the associated mistrust of ISDS were a large part of voter's reluctance with TPP. These and other concerns ultimately helped lead to the postponing and eventual abandonment of the trade negotiation altogether by the US, despite what would have potentially been a massive economic boost to that US state.

It is with this in mind, that the main disagreement to be reviewed here is whether or not power imbalances are reflected in ISDS outcomes between host nations and their foreign investors.

3.2 Origin and Purpose

There currently exists a robust debate concerning the judicial fairness rendered by third party tribunal disputes, arising from international trade and investment agreements that specifically allow for such a mechanism of arbitration. The notion of ISDS, its potential necessity in agreements and the manner in which it is exercised- are all components of dynamic global discussion. Since the close of the Second World War, the intertwining of supply chains and investment has been sought as a way to bind and stitch nations together. Along with this, powerful institutions have been structured and agreed upon in order to create a framework of cooperation that could be sustained. Recently, ISDS has become a 'red herring' in this process (Dickson-Smith & Mercurio, 2018). The scholarly research aside, there is an overwhelming popular assumption today that ISDS is a tool for abuse by the corporate wealthy; a tool for big business to extract monumental amounts of money from otherwise sovereign but economically weak, or vulnerable states

(Schultz & Dupont, 2014). What's more, there have been a number of landmark case examples in which these sentiments appear to have rung true (Franck, 2009).

Highly publicized trade negotiations such as those of the TPP or the TTIP have only furthered public interest and attention to the ISDS topic. Where debate has grown, fears and negative sentiments have followed suit. Whether it be concerns from the Belgian region of Wallonia during CETA negotiations, or California's fear over regulatory freedoms during TPP trade talks, fears over States' rights and poor nations welfare have been called into question. Whether or not the system of arbitration can perform in a way that reflects meaningful outcomes of fairness and justice, will dictate much of the overall system's survival. Indeed, TTIP and TPP are now on indefinite hold; two agreements that would have had otherwise enormous geopolitical effects. If global markets cannot secure a governing structure that maintains legal confidence for the world's participants, then participation will decline. The relevance of whether or not ISDS continues to be workable in international agreements speaks to the relevance of whether or not economic global governance can survive. ISDS is not the lynchpin to world order, but if it does not succeed in delivering perceptions of fair outcomes to signatory States who have agreed to relinquish measures of sovereignty, then those states can be expected to take their sovereignty back.

3.3 The Legality of Private Right of Action

Scholarly literature on the subject of ISDS is broad, covering many disciplines and lines of debate. The initial dissection of the topic discusses the legitimacy of providing a 'private right of action' to foreign actors in the first place. Before ISDS

appeared in the late 1960's, investors' main avenue for seeking redress remained in the realm of diplomatic requests (Echandi, 2019). The private right of action development served to give investors an alternative to State-to State diplomacy dependent resolutions (2019). Scholars and policy experts who support the process ISDS provides, often point to its necessity in facilitating the environment to attract investment and encourage trade. Without a mechanism such as ISDS, those nations seeking foreign investment would have an even more difficult time attracting it (Echandi, 2019; Oldenski, 2015; Erixon 2014; Fleming, 2014). The benefit to investors of providing a mechanism within contracts to facilitate a third-party tribunal is clear. The more important question being, is it legal? Directly challenging this notion is the historical doctrine on foreign action, specifically the Drago and Calvos doctrines to name two. This debate on the legality of ISDS, provides a groundwork for discussing the current legitimacy crisis that international law- and ISDS specifically, now face (Franck, 2011).

The second mainstream of discussion flows from an initial assumption that private right of actions taken by foreign investors upon their host states *can* be legal, and thus focuses instead on how to best facilitate these proceedings in a way that delivers the intended goals of the signatories. There has been a great deal of dialog between scholars and policy makers on this subject, with some major improvements being suggested as a result of numerous complaints by both investors and host states. Culminating from this debate, the United Nations Commission on International Trade Law (UNCITRAL) in

⁸Further information regarding Calvo Doctrine, Calvo Clause and the Drago Doctrine can be found by visiting Oxford Public International Law, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689>.

2017 presented results from a working group on the topic which outlined reforms discussing appellate mechanisms and arbitrator choice processes that would limit potential conflicts of interest (UNCITRAL, 2017). The effort not to abandon private right of action, but instead to improve its performance for the interested parties, has even led to the discussion of establishing an international investment court within the European Union. Indeed, as the General Agreement on Tariffs and Trade (GATT) proved to be precursor to the WTO, ISDS may prove to be a precursor to an investment based permanent court system- one complete with permanent judges and a clear appellate mechanism (Echandi, 2019; Van Harten, 2007).

Given the focus of this inquiry, the remaining section of the literature review will evaluate the scholarly discourse not around the legality of private right of action, but on the topic of how efficiently ISDS has performed in providing the outcomes its inclusion within agreements had intended.

3.4 The Debate on How, Not If, to Operate Private Rights of Action

The ISDS process can, as described further in the previous section, be undertaken within various international frameworks. Most common among the choices of administration, has been ICSID. By volume, ICSID facilitated over half of all ISDS proceedings, at 55% (Echandi, 2019). ICSID is currently deemed the only institutional arbitration available, all others technically exist as *ad hoc*, due to the 1965 ICSID convention (2019). Various rules can be utilized by those in arbitration, not only ICSID's institution rules. Even in cases where the ICSID facilities are utilized, some 6% of

participants choose to use another set of guidelines, despite the use of procedural ICSID space (2019).

The second most commonly used rules for arbitration proceedings has been UNCITRAL, at 31%, and 15% within others such as the International Chamber of Commerce (ICC) or the SCC (Echandi, 2019). Given the landscape of tribunals used, much of the current and past debate has revolved around how ISDS is adjudicated under both ICSID and UNCITRAL.

This is an important reality to keep in mind when discussing the debate around ISDS results, because much of the discussion concerns the outcomes of proceedings that are specific to the process of largely two specific venues. It is also a crucial point to be made when debate unfolds concerning the changing of specific rules to improve the outcomes from ISDS. ISDS in this context is not seen as the problem, instead the problem is how it is implemented. This literature review will not spend an inordinate amount of time discussing and reviewing the various rule changes and their corresponding debates, but rather seek to summarize the discussion concerning the impact of rules and language.

3.5 ISDS Goes Public, in a Very Negative Way

Detractors of ISDS have suggested that it is a tool by which international companies and investors have leveraged their outsized economic power to extract wealth and prevent regulatory measures that might otherwise protect national interests. In this regard, ISDS has been called little better than economic imperialism by a different name (Sornarajah, 2016; Kaushal, 2009). In an article published by *The European Journal of*

International Law, this sentiment has been acknowledged- questioning the empowerment of investors utilizing ISDS (Schultz & Dupont, 2014). The near meteoric rise in the number of cases over the last two decades has likewise alarmed many, with the assumption being that the increase of cases is indicative of a growing abuse of power by the Global North against the developing world (2014). As sweeping trade agreements have been proposed, select cases of abuse have been used to augment the perceived dangers.

In 2016 Times reporter Haley Sweetwater Edwards published her book entitled, *Shadow Courts: The Tribunals That Rule Global Trade*. The title of her book conveys much of the fear the general public now regards ISDS with. Her writing reflects a growing view that the tribunals provided for by ISDS clauses, have been used overwhelmingly by multinational corporations to exploit the wealth of sovereign nations and their citizens.

Similar sentiments have likewise appeared in the Economist as well, expressing concern both over a dramatic rise in the number of cases and the impact it has potentially had on domestic regulatory action. In 2014, the Economist published a piece on ISDS which characterized it as an instrument by which multinational corporations run roughshod over ‘ordinary people’ and state regulation, trampling protections on health and the environment.

While these and other journalistic publications and commentary have provoked concern from the public, the international law and investment community has also been intensely debating the subject. Dr. Muthucumaraswamy Sornarajah of the National University of Singapore has written critically about the use of legal interpretations during

arbitrations, suggesting that in some cases they do not reflect the original intent of the treaties previously agreed upon. Further, Sornarajah has asserted that the original intent of the investment protections- to deliver development, has failed. In place of promised development, he argues absolute protections to investors have been the primary outcome (Sornarajah, 2016). A much-cited author on the subject, Sornarajah's criticisms have made a lasting impression on the debate.

New York University law professor Vicki Been echoes a growing chorus of ISDS criticism challenging the broad nature of expropriation interpretations, a point of contention that has caused much of the recent controversy (Been & Beauvais, 2003). Substantial concern has been expressed by international law scholars about the losses brought to arbitration regarding 'potential' profits having been lost due to specifically regulatory measures taken by host states.

Indeed, it is here that two concerns have been shown to hold merit. First, some of the awards that have come down as a result of successfully arbitrated complaints involving the loss of potential profits due to host state enactment of regulation have been alarming. In the 1997 case of *Metalclad Corp v. United Mexican States* (under NAFTA), an ICSID ruling awarded the US investor \$17.7 million (USD) in damages. Pertinent to note within this debate, was that the original claim by the investor was for \$90 million (USD). The case, predicated on the alleged interference of local Mexican regulatory action, has served as a powerful example of how corporations can demand 'regulatory takings' and potentially dictate regulatory action by otherwise sovereign states.

Another example often held up as proof that ISDS is an investment tool of abuse, is the 2015 case between host state Ecuador and the Houston based oil company

Occidental. Due to cancelled contracts for drilling in the Amazon, an arbitration court awarded Occidental over \$1.7 billion (USD). This amounted to an award costing nearly 2% of Ecuador's GDP at the time, not including the costs associated with arbitration itself. These and a few other large cases won by investing claimants have served to inflate the average awards and cost of legal expenses (Echandi, 2019), further bolstering the detractor's arguments that ISDS has been an abusive and unjust tool of foreign investment.

3.6 Empirical Studies Begin to Challenge Negative Perceptions

Although there have clearly been cases that question any observer's view on the impartiality of ISDS outcomes, these cases have also served to distort a complicated fabric of cases that has changed and evolved both in time and place. As complaints and concerns about the outcomes ISDS has rendered, especially given the enormous increase in cases over the last couple decades, a great number of studies have been conducted to further understand the evolving nature of ISDS.

Within the body of this work, five key insights take shape to provide a more objective view of ISDS. These five insights work to explain within the confines of ISDS's legal ability how it can and cannot provide fair outcomes to those who incorporate it into agreements. These are first, that ISDS has had a history of being decided more in favor of investors than States, but that these outcomes have since evolved. Second, ISDS is no longer solely a tool of wealthy nations over poorer ones. Third, ISDS is no longer a tool used only by large corporations from wealthy States but is increasingly being invoked both by smaller businesses and by businesses from less

wealthy nations. Fourth, ISDS is shaped today not only by its ability to entice Foreign Direct Investment (FDI) to developing nations, but increasingly is now also a mechanism being used to shape and refine agreements between middle and upper-income countries. Fifth, ISDS is serving in ways both positive and negative to enforce norms and align political economies in today's global investment and trading networks. As a result of this, ISDS will almost surely be altered to accommodate a diverse body of actors and take its place as a key inclusionary part within global governance.

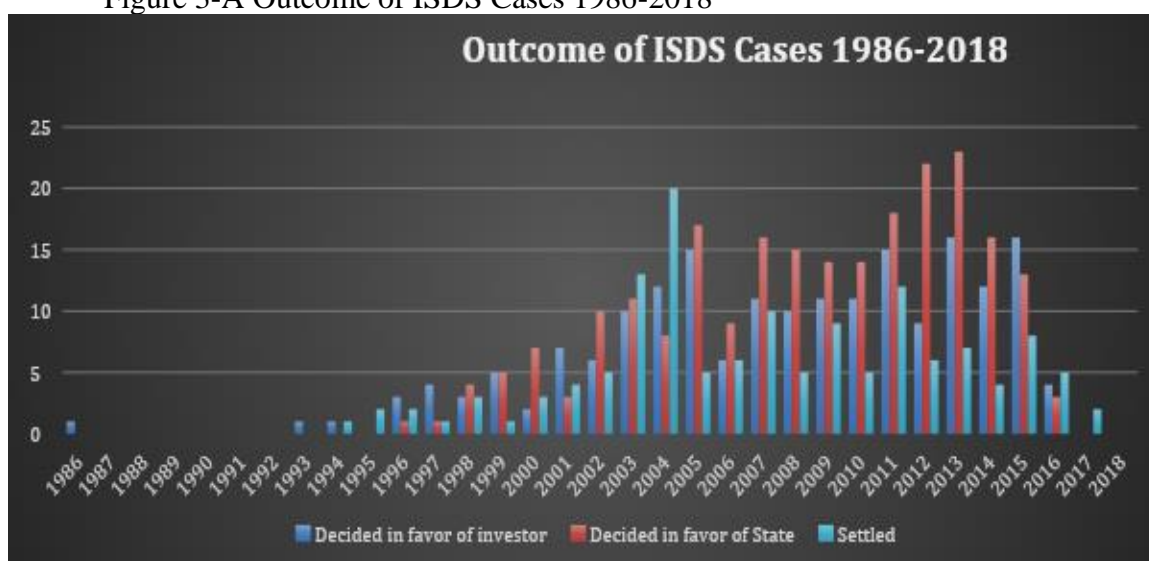
Insight One

To address the first insight, ISDS introductory had warranted the charges of mistreatment by investing States against the host States. This reality is largely acknowledged by all serious commentators on both sides of the debate (Franck, 2007; Schulz & Dupont, 2015; Sornarajah, 2016; Korzun, 2017; Echandi, 2019). As the timeline of ISDS has progressed however, the debate has taken on a more empirical aspect which paints a different picture. The United Nations Conference on Trade and Development (UNCTAD) provides information on all publicly known treaty based ISDS cases to date.⁹ These cases span all known ISDS disputes, which include the great quantity that proceeded under the procedural rules and processes of both ICSID and UNCITRAL, as well as all other available known options such as the SCC or ICC. This data reflects a changing dynamic of cases decided in favor of States vs. investors, but clearly begins with decisions in favor of the investor being more numerous than in favor

⁹Further details available by visiting <https://investmentpolicy.unctad.org/investment-dispute-settlement>

of states. There is also a clear spike in the number of cases that were settled in 2003 and 2004- which derives specifically from both the Argentine financial crisis of 2003-04 (Di Rosa, 2004) and the collapse of investment returns from the Indian Dabhol Power Project (in the state of Maharashtra). The collapse of investments tied to the Dabhol Power Project were largely due to fallout from the corruption case involving US firm Enron, whose failure culminated around the winter of 2001 (Sornarajah, 2016; UNCTAD, 2019). These two major increases in settlements, along with the clear lack of decisions made in favor of the State up until that point, can be seen illustrated in Fig. 3-A.

Figure 3-A Outcome of ISDS Cases 1986-2018

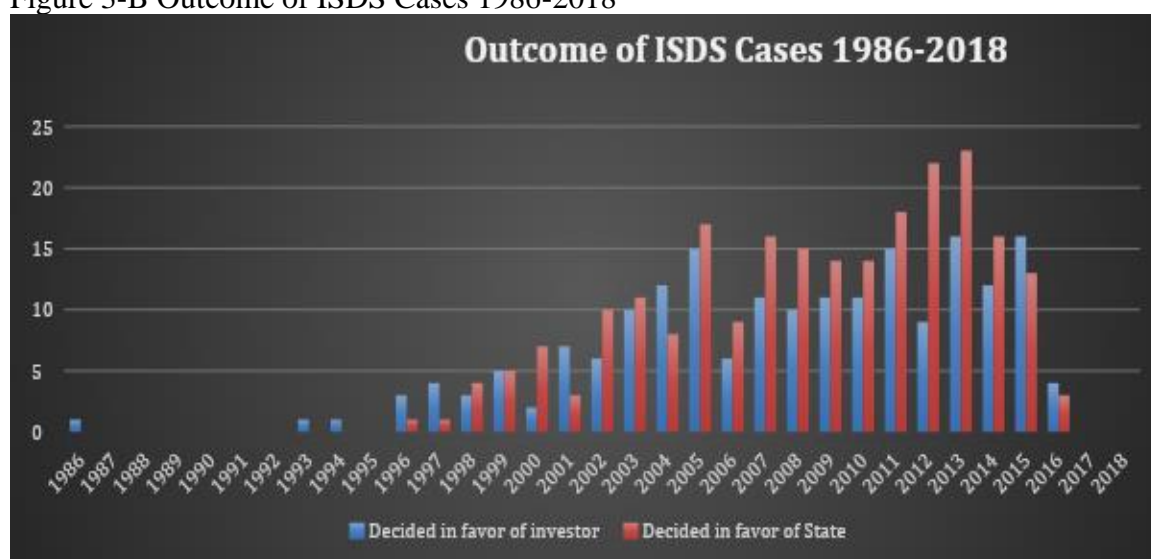


The questionable justice in the outcomes of these and older cases, provide an understandable hesitation to view ISDS in current terms as a mechanism capable of delivering justice to participants other than wealthy investors (Schulz & Dupont, 2014; Sornarajah, 2016). Examples of these abuses, as well as counter examples, are offered in more depth within the qualitative section.

Insight Two

In addressing the second key finding empirical studies have contributed to the debate, ISDS is no longer a tool used solely by wealthy nations against poorer ones. Fig. 3-B illustrates this change, depicting only decisions rendered in favor of states and investors. There is a clear change in the trend post 2005, after which a full decade passes before cases in favor of investors again overtake that of the States.

Figure 3-B Outcome of ISDS Cases 1986-2018



UNCTAD data reflects that overall, since the first ISDS case to the most recent, decisions have been made in favor of the States 35.5% of the time, compared to 29.5% for investors (UNCTAD, 2019).

Complicating this picture, is the amount that damage awards are decided. Finding a workable average has proved both difficult and misleading. Often awards are small, but when they are large- they are gargantuan. Research indicates that on average, of the awarded compensations to date, half of the awards granted were for less than \$16 million

(Wellhausen, 2016). When awards were granted, reports indicate that the amount granted was often below 30% of the original amount requested by the investor (Puig & Strezhnev, 2017; Franck, 2007). This stands in contrast to an often-cited mean of \$508 million (USD). This mean is influenced strongly by five specific cases which resulted in awards in excess of \$5 billion (USD). Their inclusion of course pulls the average higher, but is not always clearly identified (Echandi, 2019).

Insight Three

In conjunction with the perception that ISDS is a tool solely used by wealthier nations, is the accompanying assumption that it is used solely by large corporations or multinational enterprises (MNE) (Schultz & Dupont 2014; Sornarajah, 2010). This makeup of investors does not match however with the findings by the OECD in 2013, or in other studies examining the composition of investors who invoke ISDS (Miller & Hicks, 2015). The OECD has found that a third of cases submitted originated from small businesses, about half were submitted from medium up to large businesses, and less than a tenth from MNEs (Gaukrodger & Gordon, 2012; Echandi, 2019).

This composition is further underscored by research identifying 50% of all U.S. ISDS claimants as being made up of small to medium businesses, designated as having fewer than 500 employees (Miller & Hicks 2015; Franck, 2011). MNEs clearly still represent the greatest portion of the claimants, but the overall distribution reveals more diversity in incomes and business size than popular perceptions suggest.

Insight Four

Additionally, UNCTAD data reflects over 20 ISDS cases have originated from investors in developing nations themselves. Examples of this include such countries as Ukraine, Jordan and Egypt, while another 30 cases have originated from investors in upper-middle income nations (Echandi, 2019).

This perception of powerful investors invoking ISDS in abusive ways upon developing nations, is also qualified further by recent surges in ISDS provisions having been invoked between wealthier nations. ISDS is rapidly becoming a story between wealthier nations, and less a tool used between nations with wide economic disparities (Echandi, 2019).

Insight Five

Finally, ISDS is serving in ways both positive and negative to enforce norms and align political economies in today's global investment and trading networks. As a result of this, ISDS will almost surely be altered to accommodate a diverse body of actors and take its place as a key inclusionary part within global governance.

If the confidence in international institutions to deliver judgements which are impartial to non-legal influences falters, then their durability and influence of these institutions will most certainly begin to wane. Among the calls to improve international economic governing institutions such as ICSID, upgrades designed to increase faith and participation have included calls to install permanent adjudicators, increase transparency and create appellate mechanisms. The improved drafting of IIAs has also been discussed, so as to level a playing field for all participants. Already, as the UNCTAD IIA Mapping

Project has stated, treaties are increasingly borrowing from each other's success in formats, leading to more agreeable contracts to both States and investors (2020).

Chapter Four - Quantitative Analysis

4.1 Quantitative Analysis Introduction

Empirical evidence analyzing the record of ISDS cases available have provided new quantitative insights to the discussions around regulatory effects and ISDS. Work done by Christine Côté and others has offered evidence to support the theory that economic disparity does indeed play some role in adjudicated outcomes (Côté, 2014). Gary Hufbauer and proponents of ISDS's impartiality, in terms of fairness of treatment and arbitration outcomes, suggest that previous inadequacies identified by those such as Côté stem from insufficient contractual design protections needed to prevent exploitation (Hufbauer, 2015). These contractual design protections have been specifically identified by Hufbauer as contractual clauses known as savings provisions (2015, 2019). According to Hufbauer's assessment, the current record of case outcomes reflects this change, seen by a decline in arbitration decided in favor of investors over host states (2015, 2019). While there is evidence of this when looking along temporal lines (seen in literature review), the ability to quantify cases using the near comprehensive coded data provided by the UNCTAD IIA Mapping Project now offers a powerfully testable component to this debate.

The IIA Mapping Project, a collaborative initiative begun between UNCTAD and universities from around the world, has recently completed a nearly comprehensive coding of the legal content IIA treaties for more than 2,500 of the approximately 3,000 IIAs in current existence. The result provides policymakers, researchers and investors with a source of information on the specific design of contracts to be used for identifying

trends and patterns in policy, treaty drafting and outcomes. Many IIAs are broadly comparable due to similar structures, but frequently address country-specific issues in slightly varying ways, offering insightful differences in outcomes given what are often minor alterations in legal language. As UNCTAD states specifically of its mapping project, “these differences have been critical to the outcomes of many international investor-state arbitrations (UNCTAD, 2020).”

Public ISDS outcomes, which have been decided either in favor of states or investors, as well as additional case information, is available through UNCTAD’s Investment Policy division which supplies results from all the main administrative venues. These include not only the UN, but also ICSID, which facilitates the majority of arbitration. By specifically comparing the results from UNCTAD’s database with the IIA Mapping Projects identification of language considered to reflect savings provisions, it is possible to test for correlational evidence with regards to arbitration outcomes. If Hufbauer and others are correct, and the inclusion of savings provisions measurably affects the outcome of cases, then a correlation reflecting this can be found when comparing the data available from these two resources.

The approach used to find correlational evidence of savings provisions here has been broken into two quantitative sections. The first quantitative section examines savings provision inclusion and its effects on ISDS arbitration as a whole. This section also examines alternative explanatory variables, specifically those with regards to wealth and wealth disparity. While the effects of wealth disparity are less suggestive and do not return significant statistics, they do return predictive values which warrant further

examination. This relationship is picked up and further examined in a second quantitative section, which tests a model that interacts the variables of savings provisions and wealth disparity (measured in the year of case initiation).

4.2 Quantitative Analysis - Section One

I. Hypothesis

The first part of the quantitative analysis done here, focuses on the effect savings provision inclusion has on the outcome of decided cases, and examines its predictability in measures of confidence as they pertain to the case registry. Additionally, national wealth and wealth disparity variables that may likewise act as predictors are explored, most notably the disparity in wealth between host states and home states of investors in the year disputes were first initiated (measured using GDP).

The following hypotheses are tested using the IIA Data Mapping Project's coded database, cross referenced with existing case records available through UNCTAD's Investment Dispute Settlement Navigator, to create an original selection of case data specifically designed for the purposes of this inquiry. Section One's hypothesis is defined as follows.

H1: The inclusion of a savings provision will increase the likelihood of an ISDS dispute being decided in favor of a state.

II. Design

The design of the data set used here is the same as the design used in Quantitative Analysis Part Two. The collection method, use of the UN and University IIA Mapping

Project Database is the same, as well as the method by which disparity between host nations and investor's home nations has been calculated.

Data Selection

The data set and design of this study investigated whether or not the discrepancy in the GDP between a respondent state and plaintiff's home state (x) affects successful ISDS defense (y) among 2,443 cases that resulted in a clear decision of being either decided in favor of a State or an Investor (n=323). The cases analyzed are from the UNCTAD IIA Mapping Project's database, which codes for 100 different elements which identify coded legal approaches within each treaty. The project's 2,557 treaties were mapped by students of law from universities around the world, and their work was completed with coordination and guidance by UNCTAD as well as professorial supervision.

Worth noting in this selection, is the bias which results from examining only those cases which were brought to arbitration and decided. First, is the bias of only including cases brought to court. There are presumably a great many instances in which disputes have been reconciled outside of formal arbitration, and therefore the influencing variables that affected their outcomes is not included. Secondly, many cases of dispute have been settled before an arbitration reaches a definitive conclusion in favor of the state or the investor. By excluding cases of this kind, and especially those decided specifically 'in favor of neither party,' the effects of influencing variables again go unexamined. An example of this is further discussed in section 5.2, detailing the case of Newmont Mining v. Indonesia. The reason for these exclusions is due to the difficulty of examining cases

which were never begun. Secondly, owing to the fact that ISDS outcomes are only public when both parties allow for transparency, there is further difficulty in defining outcomes of cases which are sealed.

The selection bias described here does however present the finding given as a hard test of both hypotheses. If savings provisions have an adverse effect on the likelihood an investor will be successful in arbitration, then they are less likely to bring disputes to trial. Likewise, if the settlement of a dispute is abandoned or settled before arbitration is completed, the assumption would be that the contractual language was not defensive enough to warrant seeing the process through. This implies therefore that the sample bias skews the cases studied here in such a way, that only those cases which are seen as potentially favorable to investors are being measured. Therefore, measuring the variable effects of both savings provisions and GDP disparity on outcome are held to an artificially high standard, and their effects should be weighed ultimately with this in mind.

Dependent Variable

The dependent variable (y) used in this analysis describes a successful defense against a plaintiff who has brought an ISDS dispute to any of the available forums, and in which the outcome was decided as being in favor of the state or the investor not counted in the data set used for this analysis, were any cases still pending or which resulted in either a settled, discontinued, or otherwise undefined outcome. The choice to exclude these alternative outcomes was made to maintain clarity of outcome, due to the opaque nature of settled or discontinued outcomes- specifically when final agreements are not required to be documented publicly and are therefore unavailable. As a result, there are

cases in which an investor could be seen to have ‘won’ a discontinued or settled case, but given the 323 cases with definitive outcomes, the choice was made to exclude those outcomes.

Independent Variables / Control Variable

The first of two main independent variables analyzed in this study, is the disparity in GDP between the respondent and plaintiff home States in the year in which the ISDS dispute was initiated. The choice to measure the variable in this way was made for three distinct reasons. First, the majority of countries' GDP figures have fluctuated greatly between the years of first signing and currently available World Bank figures. For this reason, the use of case initiation year proved the most appropriate in gauging a country's economic standing at the time it was in a process of defense. Additionally, this was true for not only for respondent state GDP, but also for an investor's home state. Secondly, in seeking to identify a good reflective measure of power dynamics between a respondent and plaintiff state, the disparity between GDP figures was chosen. Thirdly, scenarios in which the plaintiff had a GDP less than the respondent, and therefore a negative disparity result, were removed from final calculations in order to focus exclusively on effects resulting from States being economically weaker during arbitration. Note however that these negative figures are used in the second quantitative section to follow. This was done with the intention to keep results focused on a power imbalance by which the respondent state is reliant upon a combination of degree in GDP discrepancy *as well* as a savings provision. These negative cases accounted for 72 of the total cases analyzed here.

While not included in final statistical calculations, these negative figures and their outcomes are presented in all following cross tabulations for reference.

The decision to bracket the GDP difference in the amounts chosen for tabulation purposes was decided by selecting eight sections (a ninth for negative summations) that placed the mean country GDP according to current 2018 World Bank figures just below center. Roughly one eighth of the world's countries hold GDP measures above this mean, and therefore give representation on a distributional curve above that mean. States with GDP values above this mean also are more represented in the amount of plaintiff home States and make up a disproportionate amount of the BITs analyzed.

Second Independent Variable

Of the 2,557 treaties the IIA Mapping Project analyzed, 2,443 included specifically an ISDS provision, making them appropriate for analysis. Of the 2,443 treaties, 2,299 did not include any mention of a savings provision in either the preamble or 'other' clause locations. Savings provisions are here defined in the Preamble or other clause location using IIA Mapping Project codified language:

Preamble savings provision definition:

“Reference to right to regulate (e.g. regulatory autonomy, policy space, flexibility to introduce new regulations).”

Other Clause savings provision definition:

“Right to regulate (any mentioning in the text of this or similar concepts, except preamble).”

Of the 2,557 treaties that included an ISDS mechanism, 144 also included a savings provision as described above in either a preamble, other location, or both.

Variable Abbreviations Used

Variables abbreviations presented in the results section of both sections one and two may be found in Table A1.

Table A-1 Variable Abbreviations

Full Title of Variable Term	Abbreviation	Description
Savings Provision Included	SPIncl	Specific coding language from the UNCTAD IIA Mapping Project determining y/n of a savings provision inclusion. Found in 'preamble' of agreement (yes=1, no=0): 'Reference to right to regulate (e.g. regulatory autonomy, policy space, flexibility to introduce new regulations).' <i>Or,</i> Found in 'other clauses' of agreement (yes=1, no=0): 'Right to regulate (any mentioning in the text of this or similar concepts, except preamble).'
Plaintiff GDP (2018)	PGDP.18	Plaintiff's (investor's) home State GDP in 2018
Respondent GDP (2018)	RGDP.18	Respondent host State GDP in 2018
GDP Disparity (2018)	PvRGDPdisp.18	Plaintiff's home State GDP minus Respondent host State GDP in 2018
Year of Case Initiation	IY	The year in which case was first initiated
Plaintiff GDP (Year of Case Initiation)	PGDP.IY	Plaintiff's (investor's) home State GDP in year in which case was first initiated

Respondent GDP (Year of Case Initiation)	RGDP.IY	Respondent host State GDP in year in which case was first initiated
GDP Disparity (In Year of Case Initiation)	PvRGDPdisp.IY	Plaintiff's home State GDP minus Respondent host State GDP in year in which case was first initiated

III. Results and Discussion

Tables B2 and B3 present summary data and coefficients for the full range of variables examined in the data set, along with prediction data when all are run in one model (Model 1).

Model 1 - Review of All Variables

National wealth and wealth disparity returned statistically insignificant results; a finding of interest due to a perceived intuitiveness of their influence. The only variable returning statistically significant results here, was the savings provision. This finding supports it having an effect, but the average marginal effect signifies a negative relationship. This negative relationship runs counter to hypothesis H1. Contrary to expectations, the presence of a savings provision reduced the likelihood of a case being decided in favor of the state by nearly 21%.

As discussed earlier, this negative finding may suggest that the hypothesis tested here is being run as a particularly 'hard' test. If the presence of a savings provision can be expected to increase the difficulty for an investor when seeking damages, then only those few cases including a savings provision which are deemed worthy of arbitration cost regardless of the inclusion, will therefore be pursued and counted within the data set

analyzed here. As discussed previously, due to the difficulty in measuring those cases which were deemed too difficult to be pursued by the investor due to the presence of a savings provision, these hard cases are all that remains to be measured. This would imply that the inclusion of a savings provision reduces the likelihood of a successful defense by the host state by 21%. While contrary to H1, the level of significance returned from Model 1 warrants further examination of savings provisions due to the correlation measure, even if negative.

One variable shown here to have near statistical significance is the year of initiation. For the purposes of this study, this interaction is not explored in great depth, because the focus is on savings provisions solely and their predictable influence on future ISDS disputes. ISDS cases are already known to have begun to include savings provisions in the 1990's more frequently, and the relationship to outcomes has been linked to the ensuing years of cases deciding in favor of states, as evidenced in the literature review section. The question is not if the year is the influencing factor, but if the savings provisions that were introduced in the 1990's were in fact the influencing variables. For this reason, they are left out of the models moving forward.

Table B-1 Model 1, All Variables

Coefficients:	Ave. Marginal Effects (AME)	Estimate	Standard Error	Z Value	Pr(> z)
(Intercept)		-85.39333	57.96967	-1.473	0.1407
Savings Provision Included	-0.2096	-0.89185	0.40709	-2.191	0.0285*
Plaintiff GDP (2018)	-0.009622	-78.17947	79.26839	-0.986	0.3240

Respondent GDP (2018)	0.1162	78.17864	79.26829	0.986	0.3240
GDP Disparity (2018)	0.009626	78.17947	79.26839	0.986	0.3240
Year of Case Initiation	0.01006	0.04260	0.02887	1.476	0.1400
Plaintiff GDP (Year of Case Initiation)	-0.01782	-116.35136	115.45219	-1.008	0.3136
Respondent GDP (Year of Case Initiation)	0.1515	116.35248	115.45216	1.008	0.3136
GDP Disparity (In Year of Case Initiation)	0.01782	116.35139	115.45221	1.008	0.3136

Significance codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Table B-2 Model 1, Deviance Residuals

Min	1Q	Median	3Q	Max
-1.8551	-1.2059	0.9123	1.0601	1.6192

Misclassification Error	0.4365325
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N	323
Prob > Chi ²	P = 0.03612119
AIC	447.37

4.3 Quantitative Analysis - Section Two

The second part of the quantitative analysis done here, explores potential interaction effects between the main variables of savings provision inclusion and wealth disparity (in year of initiation). While only the inclusion of a savings provision returned a statistically significant measure of predictability in Model 1, the literature regarding

wealth disparity between host states and investors increasingly suggests an interaction between the two (Sornarajah, 2010). This effect is particularly highlighted as ISDS arbitration moves from a predominantly rich vs. poor phenomenon, to an occurrence increasingly seen between middle- and upper-income nations (Schultz & Dupont 2014; Gaukrodger & Gordon, 2012; Hufbauer, 2019).

The suggested implication is that while the level of wealth disparity may or may not affect arbitration outcome directly, it's size and presence will affect the level by which savings provision inclusion will measurably act as a predictor. The assumed relationship is that of a diminishing rate of return for wealth; increases in wealth disparity will reduce the otherwise present impartiality of strict legalism, thereby increasing bias created by allowing for the introduction of resources which can be brought unfairly to bear by one side to the detriment of the other. This is in conjunction with the idea that savings provisions can only help to defend a less wealthy nation so much, and that at some point the benefits of increased disparity begin to plateau. As wealth disparity diminishes and potential wealth bias is decreased, legalism will increase and predictable power of including a savings provision will increase. This curvilinear relationship is therefore anticipated to present itself particularly well in a model which interacts these two variables.

I. Hypothesis

These assertions presented here are investigated by examining the following hypothesis.

H2: As wealth disparity increases, it will negatively affect the impact that a savings provision has on predicting the likelihood of an ISDS dispute being decided in favor of a state.

II. Design

Quantitative Methods Selection

The aim of this section seeks to investigate a potential interaction relationship between wealth disparity and the inclusion of savings provisions.

Data Set Selection

The design of the data set used here is the same as the design used in Section One. The collection method, use of the UN and University IIA Mapping Project Database is the same, as well as the method by which disparity between host nations and investor's home nations was calculated.

III. Results and Discussion

Tables C1 and C2 present summary data and coefficients from Model 2, which interacts the variables of savings provisions inclusion and wealth disparity between investors and host states in the year of ISDS case initiation.

Model 2 - Review of Interaction Term

The interaction between the two variables of savings provision inclusion and GDP disparity in the year of case initiation does not return a statistically significant value for prediction. While the prediction level is below significance levels, the measure still warrants future refining of the model to investigate interaction. As mentioned in the first

section's results, the 'hard test' of cases performed may in fact undervalue the efficacy of savings provision inclusion, and likewise underrepresent an interaction between both variables in Model 2.

There is potential that a more significant interaction is taking place, but not is not being illuminated by this study's particular measurement approach. Cases which were brought before arbitration but that included a savings provision, may drastically underrepresent the effect these clauses have on the decision-making process investors go through when deliberating whether or not to advance arbitration. Again, the 'hard test' that this approach presents, may not reflect itself well in the case data but still present prediction coefficients that are statistically significant or near significant despite their low showings.

This nuance in case selection has the potential to exacerbate interaction effects concerning wealth disparity as well. As suggested in the literature, national wealth is expected to positively affect the decision to pursue arbitration by an investor. This implies that middle- and low-income home states of investors do not as frequently pursue arbitration when savings provisions are present. Therefore, returning significance levels just outside the range necessary to reject the null hypothesis are not entirely unexpected.

When interpreting the interaction results of Model 2, two main takeaways are to be considered. The first is that although the P-value found is not in the significant range, it does still exist low enough to encourage more nuanced testing. An interaction is hinted at, but Model 2 does not secure findings to accept the hypothesis at this time. Secondly, the lack of significance found may likewise illustrate that proponents of ISDS's legalism have evidence to support their claim. If the measures found do indeed represent the

interaction as it exists, then wealth disparity has little bearing on the outcome of arbitration- even when seen interacting with savings provision inclusion. This implies that Hufbauer and other proponents of ISDS's impartiality may indeed be correct in viewing the legalism of international arbitration as more impervious to wealth disparity bias than detractors suggest.

Table C-1 Model 2, Interaction Terms

Coefficients:	Estimate	Std. Error	z value	Pr(> z)
(Intercept)	2.361e-01	1.191e-01	1.983	0.0474 *
PvRGDPdisp.IY	1.633e-05	2.709e-05	0.603	0.5467
SPIncl	-7.842e-01	3.836e-01	-2.044	0.0409 *
disparityXSPIncl	4.321e-06	3.787e-05	0.114	0.9092

Significance codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Table C-2 Model 2, Deviance Residuals

Min	1Q	Median	3Q	Max
-1.391	-1.261	1.009	1.095	1.442

N	323
Null deviance	445.84 on 322 degrees of freedom
Residual deviance	441.00 on 319 degrees of freedom
AIC	449

(Dispersion parameter for binomial family taken to be 1)

IV. Future Quantitative Analysis

Future research should focus on creating designs that measure the decision-making process by investors as it pertains to savings provisions, as opposed to solely examining the outcomes of cases which have been arbitrated to a conclusion. Alternative measures of national wealth should also be explored, as GDP may not capture the essence of potential interaction relationships.

4.4 Final Quantitative Conclusion (Section One and Two)

There remain major complications in finding the most appropriate way to measure the case data used here, given the dynamics of case pursuance by plaintiffs in the first place. Many investment disputes are weighed carefully before initiation and found to be inadvisable by council for many reasons- least of which may be the legalism established and enshrined by ISDS. The following qualitative section reviews a select number of cases which present elements of these reasons, providing tangible examples of why cases are discontinued, settled or abandoned.

In reviewing Model 1, the findings which attribute a negative sign to the effect of savings provision inclusion may be a result of their inverse relationship to successful defense. This study asserts alternatively that the result reflects a particularly skewed data set and advises further design of a model that may reveal the measure and predictability of savings provisions upon the decision to pursue arbitration, not solely the outcomes of those chosen to be arbitrated.

Related cross tabulation analysis is to be found in the appendix, which reflects incentives for this assertion. Namely, the vast majority of cases brought to arbitration do

not include a savings provision in either the preamble or ‘other’ clausal locations. The cross tabulation reveals a drastic reduction in the amount of cases brought to a final decision when savings provisions are introduced. Specifically, of all the cases analyzed here, only one case was brought to a final decision which included a savings provision in both the preamble and ‘other’ clausal locations. This finding alone speaks volumes in itself but presents uniquely difficult measuring hurdles. If cases with savings provisions are never arbitrated, then measurement of arbitrated outcomes will fail to capture their efficacy.

In reviewing Model 2, an interaction between wealth disparity and savings provisions was similarly non-definitive. While the values returned do suggest a weak relationship, they are not significant enough to accept the hypothesis H2. Similar to Model 1, the outcome may again be due largely to inadequate measurement of cases which are influenced by variables explored here, but not revealed by concluded arbitration case data. Simply put, too much may be occurring before disputes reach conclusive settlement in favor of plaintiff or respondent.

Chapter Five - Qualitative Analysis

5.1 Qualitative Analysis Introduction

The qualitative analysis section here is divided into two sections. The first section identifies an ISDS case that meets three preset qualifications to be described and is then examined along those lines. Its purpose is to introduce examples of the key factors examined in this study, previously analyzed in the quantitative section. The second section is for the purpose of examining the effect of regulatory chilling as a result of potential ISDS consequences. To limit the scope of study, two cases are examined that involve the US and Canada under 1992's NAFTA. RCE is important to discuss here, as it pertains to the confidence in legalism that savings provisions have the potential to provide but is difficult to study given the nature of cases to not result in clearly defined outcomes. Additionally, there are already case studies which offer evidence for the effect (see Côté, 2014). The challenge is not to identify examples of abuse, as much as it is to control for all other variables and explanations. Therefore, this second section is cursory, focusing instead on two cases and the process of analyzing RCE generally.

5.2 Section One - Case Study: Newmont Mining v. Indonesia

Case Selection

The following case was selected for analysis on the grounds that it provided three key points of study. First, the IIA was signed in an era characterized by the literature review as a time demonstrating the most abuse. This case was also then adjudicated recently in 2014 and therefore offers a strong juxtaposition between the years and their potential influences. Second, issues regarding RCE and other abuses are evident. While

the case is ultimately not decided clearly in favor of the plaintiff or respondent, the outcome of ‘discontinued’ is publicly discussed by both parties and offers a unique opportunity to review an outcome which is difficult to otherwise quantify. Lastly, this case emphasizes the impact from treaties which contain no savings provisions. However, the case also resulted in the drafting of a second BIT in 1994 after the first expired, choosing to include a savings provision clause. This situation offered a further opportunity to examine the effect of an RCE incident on a State’s future decision making.

Case Detail Overview

- Case Name: Nusa Tenggara v. Indonesia
- Case Decision: Discontinued
- Investment Treaty: Indonesia - Netherlands BIT (1994)
- IIA Mapping Project ID: 1518
- BIT Signed: 07/07/1968
- BIT Entered Force: 17/07/1971
- Year of Case Initiation: 2014
- ISDS: Yes
- Savings Provision in Preamble: No
- Savings Provision in Other Clauses: No
- Indonesia GDP in year of case initiation (2014): \$890.8 billion (USD)
- Netherlands GDP in year of case initiation (2014): \$891 billion (USD)
- GDP Disparity at time of case initiation (2014): \$200 million (USD)

Case Review

The Yudhoyono government in Indonesia, in an attempt to increase control over its own natural mineral wealth and at the same time increase domestic employment (in both mining and processing), passed an industry regulation in 2009 that attempted to take aim at a fix.¹⁰ This regulatory action by the Yudhoyono government was popular enough

¹⁰ Government of Indonesia Law No. 4/2009 on Mineral and Coal.

to result in reelection just three months later after its passing (Van der Pas & Damanik, 2014). The new law included specific details aimed at encouraging firms to shift more mining production activities (refining, smelting, etc.) back to within the Indonesian State, prior to their being exported. The new regulation also sought to limit foreign ownership by requiring that “foreign-owned mining industries progressively divest to become a shareholder minority within 10 years,” essentially forcing all foreign mining companies to sell “parts of their shares to the Indonesian government, municipalities or local industries – up to 51% within ten years” (Van der Pas & Damanik, 2014).¹¹

American mining company Newmont, the world’s 15th largest mining firm as of 2015,¹² claimed the legislative changes lead directly to a forced halting of all operations and eventually the total closure of the Batu Hijau mine. After negotiations broke down between both mining and government officials, a special agreement was offered to the two main mining firms, Newmont and Freeport (another affected mining company). Freeport took up the following provisions according to Van der Pas and Damanik as reported in their 2014 briefing:

- Required to sell only 30% of company shares to the government.
- Pay an export tax of 7.5% instead of 25%, then zero after the completion of a local smelter was built and operational.
- Pay a ‘significantly reduced’ export duty until 2016, then higher royalties on copper and gold sales.

¹¹Article 112, Law No. 4/2009 was intended to coerce miners to develop mining processing plants in Indonesia, a wider strategy by the Indonesian government to secure a greater share of its mineral resources (Van der Pas & Damanik, 2014).

¹²Rankings of mining company sizes: www.mining.com 2017

Freeport Chief Executive Richard Adkerson later called it, “a compromise to create a bridge for us so that we can return to normal operations” (Van der Pas & Damanik, 2014). These conditions were extended to Newmont as well, but Newmont decided to decline and instead used its legal right to pursue arbitration using ISDS, from within an agreed upon Indonesia-Netherlands BIT which was initially signed in 1968 (2014). Newmont then took the case against Indonesia before ICSID in July of 2014.¹³ Newmont’s official summary of the dispute using ISDS stated, “claims arising out of the introduction of export restrictions on copper, including an export duty and a ban on the export of copper concentrate which allegedly stalled production at the Batu Hijau copper and gold mine operated by the claimants” (ICSID, 2017).

The case was discontinued by Newmont within the same year, after “it had reached an agreement with the Indonesian government, giving the mining company special exemptions from the new mining law” (Van der Pas & Damanik, 2014). The official amount being claimed by Newmont at the time of the ICSID suit was not publicly available but has been speculated near \$1 billion (USD). Indonesia later publicly announced that it would allow its BIT with the Netherlands to expire in the following year and did not plan to renew. Indonesia has further announced it will seek the cancellation of some 60 FTAs and BITs containing the ISDS clauses specifically. Despite allowing the Dutch treaty to expire, special ‘survivor-clauses’ protections remain immune to the expiration, and in effect will continue to temporarily guard the agreement. This will

¹³BIT Indonesia - Netherlands 1994. *Nusa Tenggara v. Indonesia, Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia* (ICSID Case No. ARB/14/15).

therefore continue to leave Indonesia vulnerable to ISDS lawsuits via the Dutch BIT until 2030, despite its expiration (Van der Pas & Damanik, 2014).

According to Riza Damanik, the Chairman of Kesatuan Nelayan Traditional Indonesia (KNTI), “the impact of Bilateral Investment Treaties is not just shown in the cases brought to tribunals that rule against states’ rights to regulate and protect citizens, but also in the many cases that do not make it to ICSID because states backtrack on regulation for fear of lawsuits” (Van der Pas & Damanik, 2014). Damanik explains that this RCE is often “difficult to show...because governments that backtrack in [the] face of threats often do so without public knowledge and because agreements with corporations are made between closed doors. The case of Newmont against Indonesia, however, shows the consequences that arise from a mere threat of a billion dollar claim in response to a (proposed) new policy” (2014).

5.3 Analysis and Summary of Section One

Initially signed in 1968, the case brought against the Indonesian State by Newmont Mining ¹⁴serves as a strong example for three specific issues discussed in this inquiry. First, the year it was signed reflects a period characterized earlier by abuse. Second, the issues regarding ISDS and potentials for RCE are evident. Third, it emphasizes the impact from treaties which contain no savings provisions.

The BIT between Indonesia and the Netherlands in this case was signed in 1968, coming into force soon after in 1971. This timeframe helps to orient the outcome of the

¹⁴In 2016 PT Newmont Nusa Tenggara took the action of liquidating all remaining shares to PT Amman Mineral Nusa Tenggara.

discontinued case in 2014, by suggesting it was framing an era that commonly did not include savings provisions- which in fact it did not have in either the preamble or any other clause according to IIA Mapping Data. Likewise, the year reflects the disparity in wealth. At the time of the 2014 ICSID case, the disparity was very low, measuring on a difference of \$200 million (USD) in favor of the Netherlands. However, when looking at the disparity in 1968, the gap was much wider. In 1968 Indonesia had a GDP of \$7.076 billion (USD) compared to the Netherlands' \$27.82 billion (USD), a disparity total of \$20.744 billion (USD).

Secondly, the RCE in this case is clear. There was a decision to exempt the foreign investor directly from the application of a regulatory policy decision popular enough to result in a reelection of government, yet the policy was not enforced due to an ISDS outcome.

The third issue this case displays, is that of savings provision inclusion. While the treaty was signed in a previous era, already identified widely as being flawed for a lack of such inclusions, the decision was made later to include this contractual language. In later replacement BIT with the Netherlands, Indonesia moved to include a 'reference to the right to regulate' in a subsequent chapter, thereby providing a legal defense against arbitration regarding future mistreatment as a result of policy creation. There has been no other ISDS arbitration between the Netherlands and Indonesia since the 2014 case, based either on the expired or on the re-drafted BIT since.

5.4 Section Two - Case Examples of Regulatory Chilling Effect (RCE)

Case Selection

The following two cases were chosen due to their ability to typify regulatory chilling concerns involving the US and Canada. These cases are not reviewed in depth, as other extensive case studies examining RCE already exist, not only involving the US, but many global IIAs. The summary of this section examines in greater depth the process used to analyze RCE cases in general, discussing the views of recent literature regarding their study.

Case Reviews

- #1 Case Detail Overview
- Case Name: Chemtura vs. Canada
- IIA: NAFTA (1992)
- Year of Case Initiation: 2002

US firm Chemtura alleged \$100 million (USD) in damages against Canadian regulation that banned the agro-chemical known as Lindane, a chemical frequently used as an insecticide but that can emit toxic hydrochloric acid when decomposed through heat. The Canadian government banned its use on the grounds that it posed a health and environmental risk to consumers. An ISDS arbitration panel ultimately rejected the claim of the investor. The U.S. government dissented, stating that the decision, “tribunal showed deference to the government’s scientific and environmental regulatory determinations” (USTR, 2015).

- #2 Case Detail Overview
- Case Name: Methanex vs. the United States
- IIA: NAFTA (1992)
- Year of Case Initiation: 1999

The Canadian Methanex Corporation alleged \$970 million (USD) in injuries which resulted from a Californian regulation that banned the use of a gasoline additive Methyl tert-butyl ether (MTBE). The additive, created to oxygenate and increase gasoline octane, was deemed hazardous and a threat to groundwater when spilled. Ensuing arbitration “underscored the right of governments to regulate for public purposes, including regulation that imposes economic burdens on foreign investors, and stated that investors could not reasonably expect that environmental and health regulations would not change” (USTR, 2015). The U.S. stated that the “tribunals adjudicating ISDS cases under U.S. agreements have consistently affirmed that government actions designed and implemented to advance legitimate regulatory objectives do not violate investment obligations” (USTR, 2015).

Additional Findings on RCE Relationship - Canada and US

Additional reading on the subject of RCE effects between Canada and the US, offer a revealing informality with regards to regulatory pressure. William Greider, writing for The Nation, has stated that the former US Trade Representative Carla Hills, “oversaw the NAFTA negotiations for Bush Sr. and now heads her own trade-consulting firm” (Greider, 2001), with intimate knowledge of how foreign investors specifically act to threaten states with ISDS in regards to their regulation. Greider has written about a specific incident involving the Canadian Ottawa government and Hills’ two big tobacco clients R.J. Reynolds and Philip Morris. Hills purportedly sent Julius Katz, who had previously been her chief deputy while working as the US Trade Rep. to, “warn Ottawa

to back off its proposed law to require plain packaging for cigarettes.” Otherwise Katz had said, “Canada would have to compensate his clients under NAFTA” (Greider, 2001).

Greider described that the Canadian Health Minister responded by saying, "No US multinational tobacco manufacturer or its lobbyists are going to dictate health policy in this country" (Greider, 2001). Greider then reported later that Canada did indeed drop the proposed smoking regulation and other such policies. Greider continues by quoting a former government official from Ottawa who said that, “I've seen the letters from the New York and DC law firms coming up to the Canadian government on virtually every new environmental regulation and proposition in the last five years. They involved dry-cleaning chemicals, pharmaceuticals, pesticides, patent law. Virtually all of the new initiatives were targeted and most of them never saw the light of day" (Greider, 2001).

5.5 Analysis and Summary of Section Two

The brief exploration of case studies here only adds to a growing number of examples in which there is substantial reason to accept the occurrence of RCE. Christine Côté examines more cases which exhibit this effect, but in line with discussions described in the literature review, her examples center around cases which took place in the 1990's, when provisions that protected the rights to regulate were more infrequent. She includes in her study some of the following examples:

- 1997, *Metalclad Corp vs. The Government of Mexico*, case claiming \$96,000,000.00 (US) and involving hazardous waste.
- 1997, *Ethyl Corporation vs. The Government of Canada*, case claiming \$347,000,000.00 (US) and involving a gasoline additive.

- 1999, *Methanex Corporation vs. The Government of the United States*, case claiming \$970,000,000.00 (US) and involving a gasoline additive.
- 1998, *S.D. Meyers vs. The Government of Canada*, case claiming \$10,000,000.00 (US) and involving PCB waste disposal.

These examples include many ISDS cases between Mexico, Canada and the US however, in which adjudicated regulatory complaints occurred under NAFTA's Chapter 11. Unlike the many IIAs and BITs which have been coded and quantified here, NAFTA's Chapter 11 interprets regulatory action with regard to equitable treatment more irregularly, as the second part of this qualitative section has illustrated. It is therefore more difficult to draw conclusions from these examples alone and will presumably continue to be if there exist no appellate body from which to codify results and set lasting precedents. More precise language in regard to regulatory rights have been included within the most recent United State-Mexico-Canada Agreement (USMCA). This increased specificity helped encourage Canadian involvement, particularly given its contentious efforts regarding regulatory action in the past (Ferris, 2018).

While directly linking RCE to ISDS disputes is difficult for exactly the reasons that Van der Pas and Damanik point out in the *Newmont Mining v. Indonesia* case examined in the first section, the accumulation of cases and the building of evidence in the form of direct sources concerning their decision making seems to be the beginning to further research substantiating the RCE presence.

There is evidence that indeed the size and respective influence of the investor's home state plays too great a role to deny. To begin with, the United States has never lost an ISDS case. Canada, with a GDP roughly a tenth the size of the US, has faced the

highest number of arbitrations of any nation, directly attributable to ISDS (Barlow, 2015). The US's ability to impact a country's trade revenues based upon such things as 'preferred-trading-partner' lists (example from Argentina) and willingness/ability to put forth the time and monetary assets required to launch lawsuits that can average 3.6 years and cost an average of \$8 million (US).

In a 1999 ISDS case which demonstrates this, the U.S. was sued by Canada for nearly a billion dollars (USD) after the State of California banned a specific toxic gasoline additive (Côté, 2014). While there may be evidence that congress took momentary pause, it is difficult to find any actual chilling with regards to regulation. Canada is meanwhile currently pursuing a \$15 billion (USD) settlement through ICSID against the U.S. for failing to approve the Keystone XL pipeline. The main argument is politicization of the pipeline, attributed to showing Canada unfair treatment under NAFTA's Chapter 11 rules. The US was clearly willing to risk the 15-billion-dollar lawsuit potentially because it deemed the negative political impact of approving the pipeline to be more damaging. This implies that the US government may be both comfortable in its ability to coerce the Canadian government effectively than it can itself be coerced, and/or also that its own legal framework (despite NAFTA's inability to provide adequate savings clauses to other nations) can withstand the suit. The suit could have profound consequences near and far should it proceed and potentially be found in Canada's favor.

Thus far RCE has been suggested to occur in a few specified instances, but due to ISDS having a historically non-transparent arbitration process, it has been difficult to provide a body of conclusive evidence that solidifies it with certainty. The Freedom of

Information Act has assisted the access of some foreign internal government's decision-making process, such as with Guatemala (Kennard, 2015), Indonesia (Van der Pas and Damanik, 2014) and Canada (Greider, 2001), which have offered insights to its nature.

Supporters of ISDS who dismiss the power of RCE, state that foreign firms do not influence the policy decision making processes abroad or domestically (Hufbauer, 2015), instead contending that IIAs most often do two things: guard the State's ability to regulate in the public interest and increase regulation overall¹⁵ (USTR, 2015). Statistical data revealing more frequent losses of ISDS arbitration by investors over States supports this (European Commission, 2015). However, it can be terribly misleading, as cost and benefit analysis of policy effects are difficult to measure even when events are well defined.

Settlement awards, having run into the billions, put developing countries at great risk by their inability to incur the arbitration costs alone. There is limited recourse in these instances, given that ISDS judgements are binding and by their nature largely facilitated and enforced through a wider global financial coercion system. This system is operated by wealthier States, which reinforce the cycle. However, investors remind opponents often that states seek IIA regardless of these risks, in exchange for the ability to secure investment. This too is challenged, evidenced by Brazil which exhibits a total lack of ISDS mechanisms within its IIAs, yet continues to attract massive foreign investment.

¹⁵A recent study by the Organization of American States found that CAFTA-DR countries have improved over 150 existing environmental laws and regulations and adopted 28 new laws and regulations related to wastewater, air pollution, and solid waste (USTR, 2015).

Brazil aside, the picture cases discussed here arguably creates further legitimacy for concern for RCE. A new level of economic leverage is emerging as a result, by which foreign investors tilt the consideration process of policy legislation out of the hands of home populations. A legitimate threat to a state's ability to regulate in its public interest is therefore emerging and is of great concern.

Chapter 6 - Conclusion

6.1 Conclusion

If confidence in international economic institutions to render judgements which are impartial to non-legal influences become suspect, then their durability will erode. This inquiry has investigated the current disagreement on whether or not power imbalances are reflected inordinately within ISDS arbitration outcomes between host nations and their foreign investors. Although there have been clear instances which question any observer's view of ISDS impartiality, these outcomes have also served to distort a complicated fabric of case results that have changed and evolved both in time and space.

By specifically comparing results from the UNCTAD International Investment Database with the newly created IIA Mapping Project, it has been possible to test for correlational evidence between ISDS decisions and the presence of savings provision clauses. These clauses have been championed by ISDS proponents as a corrective measure with the power to restore faith in international judicial outcomes. With the creation of a near comprehensive and originally curated dataset, the results of this inquiry have revealed a modest but measurable correlation between the presence of savings provisions and the decision of ISDS arbitration to be decided in favor of a state. However, this correlation has unexpectedly returned an AME with a negative signing, indicating saving provisions reduce the probability of successful defense by 21% for host states. Although contrary to the hypotheses H1 and H2, this finding may not entirely negate the basis of either. When considered as having been run as a 'hard test,' these

results may have the potential to imply further research design is needed to capture those cases which are not pursued (and therefore not concluded) due to the natural legal defensiveness that savings provisions may provide. Indeed, the great majority of cases analyzed here did not contain savings provisions, and the resulting lack of concluded case data for arbitration in which a savings provision was present, may have severely distorted these outcomes. It is a powerful finding in itself to find so few cases in this category at all. Securing a measure by which to gauge any deterrence that savings provisions provide would more adequately test the efficacy of Hufbauer's and other proponent's legalistic view that ISDS can be positively administered by improving contractual design.

These findings and the additional qualitative analysis given here, bolster support for the further study and inclusion of savings provisions as a meaningful improvement in state-investor contractual defense and the maintenance of international confidence regarding the durability of international economic institutions.

Among the calls to improve international economic governing institutions such as ICSID by installing permanent adjudicators, increasing transparency and creating appellate mechanisms- the inclusion of savings provisions within international agreements should also be pursued in order to expand international legal legitimacy. This inquiry has shown that despite disparities in national wealth, the inclusion of savings provisions can indeed have a measurable effect on discouraging impartiality seen otherwise as a result of economic power discrepancy.

Chapter 7 - Future Research

7.1 Third Party Arbitration Services

Adding to the potential for regulatory chilling and the impartiality of economic power disparity, is the existence of third-party investors. Third party investors provide full or partial funding for the legal costs incurred by investors throughout the arbitration process. There is a demand for this financial assistance, since the average length and cost of the arbitration alone is measured in years and by the millions of dollars (Gaukrodger & Gordon, 2012). If successful, a portion of the final settlement award is then paid back to this third party (plus a profit), thus creating a potentially lucrative incentive to generate further cases not solely based on merit, but also on chance. This has the potential to magnify any overall effect of a regulatory chill, and certainly also has the potential to negate impartial adjudication in favor of cases fought via economic attrition. This could be of particular threat, given the current absence of any appellate mechanisms.

It is therefore of great interest to know where sovereignty is most vulnerable, and to what degree it has been threatened by investor's ability to secure economic recourse.¹⁶ Future research would propose further direct-source research and interviews to more deeply uncover and understand the causes and connections necessary for RCE and court-impartiality to occur as a direct or indirect result of these third party investors.

¹⁶Research by the OECD puts "the average legal and arbitration costs for a claimant" at about an *average \$8 million (US)* and have reached into the billions now as well. (Gaukrodger & Gordon 2012).

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Appendix

I. Quantitative Methods Section Three (Extension - Cross Tabulation)

The design of the cross tabulations presented here, divides GDP disparity into eight brackets. GDP discrepancy has been measured in the year in which the arbitration was first initiated. The decision to divide GDP disparity into eight was chosen to reflect a moderate spectrum, with the \$500-\$700 billion (USD) bracket represented in the center, reflecting the world's GDP mode. Brackets were calculated by subtracting host State GDP from investor's home country GDP. The negative bracket is used to designate those instances in which the nation being brought to arbitration had a higher GDP than the nation from which an investor's suit originated. All figures are represented in billions of dollars (USD).

The design of the data set used here is the same as the design used in Quantitative Analysis Section One and Two. The collection method, use of the UN and University IIA Mapping Project Database is the same, as well as the method by which disparity between host nations and investor's home nations was calculated.

II. Results

Cross-tabulation analysis of Zero-Order Results

Table D-1 displays the preliminary zero-order relationship results, presented in a cross-tabulation analysis. The following results reflect the entirety of treaties studied here, as only treaties containing ISDS clauses within them were examined. Treaties with or without saving provisions included (either in the preamble or elsewhere in textual body) are likewise included.

Table D-1

All Treaties with ISDS	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.
Was the ISDS dispute successfully Defended (i.e decided in favor of State)?	Negative	Less than \$100	\$100 - \$300	\$300 - \$500	\$500 - \$700	\$700 - \$900	\$900 - \$1,100	\$1,100 - \$1,300	More than \$1,300
1. Yes	55.6%	54.5%	58.3%	51.9%	40.9%	66.7%	44.4%	78.6%	51.9%
	(20)	(6)	(14)	(14)	(9)	(16)	(4)	(11)	(81)
0. No	44.4%	45.5%	41.7%	48.1%	59.1%	33.3%	55.6%	21.4%	48.1%
	(16)	(5)	(10)	(13)	(13)	(8)	(5)	(3)	(75)
Total (n)	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	(36)	(11)	(24)	(27)	(22)	(24)	(9)	(14)	(156)
Probability of successful defending	55.6%	54.5%	58.3%	51.9%	40.9%	66.7%	44.4%	78.6%	51.9%

Introduction of Multiple Independent Variables and their Coefficients

This study next extends to accommodate the second independent variable, the presence of a savings provision within the treaty. Tables D-2 and D-3 display these results in a cross-tabulation analysis, controlling for the inclusion of a savings provision within a contract.

Table D-2

NO savings provision Present	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.
Was the ISDS dispute successfully Defended (i.e decided in favor of State)?	Negative	Less than \$100	\$100 - \$300	\$300 - \$500	\$500 - \$700	\$700 - \$900	\$900 - \$1,100	\$1,100 - \$1,300	More than \$1,300
1. Yes	55.6%	54.5%	58.3%	54.2%	53.3%	65.2%	33.3%	75.0%	54.3%

	(20)	(6)	(14)	(13)	(8)	(15)	(2)	(9)	(75)
0. No	44.4%	45.5%	41.7%	45.8%	46.7%	34.8%	66.7%	25.0%	45.7%
	(16)	(5)	(10)	(11)	(7)	(8)	(4)	(3)	(63)
Total (n)	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	(36)	(11)	(24)	(24)	(15)	(23)	(6)	(12)	(138)
Probability of successful defending	55.6%	54.5%	58.3%	54.2%	53.3%	65.2%	33.3%	75.0%	54.3%

Table D-3

Saving Provision IS Present	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.	GDP Disc.
Was the ISDS dispute successfully Defended (i.e. decided in favor of State)?	Negative	Less than \$100	\$100 - \$300	\$300 - \$500	\$500 - \$700	\$700 - \$900	\$900 - \$1,100	\$1,100 - \$1,300	More than \$1,300
1. Yes	0.0%	0.0%	0.0%	33.3%	14.3%	100.0%	66.7%	100.0%	33.3%
	(0)	(0)	(0)	(1)	(1)	(1)	(2)	(2)	(6)
0. No	0.0%	0.0%	0.0%	66.7%	85.7%	0.0%	33.3%	0.0%	66.7%
	(0)	(0)	(0)	(2)	(6)	(0)	(1)	(0)	(12)
Total (n)	0.0%	0.0%	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	(0)	(0)	(0)	(3)	(7)	(1)	(3)	(2)	(18)
Probability of successful defending	0.0%	0.0%	0.0%	33.3%	14.3%	100.0%	66.7%	100.0%	33.3%