

Investor-Staat- Schiedsgerichtsbarkeit: Rechtsstaatliche Probleme?

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Gliederung

- Grundlagen und Ratio des völkerrechtlichen Investitionsschutzes
- Zahlen und Fakten
- Grundlagen und Ratio Investor-State Dispute Settlement (ISDS)
- Rechtsstaat und ISDS
 - Völker- und verfassungsrechtliche Grundlagen
 - „regulatory chill“ etc.
 - Beachtung öffentlicher Interessen
 - ISDS und „Souveränität“
- Warum ISDS mit Kanada und USA?
- Investitionsschutz in CETA etc.

Internationales Investitionsschutzrecht - Maßgebliche Rechtsbeziehungen -

Investor

Staat A

Investitions-
vertrag, z.B.
Konzession
zur Förder-
ung von
Erdöl

BIT (oder
„Vertrag über
die Förderung
und den
gegenseitigen
Schutz von
Kapitalanlagen“)



Staat

Staat B

Contract

Treaty

Ratio völkerrechtlicher Investitionsschutz

- Souveränität ermöglicht jederzeitige Änderung innerstaatlichen Rechtslage
 - Einschränkbar nur durch Völkerrecht (nur treaty, nicht contract)
- Völkerrecht verbietet nicht die Diskriminierung von Ausländern
 - Siehe z.B. Jedermann- und Deutschen-grundrechte GG
 - Siehe z.B. Art. 3 III GG (Staatsangehörigkeit nicht erfasst)

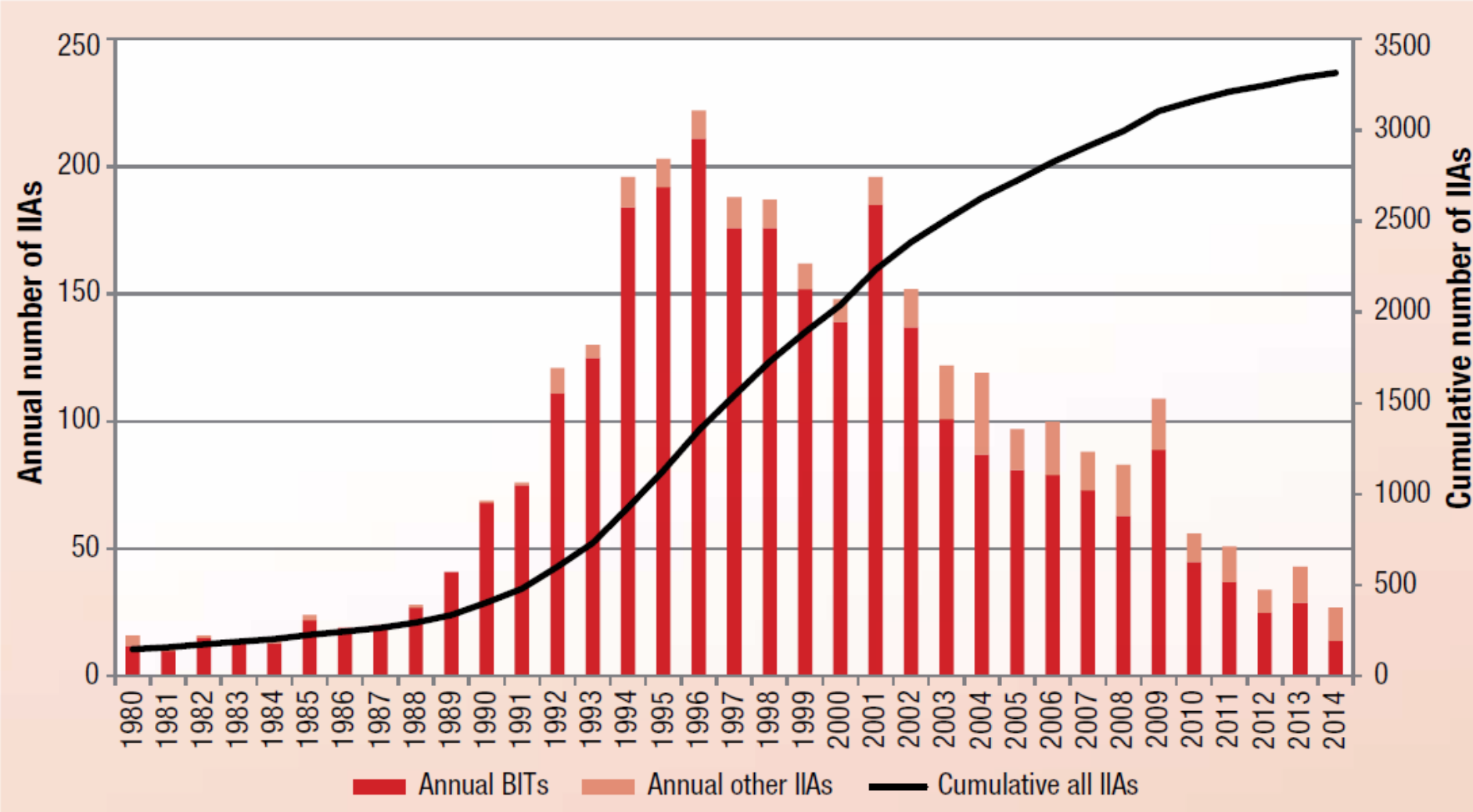
Ratio völkerrechtlicher Investitionsschutz

- Ausländische juristische Personen regelmäßig ohne völkerrechtlichen Grund-/Menschenrechtsschutz
 - Inter-American Human Rights Commission 1999:
 - “The Commission [...] considers that the Convention grants its protection to physical or natural persons. However, it excludes from its scope legal or artificial persons, since they represent a legal fiction.”
 - Art. 19 III GG
 - “inländische juristische Personen”

Ratio völkerrechtlicher Investitionsschutz

- Investitionsschutzgarantien
 - Bundeshaushalt / PwC
 - Absicherung politischer (nicht wirtschaftlicher) Risiken bei Auslandsinvestitionen durch Bund
 - Bindung an Existenz BIT
 - Ratio
 - Ggf. Abtretung Schadensersatzanspruch Investor an Bundesrepublik und Geltendmachung gegenüber ausländischem Gaststaat
 - Verpflichtung gegenüber Steuerzahler
- Diplomatischer Schutz oftmals (-) da kaum oder kein Völkergewohnheitsrecht bzgl. Investitionen

Figure 1. Trends in IIAs signed, 1980–2014

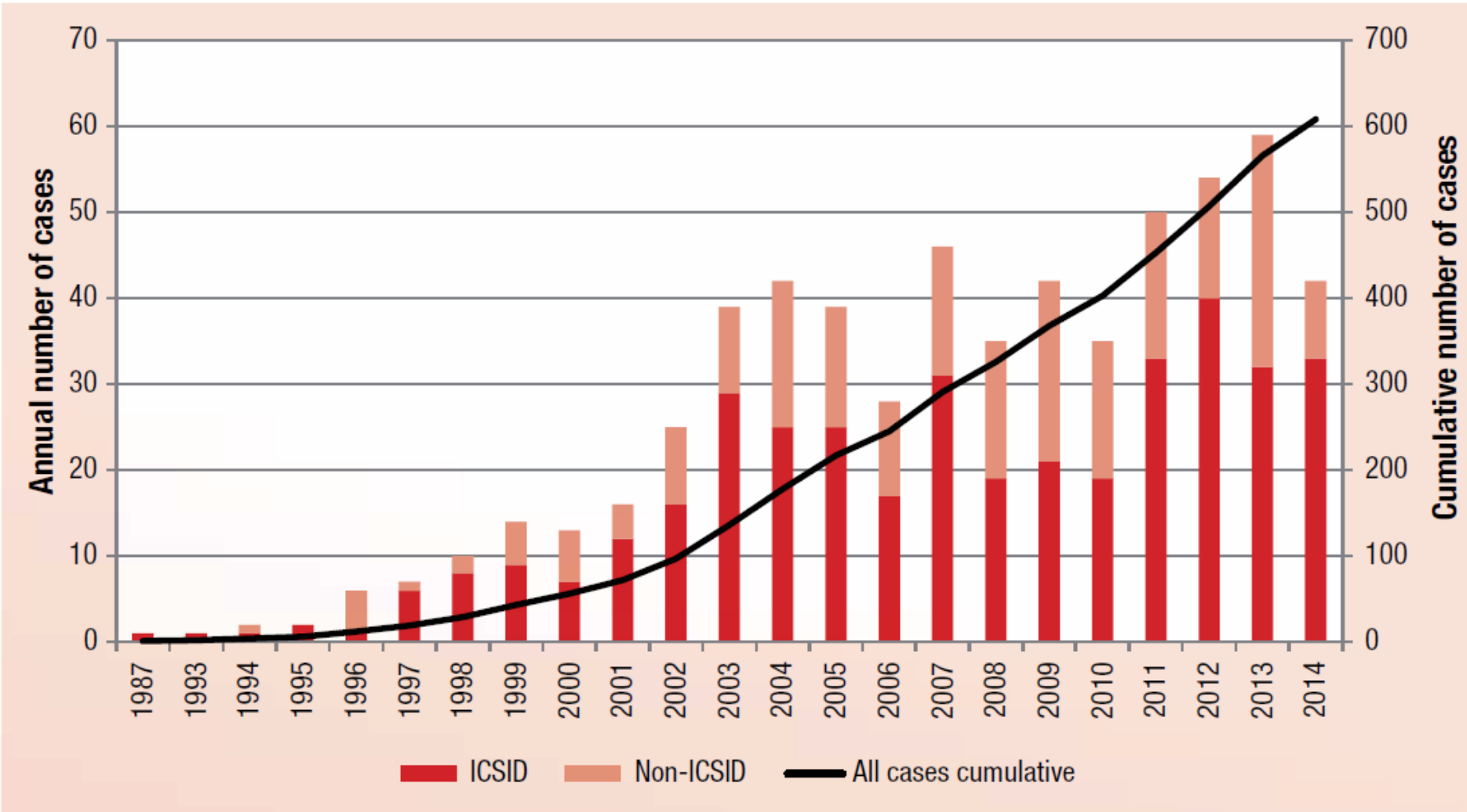


Source: UNCTAD, IIA database.
 Note: Preliminary data for 2014.

ISDS Geschichte

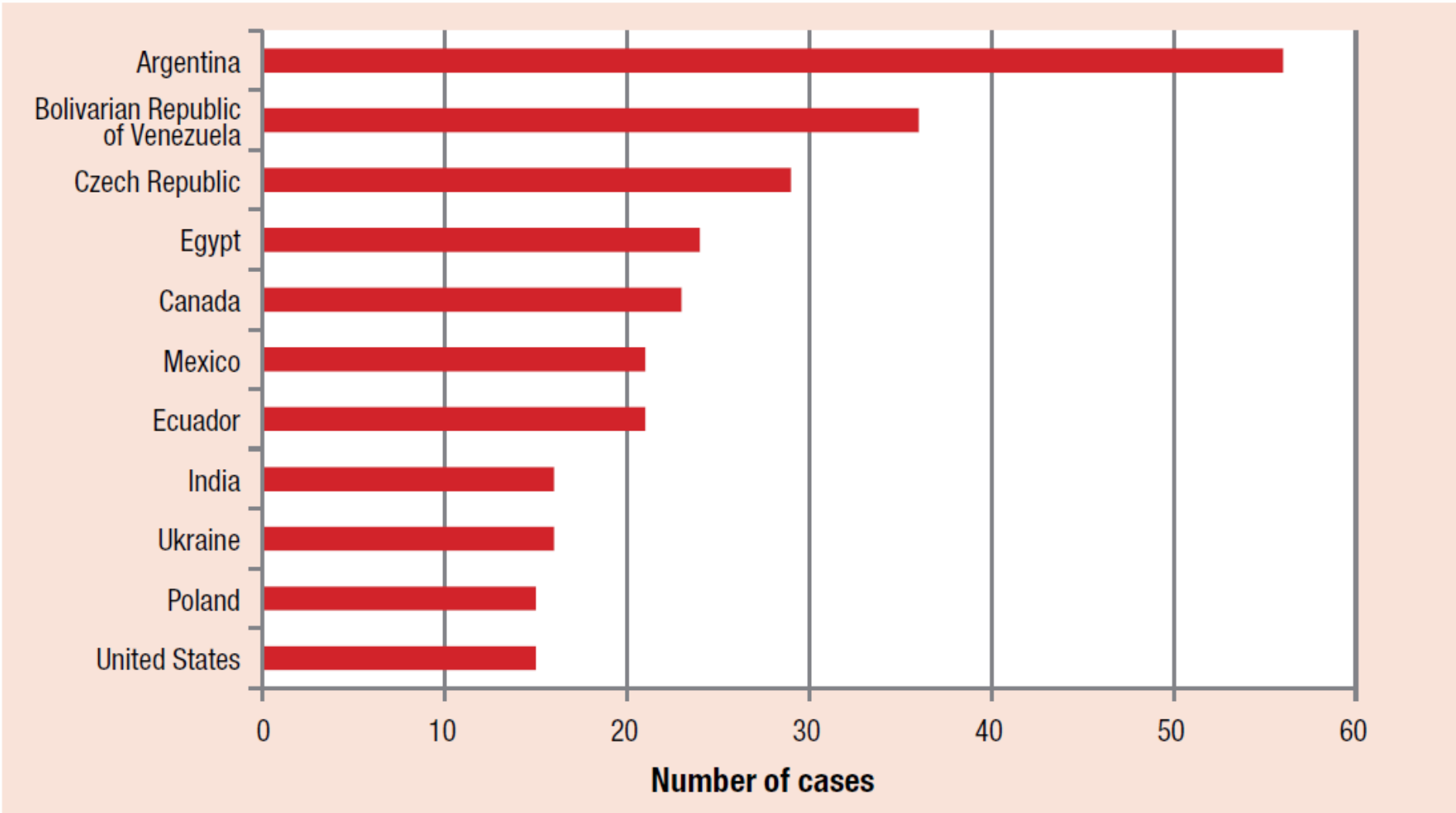
- 25. November 1959 Unterzeichnung erster BIT weltweit Deutschland-Pakistan
- ISDS daher als Instrument eines „post-colonialism“?
- 1959 bis Ende 1960er
 - Enteignung, Nichtdiskriminierung, nur Staat-Staat Streitbeilegung
- 1970er und 1980er
 - Wie oben
 - Erste ISDS-Klauseln, aber beschränkt auf Feststellung Höhe Entschädigung bei Enteignung
- Ab 1990er
 - Umfassende ISDS-Klauseln
- Ab ca. 2001
 - Vermehrt Nachhaltigkeitsklauseln und Regelungen zur Wahrung öffentlicher Interessen in BITs
 - deep and comprehensive FTAs / mega regionals

Figure 2. Known ISDS cases, annual and cumulative (1987–2014)



Source: UNCTAD, ISDS database.
 Note: Preliminary data for 2014.

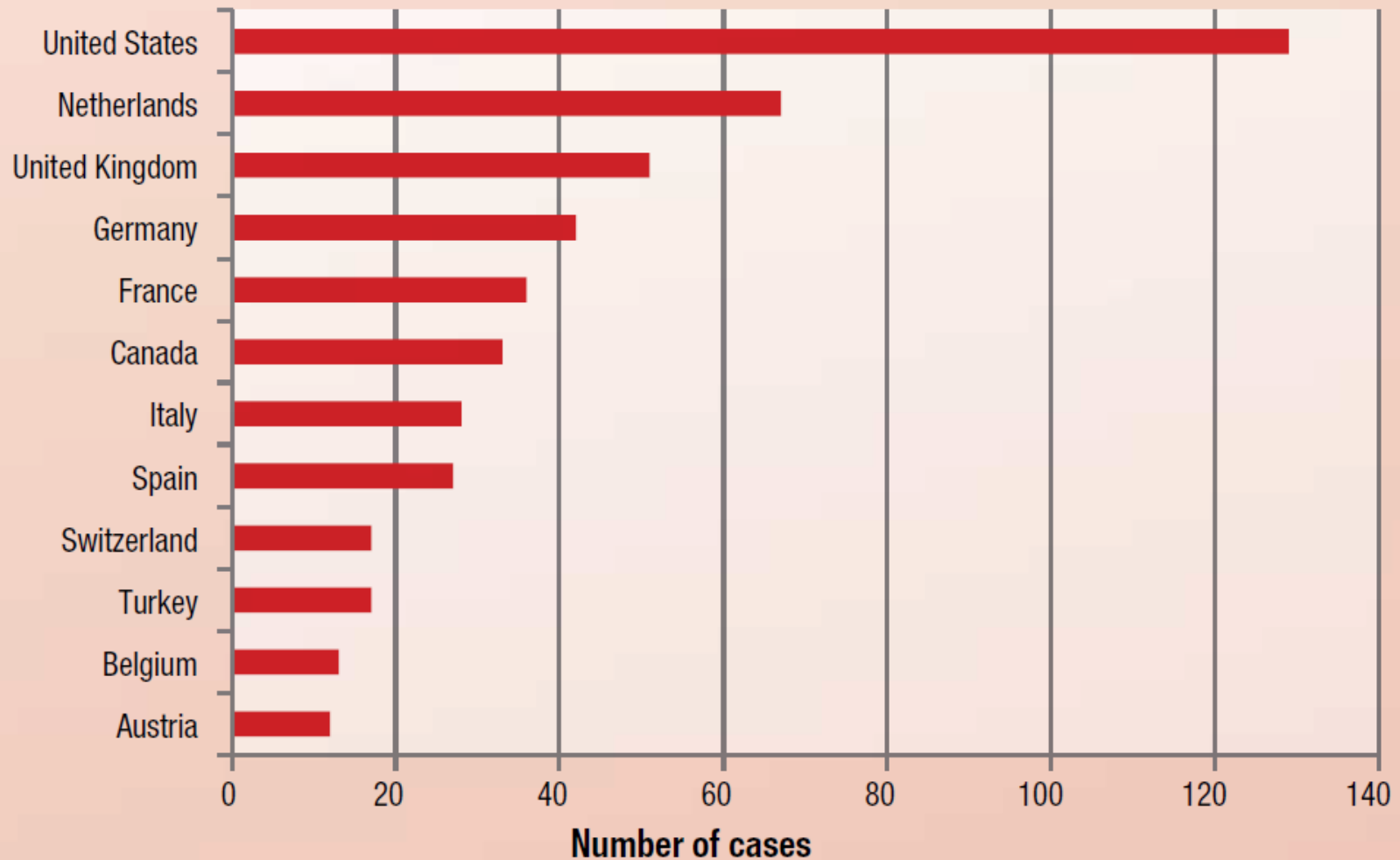
Figure 3. Most frequent respondent States (total as of end of 2014)



Source: UNCTAD, ISDS database.

Note: Preliminary data for 2014.

Figure 4. Most frequent home States (total as of end 2014)



Source: UNCTAD, ISDS database.

Note: Preliminary data for 2014.

Ratio ISDS

- Diplomatischer Schutz
 - Kein Anspruch Investor auf Tätigwerden Heimatstaat
 - Völkerrecht (-)
 - Schutzpflicht Grundrechte GG = weites Ermessen
 - Diplomatisch = Politisch = mehr als konkrete Wirtschaftsinteressen
- Innerstaatlicher Rechtsweg
 - (Leider) in den meisten Staaten der Welt unklar, langwierig, ggf. korrupt etc.
 - Innerstaatliche Anwendbarkeit z.B. CETA explizit ausgeschlossen
- Schiedsklausel in contract
 - Nicht erzwingbar, kein diplomatischer Schutz

Rechtsstaat und ISDS

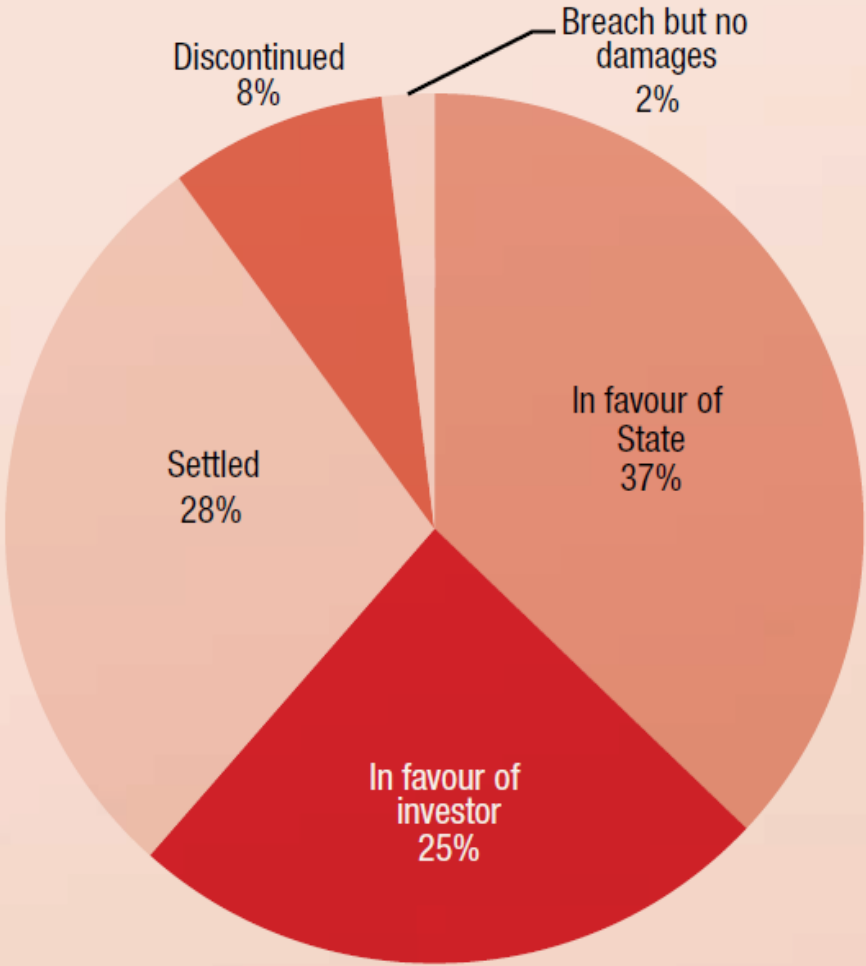
- Kein staatliches Rechtsprechungsmonopol
- Keine Verfassungspflicht zu Instanzenzug (Ausnahme Strafrecht)
- Übertragung von Hoheitsrechten gem. Art. 24 GG?
 - UNCITRAL, ICC etc.
 - (-) da immer Anerkennung und Vollstreckung nach New Yorker Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche von 1958
 - ICSID
 - (-) da keine Rechtsetzung, sondern Rechtsprechung

Rechtsstaat und ISDS

- „Regulatory chill“
- „policy space“
- „Beschränkung der Rechte des demokratische legitimierten Gesetzgebers“



Figure 5. Results of concluded cases (total as of end 2014)



Source: UNCTAD, ISDS database.
Note: Preliminary data for 2014.

NAFTA Cases

Claims Against CAN		Claims Against USA		Claims Against MEX	
Type		Type		Type	
Natural Resources	9	Natural Resources	7	Real Estate	6
Environment	6	Environment	2	Environment	4
Postal	2	Healthcare/Pharm	5	Agriculture/Food	4
Healthcare/Pharm	3	Agriculture/Food	1	Finance/Taxation	1
Agriculture/Food	4	State Court Decisions	2	Gambling	1
Energy	5	Procurement	1	Healthcare/Pharm	1
Other	5	Other	2	Other	2
Outcomes		Outcomes		Outcomes	
Against State	3	Against State	0	Against State	5
Settled	4	Settled	0	Settled	0
Dismissed	5	Dismissed	9	Dismissed	6
Withdrawn	6	Withdrawn	3	Withdrawn	0
Inactive	9	Inactive	4	Inactive	7
Pending	7	Pending	4	Pending	1
	34		20		19
Overall Trends					
Natural Resources	16	Against State	8		
Environment	12	Settled	4		
Healthcare/Pharm	9	Dismissed	20		
Agriculture/Food	9	Withdrawn	9		
Other	9	Inactive	20		
Real Estate	6	Pending	12		
Energy	5	TOTAL	73		
State Court Decisions	2				
Postal	2				
Procurement	1				
Finance/Taxation	1				
Gambling	1				
TOTAL	73				

Table 1. Distribution of disputes as of September, 2013

Source: ICSID.org. Claims sum to >100% due to rounding.

Government actor	All claims		Expropriation claims	
	Number	Percent	Number	Percent
Head of state or government	18	11	9	10
Ministry	60	37	33	37
Total executive branch	78	48	42	47
Legislature	14	9	12	13
Subnational	14	9	11	12
State-owned firm	19	12	7	8
Other agency	27	17	9	10
Court	12	7	8	9
Total	163		89	

Policy Space und Regulatory Chill

“The evidence yields two important insights for policymakers seeking to reduce risk for foreign investors. First, the most common actor associated with disputes is the executive.[4] Thus, reforms that limit the discretion of the executive to interfere with foreign investment are likely to reduce investor-state claims and, more generally, may reduce political risk.[5] Second, this prevalence of disputes originating from executive activity suggests that investor-state arbitration can serve as an additional external check on executive discretion, particularly where domestic checks are weak. Given the low rate of disputes involving legislative branch activity, arguments that investor-state arbitration may encroach on the legitimate prerogatives of domestic governments appear to be overstated. Instead, democratic legislatures should embrace investor-state arbitration as an additional check on executive branch misbehavior.”

Which host country government actors are most involved in disputes with foreign investors? By Jeremy Caddel and Nathan M. Jensen, Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment, No. 120, April 28, 2014

Keine Beachtung öffentlicher Interessen?

- “the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.”
 - *Semire v. Ukraine*, ICSID Case NO. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 273.

ISDS und „Souveränität“

- The Alabama Claims 14 September 1872
 - Schiff unter britischer Flagge, das im US-amerikanischen Bürgerkrieg für Konföderierte Staaten fuhr
 - Verletzung “due diligence” durch UK?
 - Vorschlag: Entscheidung durch internationales Schiedsgericht
 - Noch 1865 Ablehnung durch UK Foreign Secretary Earl Russel: “Her Majesty’s Government are the sole guardians of their honour”

Warum ISDS mit Kanada und USA?

- Seit Jahren Justizkonflikte EU / US
 - jury system; discovery vs Datenschutz; “exorbitant” oder “extraterritorial” Jurisdiktion; punitive und triple damages, etc.
- Loewen vs. USA (NAFTA Award 26 June 2003)
 - “By any standard of measurement, the trial involving O’Keefe and Loewen was a disgrace. By any standard of review, the tactics of O’Keefe’s lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.”
- Siehe auch, e.g., Mondev vs. USA (NAFTA 2002)
- Politische Dimension, insbesondere im Verhältnis zu China

Investitionsschutz in CETA etc.

- Nur post-establishment
 - Kein Marktzugang
- Konkretisierung „Gerechte und billige Behandlung“
- Konkretisierung, dass grundsätzlich keine Entschädigung bei indirekter Enteignung im öffentlichen Interesse
- Code of Conduct Arbitrator



Investment Protection in CETA

- Pre- and post-establishment
 - ISDS not applicable for pre-establishment
 - i.e. no ISDS enforcement of market access
 - Market access remains sovereign freedom of EU and MS (subject to WTO and CETA limitations)
- Fair and equitable treatment
 - Early tendency in arbitral practice of extensive interpretation
 - However, much more restrictive for several years already

Investment Protection in CETA

- Fair and equitable treatment
 - US Model BIT 2012 Art. 5 (2)

„For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”

Investment Protection in CETA

- Fair and equitable treatment
 - CETA Art. X.9

“A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:

 - Denial of justice in criminal, civil or administrative proceedings;
 - Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
 - Manifest arbitrariness;
 - Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
 - Abusive treatment of investors, such as coercion, duress and harassment; or
 - A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.”

Expropriation

- Problem: indirect expropriation
 - Determination

“indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.”

CETA Art. X.11 (1)
 - Jurisprudence of European Court of Human Rights

Expropriation

- Problem: indirect expropriation
 - Limitations

“For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.”

CETA Art. X.11 (3)

State Courts and ECJ Review of ISDS-Awards

- EU not a party to ICSID (and will not become a party), thus always UNCITRAL, ICC, etc.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Art. V (2)

“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

- ECJ, Case C-126/97, Eco Swiss [1999]:
 - basic principles of EU law as public policy

