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RECENT TRENDS IN IIAS AND ISDS[1]

Highlights

- Countries continue to use international investment agreements (IIAs) as a tool for international investment policy making. The year 2014 saw the conclusion of 27 IIAs, that is one every other week. This brings the total number of agreements to 3,268.
- The IIA universe is evolving with regard to substantive provisions: pre-establishment commitments and sustainable development-oriented clauses are on the rise.
- At least 45 countries and four regional integration organizations are currently revising or have recently revised their model agreement.
- Investors continue to use the investor–State dispute settlement (ISDS) mechanism. In 2014, claimants initiated 42 known treaty-based ISDS cases. With 40 per cent of new cases initiated against developed countries, the relative share of cases against developed countries has been on the rise (compared to the historical average of 28 per cent).
- The two types of State conduct most commonly challenged by investors in 2014 were cancellations or alleged violations of contracts, and revocation or denial of licences. Over time, the Energy Charter Treaty (ECT) surpassed the North American Free Trade Agreement (NAFTA) as the most frequently invoked IIA.
- ISDS tribunals rendered at least 42 decisions in 2014. This includes an award of USD 50 billion in three closely related cases, the highest known award by far in the history of investment arbitration. The overall number of concluded cases has reached 356, with 37 per cent decided in favour of the State, 25 per cent in favour of the investor and 28 per cent of cases settled.
- The year saw important multilateral developments geared towards increased transparency in ISDS. These include the coming into effect of the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency and the adoption of the Convention on Transparency in Treaty-based Investor-State Arbitration, which will be opened for signature later in 2015.
- Concerns about IIAs and ISDS have prompted a debate about their challenges and opportunities in multiple forums. Today, a broad consensus is emerging that the regime of IIAs and the related dispute settlement mechanism need to be reformed to make them work better for sustainable development. Such reform would need to be undertaken in a comprehensive and gradual way, taking into account the interests of all stakeholders.

[1] Prepared by UNCTAD's IIA Team in advance of the Expert Meeting on "The Transformation of the International Investment Agreement Regime" from 25-27 February 2015 in Geneva. UNCTAD is grateful to Azar Aliyev, N. Jansen Calamita, Lise Johnson, Lisa Sachs, Christian Tams, Catharine Titi and the UNCITRAL Secretariat for providing comments on the draft version of this note.

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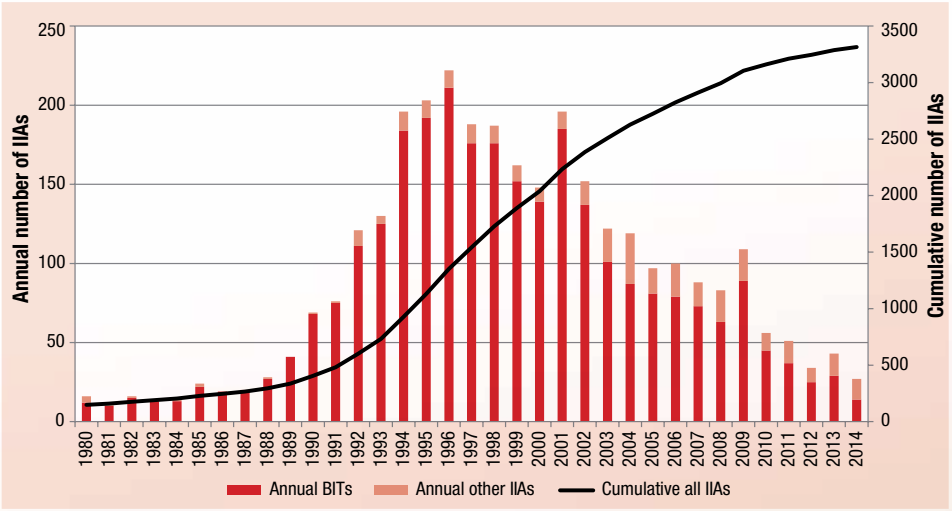
I. Trends in the conclusion of IIAs

The year 2014 saw the conclusion of 27 IIAs (14 BITs and 13 "other IIAs"),[2] bringing the total number of agreements to 3,268 (2,923 BITs and 345 "other IIAs") by year-end (figure 1).[3] Countries/economies that were particularly active in concluding IIAs in 2014 include Canada (seven), Colombia, Côte d'Ivoire, and the European Union (three each). The annual number of "other IIAs" has remained stable over the past few years, while the annual number of BITs continues to decline. See annex 1 for a list of each country's total number of BITs and "other IIAs" concluded in 2014.

An increasing number of countries are reviewing their model IIAs in line with recent developments in international investment law. At least 45 countries and four regional integration organizations are currently or have been recently revising their model IIAs.[4] Notable examples include work on a new model agreement by Brazil and India.

Figure 1. Trends in IIAs signed, 1980–2014



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

"Other IIAs" concluded in 2014 can be grouped into three broad categories, as identified in *WIR12*:[5]

- *Seven agreements with BIT-equivalent provisions.* The Australia–Japan EPA, the Australia–Republic of Korea FTA, the Canada–Republic of Korea FTA, the Japan–Mongolia EPA, the Mexico–Panama FTA, the Additional Protocol to the Framework Agreement of the Pacific Alliance (between Chile, Colombia, Mexico and Peru), and the Treaty on Eurasian Economic Union (between Armenia, Belarus, Kazakhstan and the Russian Federation) fall in the category of IIAs that contain obligations commonly found in BITs, including substantive standards of investment protection and ISDS.
- *Three agreements with limited investment provisions.* The European Union–Georgia Association Agreement, the European Union–Republic of Moldova Association Agreement and the European Union–Ukraine Association Agreement fall in the category of agreements that provide limited investment-related provisions (e.g. national treatment with respect to commercial presence or free movement of capital relating to direct investments).

[2] "Other IIAs" refers to economic agreements other than BITs that include investment-related provisions (e.g. investment chapters in economic partnership agreements (EPAs) and free trade agreements (FTAs), regional economic integration agreements and framework agreements on economic cooperation).

[3] The total number of IIAs has been revised as a result of retroactive adjustments to UNCTAD's database on BITs and "other IIAs". Readers are invited to visit UNCTAD's expanded and upgraded IIA database, which offers a number of new user-friendly search options (http://investmentpolicyhub.unctad.org).

[4] Updated based on chapter III of the 2014 World Investment Report (WIR), Investing in the SDGs: An Action Plan, June 2014, available at http://unctad.org/en/publicationslibrary/wir2014_en.pdf.

[5] The text of the Agreement for Trade in Services and Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India is not available.

- *Two agreements with investment cooperation provisions and/or a future negotiating mandate.* The ECOWAS–United States of America Trade and Investment Framework Agreement (TIFA), and the Malaysia–Turkey FTA contain general provisions on cooperation in investment matters and/or a mandate for future negotiations on investment.

At the same time, some countries continued to disengage from the IIA regime. For example, Indonesia gave notice of the termination of its BIT with the Netherlands in March 2014.[6] The termination will come into effect on 1 July 2015. The agreement will remain in force for a period of 15 years with respect to investments made prior to the date of termination. And, following South Africa's unilateral denouncement of its BIT with Germany in October 2013,[7] the termination came into effect on 22 October 2014. The agreement will remain in force for a period of 20 years with respect to investments made prior to the date of termination.

II. Content of new IIAs

Pre-establishment commitments are on the rise

The number of agreements that include pre-establishment rights is on the rise. As of the end of 2014, about 10 per cent of all IIAs included pre-establishment commitments. Among those IIAs concluded in 2014, about half extend national treatment and most-favoured-nation treatment (MFN) obligations to the acquisition and establishment of investments. Pre-establishment IIAs signed in 2014 include both: (i) BITs or "other IIAs" with fully fledged investment chapters (although sometimes they carve out pre-establishment commitments from the scope of ISDS); and (ii) "other IIAs" with limited investment provisions (the European Union agreements with Georgia, the Republic of Moldova and Ukraine are examples).

Sustainable development provisions continue to be included

A review of 13 IIAs concluded in 2014 for which texts are available (seven BITs and six "other IIAs") shows that most of the treaties include sustainable development-oriented features, such as those identified in UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and the 2012, 2013 and 2014 *World Investment Reports* (table 1).[8] Of these agreements, eleven have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. Another eleven treaties contain a clause that explicitly recognizes that the parties should not relax health, safety or environmental standards in order to attract investment. Of those eleven, nine treaties refer to the protection of health and safety, labour rights, the environment or sustainable development in the preamble.

These sustainable development features are supplemented by treaty elements that aim more broadly at preserving regulatory space for public policies of host countries and/or at minimizing exposure to investment arbitration. Provisions found include clauses that: (i) limit treaty scope (for example, by excluding certain types of assets from the definition of investment); (ii) clarify obligations (for example, by including more detailed clauses on fair and equitable treatment (FET) and/or indirect expropriation); (iii) contain exceptions to transfer-of-funds obligations or carve-outs for prudential measures; and (iv) carefully regulate ISDS (for example, by limiting treaty provisions that are subject to ISDS, excluding certain policy areas from ISDS, setting out a special mechanism for taxation and prudential measures, and/or restricting the allotted time period within which claims can be submitted). Notably, all of the reviewed treaties concluded in 2014 omit the so-called umbrella clause.

[6] Signed in 1994.
[7] Signed in 1995.
[8] Table 1 is based on IIAs concluded in 2014 for which text was available. It does not include "framework agreements", which do not include substantive investment provisions.

Table 1. Selected aspects of IIAs signed in 2014

Policy Objectives		Additional Protocol to the Framework Agreement of the Pacific Alliance	Australia-Japan EPA	Australia-Republic of Korea FTA	Canada-Cameroon BIT	Canada-Côte d'Ivoire BIT	Canada-Republic of Korea FTA	Canada-Mali BIT	Canada-Nigeria BIT	Canada-Senegal BIT	Canada-Serbia BIT	Treaty on Eurasian Economic Union	Israel-Myanmar BIT	Mexico-Panama FTA
Stimulate responsible business practices	Selected aspects of IIAs													
Avoid over-exposure to litigation	References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble	X		X	X	X	X	X	X	X	X			
Preserve the right to regulate in the public interest	Refined definition of investment (reference to characteristics of investment, exclusion of portfolio investment, sovereign debt obligations or claims of money arising solely from commercial contracts)	X	X	X	X	X	X	X	X	X	X		X	X
Focus on investments conducive to development	A carve-out for prudential measures in the financial services sector	X	X	X	X	X	X	X	X	X	X			
Sustainable development enhancing features	Fair and equitable standard equated to the minimum standard of treatment of aliens under customary international law	X	X	X	X	X	X	X	X	X	X			X
	Clarification of what does and does not constitute an indirect expropriation	X	X	X	X	X	X	X	X	X	X			X
	Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws	X	X	X	X	X	X	X	X	X	X			X
	Omission of the so-called "umbrella" clause	X	X	X	X	X	X	X	X	X	X			X
	General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources	X	X	X	X	X	X	X	X	X	X			X
	Explicit recognition that parties should not relax health, safety or environmental standards to attract investment	X	X	X	X	X	X	X	X	X	X	X	X	X
	Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble	X	X	X	X	X	X	X	X	X	X	X	X	X
	Limiting access to ISDS (e.g., limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)	X	X	X	X	X	X	X	X	X	X			X

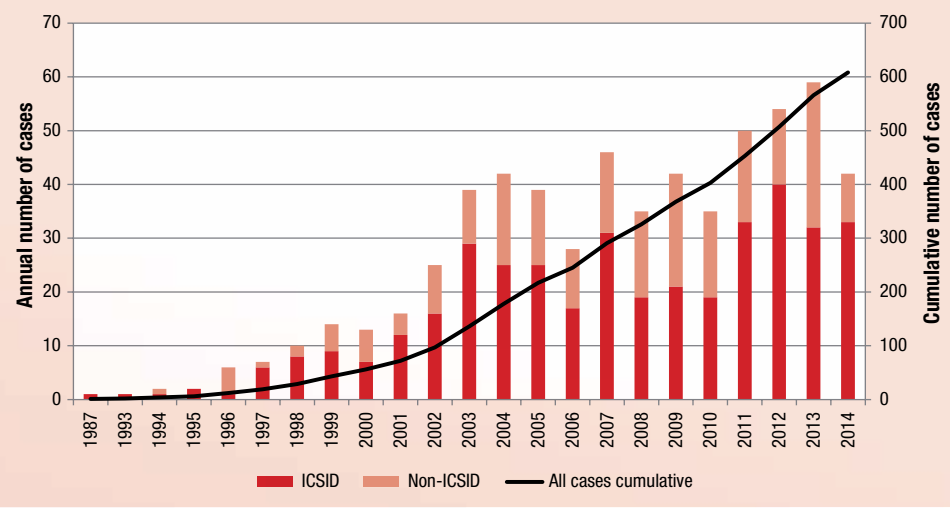
Source: UNCTAD.

III. Latest trends in ISDS[9]

In 2014, investors initiated 42 known ISDS cases pursuant to IIAs (annex 4).[10] This is lower than the record high number of new claims in 2013 (59 cases) and 2012 (54 cases) and closer to the annual averages observed in the period between 2003 and 2011.[11] As most IIAs allow for fully confidential arbitration, the actual number of non-ICSID cases could be higher.

Last year's developments brought the overall number of known ISDS claims to 608 (figure 2). One hundred and one governments around the world have been respondents to one or more known ISDS claims.

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



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

Respondent States. The relative share of cases against developed countries is on the rise. In 2014, 60 per cent of all cases were brought against developing and transition economies, and the remaining 40 per cent against developed countries.[12] In total, 32 countries faced new claims last year (annex 3). The most frequent respondent in 2014 was Spain (five cases),[13] followed by Costa Rica, the Czech Republic, India, Romania, Ukraine and the Bolivarian Republic of Venezuela (two cases each). Three countries – Italy, Mozambique and Sudan – faced their first (known) ISDS claims in history. The most frequent respondent States are presented in figure 3.

[9] Information about 2014 claims has been compiled on the basis of public sources, including specialized reporting services. We are grateful for additional information received from the ICSID Secretariat and the Energy Charter Treaty Secretariat. Information about arbitral decisions issued in 2014 was compiled by Federico Ortino, King's College London. UNCTAD's more comprehensive overview of ISDS developments in 2014, including the summary of key findings by arbitral tribunals on substantive and procedural issues, is forthcoming.

[10] This Note does not cover cases that are exclusively based on investment contracts (State contracts) or national investment laws, nor cases where a party has so far only signaled its intention to submit a claim to ISDS, but has not yet commenced the arbitration.

[11] Annual and cumulative case numbers are being continuously adjusted as a result of verification and may not exactly match the case numbers reported in the previous years.

[12] The share of cases against developed countries was 47 per cent in 2013, and 34 per cent in 2012, while the historical average is 28 per cent.

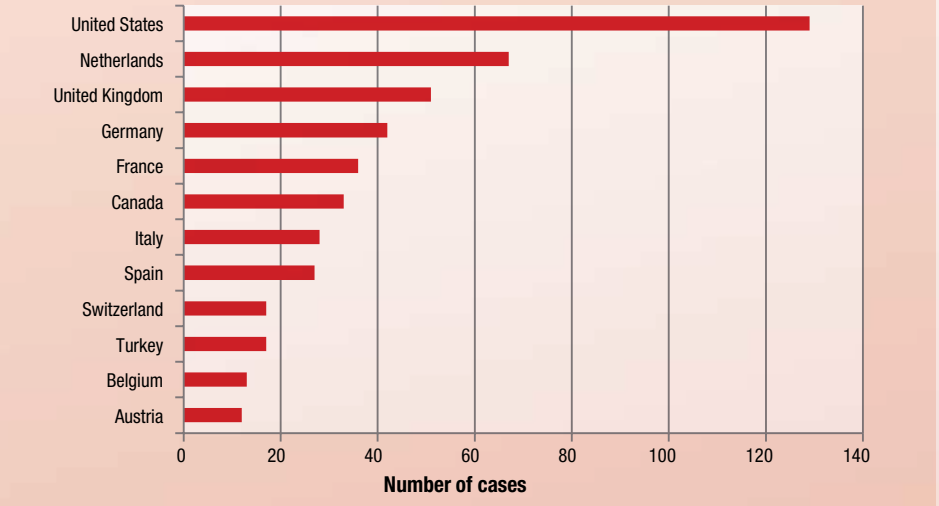
[13] All five new claims against Spain arise from the same measures that prompted the six claims against the country in 2013. Claimants maintain that the seven per cent tax on the revenues of power generators and a reduction of subsidies for renewable energy producers – introduced by Spain in 2012 to counter the budget deficit – wipe out expected profits from their investments in photovoltaic, solar thermal and wind plants.

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

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

Home country of investor. Of the 42 known new cases, 35 were brought by investors from developed countries and five were brought by investors from developing countries. In two cases the nationality of the claimants is unknown. The most frequent home States in 2014 were the Netherlands (seven cases by Dutch investors), followed by the United Kingdom of Great Britain and Northern Ireland and the United States (five each), France (four), Canada (three) and Belgium, Cyprus and Spain (two each) (annex 3). This corresponds to the historical trend where developed-country investors – in particular, those from the United States, Canada and several European Union countries – have been the main users of the system responsible for over 80 per cent of all ISDS claims (figure 4).

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



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

Intra-European Union disputes. A quarter of all known new disputes (eleven) were intra-European Union cases, which is lower than the year before (in 2013, 42 per cent of all new claims were intra-European Union). Half of them were brought pursuant to the ECT, and the rest on the basis of intra-European Union BITs. The year's developments brought the overall number of intra-European Union investment arbitrations to 99, i.e. approximately 16 per cent of all cases globally.[14]

[14] When calculating intra-European Union disputes, the time factor (when a particular State joined the European Union) has been disregarded; all disputes between States *currently* members of the European Union are counted as intra-European Union disputes.

Arbitral forums/rules. Of the 42 new known disputes, 33 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (of which three cases were under the ICSID Additional Facility Rules), six under the arbitration rules of UNCITRAL,[15] two under the Stockholm Chamber of Commerce (SCC) and one under the International Chamber of Commerce (ICC) arbitration rules. These numbers are roughly in line with overall historical statistics.

Applicable investment treaties. The majority of new cases (30) were brought under BITs. Ten cases were filed pursuant to the provisions of the ECT (twice in conjunction with a BIT), two cases under the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA), one case under the NAFTA and one case under the Canada-Peru FTA. Looking at the full historical statistics, the ECT has now surpassed the NAFTA as the most frequently invoked IIA (60 and 53 cases respectively). Among BITs, the Argentina-United States BIT remains the most frequently used agreement (20 disputes).

Economic sectors involved. About 61 per cent of cases filed in 2014 relate to the services sector. Primary industries account for 28 per cent of new cases while the remaining eleven per cent arose out of investments in manufacturing. Looking at the industries in which investments were made, the most numerous was generation and supply of electric energy (at least eleven cases), followed by oil, gas and mining (ten), construction (five) and financial services (three).

Measures challenged. The two types of State conduct most frequently challenged by investors in 2014 were: (i) cancellations or alleged violations of contracts or concessions (at least nine cases); and (ii) revocations or denials of licences or permits (at least six cases). Other challenged measures include: legislative reforms in the renewable energy sector, alleged discrimination of foreign investors vis-à-vis domestic ones, alleged direct expropriations of investments, alleged failure on the part of the host State to enforce its own legislation, alleged failure to protect investments, as well as measures related to taxation, regulation of exports, bankruptcy proceedings and water tariff regulation. Information about a number of cases is lacking. Some of the new cases concern public policies, including environmental issues, anti-money laundering and taxation.

Amounts claimed. Information regarding the amount sought by investors is scant. For cases where this information has been reported, the amount claimed ranges from USD 8 million[16] to about USD 2.5 billion.[17]

ISDS outcomes in 2014

In 2014, ISDS tribunals rendered at least 42 decisions in investor–State disputes, 33 of which are in the public domain (at the time of writing) (annex 5).[18] Of the 33 public decisions, ten principally addressed jurisdictional issues, with five decisions upholding the tribunal's jurisdiction (at least in part) and five decisions rejecting jurisdiction.[19] Fifteen decisions on the merits were rendered in 2014, with 10 accepting – at least in part – the claims of the investors, and five dismissing all of the claims.

Of the 10 decisions finding States liable, six found a violation of the FET provision and seven a violation of the expropriation provision. At least

[15] All of the UNCITRAL cases were filed pursuant to IIAs concluded prior to 2014 and, therefore, the new UNCITRAL Transparency Rules do not apply to any of them, unless the disputing parties agree to their application in their specific dispute.

[16] *Anglia Auto Accessories, Ivan Peter Busta and Jan Peter Busta v. Czech Republic* (SCC).

[17] *Cem Uzan v. Republic of Turkey* (SCC).

[18] There may have been other decisions in 2014 whose existence is not known due to the confidentiality of the dispute concerned.

[19] These exclude those decisions that upheld the tribunal's jurisdiction and considered at the same time the merits of the dispute.

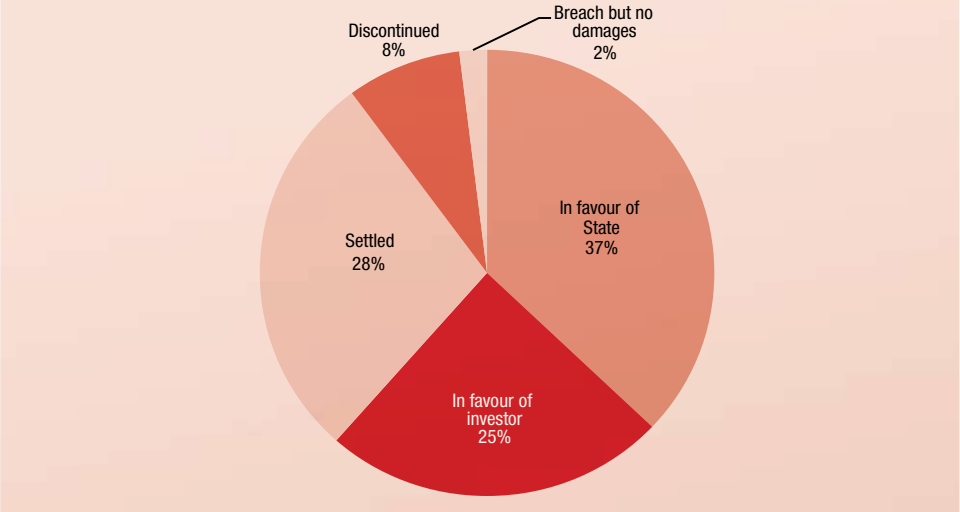
eight decisions rendered in 2014 awarded compensation to the investor, including a combined award of approximately USD 50 billion in three closely related cases, the highest known award by far in the history of investment arbitration.[20]

Five decisions on applications for annulment were issued in 2014 by ICSID *ad hoc* committees, all of them rejecting the application for annulment.[21]

Ten cases were reportedly settled in 2014, and another five proceedings discontinued for unknown reasons.

By the end of 2014, the overall number of concluded cases reached 356.[22] Out of these, approximately 37 per cent (132 cases) were decided in favour of the State (all claims dismissed either on jurisdictional grounds or on the merits), and 25 per cent (87 cases) ended in favour of the investor (monetary compensation awarded). Approximately 28 per cent of cases (101) were settled[23] and eight per cent of claims (29) were discontinued for reasons other than settlement (or for unknown reasons). In the remaining two per cent (seven cases), a treaty breach was found but no monetary compensation was awarded to the investor (figure 5).

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



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

Other developments in ISDS

In 2014 a number of multilateral developments geared towards addressing existing international investment policymaking challenges took place. These included: