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South Unity, South Progress.



Should Developing Countries Accept TPP-style Obligations on Foreign Investor Protections?

Manuel F Montes

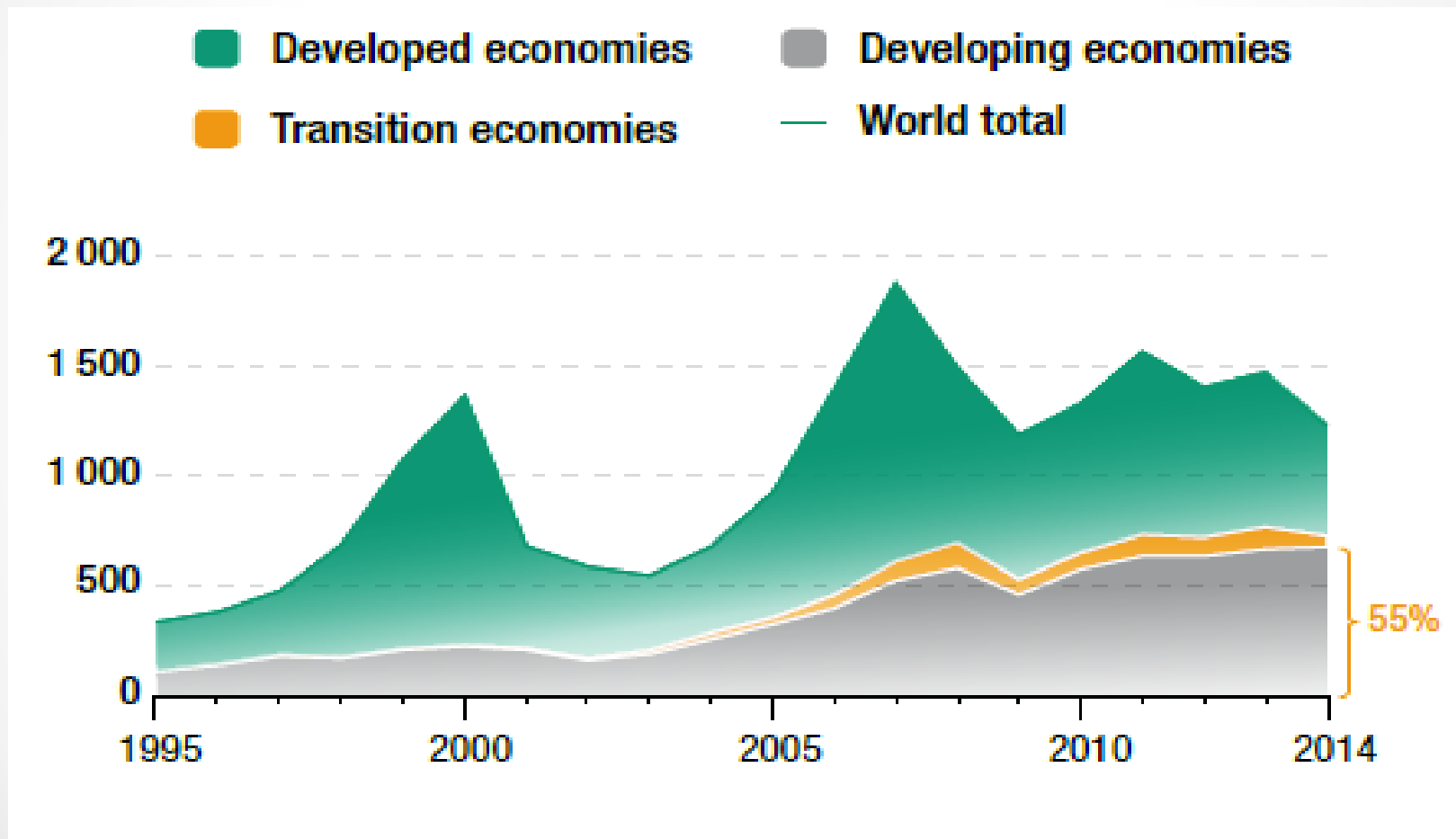
G24 Technical Group Meeting

Addis Ababa, 27-28 February 2016

Outline

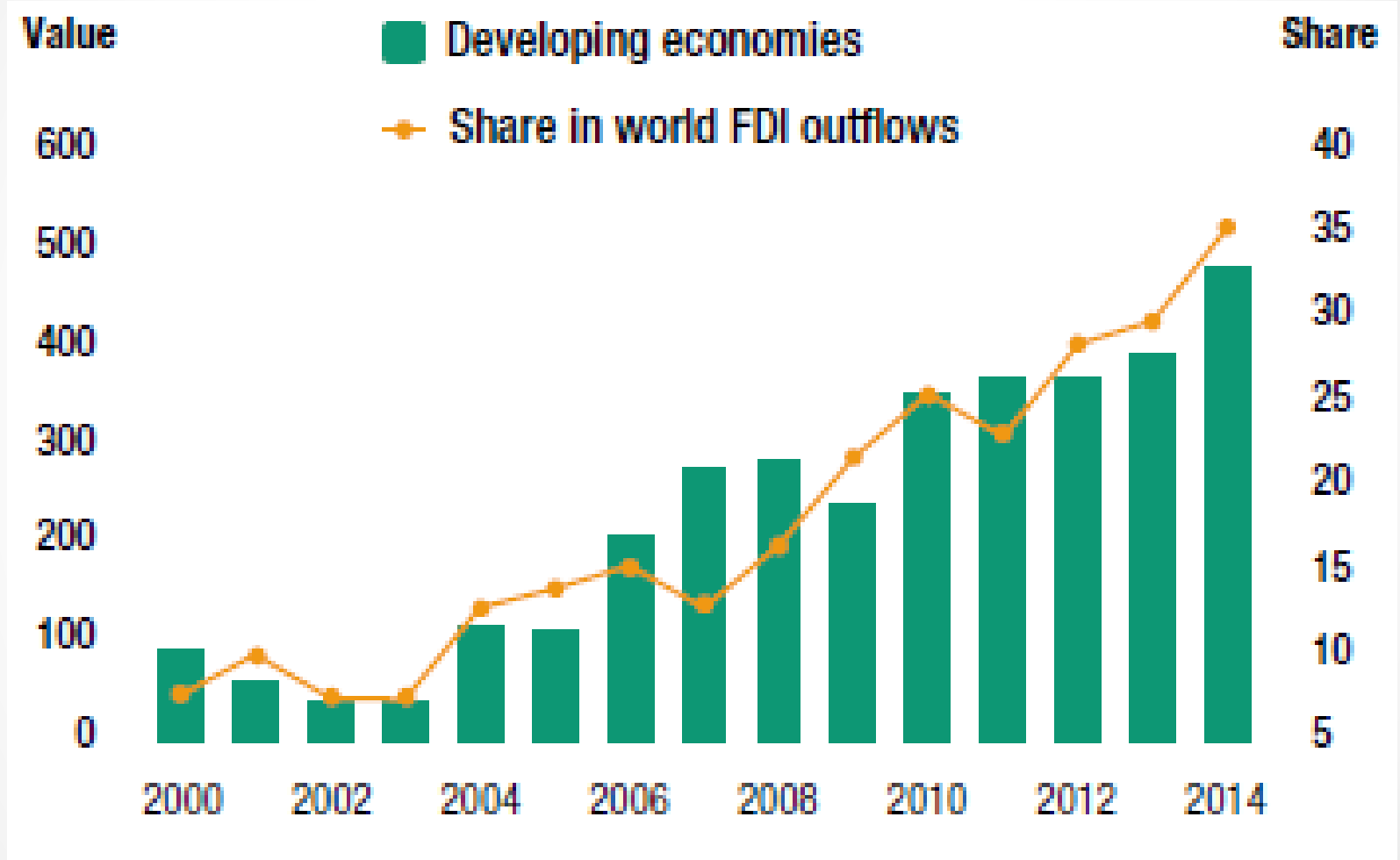
- **What are BITs or more generally IIAs (international investment agreements)**
- **Impact on investment inflows**
- **Known problems**
- **Reform efforts on part of developing countries**

Developing countries as FDI destination



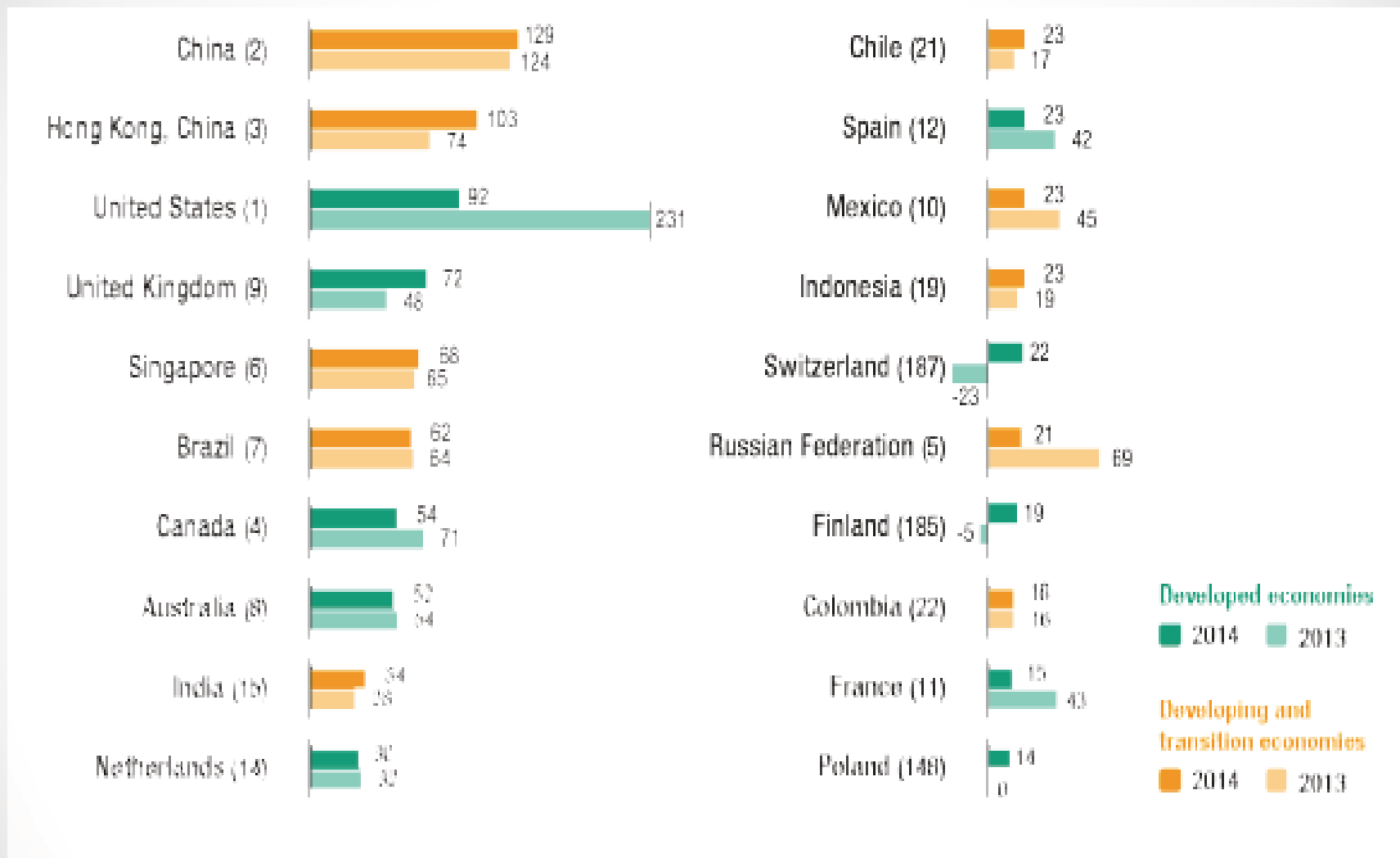
Source: UNCTAD 2015

Developing countries FDI and share

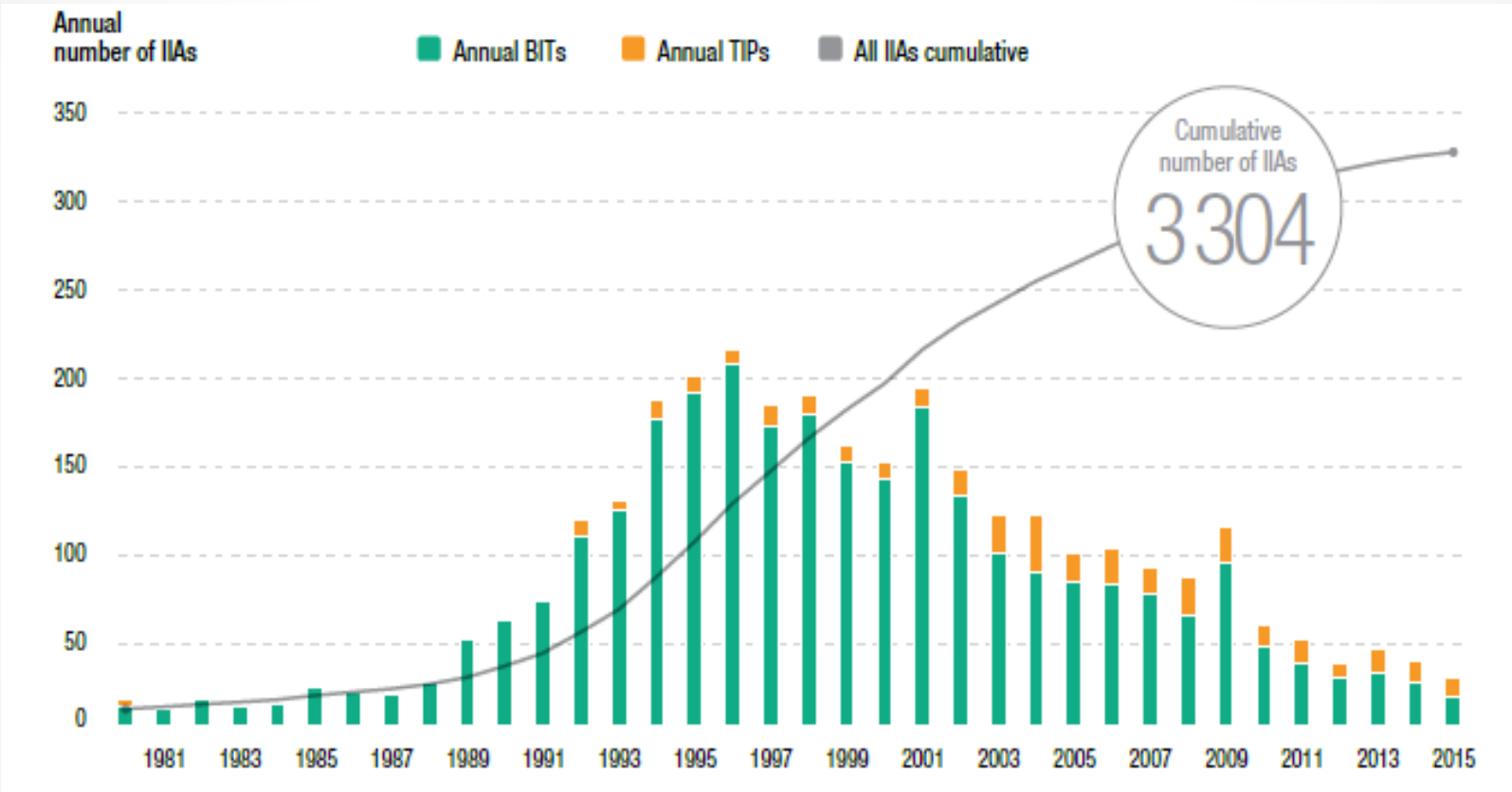


Source: UNCTAD 2015

Top FDI Hosts, 2013 and 2014



Investment treaties, new and cumulative



Source: UNCTAD 2016

BITs in force – Europe

Country	BITs In Force*	Gini
Portugal	43	34.2
Spain	70	34
France	96	30.8
Italy	76	31.9
Greece	39	33.5
Turkey	75	40
Georgia	29	41
Ukraine	55	26.4
Belarus	49	26
Lithuania	53	32.9
Latvia	44	35.9
Estonia	24	31.9
Finland	66	25.8
Norway	14	22.9
Sweden	66	24.4
United Kingdom	94	33
Denmark	47	27.8
Poland	59	31.1
Slovakia	47	25.7
Hungary	56	23.8
Moldova	38	33
Romania	78	33.2
Bulgaria	58	35.1
Macedonia	35	43.2
Albania	34	29
Montenegro	13	30
Serbia	48	27.8
Bosnia and Herzegovina	38	32.6
Croatia	47	31
Slovenia	34	23.8
Hungary	56	26.8
Austria	59	26.3
Czech Republic	77	25.2
Germany	133	29
Switzerland	115	29.7
Netherlands	91	25.8
Belgium	68	26.3
Cyprus	23	29.1
Armenia	35	37.1
Azerbaijan	32	33.7
Iceland	8	23.6
Luxembourg	68	27.2
Russian Federation	57	35.4
Malta	21	27.4

BITs in force

UK – 94

Netherlands – 91

France – 96

Switzerland – 115

Czech Rep. – 77

Russia - 57

Hungary - 56

BITs in force - Africa

Country	BITs In Force*	Gini
Egypt	72	34
Morocco	46	41
South Africa	17	77
Ethiopia	21	30.5
Sudan	13	35.3
Nigeria	13	43.3
Senegal	13	37.8
Mozambique	20	36.7
Guinea	6	39.4
Mauritania	7	38
DR Congo	5	44.4
Mali	6	33
Gabon	8	41.5
Cameroon	9	39
Uganda	7	37.5
Congo	7	47.3
Kenya	5	45.9
Namibia	8	57.9
Côte d'Ivoire	5	44.7
Magagascar	8	39.3
Bostwana	2	43.8
United Republic of Tanzania	6	35
Angola	4	55
Rwanda	4	59
Burundi	5	33.3
Malawi	3	49.1
Niger	2	34.5
Central Republic of Africa	2	56.3
Liberia	3	38.2

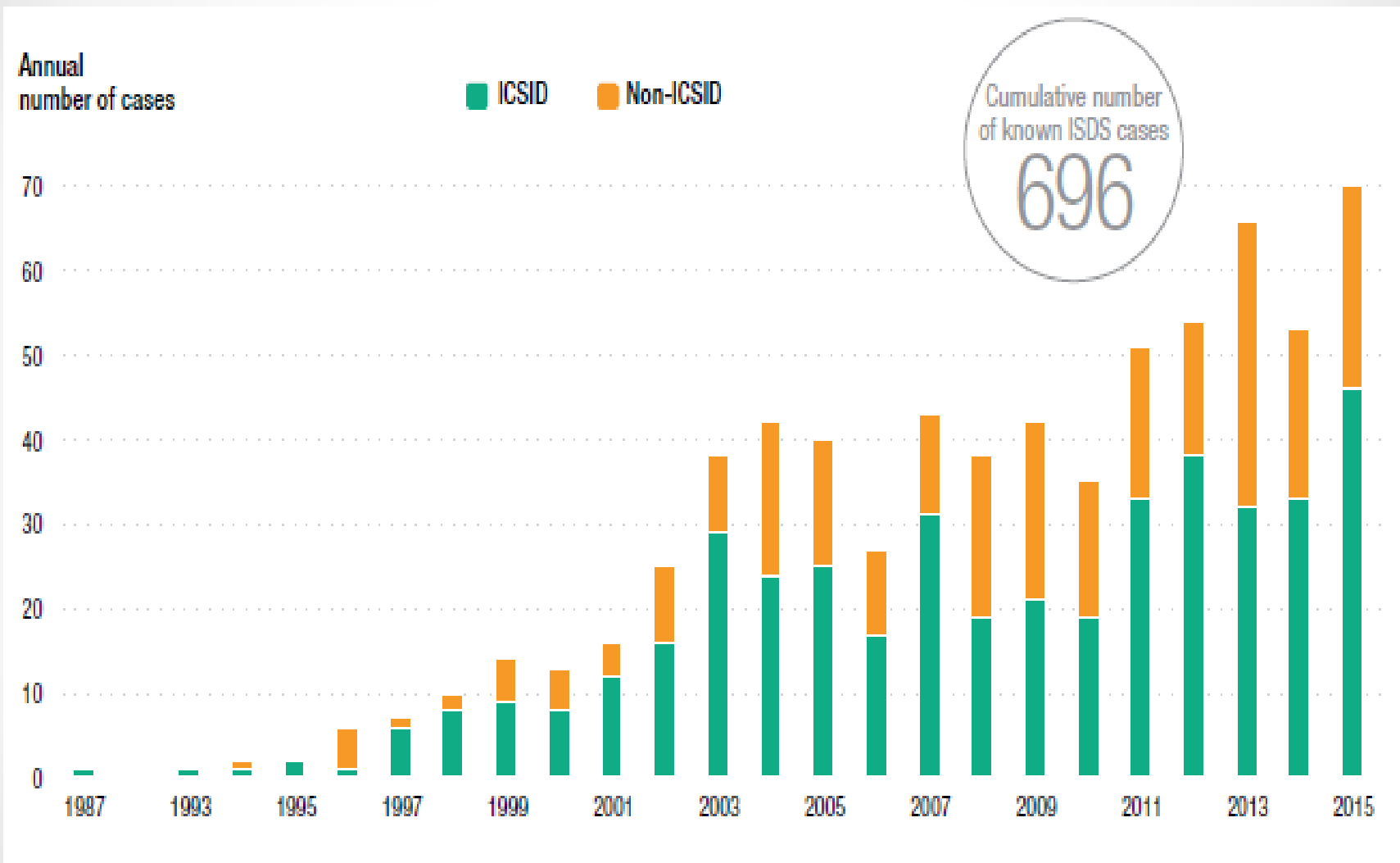
Egypt – 72
 South Africa – 17
 Morocco – 46

BITs in force – Latin America

Country	BITs In Force*	Gini
Argentina	55	41
Chile	37	50.1
Uruguay	29	43
Brazil	0	52
Paraguay	22	50
Bolivia	14	50.3
Peru	29	45
Ecuador	16	47.9
Colombia	5	56
Venezuela	27	36
Guyana	4	35
Panama	20	49
Costa Rica	14	50.8
Nicaragua	13	50
Honduras	9	55
El Salvador	18	44
Guatemala	16	54.6
Mexico	29	48.3
Dominican Republic	11	45
Barbados	9	47

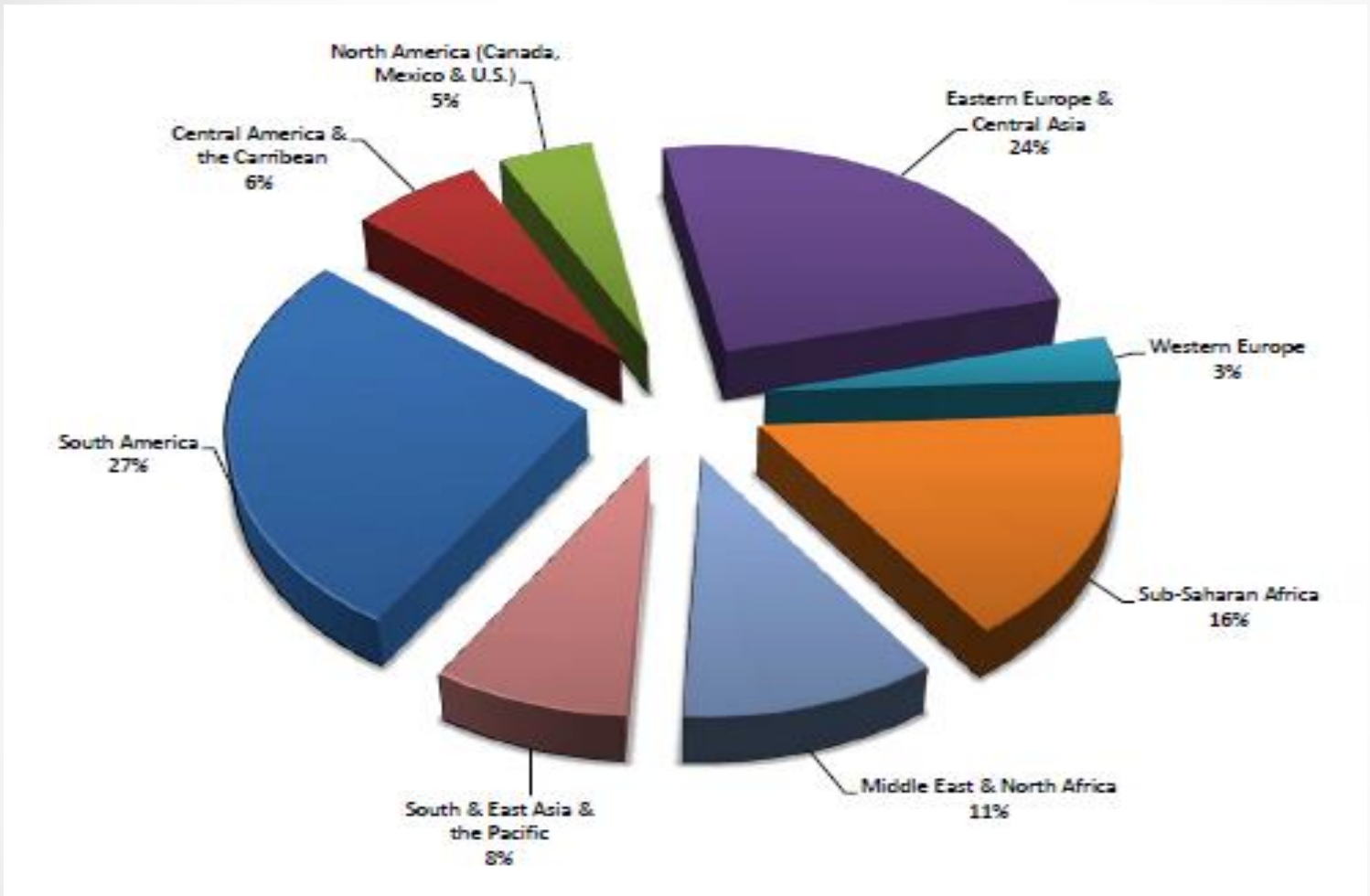
Argentina – 55
Chile – 37
Venezuela – 27
Mexico – 29

Known ISDS cases, new and cumulative



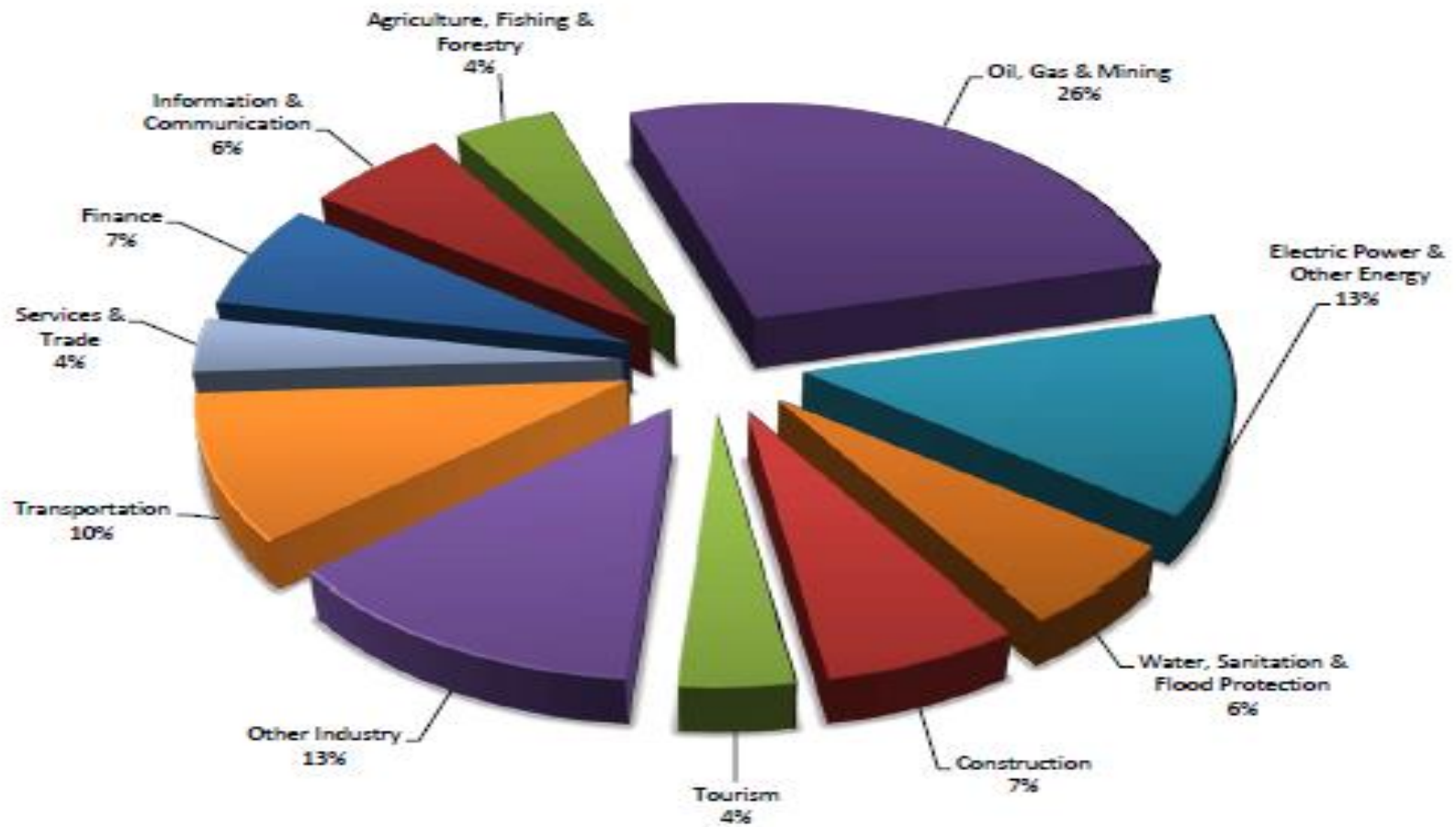
Source: UNCTAD 2015

ISDS: South America, Eastern Europe, SSA



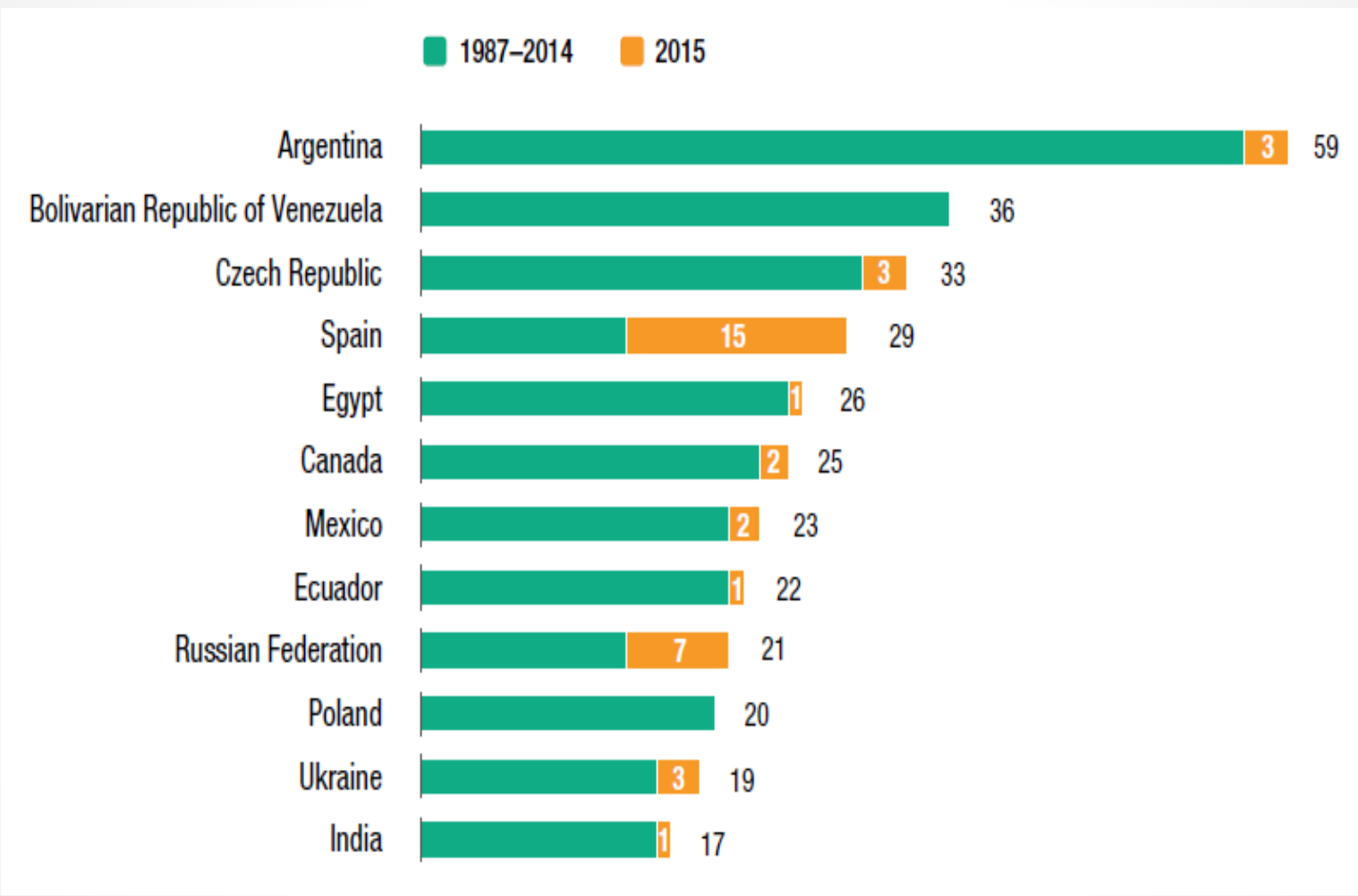
Source: Mohamadieh and Uribe 2016

Known ISDs: Sectoral allocation, role of extractive industries



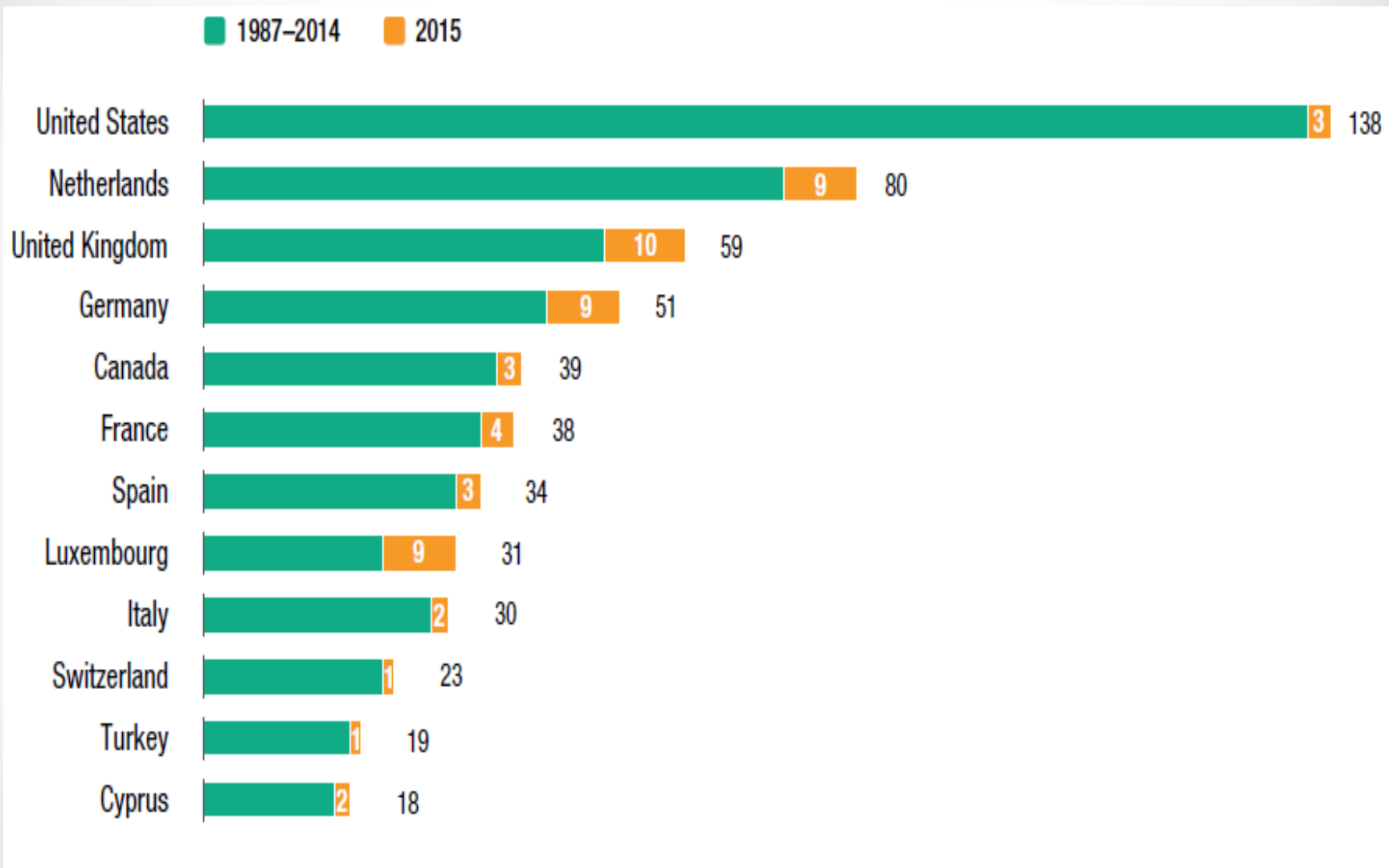
Source: Mohamadieh and Uribe 2016

ISDS: Beauty contest, most sued states



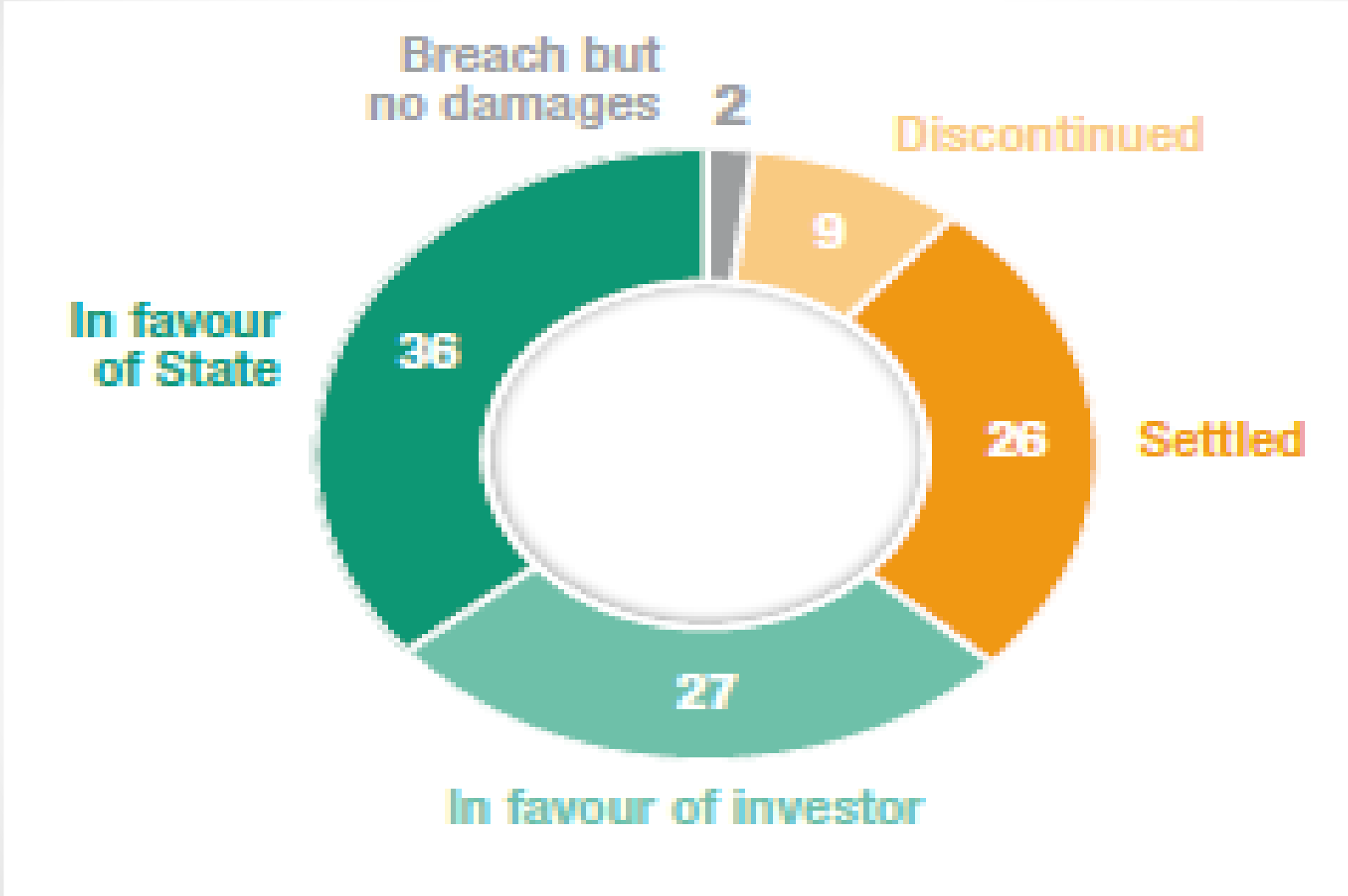
Source: UNCTAD 2016

ISDS: Home states of claimants



Source: UNCTAD 2016

ISDS: Distribution of known outcomes



Evidence of Investment Impact

- **Weak or non-existent impact**
 - Sauvart, Karl and Lisa E. Sachs (2009) “The Impact of Bilateral Investment Treaties on Foreign Direct Investment.”
 - Data is poor; causation hard to measure using econometrics, but weak positive impacts reported
- **Direct surveys of decision-making**
 - Survey of 200 of the Fortune 500 firms, Yackee (2010, p. 429) finds a “a low level of familiarity with BITs,” a pessimistic view of their ability to protect against adverse host state actions, and a low level of influence over FDI decisions

Evidence of Investment Impact

- **Direct surveys results cont.**
 - Yackee (2010): Only about five per cent of the general counsels considered BITs to be “very important” to a “typical FDI decision”
- **No evidence existence of BITs reduces the cost of political risk insurance**
- **Poulsen (2010) Interviews with officials of MIGA and private insurers – BITs not a factor in setting rates**
- **Casual evidence**
 - **Favored destinations: Brazil, South Africa, China**

Investor protection in international governance

- **1. Severe imbalance in rights and responsibilities between investors and states**
- **2. Vague treaty provisions**
- **3. Conflicts of interest in dispute process**
- **4. Chill effect on public policy**

Imbalances in rights/responsibilities

- **Definition and scope of investment**
 - Deposits, trademarks, debt, portfolio positions in the local stock market
- **National treatment**
- **'Pre-establishment' rights**
- **Fair and equitable treatment**
- **Expropriation, including 'indirect'**
- **Survival clause**

Commercial rules: compensation for damage for breach of 'contract'

- Monetary awards have become large
- Payable with compounded interest for delayed payment
- **2014:**
 - Russia-Yukos \$50 billion
 - Venezuela-Exxon \$1.6 b (incl. interest)
- **2012:**
 - Ecuador-Occidental Petroleum \$1.7 b (incl. interest)
- **2010**
 - Ecuador-Chevron \$0.7 b
- **Combined Ecuador penalties equal to 3.3% of GDP**

Litigation outcomes

- **High cost of litigation**
 - \$58 million – two Philippine cases
- **Awards and settlement**
 - Settlement most probably payment of compensation by state
- **Not all host countries equal in susceptibility to dispute action**
- **Transparency of procedure and outcome**

Restricting social policy space

- **Black empowerment policies in South Africa**
- **Minimum wage policies in Egypt**
- **Land reform in Zimbabwe**
- **Water provision in Bolivia**
- **Environmental policy in Mexico**
- **Other cases**
 - **Tobacco control in Uruguay and Australia**
 - **Debt restructuring in Argentina**

Inequality-promoting dimensions

- **Foreign investor privileges not available to indigenous investors**
 - Exemption from capital controls in a balance of payments crisis
 - Plus ISDS threat to influence policy and legislation
 - Performance measures exemptions wider than TRIMs (eg. local hiring requirements)
- **Redress beyond the domestic legal system**
 - India 2G telecommunications case
- **Promotion of a business model based on litigation**
 - Treaty shopping (thru MFN clauses)

Chilling effect on regulatory and social policy

- **Environmental regulations and clean-up requirements in extractive industries**
- **Cancellation of contracts**
 - **Punitive awards, even when state justified to cancel contracts**
 - **Non-awarding of contracts – violation of ‘legitimate expectations’ of bidders and investors**

Reforming the system

- **Withdrawal from NAFTA-style BITs, substituted by protection under domestic law**
 - Venezuela, Ecuador Bolivia renounce ICSID
 - South Africa (locating investor protection in domestic legal system)
- **Alternative (non-US-type) model provisions**
 - based on promotion, not investor protection
 - state-to-state dispute resolution
 - exhaustion of domestic remedies
 - recognizing regulatory rights of states in the public interest and introducing investor obligations
 - Brazil, India, Indonesia

Reforming the system

- Restricting what is protected investment
- Restricting what kind of investors are protected
 - Requirement of registration
 - Requirement of concrete business activity in 'home' state
- Existing treaties have undesirable features protected by 10-20 year survival clauses

Thank you

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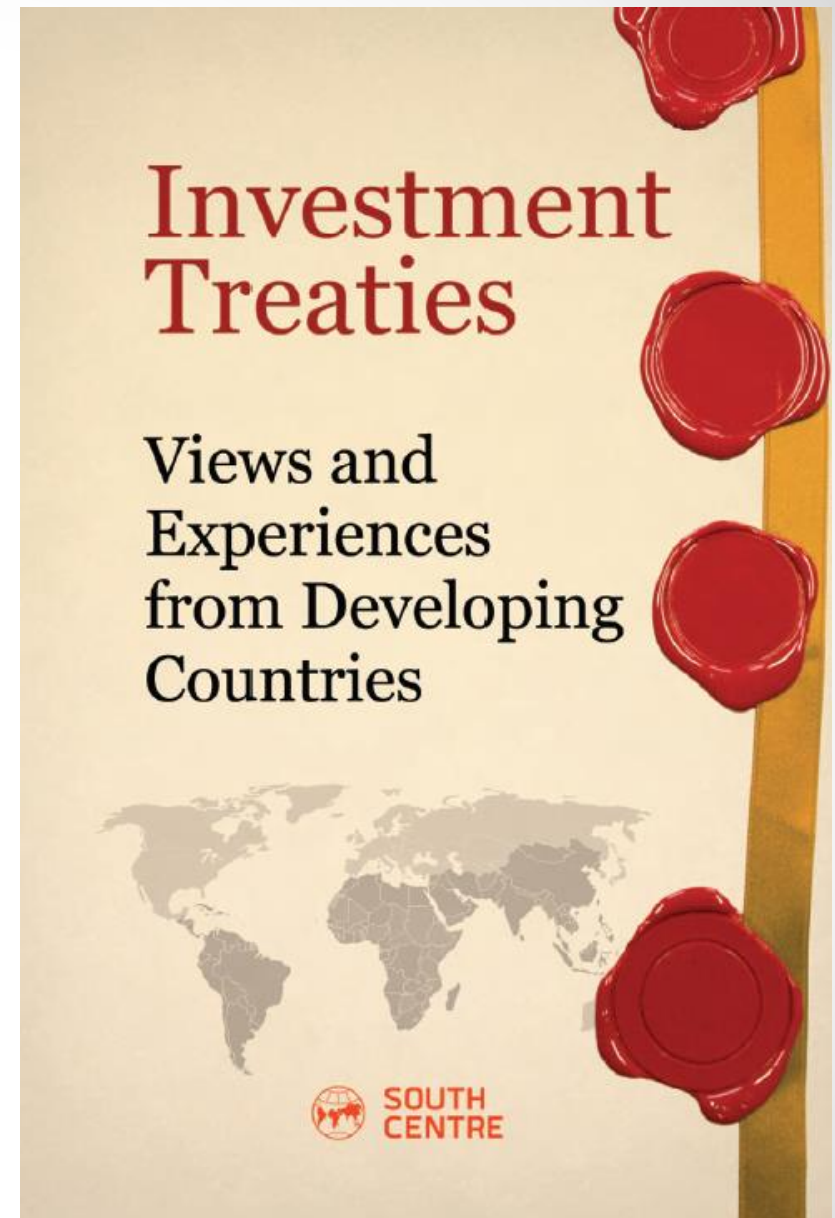
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Slide 1

- **International**
 - **Policy**
 - **Space**