



Assessing International Trade Agreements: Positive and Negative Impacts on Health and Health Systems

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Presentation Outline

- 1) How to Assess Health Impact of Preferential Trade and Investment Agreements
- 2) Recent Developments: TPP minus 1
- 3) Recent Developments: BITs and ISDS



How to Assess Health Impact of Preferential Trade and Investment Agreements

1. Many aspects of PTIAs have impact on health

IP, standards, environmental regs, etc

2. PTIAs purport to leave room to regulate in the name of public health

TPP: General health exception clause

3. But many also allow claimants to call out countries when health measure is a 'protectionist' measure in disguise

TPP and Compulsory Licenses

4. SDG 3, Target 3b: TRIPS Flexibilities for Public Health – Can be used as Benchmark

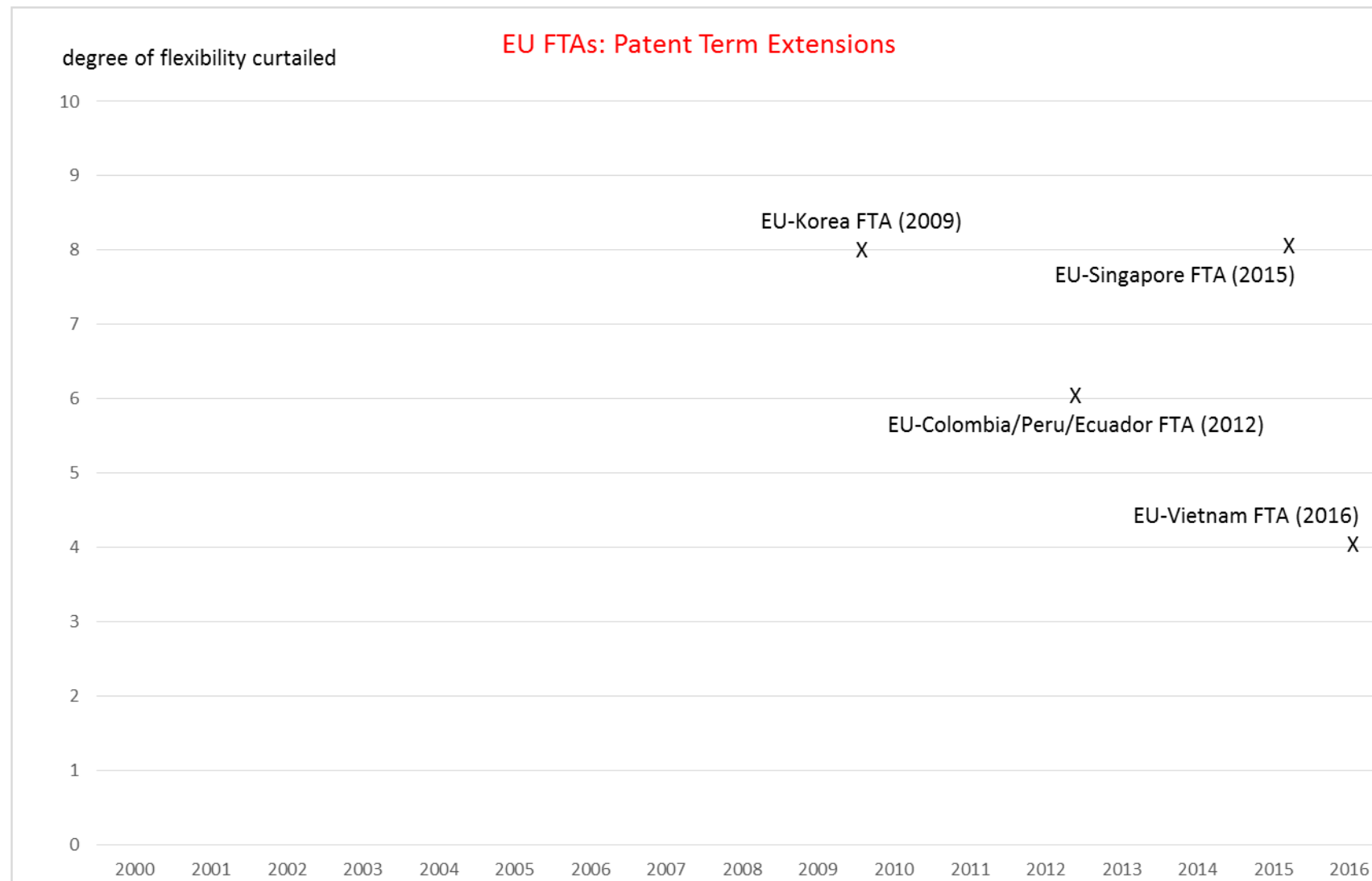


Patent Term Extensions

TRIPS Standard: rights exist 20 years from the date of application of a patent

TRIPS-Plus: compensates for delays in marketing and patent application processing

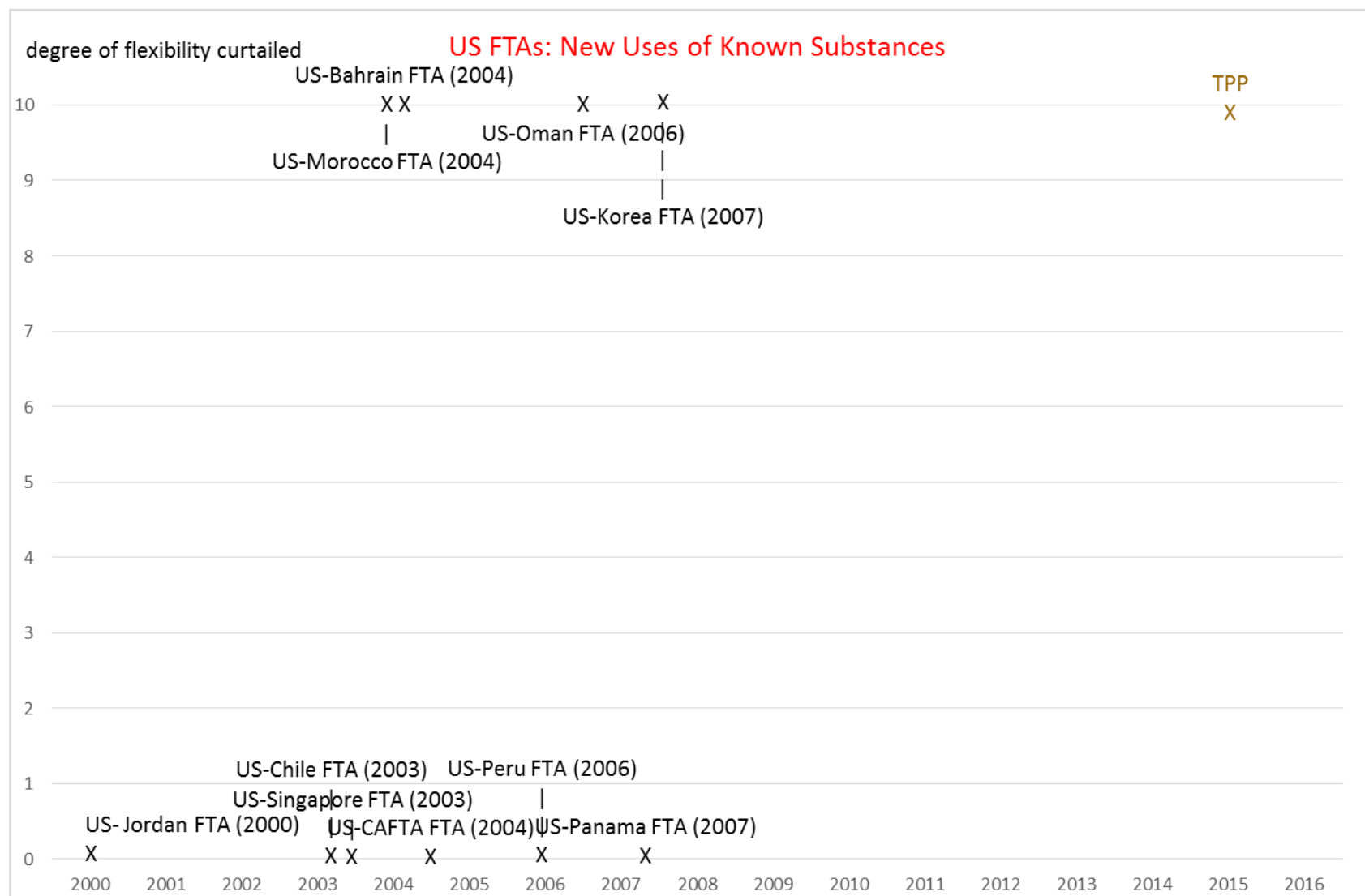
Means: standards specified in treaty





New Uses of Known Substances

TRIPS Standard:	no obligation to provide patent protection to second or subsequent uses of an invention
TRIPS-Plus:	specifically allows protection of new uses
Means:	standards specified in treaty





Recent Trends in PTIAs: The TPP Minus One



Annex I - Outline

Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Preamble

Article 1: Incorporation of the Trans-Pacific Partnership Agreement

Article 2: Suspension of the Application of Certain Provisions

Article 3: Entry into Force

Article 4: Withdrawal

Article 5: Accession

Article 6: Review of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Article 7: Authentic Texts



Annex II - List of Suspended Provisions

1. Express Shipments – Article 5.7.1(f) - suspend second sentence
2. Investment Agreement and Investment Authorisation (ISDS applies to these)
- 9.1 Definitions - suspend “investment agreement” and “investment authorisation” and associated Footnotes (5 - 11)
- 9.19.1 Submission of Claim to Arbitration - a(i) B and C; (b)(i) B and C (investment authorisation or investment agreement), chaussette, footnote 31
- 9.19.2 Submission of Claim to Arbitration, footnote 32
- 9.19.3 Submission of Claim to Arbitration - (b)delete investment authorisation or investment agreement
- 9.22.5 Selection of Arbitrators
- 9.25.2 Governing Law
- Annex 9-L Investment Agreements
3. Express Delivery Services – Annex 10-B - suspend paragraph 5 and 6
4. Minimum Standard of Treatment in Article 11.2 – suspend sub-paragraph 2(b); footnote 3 and Annex 11-E
5. Resolution of Telecommunications Disputes - Article 13.21.1(d)
6. Conditions for Participation - Article 15.8.5 - Commitments relating to labour rights in conditions for participation
7. Further Negotiations - Article 15.24.2 - suspend “No later than three years after the date of entry into force of this Agreement” *
- * footnote: *The Parties agree that negotiations referred to in Article 15.24.2 shall commence no earlier than five years after entry into force of this Agreement, unless the Parties agree otherwise. Such negotiations shall commence at the request of a Party.*
8. National Treatment - Article 18.8 footnote 4 – suspend last two sentences
9. Patentable Subject Matter - Article 18.37.2 and 18.37.4 (Second Sentence)
10. Patent Term Adjustment for Unreasonable Granting Authority Delays - Article 18.46
11. Patent Term Adjustment for Unreasonable Curtailment – Article 18.48
12. Protection of Undisclosed Test or Other Data- Article 18.50
13. Biologics - Article 18.51
14. Term of Protection for Copyright and Related Rights - Article 18.63
15. Technological Protection Measures (TPMs) - Article 18.68
16. Rights Management Information (RMI) - Article 18.69
17. Protection of Encrypted Program-Carrying Satellite and Cable Signals - Article 18.79
18. Legal Remedies and Safe Harbours - Article 18.82 and Annexes 18-E and 18-F
19. Conservation and Trade (measures ‘to combat’ trade) - Article 20.17.5 – suspend “or another applicable law” and footnote 26
20. Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices - suspend Annex 26A -Article 3 on Procedural Fairness

Items to be Finalised by the Date of Signature by consensus among all Parties for suspensions to take effect

1. State Owned Enterprises, Annex IV (Malaysia)
2. Services and Investment Non-Conforming Measures, Annex II - Brunei Darussalam - 14 – Coal – paragraph 3
3. Dispute Settlement (trade sanctions) – Article 28. 20 (Vietnam)
4. Cultural Exception (Canada)



8. National Treatment - Article 18.8 footnote 4 – suspend last two sentences
9. Patentable Subject Matter - Article 18.37.2 and 18.37.4 (Second Sentence)
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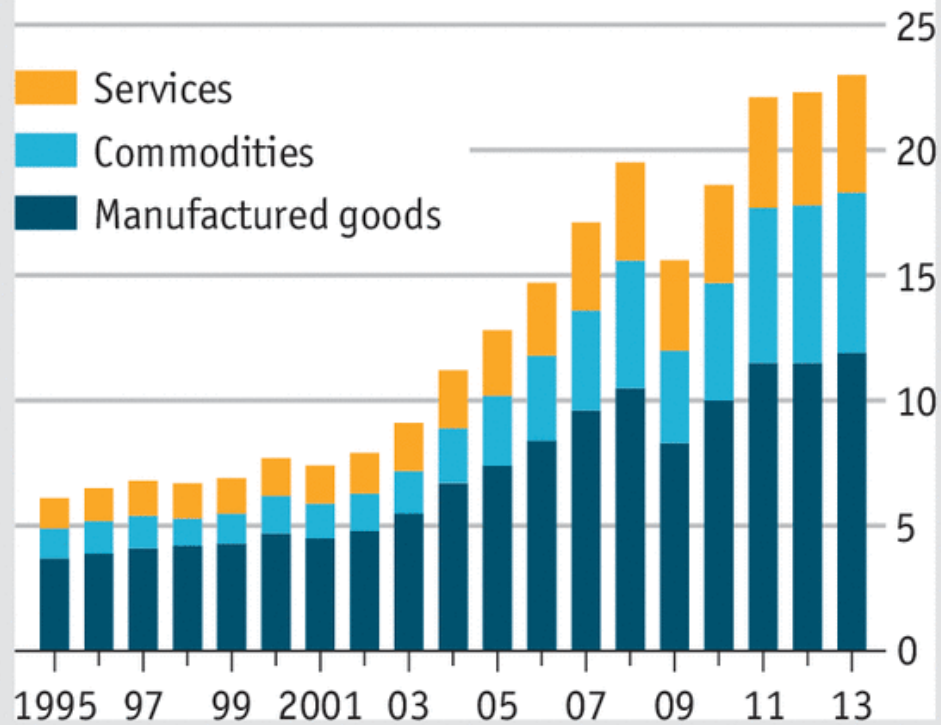


Recent Trends in PTIAs: Bilateral Investment Treaties and Investor-State Dispute Resolution



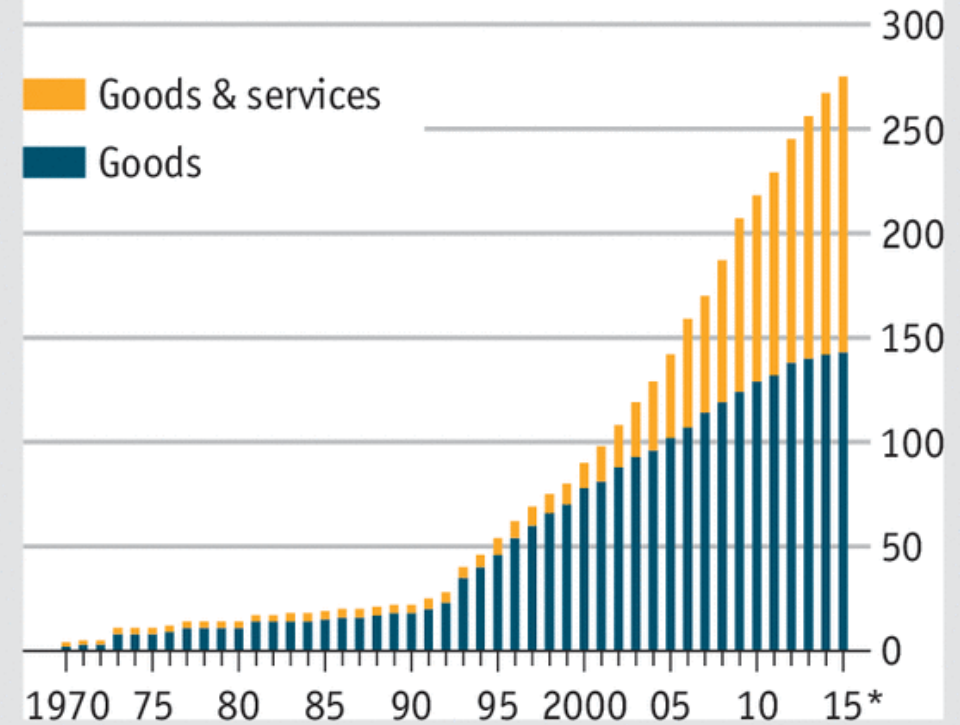
Global exports and trade agreements

Exports, \$trn



Sources: UNCTAD; WTO

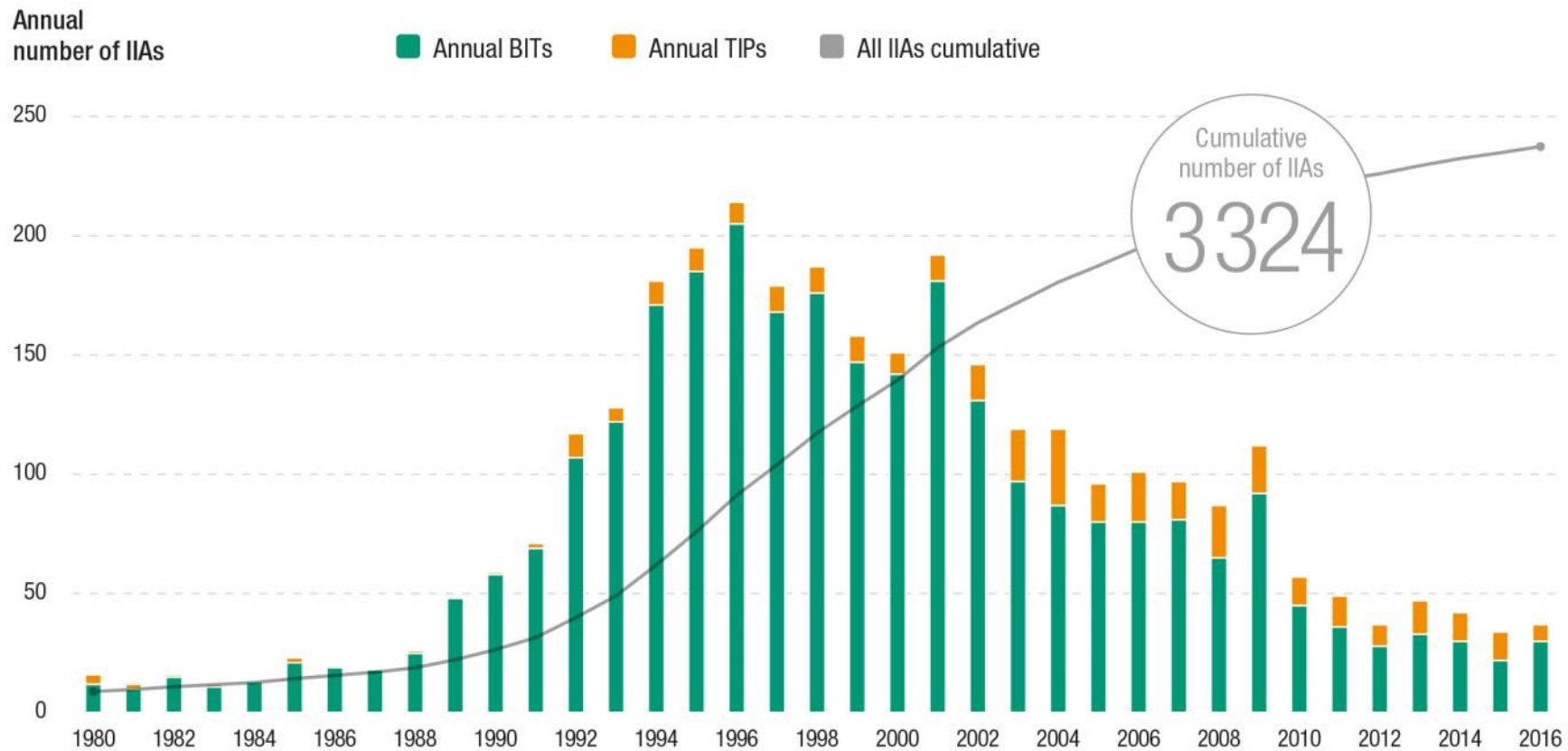
Cumulative number of trade agreements



*To October 5th

Trends in IIAs: 37 new IIAs were concluded in 2016

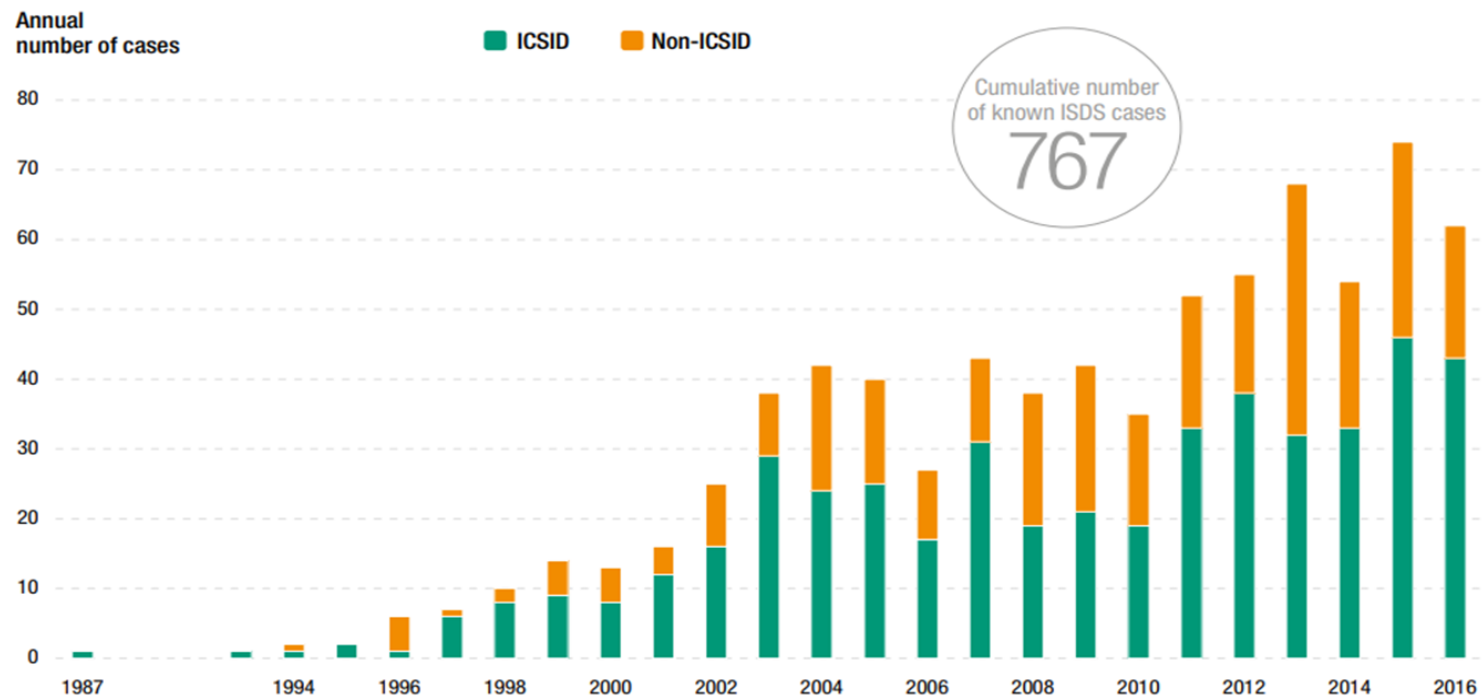
Trends in IIAs signed, 1980-2016



Source: © UNCTAD, WIR17, IIA Navigator.

The rate of new treaty-based ISDS cases

Figure III.12. Trends in known treaty-based ISDS cases, 1987–2016



Source: ©UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification and may not match case numbers reported in previous years.



BUT – Recent Years have seen Counter-Trends vs. PTIAs

- US Elections and Rejection of TPP, Brexit
- Stalling of the Doha Development Round at WTO
- Non-renewal/Termination of BITs (South Africa, Indonesia)
- Suspicion of Investor-State Dispute Settlement
 - *Philip Morris v. Australia/Philip Morris v. Uruguay*



2. Investment Agreement and Investment Authorisation (ISDS applies to these)

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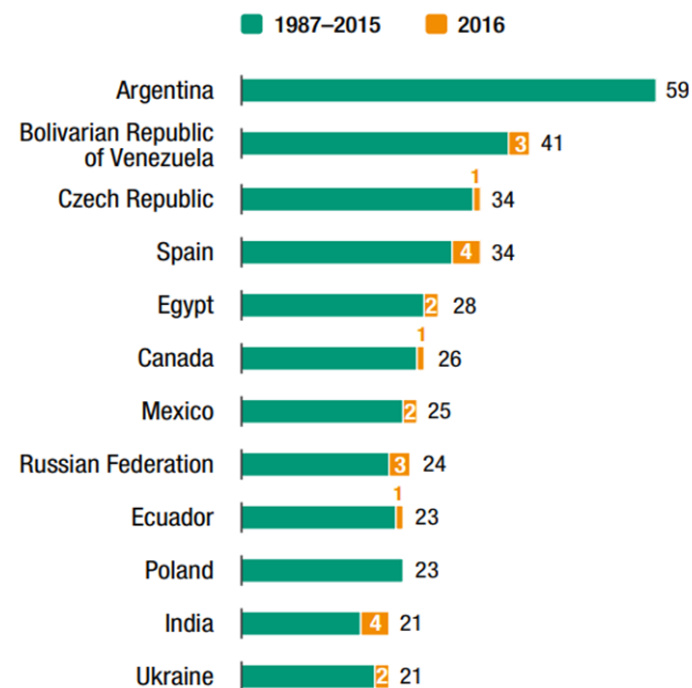
9.22.5 Selection of Arbitrators

9.25.2 Governing Law

Annex 9-L Investment Agreements

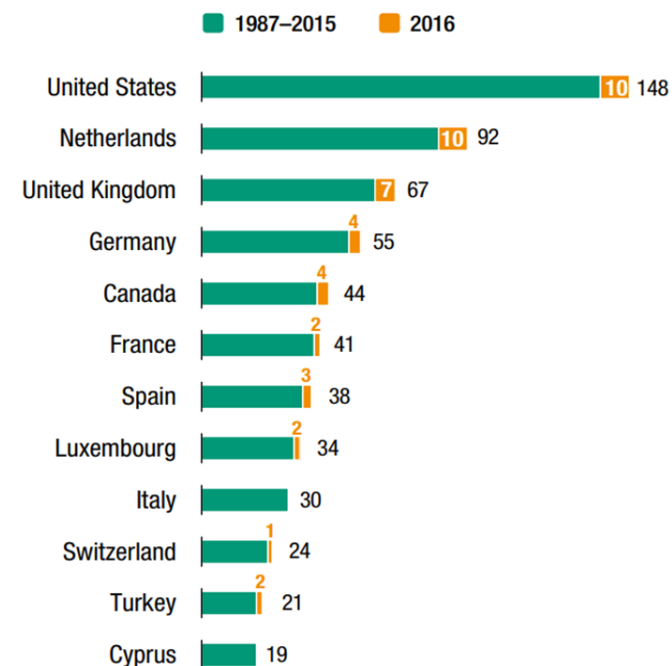
Argentina remains the most frequent respondent State, followed by Venezuela

Figure III.13. Most frequent respondent States, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Figure III.14. Most frequent home States of claimants, 1987–2016 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Evidence of IIA reform

Reform-oriented provisions in IIAs signed in 2016

	1	2	3	4	5	6	7	8	9	10	11
Argentina–Qatar BIT	Yes	Yes	No	No	Yes	Yes	No	No	Yes	No	Yes
Austria–Kyrgyzstan BIT	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes	Yes	No
Brazil–Peru ETEA	Yes	Yes	Not applicable	Not applicable	Yes	Yes	No	Yes	Yes	Yes	Yes
Canada–EU CETA	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Canada–Hong Kong, China BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Canada–Mongolia BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Chile–Hong Kong, China Investment Agreement	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Islamic Republic of Iran–Japan BIT	No	No	Yes	No	Yes	No	Yes	No	No	No	No
Islamic Republic of Iran–Slovak Republic BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Japan–Kenya BIT	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes	No
Mexico–United Arab Emirates BIT	No	Yes	Yes	No	Yes	Yes	No	No	No	Yes	No
Morocco–Nigeria BIT	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Morocco–Russian Federation BIT	No	No	Not applicable	No	No	Yes	No	No	No	No	No
Morocco–Rwanda BIT	No	Yes	Not applicable	No	Yes	Yes	No	No	No	No	No
Nigeria–Singapore BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Nigeria–United Arab Emirates BIT	No	Yes	No	No	Yes	Yes	No	No	No	No	No
Rwanda–Turkey BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No
TPP	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

1. Preamble references public policy interests as treaty objectives
2. Refined definition of investment
3. Circumscribed fair and equitable treatment
4. Clarification of indirect expropriation
5. Detailed exceptions from the free-transfer-of-funds obligation
6. Omission of the so-called “umbrella” clause
7. General exceptions
8. Not lowering of standards to attract investment
9. Promotion of Corporate and Social Responsibility standards
10. Limiting access to ISDS
11. Specific proactive provisions on investment promotion

Source: © UNCTAD, WIR17

The scope and depth of commitments in each provision varies from one IIA to another.

Yes No Not applicable

Source: © UNCTAD, WIR17.

Thank You