Volume 65, Number 1, Winter 2023

Large Corporations and Investor-State Arbitration

Weijia Rao*

Policymakers and scholars have expressed concerns about growing corporate influence over government regulations, including in the context of investor-state dispute settlement ("ISDS"). Encouraged by high-profile victories and examples of "regulatory chill," critics of ISDS have argued that it excessively serves large multinational corporate interests at the expense of government regulatory agendas. In part due to such criticisms, various proposals have been made, including the replacement of ISDS with multilateral investment courts or state-to-state arbitration.

This Article introduces a novel dataset on ISDS claimant characteristics, which reveals that most ISDS claimants are actually small- or medium-sized firms. Using this dataset, this Article empirically explores whether large firms are more successful in (1) obtaining awards of damages from governments, and (2) influencing governments to repeal or amend the challenged measures through ISDS. The data reveal no evidence that large firms are more likely to prevail in ISDS cases. However, consistent with ISDS critics' suggestions, cases brought by large firms appear more likely to end with repeal or amendment of the challenged measure.

Through case studies, this Article proposes a plausible explanation for the greater success of large corporations in chilling government regulations. The case studies show that large corporations often employ multi-pronged approaches, combining ISDS with tactics such as lobbying, domestic litigation, international dispute settlement, and diplomacy. Consequently, this Article cautions that replacing ISDS risks denying small- or medium-sized firms the opportunity to seek redress before an international arbitral tribunal, without substantially addressing concerns of "regulatory chill," so long as other facets of such multi-pronged approaches remain viable.

Table of Contents

Introduction 134
I. ISDS and Corporate Influence Over State Regulatory Authority 140
A. *Growing Corporate Political Influence* 140
B. *Regulatory Chill and ISDS* 141
C. *Large Multinational Corporations and ISDS* 144
II. Data 146
A. *Claimant Characteristics* 147
B. *Case Characteristics* 152

* Assistant Professor of Law, George Mason University. I would like to thank Christian Bush, Gareth Bowen, Brandon Gilbert, Jacob Hopkins, Anthony Le, Robert Putka, Marcus Roup, Chenyun Sun, Leigha Wentz, and John Yang for their excellent research assistance. I thank Elizabeth Acorn, Wolfgang Alschner, Lisa Bernstein, Rachel Brewster, Adam Chilton, Kathleen Claussen, Nuno Garoupa, Tom Ginsburg, William Hubbard, Louie Llamzon, William Magnuson, Joshua Paine, Stratos Pahis, Guillermo J. Garcia Sanchez, Michael Waibel and participants at the legal scholarship workshop at the University of Chicago, Levy workshop at George Mason University, Junior International Law Scholar Association annual meeting, Journal of International Economic Law junior scholar forum, 2022 American Society of International law research forum, and 2023 American Association of Law and Economics Annual Meeting for their helpful comments. I thank Lisa Liu and Carolina Moehlecke for their valuable help at the data collection stage. Any errors are my own.

III. Large Corporations and Case Outcomes 156
IV. Regulatory Chill Case Studies 163
A. *beIN v. Saudi Arabia* 164
B. *ADM v. Mexico, Cargill v. Mexico, and Corn Products International v. Mexico* 168
C. *Vodafone v. India and Cairn Energy v. India* 170
V. Implications for ISDS Reform 175
Conclusion 178

Introduction

In May 2020, responding to an economic crisis and the shortage of essential goods caused by the COVID-19 pandemic, the Peruvian Parliament passed a bill (Law 31018) suspending the collection of toll fees on the country's road network to ease the transportation of essential goods and facilitate compliance with COVID-related quarantine measures.[1]

Shortly after the bill's passage, Peru was reportedly threatened by several foreign-owned toll road concessionaires, which held the right to collect tolls on the country's roads, saying they planned to initiate investor-state arbitration proceedings against the country.[2] These threats prompted the executive branch of the Peruvian government to challenge the constitutionality of the bill before Peru's Constitutional Court.[3] Peru's minister of the economy, María Antonieta Alva, explained that this action aimed to avoid "the contingencies we're going to face in the International Centre for Settlement of Investment Disputes ("ICSID")." The minister added: "Not only is there the likelihood of claims against us; not only will we have to pay for all the legal costs and lawyers. We're also going to have to pay compensation."[4] Siding with the executive branch, the Constitutional Court held that the bill was unconstitutional.[5]

1. Cosmo Sanderson, *Peru Warned of Potential ICSID Claims Over Covid-19 Measures*, Glob. Arb. Rev. (Apr. 9, 2020), https://globalarbitrationreview.com/coronavirus/peru-warned-of-potential-icsid-claims-over-covid-19-measures [https://perma.cc/CJR8-8WMN].

2. *Concesionarios Pidieron Suspensión de Algunas Obligaciones Debido a la Pandemia* [*Dealers Requested Suspension of Some Obligations Due to the Pandemic*], Ositran (June 5, 2020), https://www.ositran.gob.pe/anterior/noticias/concesionarios-pidieron-suspension-obligaciones-pandemia [https://perma.cc/472F-WTPL]; *Perú Recibe la Primera Notificación de Intención De Arbitraje por la Gestión del Covid19* [*Peru Receives the First Notification of Intention to Arbitrate for the Management of Covid19*], CIAR Glob. (June 8, 2020), https://ciarglobal.com/peru-recibe-la-primera-notificacion-de-arbitraje-por-la-gestion-del-covid19 [https://perma.cc/CXK2-FGPN].

3. Gabriel O'Hara, *Gobierno Presenta Demanda de Inconstitucionalidad Contra Ley de Suspensión de Cobro de Peajes* [*Government Files Lawsuit of Unconstitutionality Against Law of Suspension of Toll Collection*], Gestión (June 3, 2020), https://gestion.pe/economia/gobierno-presenta-demanda-de-inconstitucionalidad-contra-ley-de-suspension-de-cobro-de-peajes-noticia/?ref=gesr0 [https://perma.cc/N76X-YJBE].

4. *Id.*

5. Sentencia Del Tribunal Constitucional [Supreme Court], Pleno Jurisdiccional, agosto 25, 2020, Expediente 0006-2020-PI, Sentencia 359/2020 (Peru), at 1, https://tc.gob.pe/jurisprudencia/2020/00006-2020-AI.pdf [https://perma.cc/4L2R-77G2].

Peru is not alone in facing investment arbitration claims or threats of the same due to measures adopted in response to COVID-19. Chile, another country hit hard by the pandemic, was on the receiving end of an investment arbitration case brought by two French airport operators. The operators challenged, among other things, the government's imposition of measures to protect against the spread of COVID-19 at Santiago's Arturo Merino Benítez International Airport and its refusal to provide financial aid following a significant drop in airport revenue.[6] The investors reportedly demanded compensation for lost profits of $37 million from 2020.[7]

The COVID-19 pandemic has provided many opportunities for multinational companies to challenge government emergency measures. For example, Colombia, Honduras, Paraguay, and Argentina made it unlawful for water service companies to cut off water supply due to users' failure to pay bills.[8] Similarly, El Salvador and Bolivia temporarily suspended utility payments for all citizens, eliminating revenue for utility companies, many of them foreign-owned.[9] Law firms warned that these measures might give rise to ISDS claims brought by foreign investors, either to recover losses as a result of these measures or, similar to the Peruvian case, to pressure governments to repeal them. As law firm Ropes & Gray put it in a client alert: "Governments have responded to COVID-19 with a panoply of measures, including travel restrictions, limitations on business operations, and tax benefits. Notwithstanding their legitimacy, these measures can negatively impact businesses by reducing profitability, delaying operations or being excluded from government benefits . . . For companies with foreign investments, investment agreements could be a powerful tool to recover or prevent loss resulting from COVID-19 related government actions."[10]

To date, countries have signed over 3,000 bilateral investment treaties ("BITs") and investment chapters in free trade agreements ("FTAs"), under which they commit to comply with a series of investment protection standards, including guarantees against (direct or indirect) expropriation of foreign investments, guarantees of fair and equitable treatment of foreign investors

6. *French Consortium Kicks Off an ICSID Claim Against Chile After USD 37 Million Loss Due to COVID-19 Pandemic*, Inv. Treaty News (Mar. 23, 2021), https://www.iisd.org/itn/en/2021/03/23/french-consortium-kicks-off-an-icsid-claim-against-chile-after-usd-37-million-loss-due-to-covid-19-pandemic [https://perma.cc/JU55-LWSZ].

7. *Id.*

8. Alexander Serrano & Daniela Gutierrez Torres, *Latin America Moving Fast to Ensure Water Services During COVID-19*, World Bank (Apr. 8, 2020), https://blogs.worldbank.org/water/latin-america-moving-fast-ensure-water-services-during-covid-19 [https://perma.cc/2GEK-NEZF].

9. *COVID-19: Will State Measures Give Rise to a New Set of Investment Claims?*, Hogan Lovells LLP (Apr. 2020), https://www.engage.hoganlovells.com/knowledgeservices/news/covid-19-will-state-measures-give-rise-to-a-new-set-of-investment-claims [https://perma.cc/ET69-7RSF].

10. *COVID-19 Measures: Leveraging Investment Agreements to Protect Foreign Investments*, Ropes & Gray LLP (Apr. 28, 2020), https://www.ropesgray.com/en/newsroom/alerts/2020/04/COVID-19-Measures-Leveraging-Investment-Agreements-to-Protect-Foreign-Investments [https://perma.cc/DB2J-MAEP].

and investments, and guarantees against arbitrary and discriminatory treatment of foreign investors and investments.[11] Most of these agreements also contain investor-state dispute settlement ("ISDS") provisions, which allow foreign investors to bring cases against the host country in which they hold investments for alleged violations of the investment protection standards. Foreign investors may also access ISDS under agreements they signed with the host state or under domestic investment law. Using ISDS, over 1,000 cases have been filed by foreign investors, resulting in more than $70 billion awarded.[12] In early years, most cases were brought because of direct takings of foreign investors' assets by host state governments. In recent years, however, more cases have targeted regulatory measures in a wide range of areas of public interest, such as the environment, energy, finance, and public health.[13]

This latest wave of claims, triggered by the COVID-19 pandemic, has generated renewed backlash against the ISDS system. Critics argue that at a time when countries most needed resources to combat the pandemic and the accompanying socio-economic crises, they were forced to divert financial and institutional resources to these claims.[14] A larger concern is that these investor claims and threats will undermine governments' ability to implement emergency public health and economic policy measures to respond to the unprecedented difficulties caused by COVID-19.[15] This concern is particularly acute in developing countries, which have been disproportionately burdened by the pandemic and face the most ISDS claims.[16] Critics have argued that the ISDS cases and the threat thereof may make developing countries reluctant to adopt public health or economic measures and "bend to the will of powerful corporations."[17]

The concern that large multinationals can weaponize ISDS to chill policymaking is not a new one. In *BG Group PLC v. Argentina*, Chief Justice John

11. *International Investment Agreements Navigator*, UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements [https://perma.cc/VP8B-8TW5] (last visited Feb. 2, 2023) [hereinafter IIA Navigator].

12. *Id.*

13. Carolina Moehlecke, *The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty*, 64 INT'L STUD. Q. 1, 2 (2020).

14. Cecilia Olivet & Bettina Müller, *Juggling Crises: Latin America's Battle with COVID-19 Hampered by Investment Arbitration Cases*, TRANSNAT'L INST. (Aug. 25, 2020), https://longreads.tni.org/jugglingcrises [https://perma.cc/H4F7-AMPC].

15. *Consultations on a Concerted Response to COVID-19 Related ISDS Risks*, INT'L INST. SUSTAINABLE DEV. (May 3, 2020), https://www.iisd.org/events/consultations-concerted-response-covid-19-related-isds-risks [https://perma.cc/V4X7-56JC].

16. Lucinda Chitapain, *Are Multinational Companies Owed Compensation for COVID-19 Emergency Measures?*, CAN. CTR. POL'Y ALTS. (May 3, 2020), https://monitormag.ca/articles/are-multinational-companies-owed-compensation-for-covid-19-emergency-measures [https://perma.cc/XS37-9PCS].

17. Manuel Pérez-Rocha, *Corporations Should Not Have the Power to Undermine the Global Battle Against Covid-19*, INEQUALITY.ORG (May 14, 2021), https://inequality.org/research/corporations-global-battle-against-covid-19 [https://perma.cc/Y9RU-C76Z]; *see* Christine Côté, A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment, 187 (2014) (Ph.D. dissertation, London School of Economics and Political Science).

Roberts opined, in his dissent, that "by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary."[18] During the negotiation of the Trans-Pacific Partnership Agreement ("TPP"), which was considered the cornerstone of the Obama Administration's economic policy in the Asia-Pacific region, the inclusion of ISDS provisions was one of the most controversial issues. Elizabeth Warren, a U.S. Senator from Massachusetts and a vocal opponent of ISDS, has argued that "[a]greeing to ISDS in [TPP] would tilt the playing field in the United States further in favor of big multinational corporations," because "it would allow big multinationals to weaken labor and environmental rules."[19] More recently, several countries announced their decision to withdraw from the Energy Charter Treaty, a multilateral investment treaty that allows investors in the energy sector to bring ISDS cases against host countries, arguing that it is incompatible with domestic climate goals because it allows large oil and gas companies to undermine governments' right to regulate for environmental purposes.[20] In May 2023, more than thirty members of Congress sent a letter to the Biden Administration, arguing that "[l]arge corporations have weaponized, and continued to weaponize . . . [ISDS] to benefit their own interests" and that "the broken ISDS system has time and time again worked in favor of big business interests."[21]

Despite these criticisms, little empirical research has examined the characteristics of investor claimants in ISDS cases, and whether the system primarily serves the interests of large multinational corporations as critics suggest. Criticisms largely treat the users of ISDS as a homogeneous group, labeling them as "large multinational corporations" and implying that they use their size and influence to prey on governments.[22] At the same time, small- or medium-sized firms' lack of use of ISDS is considered a major problem of the current system

18. 572 U.S. 25, 57 (2014). This comment from Chief Justice Roberts is inaccurate, however, because theoretically arbitral tribunals can only order respondent countries to pay monetary damages to foreign investors rather than withdraw the challenged policies.

19. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, Wash. Post (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html [https://perma.cc/4XF4-BQF2].

20. Guillermo Garcia-Perrote & Ella Wisniewski, *European Exodus from the ECT: Politics and Unintended Consequences*, Glob. Arb. Rev. (Nov. 15, 2022), https://globalarbitrationreview.com/article/european-exodus-the-ect-politics-and-unintended-consequences [https://perma.cc/82TM-UJR6].

21. Letter from Members of Congress to Ambassador Tai and Secretary Blinken (May 2, 2023), https://subscriber.politicopro.com/f/?id=0000018b-8cf5-d7d5-a1db-fff791940000 [https://perma.cc/TY6F-SMHY].

22. Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choices and Reform of Investment Law*, 112 Am. J. Int'l L. 361, 383 (2018) (noting that "[m]uch criticism of ISDS, for example, contends that large multinational corporations, allied with the arbitration bar, bring aggressive claims to chill regulation that would otherwise serve the public interest"); Ezra Klein, *What the Most Controversial Part of Obama's Trade Deal Really Does*, Vox (Nov. 10, 2015), https://www.vox.com/2015/11/10/9698698/tpp-investor-state-dispute-settlement [https://perma.cc/ET6Y-EPXM].

by policymakers, and improving their access is seen as an important goal in many proposals to reform ISDS.[23]

This Article provides descriptive statistics on the characteristics of claimants in ISDS cases. It shows that small- or medium-sized firms, rather than large ones, acted as claimants in most ISDS cases. In addition, the cases brought by small- or medium-sized firms are largely similar to those brought by large firms in terms of major case characteristics, such as duration and alleged claims.

The Article then examines whether the ISDS system is tilted in favor of large multinationals by exploring whether large firms are more successful at (1) obtaining financial compensation, and (2) exerting influence over challenged measures after filing. It finds no evidence that large firms are more likely to prevail in ISDS cases. However, compared with small- or medium-sized firms, large firms are more likely to succeed in influencing the respondent country to amend or repeal the challenged measure in ISDS cases. The results are robust when accounting for the size of the ultimate owner of a claimant firm. This finding reveals the advantage that large firms have in influencing foreign governments' decisionmaking.

Through case studies, this Article suggests that large firms tend to employ coordinated legal and public relations strategies across multiple jurisdictions to apply pressure on respondent governments. Specifically, large corporations have pursued ISDS along with other tactics such as lobbying, domestic litigation, international dispute settlement, and diplomatic efforts. The combined pressure from these multiple channels makes respondent governments more prone to repeal or modify the challenged measure in question. This finding provides a plausible explanation for large corporations' greater success in influencing respondent governments.

This Article makes several contributions to the growing ISDS literature. It is among the first attempts to describe the characteristics of claimant investors in ISDS cases.[24] Based on a more comprehensive dataset, it illuminates who is using the ISDS system, and how claimant composition has evolved over time. The finding that small- or medium-sized firms have brought more ISDS cases than large firms contradicts conventional narratives that ISDS is dominated by large firms, and reveals the unintended consequences that eliminating ISDS

23. U.N. GAOR, 36th Sess., 1st plen. mtg. at 3, U.N. Doc. A/CN.9/WG.III/WP.153 (Oct. 2, 2018); Eur. Fed'n for Inv. L. & Arb., Ensuring Equitable Access to All Stakeholders: Critical Suggestions For The MIC (July 15, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_efila.pdf [https://perma.cc/9MMM-S4H3]; ICSID, *Updated Backgrounder on Proposals for Amendments of the ICSID Rules* (June 15, 2021), https://icsid.worldbank.org/sites/default/files/Backgrounder_WP_5.pdf [https://perma.cc/D3GU-FYM8].

24. *See generally* Gus Van Harten & Pavel Malysheuski, *Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants* (Osgoode Hall L. Sch. L. Stud. Rsch. Paper Series No. 14, 2016); Susan D. Franck, Arbitration Costs: Myths and Realities in Investment Treaty Arbitration 80–81 (2019); Scott Miller & Gregory N. Hicks, Investor-State Dispute Settlement: A Reality Check (Ctr. Strategy & Int'l Stud. ed. 2015).

may have on small- or medium-sized firms. The finding aligns with other studies that posit that small firms are more frequent users of ISDS.[25]

Second, this Article casts light on which type of foreign investor has benefited more in terms of obtaining damages awards, which is what the system was originally designed for.[26] Some commentators have critiqued the ISDS system for forcing poor nations to compensate rich multinational companies in the Global North.[27] Prior empirical studies have examined whether the ISDS system is biased in favor of investors from developed countries and have reached inconsistent conclusions.[28] Instead of the development status of investor home countries, this Article focuses on firm size, and finds that large corporations do not appear to be the primary beneficiary of the system, measured either by the probability of prevailing or by the size of damages awarded. The empirical evidence does not support the criticism that the system is biased in favor of large corporations.

Finally, the findings reveal that consistent with what many ISDS critics have suggested, large corporations seem to have disproportionate influence on respondent country governments, as they are more likely to succeed in pressuring the respondent country to repeal or amend the challenged measures. However, the ways in which large corporations exert such influence appears more nuanced than conventional narratives suggest. As the case studies illustrate, they tend to employ a multi-pronged approach that makes use of various institutions across multiple jurisdictions along with ISDS. These findings illustrate how large multinational corporations have exploited the complexity of contemporary global governance arrangements to achieve their corporate goals.[29] In the meantime, because the chill is not exclusively attributable to the filing of ISDS cases itself, depriving foreign investors of the right to bring these cases may not eliminate the regulatory chill problem that concerns ISDS critics.

---

25. *See* Shujiro Urata & Youngmin Baek, *Impact of International Investment Agreements on Japanese FDI: A Firm-Level Analysis*, 46 World Econ. 2306, 2320 (2023); Alexander Gebert, *Legal Protection for Small and Medium-Sized Enterprises Through Investor-State Dispute Settlement: Status Quo, Impediments, and Potential Solutions*, *in* Small and Medium-Sized Enterprises in International Economic Law 291, 294 (Thilo Rensmann ed., 2017); Franck, *supra* note 24, at 80–81; Miller & Hicks, *supra* note 24, at 10.

26. Note that instances of obtaining damages awards are different from the actual payment of damages by respondent states, for which we do not have data.

27. Letter from All. for Just. to U.S. Cong. Offs. and U.S. Trade Rep. (Mar. 11, 2015) (on file with author).

28. Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 Osgoode Hall L.J. 211, 251–53 (2012); Sergio Puig & Anton Strezhnev, *The David Effect and ISDS*, 28 Eur. J. Int'l L. 731, 761 (2017); Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 Eur. J. Int'l L. 1147, 1167 (2014).

29. There is a growing body of literature studying the broader influence of corporations on international law. *See generally* Julian Arato, *Corporations as Lawmakers*, 56 Harv. Int'l L.J. 229 (2015); Kish Parella, *International Law in the Boardroom*, 108 Cornell L. Rev. 839 (2023); Jay Butler, *The Corporate Keepers of International Law*, 114 Am. J. Int'l L. 189 (2020); Melissa Durkee, *Interpretive Entrepreneurs*, 107 Va. L. Rev. 431 (2021).

The remainder of the Article proceeds as follows. Part I discusses growing corporate influence over government policymaking, increasing concerns over regulatory chill imposed through ISDS, and conventional narratives faulting the ISDS system for serving the interest of large corporations. Part II introduces our data and provides descriptive statistics on the characteristics of foreign investor claimants in ISDS proceedings. Part III explores whether large corporations tend to enjoy an advantage in ISDS proceedings from two aspects: (1) their likelihood of obtaining award of damages, and (2) their likelihood of influencing the challenged measure. Part IV discusses the findings' normative implications for ongoing ISDS reforms.

I. ISDS and Corporate Influence Over State Regulatory Authority

This Section provides an overview of the popular narrative and existing literature on growing corporate influence over government policymaking, both in the domestic setting and in the ISDS setting. Part A discusses general concerns over growing corporate political influence. Part B introduces the specific concern of regulatory chill in the ISDS context. Part C further discusses existing critiques of the ISDS system for serving the interest of large multinational corporations.

A. Growing Corporate Political Influence

In recent years, concerns over growing corporate power have become increasingly prominent. These concerns are particularly salient with respect to large corporations, which are considered to enjoy the most political influence and market dominance.[30] One of the major concerns about large corporations is their ability to influence the policymaking of democratic governments. It is argued that this influence yields laws that favor them, which further bolsters their influence over governments' regulatory and legislative agendas.[31] Senator Warren has highlighted these sorts of concerns about the role of large corporations in U.S. politics: "Big companies and billionaires spend millions to push

30. Senator Elizabeth Warren, for example, argues that "big corporations' political influence and market dominance are killing smaller rivals and that small business owners share interests with other victims of corporate power." Stacy Mitchell, *Elizabeth Warren Has a Theory About Corporate Power*, The Atlantic (May 16, 2019), https://www.theatlantic.com/ideas/archive/2019/05/elizabeth-warren-speaks-out-small-business/589510 [https://perma.cc/WP78-W8MV]; Tara Golshan, *Bernie Sanders's Plan to Reshape Corporate America, Explained*, Vox (Oct. 14, 2019), https://www.vox.com/2019/10/14/20912221/bernie-sanders-corporate-accountability-ftc-merger-tax [https://perma.cc/KG6J-JLNC].

31. Daniel Nyberg, *Corporations, Politics, and Democracy: Corporate Political Activities as Political Corruption*, 2 Org. Theory 1, 2 (2021) ("The [Corporate Political Activity] literature is concerned with the detailed practices of advancing business interests, with CPA broadly defined as 'any deliberate firm action intended to influence governmental policy or process.'").

Congress to adopt or block legislation. If they fail, they turn to lobbying federal agencies that are issuing regulations. And if they fail yet again, they run to judges in the courts to block those regulations from taking effect."[32] Since the U.S. Supreme Court in 2010 upheld as legal unlimited corporate funding on campaign advertising,[33] outside spending on elections has ballooned to $2.9 billion, nearly four times the total from the previous two decades.[34] By 2020, the number of registered lobbyists in Washington D.C. reached 11,535,[35] almost as many as the number of federal employees.[36] From 1998 to 2020, the amount spent on lobbying the federal government grew from $1.45 billion to $3.53 billion.[37]

A growing number of studies have found empirical evidence that firms' political activities help them obtain favorable treatment from governments.[38] These studies, however, largely focus on firms' political influence over their own governments. Firms that operate abroad have similar incentives to shape government policies in their favor, particularly because the profitability of the foreign affiliates of multinationals largely depends on the business environment in which those affiliates operate.[39] However, few studies have empirically examined whether and how firms influence foreign governments' policymaking.[40]

B. Regulatory Chill and ISDS

ISDS is a unique dispute settlement mechanism that allows foreign investors to bring claims against host countries for violations of international investment agreement obligations. In its early days, ISDS was largely used by foreign investors to seek compensation for government takings.[41] In recent years, however, more cases have been brought to challenge host countries' regulations,

---

32. *Getting Big Money Out of Politics*, Warren for Senate, https://elizabethwarren.com/plans/campaign-finance-reform [https://perma.cc/BK6Y-FW2Q].

33. *See* Citizens United v. FEC, 558 U.S. 310 (2010).

34. *Total Outside Spending by Election Cycle, Excluding Party Committees*, Open Secrets, https://www.opensecrets.org/outside-spending [https://perma.cc/NZX7-F8R4] (last visited Feb. 17, 2022).

35. *Lobbying Data Summary*, Open Secrets, https://www.opensecrets.org/federal-lobbying [https://perma.cc/SGT7-F4G7] (last visited Feb. 17, 2022).

36. *Policy, Data, Oversight*, U.S. Off. Pers. Mgmt., https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment [https://perma.cc/26VU-8A9C] (showing federal employment data for the number of employees in Washington, D.C. in 2017) (last visited Aug. 23, 2022).

37. *Lobbying Data Summary*, *supra* note 35.

38. *See generally* Pat Akey, *Valuing Changes in Political Networks: Evidence from Campaign Contributions to Close Congressional Elections*, 28 Rev. Fin. Stud. 3188 (2015); Benjamin M. Blau et al., *Corporate Lobbying, Political Connections, and the Bailout of Banks*, 37 J. Banking & Fin. 3007 (2013).

39. Rodolphe Desbordes & Julien Vauday, *The Political Influence of Foreign Firms in Developing Countries*, 19 Econ. & Pol. 421, 421 (2007).

40. *But see* Kishore Gawande et al., *Foreign Lobbies and US Trade Policy*, 88 Rev. Econ. & Stat. 563 (2006) (focusing on corporate political influence over foreign governments' trade policies).

41. *See generally* David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD Working Papers on Int'l Inv. No. 2012/03, 2012), https://www.oecd.org/investment/investment-policy/WP-2012_3.pdf [https://perma.cc/EE3D-JMGK].

including environmental and public health measures, which have broad public interest implications.[42] These challenges have been enabled by broad and vague standards provided under international investment agreements, such as the fair and equitable treatment standard and protection against indirect expropriation. This vagueness leaves ample room for foreign investors to challenge regulatory measures. A surge in ISDS regulatory challenges, particularly against public-interest-oriented regulations, has led to increasing concern over potential "regulatory chill."[43] That is, governments, particularly those in developing countries, may be pressured to reverse course on challenged measures or not regulate in the first place.[44] This may give large multinationals unprecedented power to interfere with governments' ability to regulate in the interest of their citizens.[45]

Some well-known regulatory chill examples involve host governments forgoing or delaying proposed regulations in the face of threatened ISDS cases.[46] For example, in 2002, a group of foreign mining companies threatened to bring ISDS cases against Indonesia for a law banning open-pit mining in protected forests.[47] It was estimated that these threatened claims could have cost the Indonesian government $20 billion to $30 billion in damages.[48] In response, Indonesia amended its forestry law and changed the designation of several previously protected forests to production forests, in which open-pit mining was allowed.[49] In explaining the government's decision to repeal the ban, Indonesia's Minister of Environment and Forestry stated: "There were investment activities before the Forestry Act was effective. If shut down, investors demand compensation and Indonesia cannot pay."[50] Another well-known example is the pair of ISDS cases brought by Philip Morris against Australia and Uruguay for

42. Matteo Fermeglia et al., *'Investor-State Dispute Settlement' as a New Avenue for Climate Change Litigation*, London Sch. Econ. & Pol. Sci. (June 2, 2021), https://www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation [https://perma.cc/4S5H-YZTD].

43. *See, e.g.*, Brook K. Baker & Katrina Geddes, *The Incredible Shrinking Victory: Eli Lilly v. Canada, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS*, 49 Loy. U. Chi. L.J. 479, 503 (2020).

44. Tanaya Thakur, *Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulation: A Critical Assessment*, Indian J. Int'l L. 1, 4 (2020); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 Transnat'l Env't L. 229, 236 (2017).

45. Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 Vand. J. Transnat'l L. 355, 406–07 (2017).

46. *See, e.g.*, Tienhaara, *supra* note 44; Kyla Tienhaara, *Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana*, 6 Int'l Env't Agreements 371, 388–89 (2006). *Contra* Stephan Schill, *Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?*, 24 J. Int'l Arb. 469, 477 (2007).

47. *See* Stuart G. Gross, *Inordinate Chill: Bits, Non-NAFTA MITs, and Host-State Regulatory Freedom—An Indonesian Case Study*, 24 Mich. J. Int'l L. 893, 894 (2003).

48. *See* Tienhaara, *supra* note 44, at 236.

49. Gross, *supra* note 47, at 894–95.

50. *Id.* at 895.

their legislation regulating tobacco packaging, which resulted in several other countries postponing the implementation of similar legislation.[51]

A more direct form of chilling exists when respondent governments are pressured to abandon or compromise the measure being challenged in an ISDS case. Examples of this type of chilling often cited by commentators include an ISDS case brought by Ethyl Corporation, a U.S. chemical company, against Canada for its ban on MMT, a hazardous gasoline additive.[52] The Canadian government eventually lifted the ban, despite growing concerns over hazardous vehicle emissions.[53] Both types of regulatory chill have raised concerns that ISDS provides corporations with unchecked influence over government regulations, particularly those in developing countries.[54] This Article focuses on the latter type of regulatory chill, that is, the chilling of the challenged measure itself.[55]

The regulatory chill concern is central to the controversy surrounding ISDS, which has faced widespread backlash in recent years. Criticizing ISDS for being biased toward corporate investors from developed countries, developing countries such as Venezuela and Bolivia have withdrawn from the ICSID Convention.[56] Countries such as India, Indonesia, and South Africa have likewise terminated many of their bilateral investment treaties, referring to their one-sided nature and claiming they represent "only corporate interests."[57] In a recent submission to the United Nations Commission on International Trade Law ("UNCITRAL"), which oversees intergovernmental discussion on ISDS

51. *See* Tienhaara, *supra* note 44, at 231; Moehlecke, *supra* note 13, at 1; *cf.* Anthony Le and Lisa Liu, *Public Firms and Regulatory Challenges: Evidence from Investor-State Dispute Settlement* (May 24, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4223509 [https://perma.cc/T5G6-JXLU] (exploring the relationship between regulatory challenges and case duration).

52. Ethyl Corp. v. Canada, Award on Jurisdiction UNCITRAL (June 24, 1998).

53. While *Ethyl v. Canada* is often cited as an example of a chilling effect caused by ISDS, evidence suggests that the Canadian government lifted the ban because of an adverse decision from a Canadian trade panel. *See* John Urquhart, *Canada Lifts Ban on Ethyl's Additive; U.S. Firm to Terminate its Legal Fight*, Wall St. J. (July 21, 1998), https://www.wsj.com/articles/SB900953820837355500 [https://perma.cc/FF4D-JXNR].

54. Robert Gebeloff, *Are Multinational Corporations Undermining Freedom in Poor Countries?*, Wash. Post (Sept. 13, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/09/13/are-multinational-corporations-undermining-freedom-in-poor-countries/?utm [https://perma.cc/3P3X-QQUV].

55. I study the chilling of proposed or future regulations in another article. *See* Mark Maffett, Mario Milone & Weijia Rao, *The Impact of Foreign Investors' Challenges of Domestic Regulations* (U. Miami Bus. Sch. Rsch. Paper No. 4451762, 2023).

56. Matthew Weiniger et al., *Venezuela Follows Bolivia and Ecuador with Plans to Denounce ICSID Convention*, Herbert Smith Freehills LLP (Jan. 19, 2012), https://www.lexology.com/library/detail.aspx?g=41d32953-ca8d-4a9d-b938-f8f967cc8fe8 [https://perma.cc/6YNP-HVWV].

57. Kavaljit Singh & Burghard Ilge, *India Overhauls its Investment Treaty Regime*, Fin. Times (July 15, 2016), https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc [https://perma.cc/3ZLQ-YMUJ]; *see also* Ben Bland & Shawn Donnan, *Indonesia to Terminate More Than 60 Bilateral Investment Treaties*, Fin. Times (Mar. 26, 2014), https://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0 [https://perma.cc/KLN7-L84J]; Arif Havas Oegroseno, *Revamping Bilateral Treaties*, Jakarta Post (July 7, 2014), https://www.thejakartapost.com/news/2014/07/07/revamping-bilateral-treaties.html [https://perma.cc/6T7W-8W2K].

reform, the government of Indonesia stated that "governments risk losing their policy space and limiting their right to regulate for fear of being put through litigation or facing threats from discontent[ed] investors."[58] Similarly, European Union ("E.U.") member countries are in the process of renegotiating the Energy Charter Treaty, which includes an ISDS provision and is viewed by many as outdated and inconsistent with the E.U.'s climate agenda.[59] Many argue that ISDS has gone far beyond its intended aim of protecting foreign investors from uncompensated expropriation.[60] Rather, ISDS is now being used by large multinationals to shirk regulations meant to protect public welfare, including environmental, safety, and public health measures.[61]

Despite the prevalence of concerns over the chilling effect of ISDS, relatively little is known about the extent of this "regulatory chill" and the underlying mechanisms. A few case studies have documented how ISDS cases, and the threat thereof, have led governments to abandon or modify proposed regulations, but their findings are limited to specific cases.[62] Only very recently have researchers started to systematically study the relationship between ISDS cases and respondent governments' regulatory responses.[63] So far, however, these studies have largely limited their scope to ISDS's chilling effect on a particular type of government regulation.[64]

C. Large Multinational Corporations and ISDS

The rhetoric of ISDS critics typically focuses on "large multinational corporations," which are perceived as the primary beneficiary of the system.[65] Senator Warren has stated that "[w]ith ISDS, big companies get the right to challenge laws they don't like, not in courts, but in front of industry-friendly arbitration panels that sit outside of any court system. Those panels can force taxpayers to write huge checks to big corporations—with no appeals. Workers, environmentalists, and human rights advocates don't get that special right; only corporations

58. *How Some International Treaties Threaten the Environment*, THE ECONOMIST (Oct. 5, 2020), https://www.economist.com/finance-and-economics/2020/10/05/how-some-international-treaties-threaten-the-environment [https://perma.cc/L92B-W29U].

59. Statement by European Parliament Members on the Modernisation of the Energy Charter Treaty, (Sept. 2, 2020), https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Statement-on-Energy-Charter-Treaty-ENG-VF.docx [https://perma.cc/T64V-XWRN].

60. *See* Lorenzo Cotula, *Reconciling Regulatory Stability and Evolution of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses*, 1 J. WORLD ENERGY L. & BUS. 158, 165 (2008).

61. Gebeloff, *supra* note 54.

62. Tienhaara, *supra* note 44, at 239–41.

63. *See* Tarald Laudal Berge & Axel Berger, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 J. INT'L DISP. SETTLEMENT 1 (2021); Moehlecke, *supra* note 13.

64. *See id.*

65. Puig & Shaffer, *supra* note 22, at 371.

do."[66] Along those same lines, in opposing the inclusion of ISDS in the Transatlantic Trade and Investment Partnership ("TTIP"), E.U. parliament members opined: "Accepting the ISDS would mean opening the door for big corporations to enforce their interests against E.U. legislation. This would deprive states of crucial policy space in important fields such as health or environment."[67] Similar language can be found in the news media and academic scholarship, which often describe ISDS as a dispute settlement mechanism tilted in favor of powerful multinationals at the expense of the public.[68]

At the same time, small- or medium-sized firms' limited use of ISDS is considered a major problem with the existing system. UNCITRAL Working Group III reports a shared concern that the financial burden of ISDS proceedings has limited small- or medium-sized firms' access to the system.[69] This deprives these firms of the protection provided to them under investment treaties. In its proposal to replace the ISDS with a multilateral investment court system, the European Union notes that "there will be better and easier access to this new court for the most vulnerable users, namely SMEs and private individuals."[70] Canada's 2021 Model Investment Treaty also states in its preamble that it aims to promote investment and access to dispute settlement by individuals and small- or medium-sized firms.[71] In addition, the 2022 amended ICSID arbitration rules

66. Senator Elizabeth Warren, Floor Speech on the Trans-Pacific Partnership, WARREN FOR SENATE (Feb. 2, 2016), https://www.warren.senate.gov/files/documents/2016-2-2_Warren_TPP.pdf [https://perma.cc/9V98-CP86].

67. Statement of the Socialists & Democrats in the European Parliament Opposing the Investor-State Dispute Mechanism in EU-US Trade and Investment Agreements (Jan. 21, 2014), https://www.socialistsanddemocrats.eu/newsroom/sds-want-investor-state-dispute-mechanism-out-eu-us-trade-and-investment-agreement-ttip [https://perma.cc/WEN3-6A8D]; Letter from European Ministers of Trade and Foreign Affairs to Cecilia Malmström, Comm'r Designate for Trade, Eur. Comm. (Oct. 21, 2014), http://blogs.ft.com/brusselsblog/files/2014/10/ISDSLetter.pdf [https://perma.cc/U7UY-94B8].

68. *The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game [https://perma.cc/84U4-PG6F]; Chris Hamby, *The Secret Threat that Makes Corporations More Powerful than Countries*, BUZZFEED NEWS (Aug. 30, 2016), https://www.buzzfeednews.com/article/chrishamby/the-billion-dollar-ultimatum [https://perma.cc/2ZLF-JHK7]; Celine Yan Wang, *Mine-Golia: Integrated Perspectives on the History and Prospects of International Investment Law and the Investor-State Dispute Settlement Regime*, 16 N.Y.U. J. INT'L L. & POL. 631, 653–54 (2021) ("The main beneficiaries of this flawed system have been corporate giants and wealthy investors, who have gained at the substantial expense of countries and individuals who would have benefited from the very laws and regulations that ISDS deters."). *But see* Chris Evans, *ISDS: Important Questions and Answers*, THE WHITE HOUSE OF PRESIDENT BARACK OBAMA (Mar. 26, 2015), https://obamawhitehouse.archives.gov/blog/2015/03/26/isds-important-questions-and-answers [https://perma.cc/VL25-DKX6] ("Most ISDS cases are brought by individuals or small businesses, investors that often have much fewer resources than large multinational corporations and are thus more easily discriminated against or mistreated.").

69. U.N. GAOR, *supra* note 23.

70. *Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union and its Member States, of the Other Part*, SEC (2016) 13463 final (Oct. 27, 2016).

71. *Canada's 2021 Foreign Investment Promotion and Protection Agreement (FIPA) Model*, GOV'T OF CAN. (May 11, 2021), https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/ [https://perma.cc/63UU-CS9B]. *See generally* Charles-Emmanuel Côté, *Columbia FDI Perspectives, The New Canadian Model Investment Treaty: A Quiet Evolution*, COLUM. CTR. ON SUSTAINABLE INV. (Aug. 8, 2022), https://ccsi.columbia.edu/sites/default/files/content/docs/fdi%20perspectives/No%20337%20-%20C%C3%B4t%C3%A9%20-%20FINAL.pdf [https://perma.cc/UR5F-3GN6].

feature a provision for expedited proceedings with the goal to facilitate access to investment arbitration by small- or medium-sized firms.[72]

Although many characterize ISDS as primarily serving the interests of large multinational corporations, relatively little is known empirically about the identity of the investors that act as claimants in ISDS cases. Furthermore, the scant empirical literature that does exist has presented inconsistent findings. Using a sample of 294 cases, Professor Van Harten finds that large companies and wealthy individuals have received the vast majority (that is, approximately 94.5%) of aggregate monetary compensation awarded by ISDS tribunals.[73] He also finds that extra-large companies have a much higher success rate than do other claimants.[74] Focusing on ISDS cases filed by American investors, Professors Miller and Hicks reach a contradictory finding: The majority of U.S. claimants appear to be individuals or small- and medium-sized companies.[75] In the same vein, Professor Franck finds that most ISDS claimants in her sample are individuals or private firms, with less than 12% being associated with a *Financial Times* Global 500 Corporation.[76]

Understanding the primary users and beneficiaries of ISDS will help with evaluation of criticisms that the system is tilted in favor of large multinationals, and that small- or medium-sized firms and individuals lack access to it. In addition, revealing the characteristics of foreign investors that manage to influence government decisionmaking through ISDS and the plausible underlying mechanism will further an understanding of the regulatory chill problem and potential solutions.

II. Data

For this project, I use a dataset consisting of 1,178 publicly available ISDS cases filed before 2020. The dataset includes both cases brought under investment treaties collected from the United Nations Conference on Trade and Development's ("UNCTAD") Investment Dispute Settlement Navigator, as well as cases brought under contracts or domestic investment laws collected from the International Centre for Settlement of Investment Disputes ("ICSID").[77] The dataset con-

72. Natalia Zibibbo & Brianna Gorence, *What Are the Key Recent Changes in the ICSID Rules?*, Freshfields Bruckhaus Deringer LLP (Apr. 6, 2022), https://riskandcompliance.freshfields.com/post/102hma0/what-are-the-key-recent-changes-in-the-icsid-rules [https://perma.cc/7GLV-QAXK]; ICSID, *supra* note 23.

73. Van Harten & Malysheuski, *supra* note 24, at 1.

74. *See id.*

75. Miller & Hicks, *supra* note 24, at 10.

76. Franck, *supra* note 24, at 81.

77. *Cases Database*, ICSID, https://icsid.worldbank.org/cases/case-database [https://perma.cc/VUB4-D3M6] (last visited Nov. 12, 2023); *Investment Dispute Settlement Navigator*, UNCTAD, https://investmentpolicy.unctad.org/investment-dispute-settlement [https://perma.cc/XQG6-W7WU] (last visited Nov. 12, 2023). The majority of previous empirical research on ISDS primarily examines cases initiated under

tains detailed substantive and procedural case information, including disputing party information, lawyer and arbitrator information, case substance information (i.e., case facts, case industry and alleged substantive claims), case outcome, and challenged measure outcome (i.e., whether the challenged measure is repealed or amended by the respondent country government).[78] For each claimant investor in the dataset, I first differentiate between individual and firm investors. For firm investors, a group of research assistants helped collect information on the firm's sales and number of employees, from Bloomberg, Capital IQ, Dunn & Bradstreet, Hoover's Company Profiles, Mergent Online, and NetAdvantage.[79] This information was used to measure firm size. The research assistants also collected firm listing status, founding year, ultimate owner, and branch number, from the same sources.

A. Claimant Characteristics

Table 1 presents the descriptive statistics of these firm-level variables.[80] In the dataset, 993 cases (84.2%) were brought by one or more firm investors.[81] Of those cases, we found firm sales information for 762, employee numbers for 796, and founding year for 801. There is significant variance in the size of the claimant firms. The largest firm's annual sales was $215 billion, which is roughly equivalent to the annual 2020 GDP of New Zealand.[82] The typical claimant firm in ISDS cases appears to be medium-sized, with 68 employees and annual sales of about $25.38 million. A firm's listing status and number

investment treaties. This dataset contributes to the existing literature by incorporating cases brought under contracts or domestic investment law. However, it is important to note that this dataset may not encompass the universe of all ISDS cases, as some of these cases are not publicly available. For important empirical work on ISDS, see Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 Duke L.J. 459 (2015); Daniel Behn et al., *Empirical Perspectives on Investment Arbitration: What Do We Know? Does it Matter?*, 21 J. World Inv. & Trade 188, 190 (2020); Jonathan Bonnitcha et al., The Political Economy of the Investment Treaty Regime (2017); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1 (2007); Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 J. Legal Stud. 371 (2017); Rachel Wellhausen, *Recent Trends in Investor State Dispute Settlement*, 7 J. Int'l Disp. Settlement 117 (2016); Wolfgang Alschner, Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes (2022).

78. Supplemental case information is collected from iareporter.com and italaw.com.

79. We can only obtain firm information from recent years. Such information may differ from firm information from case registration years, but only marginally. When firm information from multiple years is available, we use the information from a year that is closest to the case registration year. The information collected still represents the best information available on claimant characteristics.

80. For cases in which more than one firm acts as a claimant, I use the information of the firm with the largest sales or most employees or affiliates.

81. The remaining cases were brought exclusively by individual investors. Individual investors can be fundamentally different from firm investors. It is also difficult to evaluate the financial status of individual investors. As shown by Van Harten & Malysheuski, some individual investors are wealthy and resourceful. Hence, although this Article provides descriptive statistics on cases brought by individuals for completeness, its analysis focuses on large firms and small- or medium-sized firms. *See* Van Harten & Malysheuski, *supra* note 24.

82. *See GDP (Current US$) — New Zealand*, World Bank, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=NZ [https://perma.cc/4AHK-ZNS4] (last visited Nov. 12, 2023).

of affiliates can also indicate size. Publicly listed firms are generally larger and have access to more resources. Similarly, a large number of affiliates indicates that the claimant is part of a large corporate group. One hundred and forty-seven (14.80%) cases were brought by publicly listed firms. Three hundred and seventy-six (37.87%) cases were brought by firms with more than one affiliate. This suggests that the typical claimant firm is not large based on either of these two measures.

Table 1: Summary Statistics

	N	Mean	SD	Min	Median	Max
Sales (USD million)	762	5160.23	18291.65	0.00	25.38	215000.00
Employee Number	796	9741.73	31003.02	1.00	68.00	372194.00
Public	993	0.15	0.36	0.00	0.00	1.00
Age	801	33.29	42.52	0.00	16.00	250.00
Affiliate Number	993	42.00	133.03	0.00	0.00	1193.00
Subsidiary	993	0.30	0.46	0.00	0.00	1.00
Number of firms	993	1.40	0.73	1.00	1.00	5.00

I categorize two types of firm investors, large firms and small- or medium-sized firms, based on their employee number. Following The Organization for Economic Co-operation and Development's ("OECD") approach,[83] I categorize firms with 250 employees or more as large, and firms with fewer than 250 employees as small- or medium-sized. For firms with no employee information, I categorize them as small- or medium-sized firms, because they are unlikely to be large firms if there is no publicly available information about them.[84] It is important to note that the 250-employee threshold represents a conservative classification of "large firms." This is because the OECD definition can encompass firms considerably smaller in size (for example, a firm with 251 employees) than those typically envisioned by critics when discussing "large multinational corporations."[85] Based on this threshold, of the 993 cases brought by firm investors, 668 (67%) were brought by small- or medium-sized firms. I also collected information on the claimant firm's ultimate parent, if applicable. After

83. *Enterprises by Business Size*, Org. Econ. Co-operation & Dev. (OECD), https://data.oecd.org/entrepreneur/enterprises-by-business-size.htm [https://perma.cc/4X52-BDCQ] (last visited Nov. 12, 2023).

84. In untabulated results, I rerun all empirical tests after excluding firms with no publicly available information, and the results are substantively and statistically similar.

85. *See Developments and Reform of Investor-State Dispute Settlement*, Norton Rose Fulbright LLP (June 2017), https://www.nortonrosefulbright.com/en/knowledge/publications/a93bd1d4/developments-and-reform-of-investor-state-dispute-settlement [https://perma.cc/KLK7-9CU6] ("[A] misconception is that ISDS is only for Fortune 500 company.").

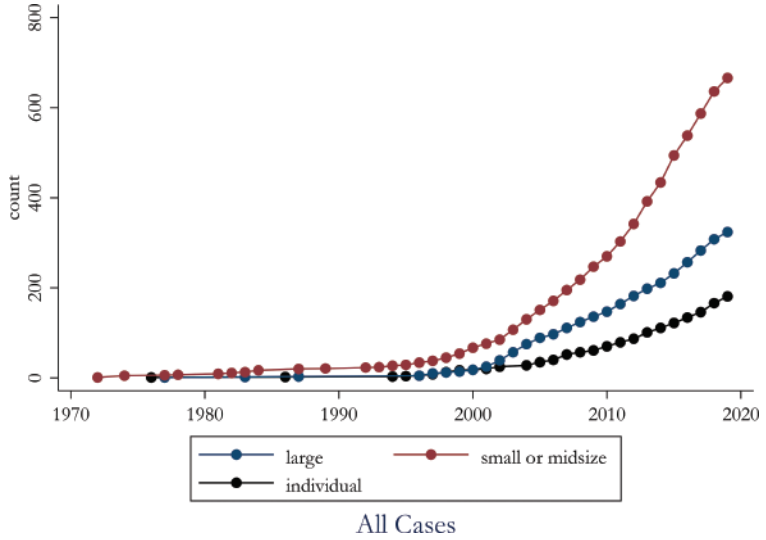
accounting for parent size, 585 cases (59%) were brought by small- or medium-sized firms. The other 83 cases were brought by small- or medium-sized firms whose ultimate owners are large firms.

Figure 1 plots, by claimant type, a time series of the cumulative number of cases in the dataset. The overall growth in cases brought by firms of all sizes was similar in the early years. However, since 2010, 421 ISDS cases have been brought by small- or medium-sized firms, whereas only 189 have been brought by large ones. This discrepancy may be explained by growing awareness of ISDS as a means of dispute settlement, as well as increasing availability of third-party funding for cases.[86] The number of cases brought by individual investors has also steadily increased over the past decade. These cases account for approximately 15% of all ISDS cases as of 2019. Overall, the data show that small- or medium-sized firms have brought more cases than large firms have, and constitute the primary users of the system by case volume.[87]

86. *See* Brooke Guven & Lise Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement* 1, 5 (Colum. Ctr. on Sustainable Inv. Working Paper, 2019), https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/extractive%20industries/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Disptue-Settlement-FINAL.pdf [https://perma.cc/6AUP-XKMF].

87. One possible selection issue is that a larger share of small- or medium-sized firms are subject to adverse government measures than are large firms. That being the case, they may not have better access to the system even though they have brought more cases than have large firms. This is less likely to be a concern, because while there are no available data on the ratio of small- or medium-sized firms relative to large firms which are subject to adverse government measures in a country, available data suggest that, in general, small- or medium-sized firms constitute the vast majority of all firms in a country. For example, according to statistics from the U.S. Small Business Association, there are 31.7 million small businesses in the United States, as compared to 20,139 large businesses. That is, over 99% of firms in the United States are small businesses. In addition, it is not obvious that small- or medium-sized firms are more likely to be targeted by adverse government measures. Existing research suggests that a large number of regulations are designed to address the behavior of large businesses, as opposed to small businesses. *See, e.g.*, Lloyd Dixon et al., *The Impact of Regulation and Litigation on Small Business and Entrepreneurship* 61 (RAND Corp. Working Paper No. WR-317-ICJ, 2006).

Figure 1: Case Filing



Some claimant investors have repeatedly brought ISDS cases, many challenging the same measure in multiple jurisdictions or in multiple forums. These repeat players have also spent more resources in pursuing ISDS cases. Figure 2 breaks down the composition of repeat players by claimant type. Of the 1,575 unique claimant investors that had brought an ISDS case by 2020, eighty-seven (5.52%) acted as claimant in more than one ISDS case. That is, the vast majority of claimants in ISDS cases are one-time players. Of the seventy-six investors that have acted as claimant in two ISDS cases, thirty-six are large firms.[88] Nine investors (six large firms, two small- or medium-sized firms, and one individual) have acted as claimants in three ISDS cases. Two firms have brought more than three cases in the dataset. Impregilo S.p.A., a firm from Italy with over 10,000 employees, has brought five cases. Two of these cases were brought against Pakistan for a dispute arising from the development of a hydrocarbon project.[89] The other three cases were brought against Argentina for disputes over a toll highway and a water concession, and against the UAE for a dispute over a mosque construction project.[90] RSM

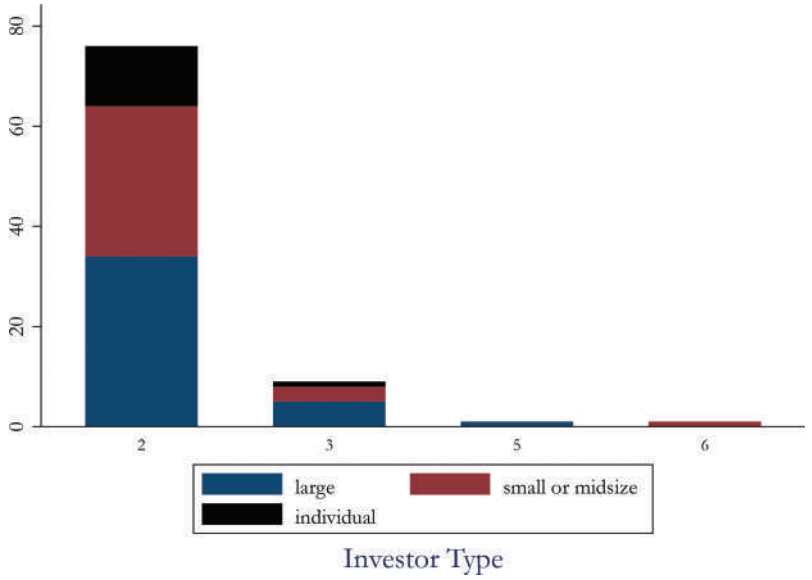
88. Another twenty-nine are small- or medium-sized firms, and eleven are individuals.

89. Damien Charlotin, *Looking Back: In Impregilo v Pakistan Case, Arbitrators Needed to Grapple with Distinction Between Treaty/Contract Claims and Scope of Umbrella Clause*, Inv. Arb. Rep. (May 22, 2017), https://www.iareporter.com/articles/looking-back-in-impregilo-v-pakistan-case-arbitrators-needed-to-grapple-with-distinction-between-treatycontract-claims-and-scope-of-umbrella-clause [https://perma.cc/L2A8-CP35].

90. Damien Charlotin, *Uncovered: Despite Finding of Liability, Turkish Builder Is Awarded No Damages in Treaty Arbitration Against Libya; But Investor Is Free to Try its Chance Again*, Inv. Arb. Rep. (Jan. 24, 2022), https://www.iareporter.com/articles/uncovered-despite-finding-of-liability-turkish-builder-is-awarded-no-

Production Corporation, a small- or medium-sized energy company based in Texas, has brought six cases, the most cases brought by any one investor in the dataset.[91] All six cases concern disputes related to mining licenses that the company held in respondent countries. It appears that the company has relied on third-party funding in at least one case.[92] Hence, while large firms, whose operations spread across multiple jurisdictions, overall tend to be more active in initiating multiple ISDS proceedings, other foreign investors now also have the resources to pursue multiple cases, particularly with the availability of third-party funding.

Figure 2: Repeat Claimant Type



damages-in-treaty-arbitration-against-libya-but-investor-is-free-to-try-its-chance-again [https://perma.cc/Q29B-7RGL]; Luke Eric Peterson, *Arbitrators Split on Jurisdiction over Water Concession Dispute, But Agree that Argentina Committed Some Treaty Breaches and Should Reimburse Italian Investor for its Sunk Costs*, Inv. Arb. Rep. (June 30, 2011), https://www-iareporter-com.mutex.gmu.edu/articles/arbitrators-split-on-jurisdiction-over-%20water-concession-dispute-but-agree-that-argentina-committed-some-treaty-breaches-and-%20should-reimburse-italian-investor-for-its-sunk-costs [https://perma.cc/98SC-2BZR].

91. RSM Prod. Corp. v. Cameroon, ICSID Case No. CONC/11/1, Conciliation Report (Sept. 19, 2011); RSM Prod. Corp. v. St. Lucia, ICSID Case No. ARB/12/10, Notice of Arbitration (Apr. 23, 2012); RSM Prod. Corp. v. Ecuador (May 13, 2010); RSM Prod. Corp. v. Gren., ICSID Case No. ARB/10/6 (Mar. 16, 2010); RSM Prod. Corp. v. Cent. Afr. Rep., ICSID Case No. ARB/07/2 (Jan. 18, 2007); RSM Prod. Corp. v. Gren., ICSID Case No. ARB/05/14 (Aug. 5, 2005).

92. Luke Eric Peterson, *In a Novel Ruling, ICSID Tribunal Orders that Impecunious Third-Party Funded Claimant Should Cover All Advance-Costs of Proceedings*, Inv. Arb. Rep. (Jan. 10, 2014), https://www.iareporter.com/articles/in-a-novel-ruling-icsid-tribunal-orders-that-impecunious-third-party-funded-claimant-should-cover-all-advance-costs-of-proceedings [https://perma.cc/EUS2-AH6C].

B. Case Characteristics

While small- or medium-sized firms have brought more cases than large firms have, cases brought by large firms may be different, either because the disputes in which they are involved are of a different nature, or because they are more resourceful, as critics have argued. That being the case, any difference in case outcome that we observe may derive from differences in the cases themselves rather than firm size. Hence, I explore whether cases brought by large firms differ in a significant way from those brought by other claimant types. Specifically, I examine the length of a case ("Case Duration"), the prior ISDS experience of both the claimant's lawyers ("Lawyer Experience") and arbitrators ("Arbitrator Experience"), and the importance of an investor's home country to the respondent country's global value chain ("Global Value Chain").

One major criticism of ISDS is the long length of its proceedings, which creates significant financial burdens for respondent countries to defend cases.[93] It is often argued that foreign investors have incentives to prolong cases as much as possible to pressure respondent countries to withdraw the challenged measure and to deter similar measures elsewhere.[94] Compared with small- or medium-sized firms and individuals, large firms may have more resources to pursue lengthy proceedings, which may pressure the respondent country to repeal the challenged measure.

Lawyers and arbitrators play significant roles in ISDS proceedings. Claimant investors select lawyers to litigate and arbitrators to adjudicate their cases. These lawyers and arbitrators can vary significantly in their experience and prestige, which is another metric for the resourcefulness of a claimant investor in pursuing ISDS cases. The law firms that frequently act as counsel in ISDS cases are typically "Big Law" firms.[95] Along with their experience, they bring to claimant investors institutional knowledge and litigation skills, which are valuable assets that can increase an investor's odds of prevailing in a case. Similarly, the most sought-after arbitrators are usually prestigious lawyers or professors with established reputations in the field. They can have more influence over their colleagues on the tribunal and hold more sway over the outcome of a case. I use the number of times that a lawyer or arbitrator has been appointed in prior cases *before* a case is filed as a proxy for experience. Large firms may have

93. *See* Luke R. Nottage & Ana Ubilava, *Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry*, 21 INT'L ARB. L. REV. 111 (2018); Guillermo J. Garcia Sanchez, *Defrosting Regulatory Chill*, U. PA. J. INT'L L. (forthcoming).

94. *See, e.g.*, Krzysztof J. Pelc, *What Explains the Low Success Rate of Investor-State Disputes?*, 71 INT'L ORG. 559, 560 (2017); Le & Liu, *supra* note 51.

95. In the dataset, the top ten law firms that have acted as counsel in the most cases are Freshfields Bruckhaus Deringer, King & Spalding, White & Case, Curtis, Mallet-Prevost, Colt, Arnold Porter, Allen & Overy, Foley Hoag, Shearman & Sterling, Sidley Austin, and Debevoise & Plimpton.

more resources to appoint experienced lawyers and arbitrators, which could sway case outcomes in their favor.

Finally, different cases may carry different economic costs for the same respondent country, depending on potential disruption to that respondent country's global value chain integration. Prior literature argues that a case brought by a claimant whose home country is deeply integrated with the respondent country via the global value chain, may cause greater disruption to the respondent country's global value chain integration.[96] As a result, the respondent country may have more incentives to repeal the measure challenged in that case. To measure a case's potential disruption to the respondent country's global value chain integration, I use the value of intermediate goods the respondent country imports from the claimant's home country relative to its global imports as a proxy.[97]

Table 2 presents a comparison across large firms, small- or medium-sized firms, and individuals on key case characteristics. On average, large firms appear to have had cases that last longer and involve more experienced lawyers and arbitrators, compared to small- or medium-sized firms and individuals. Figure A1 reports the same information graphically by showing the standardized differences for large firms and small- or medium-sized firms.[98] Statistically, however, cases brought by large firms do not differ significantly from those brought by small- or medium-sized firms in terms of case duration, lawyer experience, and bilateral global value chain integration. The only exception appears to be arbitrator experience, where arbitrators appointed by large firms have significantly more experience than those appointed by small- or medium-sized firms.

Table 2: Case Characteristics

	Large		Small or Midsize		Individual	
	Mean	SD	Mean	SD	Mean	SD
Global Value Chain	0.09	0.14	0.08	0.14	0.09	0.15
Case Duration	3.66	2.52	3.63	2.24	3.28	2.05
Lawyer Experience	20.35	24.02	18.96	25.33	14.04	21.23
Arbitrator Experience	12.06	12.12	10.31	11.74	8.98	11.55

96. *See* Carolina Moehlecke et al., *Global Value Chains as a Constraint on Sovereignty: Evidence from Investor-State Dispute Settlement*, 67 Int'l Stud. Q. 1 (2023).

97. *Direction of Trade Statistics*, Int'l Monetary Fund, https://data.imf.org/?sk=9D6028D4-F14A-464C-A2F2-59B2CD424B85 [https://perma.cc/Y7LR-CJ78] (last visited Nov. 12, 2023).

98. These are differences in mean outcomes between large firms and small- or medium-sized firms, standardized by a parameter which depends on the standard deviations of the outcomes in the two groups. Specifically, we report *Cohen's d*.

In addition to the aforementioned case characteristics, which reveal the extent of a claimant investor's use of ISDS, I also explore a few other standard case characteristics to understand the differences in cases brought by large firms, small- or medium-sized firms, and individuals.

Figure A2 plots, on a world map, the distribution of respondent countries based on claimant investor type. The data demonstrate that large firms have brought ISDS cases against 87 different countries; small- or medium-sized firms have brought ISDS cases against 118 different countries; individuals have brought ISDS cases against 70 different countries. For all three types of claimants, the majority of cases were brought against high income or upper middle-income countries.

Figure A3 graphs the share of cases brought by each claimant type across different industries. For both large firms and small- or medium-sized firms, electricity, gas, steam and air conditioning supply, mining and quarrying, and manufacturing are the three industries in which most cases arise. These three industries together account for over half of the cases brought by both large firms and small- or medium-sized ones. The industry composition of cases that were brought by individuals looks different. Manufacturing, financial and insurance activities, and real estate are the top three industries in which most individual-initiated cases arise.

Figure A4 graphs the share of substantive claims alleged by each claimant type. The substantive claims reveal important information about the nature of an investor's case. For instance, while direct expropriation claims are more often associated with direct takings, indirect expropriation and fair and equitable treatment claims are more often associated with the challenge of domestic regulations.[99] Indirect expropriation claims generally cover government measures that are "tantamount to" expropriation but do not involve a transfer of the legal title of the property in question. Prior literature argues that investors bring indirect expropriation claims with the intent to temper the host country's regulatory ambitions, instead of obtaining monetary compensation.[100] Fair and equitable treatment claims are often brought together with indirect expropriation claims, serving similar purposes.[101] Similar to what prior studies have revealed, fair and equitable treatment and indirect expropriation are the two most common claims brought by all three types of investors.[102] For each type of investor, the fair and equitable treatment claim was alleged in over 80% of cases. The indirect expropriation claim was alleged in over 70% of cases.

99. Pelc, *supra* note 94, at 567.

100. *Id.*

101. *Id.*; Leslie Johns et al., *Judicial Economy and Moving Bars in International Investment Arbitration*, 15 Rev. Int'l Org. 923, 932 (2020).

102. Bonnitcha et al., *supra* note 77, at 94.

By contrast, the more traditional types of substantive claims, such as direct expropriation and national treatment, were raised in less than 30% of cases by any claimant type.

Figure A5 graphs the distribution of measures in dispute by each claimant type. The measures in dispute are categorized into seven broad groups: administrative (in)action; concession; license or permit denial or revocation; contract dispute; court decision or criminal prosecution; expropriation or nationalization of assets; industry-wide regulatory measures.[103] As Figure A5 shows, cases brought by large firms and small- or medium-sized firms both predominantly feature contract disputes and industry-wide regulatory measures, with large firms exhibiting a higher share of cases challenging industry-wide regulatory measures. Notably, compared to large firms, small- or medium-sized firms bring a higher proportion of cases challenging the host government's expropriation or nationalization of assets. On the other hand, over 30% of the cases brought by individuals challenged the host government's expropriation or nationalization of assets, representing the most frequently challenged measure in cases brought by individuals.

Figure A6 graphs, by claimant type, the distribution of the legal instruments that claimant investors rely on to bring a case. Although investment treaties are widely recognized as the most frequently invoked instrument in ISDS cases, claimants may also initiate ISDS cases based on contracts or domestic investment law, provided that the latter contain clauses in which the respondent state consents to such proceedings.[104] As Figure A6 shows, both large firms and small- or medium-sized firms invoke BITs in more than 60% of their cases. Small- or medium-sized firms have a higher proportion of cases brought under contracts and the Energy Charter Treaty compared to large firms. Individual investors, on the other hand, have brought approximately 80% of their cases under a BIT.

In summary, the aforementioned case characteristics do not appear to reveal substantial differences between cases brought by large firms and those brought by small- or medium-sized ones. To account for potential confounding factors that may arise, I control for these case characteristics in alternative specifications in the regression analysis.

103. This categorization is based on the case facts variable that I coded for my previous work. *See* Weijia Rao, *Are Arbitrators Biased in ICSID Arbitration? A Dynamic Perspective*, 66 Int'l Rev. L. & Econ. 1, 16 (2021).

104. *See* Stratos Pahis, *Rethinking International Investment Law: Form, Function & Reform*, 63 Va. J. Int'l L. 447, 451 (2023).

III. Large Corporations and Case Outcomes

To assess whether ISDS has primarily been used to serve the interests of large corporations, I explore how successful different types of investors are in terms of securing favorable outcomes. I find that, while large firms do not appear to have a significant advantage over small- or medium-sized ones in obtaining damages awards, the cases they file are significantly more likely to result in repeal of the challenged measures. The results remain robust after accounting for the size of the ultimate owner of a claimant firm. Through three case studies, I show that large firms may be more successful in pressuring respondent countries to reverse course by combining ISDS claims with coordinated legal and public relations strategies across multiple jurisdictions. These strategies include lobbying, domestic litigation, international dispute settlement, and diplomacy.

I focus on two favorable outcomes that a foreign investor may obtain after filing an ISDS claim: financial compensation and changes to the challenged measure. The remedy available in ISDS proceedings is damages. Respondent countries are not obligated to alter their measures, even if such measures are found to be inconsistent with treaty obligations. However, the length and costs of ISDS proceedings may pressure respondent countries to repeal or amend the challenged measures. Hence foreign investors may benefit from filing ISDS cases inasmuch as respondent countries amend or repeal a challenged measure.

Table 3 breaks down case composition by claimant type in all filed ISDS cases ("All Cases"), cases in which the investor prevails ("Investor Winning Cases"),[105] and cases in which the disputed measure is eventually repealed or amended by the host country's government ("Measure Repealed Cases").[106] Of the 1178 cases in the data set, 500 resulted in an award, with 223 in favor of the foreign investors. Eighty cases led to the repeal or amendment of the challenged measure. Interestingly, contrary to what critics have often suggested, high and upper-middle income countries, rather than low and lower-middle income ones, appear to be responsible for a majority (fifty-six out of the eighty) of the recorded measure repeals. This may explain the trend of developed countries criticizing the ISDS system for creating a "regulatory chill."[107]

105. The investor is considered the winner of a case if it is awarded more than $0.

106. Measure Repealed Cases are those in which the challenged measure has been amended, repealed, replaced, or overruled by the domestic judiciary. A group of research assistants helped identify Measure Repealed Cases based on (1) information from a dataset compiled by Professors Carolina Moehlecke, Calvin Thrall, and Rachel Wellhausen covering cases filed before 2017, and recording whether there is a pro-investor change to a disputed regulation; and (2) information from publicly available sources on what happens to a challenged measure after a case is filed. *See* Moehlecke et al., *supra* note 96.

107. *See* Garcia-Perrote & Wisniewski, *supra* note 20.

As Table 3 shows, large firms have a slightly higher winning rate than do small- or medium-sized firms and individuals. Large firms have won about 20.9% of the cases they have brought. In addition, more cases brought by large firms have resulted in the challenged measure being repealed or amended by the respondent country government. About 11.7% of all cases filed by large firms have resulted in such a reversal, as compared to about 5.8% for small- or medium-sized firms and 1.6% for individuals.

Table 3: Claimant Type

	All Cases	Winning Cases (%)	Measure Repealed (%)
Large Firm	325	68 (20.9%)	38 (11.7%)
Small or Medium Firm	668	124 (18.6%)	39 (5.8%)
Individual	185	31 (16.8%)	3 (1.6%)
Total	1178	223 (18.9%)	80 (6.8%)

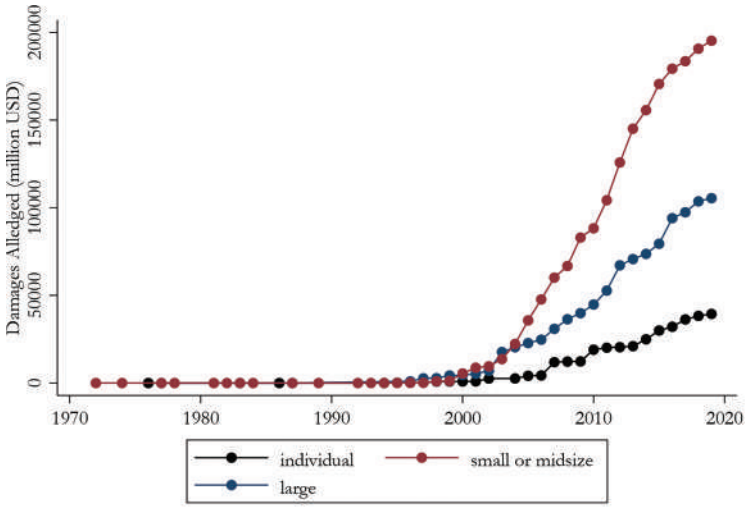
Figure 3 plots the cumulative damages claimed by and awarded to each claimant type over time.[108] As Panel (a) shows, over time, small- or medium-sized firms have claimed a larger sum of damages ($195,234.40 million) than large firms ($105,441.00 million) or individuals ($39,419.71 million). The average amount of damages claimed by large firms per case ($499.72 million) is slightly larger than that claimed by small- or medium-sized firms ($491.77 million) or individuals ($331.26 million).[109] In terms of gross awarded damages as Panel (b) shows, small- or medium-sized firms and large firms had each been awarded over $10 billion in damages by 2019. Again, on average, large firms obtained larger awards per case ($163.49 million) than small- or medium-sized firms ($110.87 million) or individuals ($31.29 million).[110]

108. I have winsorized the amount of damages by replacing the bottom and the top five percent of the values with the values corresponding to the fifth and the ninety-fifth percentile, respectively.

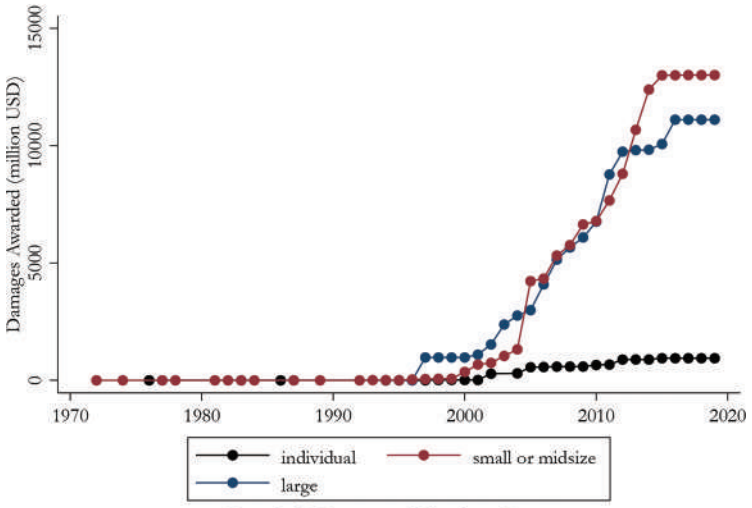
109. Without winsorizing, the average amount of damages alleged by small- or medium-sized firms ($1,087.60 million) is much larger than that alleged by large firms ($742.44 million).

110. Without winsorizing, the average amount of damages awarded to small- or medium-sized firms ($608.40 million) is much larger than that awarded to large firms ($190.12 million).

Figure 3: Cumulative Alleged and Awarded Damages



Panel (a) All Cases



Panel (b) Investor Winning Cases

Having provided descriptive evidence on case outcomes for different types of claimant investors, I employ a series of regression analyses to examine whether large firms are systematically more likely to win ISDS cases and influence challenged measures than small- or medium-sized firms.

Table 4 presents the baseline results from ordinary least squares ("OLS") regressions. Models (1) to (3) estimate the relationship between being a large firm and the likelihood of the challenged measure being repealed or amended by the respondent country. Models (4) to (6) estimate the relationship between

being a large firm and the likelihood of winning a case. To control for possible selection bias due to case settlement, I re-estimate (4) to (6) using a two-stage Heckman selection model.[111] Models (7) to (9) report results from the second stage. In the preferred specifications, I control for firm characteristics, case characteristics, and fixed effects for the respondent country, case industry, challenged measure, invoked instrument, and alleged claims. The standard errors are clustered at the industry level to account for serial correlation. As Table 4 shows, being a large firm is associated with an increase of approximately eight percentage points in the likelihood of a challenged measure being repealed or amended by the host country. In contrast, most specifications suggest that firm size is not correlated with the probability of prevailing in a case. The coefficients for *Large Firm* are negative in three of the six model specifications. In other words, large firms do not appear more likely to secure awards of damages in ISDS cases.[112]

Table 4: Large Firm and Case Outcome

	(1) Measure Repealed	(2) Measure Repealed	(3) Measure Repealed	(4) Investor Win	(5) Investor Win	(6) Investor Win	(7) Investor Win	(8) Investor Win	(9) Investor Win
Large Firm	0.084***	0.075***	0.079***	0.052	-0.082	-0.072	0.135	0.059	-0.012
	(0.029)	(0.022)	(0.021)	(0.073)	(0.114)	(0.113)	(0.177)	(0.204)	(0.210)
Public	-0.007	-0.030	-0.043	0.197**	0.169	0.164	0.497**	0.533*	0.466
	(0.037)	(0.054)	(0.068)	(0.087)	(0.113)	(0.121)	(0.253)	(0.291)	(0.299)
Age	-0.000	-0.000	-0.000	-0.001	-0.000	-0.001	-0.002	-0.002	-0.002
	(0.000)	(0.000)	(0.000)	(0.001)	(0.001)	(0.001)	(0.002)	(0.002)	(0.002)
Affiliate Number	-0.000	-0.000	0.000	0.000	-0.000	-0.000	0.000	0.000	0.000
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.001)	(0.001)	(0.001)
Subsidiary	-0.028	-0.035*	-0.035	0.089*	0.016	-0.011	0.226	0.235	0.189
	(0.026)	(0.017)	(0.022)	(0.051)	(0.040)	(0.034)	(0.156)	(0.181)	(0.188)
Global Value Chain			0.027			-0.125			-0.178
			(0.097)			(0.223)			(0.857)
Lawyer Experience			0.000			0.001			0.005
			(0.001)			(0.002)			(0.005)
Arbitrator Experience			0.001			0.004			0.004
			(0.001)			(0.003)			(0.008)
N	799	518	460	338	276	265	801	784	690
Host State		✓	✓		✓	✓		✓	✓
Industry		✓	✓		✓	✓		✓	✓
Measure		✓	✓		✓	✓		✓	✓
Instrument		✓	✓		✓	✓		✓	✓
Claim		✓	✓		✓	✓		✓	✓

Columns (1) to (6) report results from OLS regression. Columns (7) to (9) report results from the second stage of Heckman selection model.
Standard errors clustered by industry in parentheses.
The constant is omitted. ***<.01;**<.05;*<.1

111. I have included the same independent variables in the first stage selection model as in the second stage. Additionally, to aid with the identification of the Heckman model, in the first stage, I rely on an exclusion restriction *Alleged Amount Public*. *Alleged Amount Public* denotes whether the amount of damages sought by investors is made public. The publicity of the alleged amount of damages makes settlement less likely, but is unlikely to affect case outcome at the award stage. For prior research that uses the same method, see generally Pelc, *supra* note 94, at 575; Weijia Rao, *Development Status and Decision-Making in Investment Treaty Arbitration*, 59 Int'l Rev. L. & Econ. 1 (2019), at 10.

112. This finding is consistent with results from an experiment conducted by Puig & Strezhnev, which found that respondent arbitrators are more likely to award costs to small firms as compared to claimants who are Fortune 500 companies. *See* Puig & Strezhnev, *supra* note 28, at 761.

In Tables 5 and 6, instead of a dummy variable denoting whether a firm is categorized as large, I use the natural log of a firm's number of employees and the natural log of a firm's annual sales as an alternative measure of firm size. The results are consistent with those in Table 4. An increase in firm size by doubling the number of employees or annual sales is associated with an increase of approximately 1.24% in the likelihood of the repeal or amendment of the challenged measure. By contrast, across all specifications, the results suggest that firms with a larger number of employees or higher annual sales are not associated with a significantly higher likelihood of winning a case.

Table 5: Large Firms and Case Outcome (Employee Number)

	(1) Measure Repealed	(2) Measure Repealed	(3) Measure Repealed	(4) Investor Win	(5) Investor Win	(6) Investor Win	(7) Investor Win	(8) Investor Win	(9) Investor Win
Employee Number (log)	0.011**	0.013***	0.015***	0.009	-0.010	-0.006	0.021	0.031	0.024
	(0.004)	(0.004)	(0.003)	(0.009)	(0.017)	(0.019)	(0.028)	(0.032)	(0.033)
Public	-0.008	-0.051	-0.073	0.176**	0.174	0.165	0.452*	0.545*	0.450
	(0.039)	(0.051)	(0.062)	(0.082)	(0.142)	(0.156)	(0.254)	(0.291)	(0.299)
Age	-0.000	-0.000	-0.000	-0.001	-0.000	-0.000	-0.002	-0.002	-0.002
	(0.000)	(0.000)	(0.000)	(0.001)	(0.001)	(0.001)	(0.002)	(0.002)	(0.002)
Affiliate Number	-0.000	-0.000	0.000	0.000	-0.000	-0.000*	0.000	-0.000	0.000
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.001)	(0.001)	(0.001)
Subsidiary	-0.025	-0.042**	-0.040	0.052	-0.022	-0.047	0.130	0.123	0.090
	(0.026)	(0.018)	(0.024)	(0.047)	(0.040)	(0.050)	(0.163)	(0.191)	(0.195)
Global Value Chain			-0.032			-0.057			-0.424
			(0.126)			(0.267)			(0.873)
Lawyer Experience			0.000			0.001			0.005
			(0.001)			(0.002)			(0.005)
Arbitrator Experience			0.001			0.004			0.003
			(0.001)			(0.003)			(0.009)
N	732	469	416	313	257	247	776	761	670
Host State		✓	✓		✓	✓		✓	✓
Industry		✓	✓		✓	✓		✓	✓
Measure		✓	✓		✓	✓		✓	✓
Instrument		✓	✓		✓	✓		✓	✓
Claim		✓	✓		✓	✓		✓	✓

Columns (1) to (6) report results from OLS regression. Columns (7) to (9) report results from the second stage of Heckman selection model. Standard errors clustered by industry in parentheses.
The constant is omitted. ***<.01;**<.05;*<.1

Table 6: Large Firm and Case Outcome (Sales Volume)

	(1) Measure Repealed	(2) Measure Repealed	(3) Measure Repealed	(4) Investor Win	(5) Investor Win	(6) Investor Win	(7) Investor Win	(8) Investor Win	(9) Investor Win
Sales (log)	0.013***	0.012**	0.016**	-0.004	-0.011	-0.006	-0.010	-0.014	-0.013
	(0.005)	(0.005)	(0.006)	(0.011)	(0.024)	(0.025)	(0.032)	(0.036)	(0.036)
Public	-0.018	-0.051	-0.071	0.210**	0.235	0.225	0.533**	0.694**	0.585*
	(0.041)	(0.049)	(0.063)	(0.075)	(0.155)	(0.165)	(0.262)	(0.299)	(0.306)
Age	-0.000	-0.000	-0.000	-0.001	-0.001	-0.001	-0.001	-0.001	-0.001
	(0.000)	(0.001)	(0.000)	(0.001)	(0.001)	(0.001)	(0.002)	(0.002)	(0.002)
Affiliate Number	-0.000	-0.000	0.000	0.000	-0.000*	-0.000**	0.000	-0.000	0.000
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.001)	(0.001)	(0.001)
Subsidiary	-0.032	-0.051***	-0.059**	0.087*	0.024	-0.005	0.218	0.180	0.126
	(0.026)	(0.017)	(0.022)	(0.045)	(0.040)	(0.054)	(0.172)	(0.199)	(0.202)
Global Value Chain			-0.086			-0.003			-0.326
			(0.139)			(0.261)			(0.895)
Lawyer Experience			0.000			0.001			0.005
			(0.001)			(0.002)			(0.005)
Arbitrator Experience			0.002			0.005			0.004
			(0.001)			(0.003)			(0.009)
N	703	449	394	297	244	234	760	747	656
Host State		✓	✓		✓	✓		✓	✓
Industry		✓	✓		✓	✓		✓	✓
Measure		✓	✓		✓	✓		✓	✓
Instrument		✓	✓		✓	✓		✓	✓
Claim		✓	✓		✓	✓		✓	✓

Columns (1) to (6) report results from OLS regression. Columns (7) to (9) report results from the second stage of Heckman selection model. Standard errors clustered by industry in parentheses.
The constant is omitted. ***<.01;**<.05;*<.1

So far, my analysis has focused on the size of the claimant firms. Some of these claimants are conduit subsidiaries through which ultimate parent firms make investments to take advantage of favorable BITs[113] or favorable tax rates in a third country.[114] Hence, while a case may have been brought by a small- or medium-sized firm, any financial compensation or measure repeal resulting from this case could have benefitted the firm's ultimate parent, which could be a large firm. In my dataset, out of the 668 cases brought by small- or medium-sized firms, eighty-three (12.43%) were brought by firms whose ultimate owners are large firms. To take these large firms into account, I rerun the main specification after accounting for the size of the ultimate owner of a claimant firm. In Table 7, a firm is categorized as a large firm if either the claimant or the ultimate owner of the claimant is a large firm. The results are largely consistent with those in the main analysis. Cases brought by large firms, or by firms which are owned by large firms, are significantly more likely to result in the repeal or amendment of the challenged measure. On the other hand, there

113. *See* Julian Arato et al., *Reforming Shareholder Claims in ISDS*, 14 J. Int'l Disp. Settlement 242, 246 (2023); Julian Arato, *The Elastic Corporate Form in International Law*, 62 Va. J. Int'l L. 383, 412 (2022).

114. *See* Calvin Thrall, Spillover Effects in International Law: Evidence from Tax Planning (Nov. 23, 2021) (unpublished manuscript), https://www.calvinthrall.com/assets/taxplanning_postJMP.pdf [https://perma.cc/34LS-ZJZJ].

is little evidence that large firms are more likely to obtain an award of damages, either by bringing cases themselves or by bringing cases through intermediary subsidiaries.

To further address concerns arising out of the selection problem, in Table 8, I employ matching, which is a popular method in social science that seeks to pair two units that look similar on a number of dimensions, with the only observable difference being the variable of interest.[115] Here, I use exact matching, and match case pairs based on the following case characteristics: case industry, challenged measure, the respondent country's polity score, and the respondent country's income level.[116] The resulting analysis guarantees that cases are comparable on these observed dimensions, with the only difference being the claimant firm size. After creating the matched sample, I then use OLS regression to investigate the effect of being a large firm on the likelihood of (1) having the measure repealed or amended by the respondent country, and (2) prevailing in a case in the form of obtaining financial compensation. Columns (2) and (4) of Table 8 report additional results after accounting for the size of the ultimate owner of a claimant firm. The results are consistent with those in the main analysis. Being a large firm is associated with a more than five percent increase in the probability of the measure being repealed or amended by the respondent country. On the other hand, being a large firm is not positively correlated with the likelihood of prevailing in a case. Overall, the results provide evidence that large firms are the primary beneficiary of ISDS cases, as evidenced by their propensity to influence the challenged measure rather than obtain financial compensation.

115. *See* Donald B. Rubin, *Matching to Remove Bias in Observational Studies*, 29 BIOMETRICS 159, 170–76 (1973).

116. I did not control for other case characteristics because doing so may introduce post-treatment bias.

Table 7: Large Firm and Case Outcome (Parent Size)

	(1) Measure Repealed	(2) Measure Repealed	(3) Measure Repealed	(4) Investor Win	(5) Investor Win	(6) Investor Win	(7) Investor Win	(8) Investor Win	(9) Investor Win
Large Firm (Parent)	0.073***	0.053***	0.053***	0.078	0.014	0.022	0.201	0.191	0.135
	(0.023)	(0.017)	(0.013)	(0.061)	(0.104)	(0.105)	(0.176)	(0.205)	(0.207)
Public	-0.004	-0.024	-0.037	0.186**	0.138	0.133	0.470*	0.479	0.407
	(0.037)	(0.052)	(0.064)	(0.086)	(0.124)	(0.131)	(0.252)	(0.292)	(0.300)
Age	-0.000	0.000	0.000	-0.001	-0.001	-0.001	-0.002	-0.002	-0.002
	(0.000)	(0.000)	(0.000)	(0.001)	(0.001)	(0.001)	(0.002)	(0.002)	(0.002)
Affiliate Number	-0.000	-0.000	0.000	0.000	-0.000	-0.000	0.000	-0.000	0.000
	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.000)	(0.001)	(0.001)	(0.001)
Subsidiary	-0.044*	-0.044**	-0.042*	0.068	-0.003	-0.029	0.172	0.173	0.140
	(0.025)	(0.017)	(0.021)	(0.056)	(0.039)	(0.044)	(0.167)	(0.194)	(0.200)
Global Value Chain			0.013			-0.139			-0.157
			(0.094)			(0.242)			(0.851)
Lawyer Experience			0.000			0.001			0.005
			(0.001)			(0.002)			(0.005)
Arbitrator Experience			0.001			0.004			0.004
			(0.001)			(0.003)			(0.008)
N	799	518	460	338	276	265	801	784	690
Host State		✓	✓		✓	✓		✓	✓
Industry		✓	✓		✓	✓		✓	✓
Measure		✓	✓		✓	✓		✓	✓
Instrument		✓	✓		✓	✓		✓	✓
Claim		✓	✓		✓	✓		✓	✓

Columns (1) to (6) report results from OLS regression. Columns (7) to (9) report results from the second stage of Heckman selection model. Standard errors clustered by industry in parentheses.
The constant is omitted. ***<.01;**<.05;*<.1

Table 8: Large Firm and Case Outcome (Exact Matching)

	(1) Measure Repealed	(2) Measure Repealed	(3) Investor Win	(4) Investor Win
Large Firm	0.068***		-0.015	
	(0.022)		(0.033)	
Large Firm (Parent)		0.051**		-0.015
		(0.021)		(0.032)
N	642	679	642	679

The constant is omitted. ***<.01;**<.05;*<.1

IV. Regulatory Chill Case Studies

Studying why large firms are more successful in "chilling" the challenged measure is challenging because of the lack of information on the underlying causes that led the respondent country to reverse course. In this Section, I present three case studies in which the ISDS claimant was a large firm, and the challenged measure was amended or repealed by the host country government. In all three cases, the claimant investors employed a coordinated legal and

public relations strategy across multiple jurisdictions to pressure the respondent government to reverse course on the challenged measure. In addition to ISDS claims, large firms also resorted to lobbying, domestic litigation, international dispute settlement, and diplomatic solutions. Such strategy is less common in cases brought by small- or medium-sized firms and individuals.[117] While the case studies fall short of systematically identifying a causal mechanism, they provide one plausible explanation as to why large firms might be more successful in influencing the respondent country to repeal or amend the challenged measure.

A. beIN v. Saudi Arabia

In this case, beIN media group ("beIN"), a Qatar-based global sports and entertainment media company, held exclusive rights to broadcast major sporting events in Saudi Arabia.[118] In 2017, following Saudi Arabia's severance of relations with Qatar, the Saudi Ministry of Culture and Information revoked beIN's license and blocked access to beIN's website in Saudi Arabia, citing security concerns.[119] Additionally, the Ministry prohibited the distribution of beIN set-top boxes and threatened legal action and penalties for distributing media content without a license in Saudi Arabia.[120] The Saudi Arabian Monetary Authority subsequently issued a decision prohibiting "all monetary operations in all methods of payment . . . to [beIN] either for new subscriptions or any renewals in its channels or services."[121] As a result of these measures, beIN was effectively banned in Saudi Arabia. In August 2017, a broadcasting entity known as beoutQ (a satirical derivation of beIN advocating to "be out Qatar") began broadcasting pirated sports content from beIN.[122] The pirated content later expanded to encompass films and television shows.[123]

On October 1, 2018, beIN initiated a $1 billion ISDS case against Saudi Arabia under the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (the "OIC Agreement").[124] beIN alleged that the measures taken by Saudi Arabia constituted, among other things, violations of Saudi Arabia's obligations to provide full protection and security, fair and equitable treatment,

117. Where such information is available, it appears that measure repeals in cases brought by small- or medium-sized firms and individuals more often result from changes in investor behavior or domestic politics.

118. Panel Report, *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R, ¶¶ 2.32, 2.33 (June 16, 2020).

119. *See id.* ¶ 2.36.

120. *See id.* ¶ 2.37.

121. *Id.* ¶ 2.38 (quoting Qatar's first written submission).

122. *Id.* ¶¶ 2.40, 2.45.

123. *See id.*

124. *See* beIN Corp. v. Saudi Arabia, Claimant's Notice of Arbitration (Oct. 1, 2018).

and protection against expropriation and arbitrary and discriminatory measures under the OIC Agreement.[125]

This case is a typical example of a large multinational corporation employing coordinated legal and public relations strategies across multiple jurisdictions in an effort to pressure the host country government to reverse course on the challenged measure. In addition to bringing the ISDS case, beIN appealed to the Qatari government to bring a case against Saudi Arabia at the World Trade Organization (WTO).[126] The WTO case, which was filed on the same day as the ISDS case and represented by the same group of attorneys, challenged a similar set of Saudi government actions under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), including the revocation of beIN's license and Saudi Arabia's failure to enforce criminal measures and penalties against beoutQ.[127]

The WTO case was one of beIN's several legal and public relations efforts to put pressure on Saudi Arabia. Prior to initiating the ISDS case, beIN joined forces with other prominent rights holders, including the Fédération Internationale de Football Association ("FIFA"), Union of European Football Associations ("UEFA"), the Asian Football Confederation ("AFC"), Football Association Premier League Limited ("The Premier League"), and Liga Nacional de Fútbol Profesional ("LaLiga"), to take legal action against Saudi Arabia and publicly denounce the piracy activities of beoutQ.[128] Together with beIN, these rights holders also established a lobbying group to persuade other governments to put pressure on the Saudi government and to investigate the beoutQ piracy.[129] As a result of these joint efforts, the Office of the United States Trade Representative ("USTR"), in its 2019 Special 301 Report, placed Saudi Arabia on the Priority Watch List, citing the Saudi government's failure to take sufficient steps to

125. *See id.*

126. *See* Hugh Stephens, *How the WTO Helped to End Sports Broadcast Piracy in the Middle East*, U. Calgary Sch. Pub. Pol'y (July 15, 2020), https://www.policyschool.ca/how-the-wto-helped-to-end-sports-broadcast-piracy-in-the-middle-east [https://perma.cc/XHF4-Q82B].

127. *See* Joyce Hanson, *Qatar Seeks WTO Talks with Saudi Arabia over IP Piracy Row*, Law360 (Oct. 4, 2018), https://www.law360.com/articles/1089549?scroll=1related=1 [https://perma.cc/3QA5-Y8DP]; Deepak Raju et al., *Multi-Forum Strategies to Tackle Climate Change and Other Complex Problems: A Note from Practitioners*, EJIL:Talk! (Nov. 1, 2022); https://www.ejiltalk.org/multi-forum-strategies-to-tackle-climate-change-and-other-complex-problems-a-note-from-practitioners [https://perma.cc/5K78-WHQM]; Panel Report, *supra* note 118, ¶ 2.46.

128. *See beIN MEDIA GROUP and Cable Network Egypt to Take Legal Action Against Live Sports Piracy in Egypt*, beIN Media Grp. (May 30, 2022), https://www.beinmediagroup.com/article/bein-media-group-and-cable-network-egypt-to-take-legal-action-against-live-sports-piracy-in-egypt [https://perma.cc/DPU5-7FKP]; *Joint Public Statement on Behalf of FIFA, UEFA, AFC, The Premier League, LaLiga and Bundesliga on beoutQ*, FIFA (Jan. 22, 2019), https://www.fifa.com/about-fifa/organisation/media-releases/joint-public-statement-on-behalf-of-fifa-uefa-afc-the-premier-league-laliga-and- [https://perma.cc/34ME-QPBF].

129. *See* Eric Priezkalns, *beIN or Out? Why Saudi Sports Fans Pirate Qatari TV*, Commsrisk (Nov. 17, 2017), https://commsrisk.com/bein-or-out-why-saudi-sports-fans-pirate-qatar-tv [https://perma.cc/8UMR-6AYP].

curb beoutQ's piracy activities.[130] In 2020 and 2021, Saudi Arabia remained on the Priority Watch List due to its "fail[ure] to take action against rampant satellite and online piracy made available by illicit pirate service beoutQ."[131] Similarly, in response to submissions from the rights holders, the U.K. government pledged to investigate beoutQ's piracy and engage in talks with the Saudi government on that issue.[132] According to beIN's Director of Corporate Affairs, David Sugden, the company realized that "public pressure would apply a more immediate pressure point on the Saudis," and therefore "[beIN] started lobbying governments," particularly the U.S. and U.K. governments, which were perceived to have the most influence on Saudi Arabia.[133]

In addition to the legal proceedings and lobbying efforts, beIN created a website specifically devoted to republishing global condemnation of Saudi Arabia's ban on beIN, and inaction against the beoutQ piracy.[134] Furthermore, beIN actively hindered Saudi Arabia's attempts to acquire English Premier League club Newcastle United FC and broadcast rights for the UEFA Champions League.[135] Sports were a crucial component of Saudi Arabia's Vision 2030 Program, a strategic plan aimed at reducing the country's dependence on oil, enhancing its international image, and attracting foreign investment.[136] The acquisition of Newcastle United and broadcast rights for the Champions League were considered significant steps to implement the Vision 2030 program, and beIN's efforts to block these deals added further pressure on the Saudi government.[137]

---

130. Off. of U.S. Trade Rep., 2019 Special 301 Report 57–58 (Apr. 2019), https://ustr.gov/sites/default/files/2019_Special_301_Report.pdf [https://perma.cc/XYT8-XHQY].

131. Off. of U.S. Trade Rep., 2021 Special 301 Report 57 (Apr. 2021) https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf [https://perma.cc/587D-WXUW].

132. *See* Sam Carp, *UK Government to Investigate BeoutQ Premier League IP Theft*, SportsPro (Apr. 25, 2019), https://www.sportspromedia.com/news/uk-government-premier-league-piracy-beoutq-saudi-arabia [https://perma.cc/6FEV-STT5].

133. Marhaba Qatar, BeoutQ: An Unprecedented Piracy Story 17 (2019).

134. *Global Condemnation*, beoutQ: The Saudi State-Supported Piracy of World Sport and Entertainment, https://beoutq.tv/international-condemnation [https://perma.cc/AZ8R-S7TS].

135. *See* Areeb Ullah, *Newcastle Takeover: Why Qatar's beIN Sports Was Key to Saudi Deal*, Middle E. Eye (Oct. 8, 2021), https://www.middleeasteye.net/news/newcastle-united-takeover-saudi-qatar-bein-why-key [https://perma.cc/3C9V-58RG]; Matt Slater, *UEFA and beIN Agree New Television Deal for Middle East and North Africa Regions*, The Athletic (June 10, 2021), https://theathletic.com/4210135/2021/06/10/uefa-and-bein-agree-new-television-deal-for-middle-east-and-north-africa-regions [https://perma.cc/3HYA-JG4Z].

136. *See* Danya Rubenstein-Markiewicz, *After the Match, Saudi Arabia Makes the Real Play*, Wash. Inst. for Near E. Pol'y: Fikra F. (July 13, 2018), https://www.washingtoninstitute.org/policy-analysis/after-match-saudi-arabia-makes-real-play [https://perma.cc/FA65-SNAJ.

137. *See* Tariq Panja, *Saudi Arabia Mulls Bid for 2030 World Cup*, N.Y. Times (June 10, 2021), https://www.nytimes.com/2021/06/10/sports/soccer/saudi-arabia-world-cup.html [https://perma.cc/Z89Z-R436]; *Qatar's beIN Sport Renews English Premier League Contract Despite Sole Opposition*, Middle E. Monitor (Dec. 18, 2020), https://www.middleeastmonitor.com/20201218-qatars-bein-sport-renews-english-premier-league-contract-despite-sole-opposition/ [https://perma.cc/NNT2-QH6P]; George Caulkin, Chris Waugh & Adam Crafton, *"The Gloves Were Off" Then the Deal Was Off: Why Newcastle's Takeover Collapsed*, The

The legal and public relations efforts undertaken by beIN were successful in bringing about change. In June 2020, a WTO panel found that Saudi Arabia violated its TRIPS obligations for failing to initiate criminal proceedings against willful intellectual property ("IP") infringers and for preventing IP rights holders from initiating civil suits against beoutQ.[138] While Saudi Arabia initially appealed the panel report to the now-defunct Appellate Body, it later withdrew the appeal.[139] Against the backdrop of deescalating tensions in the region,[140] on October 6, 2021, Saudi Arabia formally announced that it would lift the ban on beIN.[141] In return, Qatar agreed to halt all legal battles connected to the beoutQ dispute, including the ISDS case.[142] Saudi Arabia also took steps to address the beoutQ piracy and enhance IP rights enforcement. The beoutQ's satellite broadcast service was discontinued in August 2019.[143] In June 2020, Saudi authorities took further steps to restrict the distribution of Illicit Streaming Devices ("ISDs"), devices that beoutQ used for its Internet broadcasting.[144] Moreover, to enhance IP rights enforcement, Saudi Arabia established specialized IP enforcement courts, provided training "to increase government compliance with IP laws," and established a permanent committee (that is, the National Committee for the Enforcement of Intellectual Property)

Athletic (July 30, 2020), https://theathletic.com/1963663/2020/07/30/newcastle-united-takeover-withdraw-staveley-ashley-pif-premier-league [https://perma.cc/NNU6-Z57Z].

138. *See* Panel Report, *supra* note 118, ¶ 7.294.

139. Communication from Qatar, *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/11 (Apr. 25, 2022).

140. On January 5, 2021, six delegations from the Gulf Cooperation Council ("GCC") signed the AlUla Declaration during a special summit to unify the MENA countries (such as Qatar and Saudi Arabia) after more than three years of diplomatic and trade boycotts. Saudi Arabia agreed to reopen its air, land, and sea borders to Qatar. Among other goals, the AlUla Declaration called for greater regional integration of the GCC by "completing the requirements for a Customs Union and the Common Gulf Market . . . enhancing civil society institutions . . . and enhancing relations between the Council and the Digital Cooperation Organization . . . [and] further advance digitization goals among the Member States." Tuqa Khalid, Full Transcript of AlUla GCC Summit Declaration: Bolstering Gulf Unity, Al Alarabiya (Jan. 6, 2021), https://english.alarabiya.net/News/gulf/2021/01/06/Full-transcript-of-AlUla-GCC-Summit-Declaration-Bolstering-Gulf-unity [https://perma.cc/5RD9-JQJ5]; *see also* Ismaeel Naar, *Saudi Arabia Reopens Airspace, Borders to Qatar: Kuwait Minister*, Al Alarabiya (Jan. 5, 2021), https://english.alarabiya.net/News/gulf/2021/01/04/Saudi-Arabia-to-open-airspace-borders-to-Qatar-Kuwait-minister [https://perma.cc/755L-BBMP].

141. *See* Adam Crafton & Matt Slater, *Saudi Arabia Reverses beIN Sport Ban After Four and a Half Years,* The Athletic (Oct. 6, 2021), https://theathletic.com/news/saudi-arabia-reverses-bein-sport-ban/olc80FZA5pPr [https://perma.cc/85JU-2S5F]. Interestingly, on October 7, 2021, a day after the beIN ban was lifted, the parties involved in the Newcastle deal announced that the purchase could go ahead. *See Newcastle Takeover: All Parties Hopeful Saudi-Led Consortium's Deal Can Be Announced on Thursday*, Sky Sports (Oct. 7, 2021), https://www.skysports.com/football/news/12040/12427926/newcastle-takeover-all-parties-hopeful-saudi-led-consortiums-deal-can-be-announced-on-Thursday [https://perma.cc/DRK6-5HN9].

142. *See* Andrew Mills, *Qatar, Saudi Arabia Halt WTO Efforts to Resolve Piracy Broadcast Dispute*, Reuters (Jan. 10, 2022), https://www.reuters.com/world/middle-east/qatar-saudi-arabia-halt-wto-efforts-resolve-piracy-broadcast-dispute-2022-01-10 [https://perma.cc/2PZF-XQJ6].

143. *See* Vijaya Cherian, *Pirate Service beoutQ Goes Off Air*, Broadcast Pro Middle E. (Aug. 14, 2019), https://www.broadcastprome.com/news/pirate-service-beoutq-goes-off-air [https://perma.cc/8KAE-M5VL].

144. Stephens, *supra* note 126.

to "develop IP legislation and regulations."[145] These improvements in IP rights protection were recognized by the USTR, which removed Saudi Arabia from its Priority Watch List in its 2022 Special 301 Report.[146]

B. ADM v. Mexico, Cargill v. Mexico, and Corn Products International v. Mexico

On January 1, 2002, Mexico introduced a tax on soft drinks and other beverages containing high fructose corn syrup ("HFCS") or sweetener other than cane sugar.[147] The tax primarily targeted imports of HFCS from the United States, which was the primary exporter of non-sugar sweeteners to Mexico.[148] This action was part of a larger trade dispute between the two nations regarding the bilateral trade of sugar and non-sugar sweeteners.[149] Mexico was concerned about the impact of cheaper HFCS imports from the United States on its domestic cane sugar producers, as well as its limited access to the U.S. sugar market.[150]

After Mexico imposed the beverage taxes, three U.S. sweetener manufacturers, ADM, Cargill, and Corn Products International, initiated separate ISDS proceedings against Mexico under Chapter Eleven of the North American Free Trade Agreement ("NAFTA").[151] All three companies are among the largest food producers in the United States. They alleged that Mexico's tax measure violated various obligations under NAFTA, including the national treatment standard, performance requirement, and prohibition of expropriations.[152] The initiation of ISDS cases was just one of a series of actions that U.S. HFCS producers took to pressure the Mexican government to repeal the beverages taxes.[153]

---

145. Off. of U.S. Trade Rep, 2022 Special 301 Report 10, 12 (Apr. 2022), https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf [https://perma.cc/XW4G-ASZE].

146. *See id.*

147. Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶4.3, WTO Doc. WT/DS308/R (adopted July 10, 2005).

148. Magda Kornis, *U.S. Corn Sweeteners and Mexican Sugar: Agreement at Last!*, USITC J. Int'l Com. & Econ. 1, 3 (2006).

149. *See id.* at 1.

150. In 1997, Mexico imposed antidumping duties on imports of products containing HFCS from the United States, after finding that these products were being sold in Mexico below their fair value price. The United States challenged these antidumping duties, both under Chapter 19 of NAFTA and at the WTO, and prevailed in both proceedings. The antidumping duties were lifted by Mexico in May 2002. *See* Stephen Haley & Nydia Suarez, *U.S.-Mexico Sweetener Trade Mired in Dispute*, U.S. Dep't of Agric. (Sept. 1999), https://www.ers.usda.gov/media/trslu0ge/us-mexico-sweetener-trade-mired-in-dispute.pdf [https://perma.cc/9LQL-W7UU].

151. *See* Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB/04/5, Award (Nov. 21, 2007); Cargill, Inc. v. Mexico, ICSID Case No. ARB/05/2, Award (Sept. 18, 2009); Corn Prods Int'l, Inc. v. Mexico, ICSID Case No. ARB/04/1, Award (Aug. 18, 2009).

152. Archer Daniels Midland Co. v. Mexico, ICSID Case No. ARB/04/5, Notice of Arbitration (Aug. 4, 2004), 15–18.

153. *NAFTA Suit on HFCS Tax Threatened as U.S., Mexican Industries Talk*, Inside U.S. Trade (Oct. 17, 2003), https://insidetrade.com/inside-us-trade/nafta-suit-hfcs-tax-threatened-us-mexican-industries-talk [https://perma.cc/X5FH-35UH].

In addition to the ISDS proceedings, the three U.S. firms lobbied the U.S. Congress and the Bush Administration to urge its Mexican counterpart to remove the tax.[154] A week after Mexico imposed the HFCS tax, ADM, Cargill, and Corn Products International, together with other members of the HFCS industry, sent an industry letter to the United States Trade Representative, Robert Zoellick, requesting that he "seek a commitment from the Government of Mexico by the close of this week to take whatever steps that are within its power to prevent this tax reform from going into effect in order to prevent further damage to America's largest agricultural sector."[155] In response to these requests, the USTR initiated multiple rounds of negotiations with the Mexican government to resolve the dispute, while simultaneously filing a WTO case against Mexico on the ground that the beverage taxes violated the national treatment standard under General Agreement on Tariffs and Trade ("GATT") Article III, by treating foreign imports less favorably than domestic like products.[156] Furthermore, the Corn Refiners Association ("CRA"), of which ADM, Cargill, and Corn Products International are members, also lobbied the U.S. Senate to impose retaliatory tariffs on Mexican food and agricultural exports to the United States.[157] Senator Chuck Grassley, who was at the time the chairman of the Senate Committee on Finance and represented a key corn and corn sweetener production state, introduced a bill to impose duties on Mexican products, such as tequila, in retaliation for Mexico's taxes.[158] Grassley also met with Mexican senators and urged the removal of the beverages taxes.[159]

The three U.S. firms also approached the Mexican government to reverse the tax measure. Cargill representatives held meetings with Mexico's Secretary of Economy, Ernesto Derbez, to discuss the possibility of repealing the tax.[160] Corn Products International and its wholly owned subsidiary, Arancia CP, carried out an "extensive lobbying campaign" spanning 21 months, which included meetings with government officials and over 100 legislators from

154. Elizabeth Trujillo, *Disaggregating the Regional-Multilateral Overlap: The NAFTA Looking-Glass*, 19 Ind. Int'l & Comp. L. Rev. 553, 561 (2009).

155. Letter from High Fructose Corn Syrup Industry Members to Robert Zoellick, U.S. Trade Rep. (Jan. 2002) (on file with author).

156. Trujillo, *supra* note 154, at 560; Richard Mills, *USTR Zoellick Pleased Mexico Exempts High Fructose Corn Syrup from Protectionist Tax*, Off. of U.S. Trade Rep. (Mar. 5, 2003), https://ustr.gov/archive/Document_Library/Press_Releases/2002/March/USTR_Zoellick_Pleased_Mexico_Exempts_High_Fructose_Corn_Syrup_from_Protectionist_Tax.html [https://perma.cc/AE43-UFGH].

157. Corn Refiners Assoc., Corn: Part of a Healthy Diet, Annual Report 2004, at 4 (2004), https://corn.org/wp-content/uploads/2015/07/CRAR2004.pdf [https://perma.cc/52BT-2XWV].

158. *Grassley Introduces Bill Retaliating Against Mexican Exports for HFCS Tax*, Inside U.S. Trade (Nov. 25, 2003), https://insidetrade-com.mutex.gmu.edu/content/grassley-introduces-bill-retaliating-against-mexican-exports-hfcs-tax [https://perma.cc/H7VN-CDD6].

159. *See id.*; *Grassley Meets with Mexican Senators, Urges Removal of Ag Trade Barriers*, U.S. Senate Comm. On Fin. (May 15, 2003), https://www.finance.senate.gov/chairmans-news/grassley-meets-with-mexican-senators-urges-removal-of-ag-trade-barriers [https://perma.cc/T2UZ-CSWW].

160. Cargill, Inc. v. Mexico, ICSID Case No. ARB/05/2, Notice of Arbitration, ¶ 5 (Dec. 29, 2004).

Mexico's two leading parties.[161] Arancia CP also instituted domestic litigation proceedings in Mexican courts to challenge the constitutionality of the beverage taxes.[162] Likewise, ADM held meetings with Mexico's Secretary of Economy in Washington D.C. and with other Mexican officials in Mexico City, to urge for the removal of the tax.[163]

The sustained pressure campaign eventually resulted in Mexico's repeal of the beverages tax. In March 2006, the Appellate Body issued a report concluding that Mexico's tax measure violated its obligations under WTO agreements.[164] On July 27, 2006, the United States and Mexico reached an agreement to resolve the dispute. Mexico agreed to terminate the HFCS tax by January 1, 2007.[165] In exchange, the United States agreed to increase sugar imports from Mexico.[166] Interestingly, in contrast to the beIN case, after Mexico suspended the tax measure, the three U.S. firms persisted with their arbitration proceedings and eventually prevailed, securing a total of over $168 million in damages.[167]

C. Vodafone v. India and Cairn Energy v. India

Both Vodafone and Cairn Energy are large British multinational corporations that have business operations in India. In 2012, India amended its Income Tax Act ("2012 Amendment") to allow for the retrospective collection of taxes on capital gains from transfer of shares by non-residents in non-Indian companies that indirectly held assets in India.[168] Such capital gains were not taxable before the 2012 Amendment. The amended law applied retrospectively to any transaction made after 1962, when the Income Tax Act was enacted. Having previously entered into such transactions, Vodafone and Cairn Energy were both subject to the amended legislation.

In May 2007, Vodafone acquired a majority stake in the Hong Kong-based mobile operator, Hutchison Whampoa, from Hutchison Telecommunications

161. Corn Products Int'l, Inc. v. Mexico, ICSID Case No. ARB/04/1, Notice of Arbitration, ¶ 70 (Oct. 21, 2003).

162. Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga*, 5 MEX. L. REV. 199, 229 (2012).

163. *Archer Daniels*, Notice of Arbitration, at ¶ 14.

164. LATIN AM. DIGIT. BEAT, *WTO Issues Final Decision Declaring Mexican Tax on Corn Syrup Illegal* 1 (Mar. 29, 2006), https://digitalrepository.unm.edu/sourcemex/4973 [https://perma.cc/V5A9-KX98].

165. Kornis, *supra* note 148, at 3.

166. *See id.* at 8.

167. Luke Eric Peterson, *Damages Awarded in One of Three NAFTA Sweetener Arbitrations Against Mexico*, INV. ARB. REP. (Sept. 2, 2009), https://www.iareporter.com/articles/damages-awarded-in-one-of-three-nafta-sweetener-arbitrations-against-mexico [https://perma.cc/8JZH-AAUP]; Elizabeth Whitsitt, *Claim by Cargill Leads to Another Loss for Mexico*, INT'L INST. SUSTAINABLE DEV. (Oct. 2, 2009), https://www.iisd.org/itn/en/2009/09/29/claim-by-cargill-leads-to-another-loss-for-mexico [https://perma.cc/2MQ4-3MVN].

168. Koustav Das, *Controversial Retrospective Tax Law Scrapped After Long Wait: Here's What it Means,* IND. TODAY (Aug. 6, 2021), https://www.indiatoday.in/business/story/controversial-retrospective-tax-law-scrapped-after-long-wait-here-s-what-it-means-1837747-2021-08-06 [https://perma.cc/6HMJ-TN8R].

International Limited for an amount of $11 billion. Both Vodafone and Hutchison Telecommunications International Limited were considered non-residents for tax purposes.[169] As a result of the acquisition, Vodafone gained indirect control of an Indian telecom company, Hutchison Essar Limited.[170] Prior to the 2012 Amendment, Indian tax authorities approached Vodafone regarding the taxation of capital gains arising from the transaction, which involved Indian assets.[171] Vodafone did not comply with the tax demand and challenged it in Indian courts.[172] After the 2012 Amendment was enacted, Indian tax authorities renewed the tax demand on Vodafone, imposing a capital gains tax of $2.14 billion, which was later increased to $3.32 billion to include interest and penalties.[173] Vodafone protested the tax assessment and refused to pay the tax bill.[174]

Similarly, in 2006, in an effort to consolidate its Indian assets under one Indian holding company (Cairn India), Cairn UK Holdings Limited (Cairn Energy) transferred its shareholding in Cairn India Holdings Limited to Cairn India.[175] As a result of the transaction, Cairn India acquired the entire Indian business of the Cairn group.[176] Under the 2012 Amendment, Cairn Energy was ordered to pay $1.6 billion in retroactive tax on capital gains from this transaction. With interest and penalties, the tax demand grew to $4.4 billion.[177]

Both companies resorted to ISDS, challenging India's application of the 2012 Amendment in separate proceedings.[178] Vodafone filed two ISDS cases against India, one by its parent company in London under the U.K.-India BIT, the other one by its Dutch subsidiary under the Netherlands-India BIT.[179] In both cases, Vodafone argued that India's imposition of tax demands under the 2012 Amendment violated the fair and equitable treatment standard under the two BITs.[180] Similarly, Cairn Energy brought an ISDS case under the U.K.-India

169. *See* Cairn Energy PLC and Cairn U.K. Holdings Ltd. v. India, PCA Case No. 2016-07, Final Award (Dec. 21, 2020), paras. 37, 103.

170. Ravi Sawana, *Impact of Vodafone Arbitration Award—An Analysis*, Bloomberg (Oct. 13, 2020), https://news.bloombergtax.com/daily-tax-report-international/impact-of-vodafone-arbitration-award-an-analysis [https://perma.cc/4SLJ-VXSK].

171. *Cairn Energy*, Final Award, at ¶ 108.

172. *Id.* at ¶ 109.

173. Das, *supra* note 168; *Vodafone Files Second Tax Claim Against India*, Glob. Arb. Rev. (May 17, 2017), https://globalarbitrationreview.com/article/vodafone-files-second-tax-claim-against-india [https://perma.cc/G8XV-8UYZ].

174. *See Cairn Energy*, Final Award, at ¶ 109.

175. *See id.* at ¶ 76.

176. Sawana, *supra* note 170; Sanderson, *supra* note 1.

177. Sanderson, *supra* note 1.

178. Vodafone Int'l Holdings BV v. India (I), PCA Case No. 2016-35, Notice of Arbitration (Apr. 17, 2014); Vodafone Grp. PLC and Vodafone Consol. Holdings Ltd. v. India (II); *see Cairn Energy*, Final Award, at ¶ 2.

179. *Vodafone Versus India Investment Treaty Arbitration*, Aceris Law (Apr. 6, 2018), https://www.acerislaw.com/vodafone-versus-india-investment-treaty-arbitration [https://perma.cc/Q4ZW-KTZS].

180. Nikos Lavranos, *Vodafone v India Award: Risky Business of Retroactive Taxation*, Thompson Reuters (Dec. 21, 2020), http://arbitrationblog.practicallaw.com/vodafone-v-india-award-risky-business-of-retroactive-taxation [https://perma.cc/L6B7-NPCL].

BIT.[181] Both companies sought damages and requested that the Indian government withdraw its unlawful tax demand.[182]

Besides resorting to ISDS, the two companies engaged in a series of litigation and public relations efforts. Vodafone initially challenged Indian tax authorities' imposition of the capital gain tax in Indian courts and won a landmark decision at the Supreme Court of India, which found that the 1962 Income Tax Act did not allow for taxation of indirect transfers of capital assets in India by non-residents.[183] Vodafone's chief executive, Vittorio Colao, submitted a letter to Indian Prime Minister Manmohan Singh, expressing concerns that retrospective taxation would tarnish India's image as an investment destination.[184] The U.K. Government also engaged in talks with the Indian Government regarding the Vodafone case, with multiple British Prime Ministers bringing it to the attention of the Indian Prime Minister in an effort to pressure the latter to repeal the tax.[185] A joint statement was also issued by the United States, the United Kingdom, and the European Union, expressing concerns over India's move to impose a retrospective capital gains tax on transactions taking place wholly outside of India.[186]

Cairn Energy, like Vodafone, took a multi-pronged approach in response to the retrospective tax demand from India. While the ISDS case was ongoing, Cairn Energy initiated multiple rounds of domestic litigation, challenging its tax assessment at the Income-Tax Appellate Tribunal ("ITAT") and the Delhi

181. *See Cairn Energy*, Final Award, at ¶ 2.

182. *Vodafone Goes Ahead with Treaty Claim Against India*, GLOB. ARB. REV. (May 8, 2018), https://globalarbitrationreview.com/article/vodafone-goes-ahead-treaty-claim-against-india [https://perma.cc/MXW3-UPLJ].

183. This ruling partially prompted the Indian Parliament to pass the 2012 Amendment to expand the scope of the legislation to cover such transfers. *See Cairn Energy*, Final Award, ¶¶ 123–124.

184. Gargi Chakravarty, *Retrospective Tax: A Timeline of Flip-Flops*, BUS. STANDARD (Jan. 25, 2013), https://www.business-standard.com/article/economy-policy/retrospective-tax-a-timeline-of-flip-flops-112101000156_1.html [https://perma.cc/KHB3-TB4H].

185. When Vodafone was first hit with the tax assessment, then-British Prime Minister, Gordon Brown, wrote to Indian Prime Minister Singh, stating that taxing cross-border deals, such as Vodafone's, could "create uncertainty for foreign investors and affect the country's investment climate." *Gordon Brown Writes to Manmohan on Vodafone*, ECON. TIMES (Feb. 5, 2010), https://economictimes.indiatimes.com/industry/telecom/gordon-brown-writes-to-manmohan-on-vodafone/articleshow/5536483.cms [https://perma.cc/8CV4-8AAZ]. After Indian tax authorities renewed the tax demand following the amendment of the Income Tax Act, Gordon Brown's successor, David Cameron, also raised the Vodafone issue to Indian Prime Minister on multiple occasions, pressuring the latter to resolve the tax issue soon. *See Cameron Backs Vodafone in Tax Dispute With India, Says System Should Be Fair*, NDTV PROFIT (Feb. 18, 2013), https://www.ndtv.com/business/cameron-backs-vodafone-in-tax-dispute-with-india-says-system-should-be-fair-318132 [https://perma.cc/9PRN-FXCZ]; Rowena Mason & Dean Nelson, *David Cameron Intervenes for Cairn and Vodafone in India*, TELEGRAPH (Feb. 19, 2011), https://www.telegraph.co.uk/finance/newsbysector/energy/8334832/David-Cameron-intervenes-for-Cairn-and-Vodafone-in-India.html [https://perma.cc/645P-9C86]. Along the same lines, the U.K. Chancellor of the Exchequer, George Osborne, stated that "[w]e are concerned about the proposed Budget measure . . . not just because of its impact on one company, Vodafone, but because we think it might damage the overall climate for investment in India." Mukesh Jagota & Prasanta Sahu, *U.K. Raises Tax Issue with India*, WALL ST. J. (Apr. 3, 2012), https://www.wsj.com/articles/SB10001424052702304023504577319363809558678 [https://perma.cc/2UR5-PFG8].

186. *Cairn Energy*, Final Award, at ¶ 112.

High Court.[187] Cairn Energy also worked closely with the U.K. Government in an effort to resolve the dispute. Cairn Energy's top executives accompanied the U.K. Government's trade delegation to India to lobby for the repeal of the tax.[188] Ahead of Theresa May's visit to India in 2016, Cairn Energy submitted letters to Indian Prime Minister Narendra Modi and Finance Minister Arun Jaitley, reminding them that the resolution to the retrospective tax demand was still pending.[189] During the visit, May raised the issue of Cairn Energy with Modi, who promised that they were "working on it."[190]

The ISDS tribunals in both cases found that India's retrospective taxation violated the fair and equitable treatment standard under its BITs.[191] Cairn Energy was awarded $1.7 billion plus interest in damages.[192] The amount of damages awarded in the Vodafone case remains confidential.[193] The multi-pronged efforts persisted after the award was issued. Cairn Energy took steps in multiple forums to enforce the ISDS award and pressure the Indian government to withdraw the tax measures. Several Cairn shareholders reportedly lobbied U.K., U.S., and Indian authorities to press for the enforcement of the award.[194] On behalf of its shareholders, including big financial institutions such as BlackRock, Fidelity, Franklin Templeton, Schroders, and Aviva, Cairn Energy submitted a letter to the Indian government, threatening to seize Indian government assets.[195] The letter stated that "[a]s India is a signatory to the New York Convention, the award can be enforced against Indian assets in numerous jurisdictions around the world for which the necessary preparations have been put in place."[196] Cairn Energy followed through on its threat and pursued enforcement proceedings in various jurisdictions. Specifically, Cairn Energy

187. *$1.4 Billion Cairn Arbitration Award: Nirmala Sitharaman Says It's Her Duty to Appeal*, Times of India (Mar. 5, 2021), https://timesofindia.indiatimes.com/business/india-business/1-4-billion-cairn-arbitration-award-finance-minister-says-its-her-duty-to-appeal/articleshow/81348282.cms? [https://perma.cc/Z8L5-QY7V].

188. *Cameron Directly Lobbies with Indian PM to Further Brit Companies' Interest*, Asian News Int'l (Feb. 19, 2011), https://www.yahoo.com/news/cameron-directly-lobbies-indian-pm-further-brit-companies-20110219-044827-303.html [https://perma.cc/KKT9-FC8J]; Mason & Nelson, *supra* note 185.

189. Lei Wang, *Defence, Trade to Be Focus of May's Talks With Modi*, BRICS Info. Sharing & Exchanging Platform (Nov. 7, 2016), http://www.brics-info.org/defence-trade-to-be-focus-of-mays-talks-with-modi [https://perma.cc/LD4P-RTPW].

190. Jim Pickard & Kiran Stacey, *Immigration Dominates Theresa May's Trade Mission to India*, Fin. Times (Nov. 7, 2016), https://www.ft.com/content/35094156-a4d4-11e6-8898-79a99e2a4de6 [https://perma.cc/6NNG-HNLB].

191. *See Cairn Energy*, Final Award, at ¶ 887.

192. Toby Fisher, *Cairn Freezes Indian Property in Paris*, Glob. Arb. Rev. (July 8, 2021), https://globalarbitrationreview.com/article/cairn-freezes-indian-property-in-paris [https://perma.cc/7SV5-KGJT].

193. Cosmo Sanderson, *India Liable in Vodafone Tax Dispute*, Glob. Arb. Rev. (Sept. 25, 2020), https://globalarbitrationreview.com/article/india-liable-in-vodafone-tax-dispute [https://perma.cc/8W8Z-GJPP].

194. Amy Kazmin, *Cairn Energy Threatens to Seize Indian Assets Over $1.2bn Tax Dispute*, Fin. Times (Jan. 27, 2021), https://www.ft.com/content/6a2ffeb0-c321-47b2-a0dd-a2742b401f44 [https://perma.cc/YYZ6-C3WS].

195. *See id.*

196. Aditi Shah & Aftab Ahmed, *Exclusive: Cairn Energy Threatens to Enforce Arbitration Award Against Indian Assets Overseas*, Reuters (Jan. 25, 2021), https://www.reuters.com/article/

filed cases in French and U.S. courts, freezing more than €20 million worth of properties owned by India in Paris, and targeting assets of Air India, India's national airline, in the United States.[197] The company also brought recognition proceedings in Mauritius and Singapore, and was reportedly considering similar actions in the Cayman Islands, Japan, and the United Arab Emirates.[198]

Finally, Cairn Energy also appealed to the Indian public to exert additional pressure on the Indian government, with its CEO posting on Twitter that "[Cairn Energy] has enjoyed a long and successful history operating in India, investing billions of dollars, bringing employment and benefiting local communities . . . [W]e have discussed a number of proposals with the aim of finding a swift resolution that could be mutually acceptable to the Government of India and the interests of Cairn's shareholders. Assuming such a resolution can be achieved, we look forward to being able to move on to further opportunities to invest in India."[199]

These joint efforts succeeded. In 2021, India passed a new bill to repeal the retrospective tax.[200] Under the new bill, all pending retrospective tax claims would be dropped and any tax amount paid would be returned, provided that the companies withdrew litigation or arbitration claims.[201] The bill specifically referred to the ISDS cases brought by Vodafone Group and Cairn Energy, stating that "the retrospective [taxation law] and consequent demand created in a few cases continue to be a sore point with potential investors" and "damage India's reputation as an attractive destination."[202] Both companies welcomed the move and agreed to forgo the arbitral awards and future claims against India.[203]

***

The three case studies show that in pressuring respondent governments to reverse course on the challenged measure, large firms employ a multi-pronged approach, wherein the filing of ISDS cases is only one pillar of a coordinated strategy. In each of these cases, large firms mobilized support from their home

---

cairn-energy-india-arbitration/exclusive-cairn-energy-threatens-to-enforce-arbitration-award-against-indian-assets-overseas-idUSKBN29U1FI [https://perma.cc/Z3XR-NMN8].

197. Cosmo Sanderson, *Cairn Settles Tax Dispute with India*, Glob. Arb. Rev. (Nov. 4, 2021), https://globalarbitrationreview.com/cairn-settles-tax-dispute-india [https://perma.cc/84VG-GKRA].

198. *See id.*

199. @CapricornEnergy, Twitter (Feb. 22, 2021, 3:55 AM), https://twitter.com/capricornenergy/status/1363774289204371457? [https://perma.cc/J7R5-MQM3].

200. Das, *supra* note 168.

201. *Indian Government Brings in a Bill to Bury the Infamous Retrospective Tax That Haunted Cairn and Vodafone for Nearly a Decade*, Press Tr. India (Aug. 5, 2021), https://www.businessinsider.in/policy/news/cairn-energy-tax-dispute-new-bill-to-remove-retrospective-taxation-that-hit-vodafone/articleshow/85071357.cms [https://perma.cc/U9J9-G73G].

202. *Id.*

203. Dilasha Seth, *Vodafone Likely to Settle Retro Tax Case with India in Coming Weeks*, Bus. Today (Nov. 9, 2021), https://www.businesstoday.in/latest/corporate/story/vodafone-likely-to-settle-retro-tax-case-with-india-in-coming-weeks-311724-2021-11-09 [https://perma.cc/M86Q-VMH4].

country governments, industry associations, or business partners to exert additional pressure on the respondent governments. This finding is consistent with a broader literature that illustrates how large multinational corporations have various institutional choices at their disposal and pursue a combination of them to achieve their corporate goals.[204] Adding to this literature, the case studies illustrate that this tactic is a global phenomenon. With higher stakes in industries and businesses that span across multiple jurisdictions, large firms have stronger incentives to influence the regulatory landscape than small- or medium-sized firms have.[205] Additionally, large firms are typically better-connected and have more resources to utilize various institutional choices, making them more likely to successfully chill government regulation.[206]

V. Implications for ISDS Reform

One of the main concerns surrounding the ISDS system is that it serves the interests of large multinational corporations and allows them to chill government regulation at the expense of the public interest. In light of these concerns, efforts to reform the ISDS system have gained traction in recent years. One of the most notable reform efforts is the one led by the UNCITRAL Working Group III. As part of this effort, countries and commentators have put forward various proposals to reform the existing system. Some of these proposals are more incremental in nature, focusing on addressing specific concerns without an overhaul of the existing system.[207] Others aim to eliminate one of the key features of the system: the ability of foreign investors to directly bring claims against host countries before an international arbitral tribunal.[208] For example, the European Union and Canada have proposed to replace ISDS with a multilateral investment court, in which judges are appointed with fixed terms and receive a regular salary.[209] The European Union has already included provisions

204. *See generally* Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 Int'l Org. 735 (2007); Ji Li, *In Pursuit of Fairness: How Chinese Multinational Companies React to U.S. Government Bias*, 62 Harv. Int'l L.J. 375 (2021); Benjamin Hawkins et al., *A Multi-Level, Multi-Jurisdictional Strategy: Transnational Tobacco Companies' Attempts to Obstruct Tobacco Packaging Restrictions*, 14 Glob. Pub. Health 570 (2019).

205. *See* In Song Kim et al., *Firms and Global Value Chains: Identifying Firms' Multidimensional Trade Preferences*, 63 Int'l Stud. Q. 153, 166 (finding that "multinational firms would be most interested in investment protection given their global production networks, while it would be least salient for domestic firms").

206. *See* Matilde Bombardini, *Firm Heterogeneity and Lobby Participants*, 75 J. Int'l Econ. 329, 329; Geoffrey Gertz et al., *Legalization, Diplomacy, and Development: Do Investment Treaties De-Politicize Investment Disputes?* 107 World Dev. 239, 251 (2018).

207. Anthea Roberts, *Incremental, Systematic, and Paradigmatic Reform of Investor-State Arbitration*, 112 Am. J. Int'l L. 410, 414–15 (2018).

208. *Id.* at 416.

209. *Commission Concept Paper on Investment in TTIP and Beyond—The Path for Reform*, at 11, COM (2015) 8555 final (May 5, 2015), https://www.statewatch.org/media/documents/news/2015/may/eu-council-ttip-8555-15.pdf [https://perma.cc/EGS8-2XEJ].

featuring the multilateral investment court in recent treaties that it signed with Canada, Vietnam and Singapore.[210] Other countries, such as Brazil and India, have proposed to remove ISDS and instead resolve these disputes through other dispute resolution mechanisms such as domestic litigation and state-to-state arbitration.[211] Under the United States-Mexico-Canada Agreement ("USMCA"), which replaced NAFTA, ISDS is no longer available for disputes involving Canada (or Canadian investors), and its scope has been significantly limited for disputes between the United States (or U.S. investors) and Mexico (or Mexican investors).[212]

The empirical findings in this Article bear relevance to the ongoing discussion surrounding ISDS reform and the various institutional alternatives. ISDS was originally designed to provide a neutral adjudicatory forum that would allow foreign investors to obtain financial compensation from host countries for investments that were expropriated or otherwise negatively affected as a result of the host country's violations of international law. The availability of an independent arbitral tribunal for the resolution of investor-state disputes can be especially crucial for small- or medium-sized firms, who are more vulnerable to abuse by host country governments and less likely to receive justice before domestic courts or other domestic mechanisms.[213] In fact, for small- or medium-sized firms, ISDS is often considered a last resort to recover losses.[214] As the data show, contrary to what many commentators have suggested, small- or medium-sized firms actively initiate ISDS proceedings and have therefrom claimed significant damages. There is no clear evidence that small- or medium-sized firms lack access to or have limited recourse in ISDS proceedings.[215]

On the other hand, the proposed institutional alternatives may be less accessible to small- or medium-sized firms than is ISDS and may even reinforce the imbalance in influence between large multinational corporations and small- or medium-sized firms. As others have noted, a multilateral investment court with a two-tiered system featuring a standing court and an appeals court may

210. *See* Comprehensive Economic and Trade Agreement, E.U.-Can., arts. 8.27, 8.28, Oct. 30, 2016; Investment Protection Agreement, E.U.-Sing., art. 3.12, Oct. 19, 2018; Free Trade Agreement, E.U.-Viet. art. 15.4, June 30, 2019.

211. Roberts, *supra* note 207, at 416.

212. Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) art. 14, Nov. 30, 2018, 134 Stat. 11.

213. *Commission Report on the Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (ITIP)*, at 67, COM (2015) 3 final (Jan. 13, 2015).

214. Queen Mary U. London, 2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS (2020), https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf [https://perma.cc/4YW2-LNN2].

215. This is consistent with a fact sheet posted by USTR in 2015, which states that "[m]ost ISDS cases are brought by individuals or small businesses, investors that often have much fewer resources than large multinational corporations and are thus more easily discriminated against or mistreated." Evans, *supra* note 68.

not reduce costs, but rather only add delays to the procedure.[216] Indeed, with a limited number of judges, a multilateral investment court may face even greater challenges in addressing the volume of cases that may arise, as has already been demonstrated by the WTO's appellate body.[217] All of these factors can make a multilateral investment court more favorable to large corporations as opposed to small- or medium-sized firms, which are less resourced and in particular need of international arbitration to protect them against violations of investment protection obligations.[218]

Similarly, resorting to alternative mechanisms such as domestic litigation or state-to-state arbitration may only imperil small- or medium-sized firms' ability to recover damages. As mentioned, compared to large multinational corporations, small- or medium-sized firms are often less well-connected locally and have fewer resources in general, and for that very reason need a neutral adjudicatory forum at the international level.[219] Small- or medium-sized firms are likely to be particularly disadvantaged if their only resort is domestic litigation. Likewise, with respect to state-to-state arbitration, where only the investor's home state has the right to bring a case on behalf of the investor, small- or medium-sized firms are also in a disadvantaged position. Compared to large corporations, small- or medium-sized firms have less political access to home state officials, who often allocate state resources based on an investor's economic weight and systemic importance.[220] Large corporations are politically influential and resourceful, therefore more likely to succeed in persuading their home state governments to bring a case on their behalf.[221] In sum, the proposed institutional alternatives may not provide as much access to small- or medium-sized firms as does ISDS.

Turning to the concern that ISDS empowers well-resourced large corporations to influence host country policymaking, the empirical findings in this Article suggest that this concern is not without reason. Cases brought by large multinational corporations are more likely to result in the challenged measure being repealed or amended by the host country government. However, the way in which large corporations exert such influence appears to be more nuanced than existing commentaries indicate. While many critics attribute the "chilling" of regulations almost exclusively to ISDS, describing it as a major problem of the system itself, ISDS is sometimes only one part of a broader strategy employed by large corporations across multiple forums to shape the rules and

216. *See* Puig & Shaffer, *supra* note 22, at 407.
217. *See id.*; *Commission Report*, *supra* note 213, at 128.
218. *See* Puig & Shaffer, *supra* note 22, at 380.
219. *See* Urata & Baek, *supra* note 25, at 2320.
220. Alan Sykes, *Public Versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 J. Legal Stud. 631, 643 (2005); Puig & Shaffer, *supra* note 22, at 388.
221. Puig & Shaffer, *supra* note 22, at 394.

policies that affect their investments. Compared to small- or medium-sized firms, large multinational corporations tend to have long-term interests in host countries in which they invest and stronger incentives to fight for the "rules of the game."[222] That being the case, the institutional alternatives discussed above, which preclude foreign investors from bringing cases before an international arbitral tribunal, may do little to address the regulatory chill problem. Large corporations can always resort to alternatives, in addition to the other means that they have at their disposal, to exert pressure on the host country government. If anything, the proposed reforms could even reinforce the imbalance in influence between large multinational corporations and small- or medium-sized firms, as the proposed alternatives might be less accessible to small- or medium-sized firms than is ISDS.

To be clear, this Article does not suggest that the current ISDS system is free from problems or superior to the proposed alternatives in all aspects. Instead, the Article argues that the current reform proposals may not effectively address concerns regarding ISDS primarily serving the interests of large multinational corporations while being inaccessible to small- and medium-sized firms, which themselves may not be well-founded.

Conclusion

The ISDS system has long been criticized for empowering large multinationals; they are considered the primary users and the main beneficiaries of the system, both in terms of obtaining awards of damages, which is what the system was originally designed for, and in terms of influencing host country government actions, a phenomenon that has been subject to increasing concern. This Article empirically examines this criticism by presenting comprehensive descriptive statistics on the characteristics of claimants in ISDS cases. While it is generally believed that the financial burden of ISDS proceedings may limit the access of small- or medium-sized firms to the system, this Article shows that small- or medium-sized firms, rather than large firms, acted as claimants in most ISDS cases. With respect to damages, large firms do not appear more likely to prevail in ISDS cases. However, compared with small- or medium-sized firms, large firms have had greater success in influencing respondent countries to amend or repeal the challenged measures in ISDS cases.

Case studies suggest that large firms may be more successful in chilling government regulation due to the coordinated legal and public relations strategies they employed. ISDS claims are only one pillar of this coordinated strategy. In each of the three cases described above, the claimant investors' home country

222. Busch, *supra* note 204; Li, *supra* note 204.

governments, industry associations, or business partners played a role in pressuring host governments. Large firms, which are typically better-connected and possess greater influence in the industry, may be better able to mobilize support from these actors. By contrast, small- or medium-sized firms are likely less-equipped to recruit other actors to push the respondent government to repeal the challenged measure. Instead, they often file ISDS cases to obtain financial compensation.

Concerns over ISDS's empowerment of large multinationals to influence government public policies have given rise to increasing demands for reform. Some have argued for the abolition of the ISDS system. However, these types of proposals may not solve the problem of regulatory chill. Large firms can still resort to other fora both domestically and abroad to influence respondent government policies. While there is evidence that large multinational corporations are more successful in pressuring respondent governments to abandon the measures they challenged in ISDS cases, it is questionable that eliminating ISDS will restrain this corporate influence. Instead, it may deprive small- or medium-sized firms, who are more vulnerable to abuse of power by host country governments, of the opportunity to seek redress before an international arbitral tribunal.

Figure A1: Case Characteristics of Large Firms (in Standardized Difference)

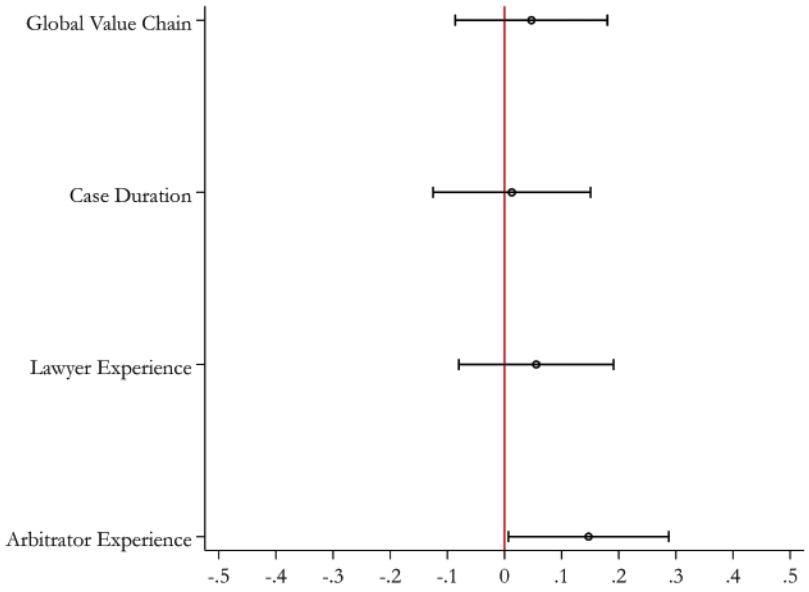


Figure A2: Respondent Countries

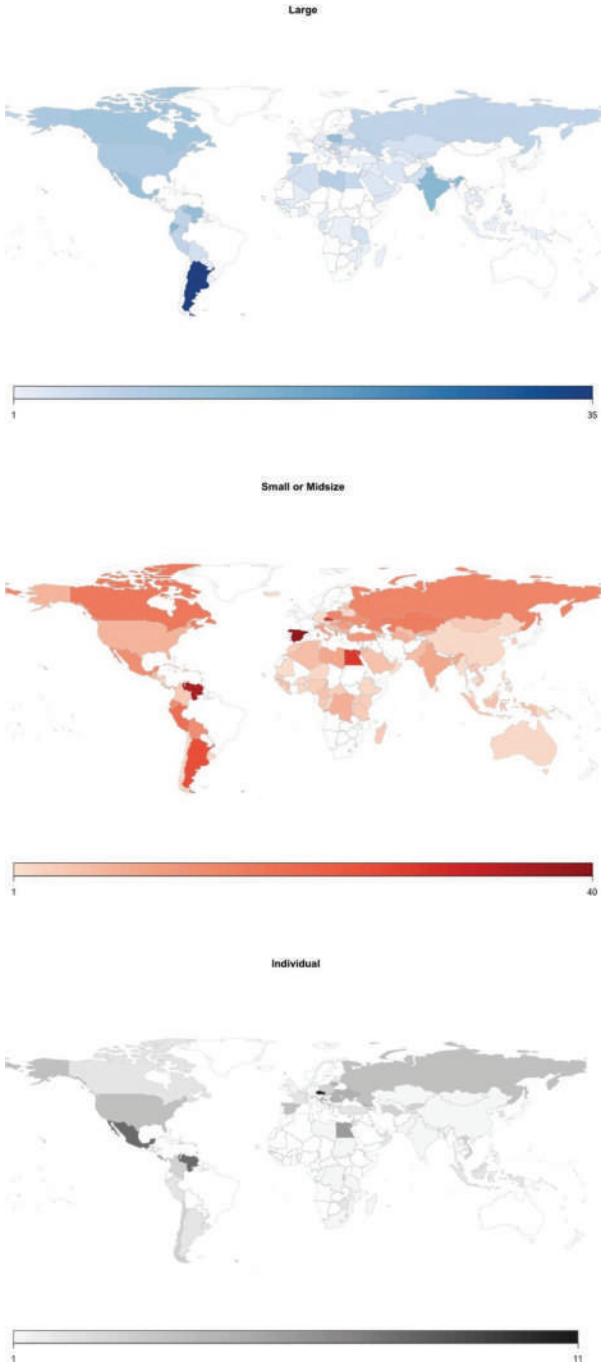


Figure A3: Industry

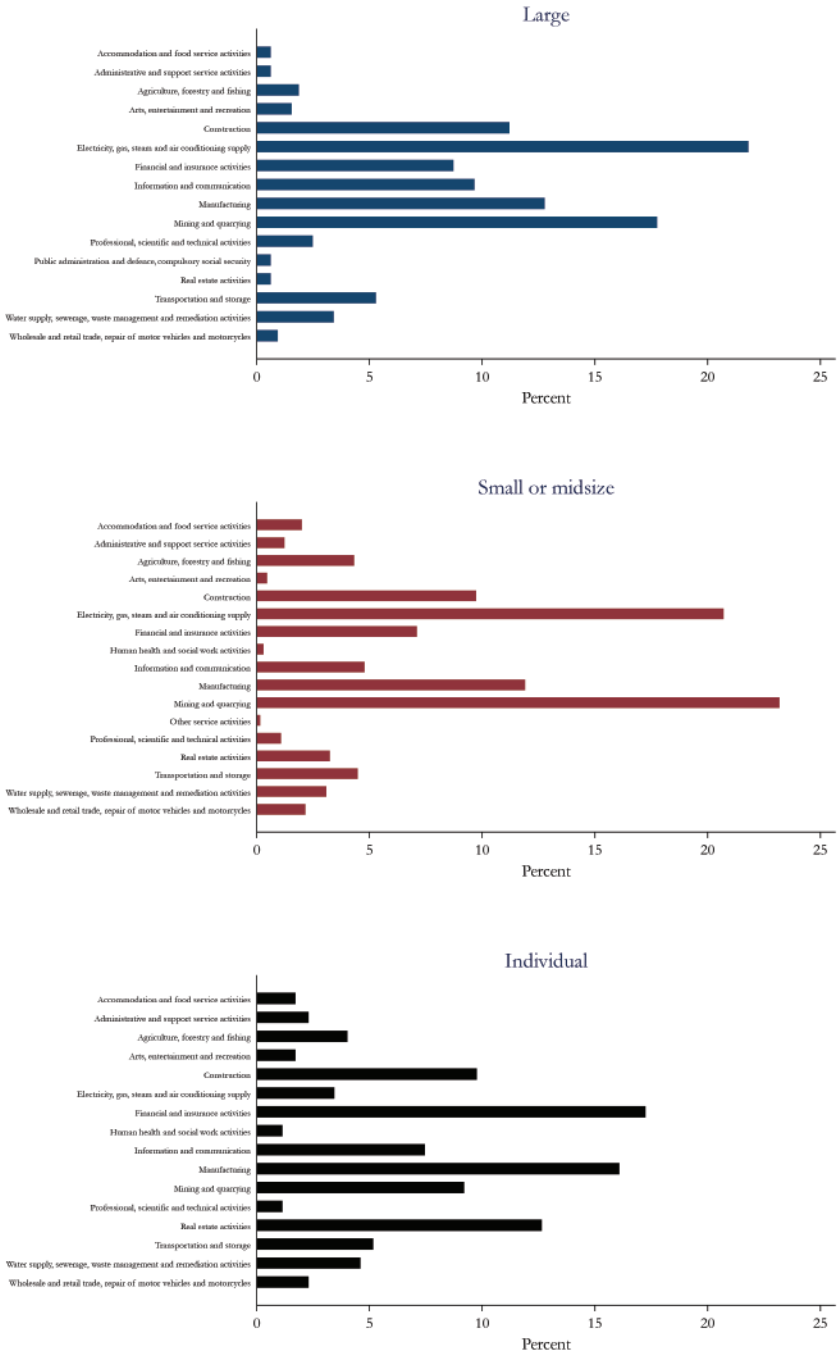


Figure A4: Alleged Claims

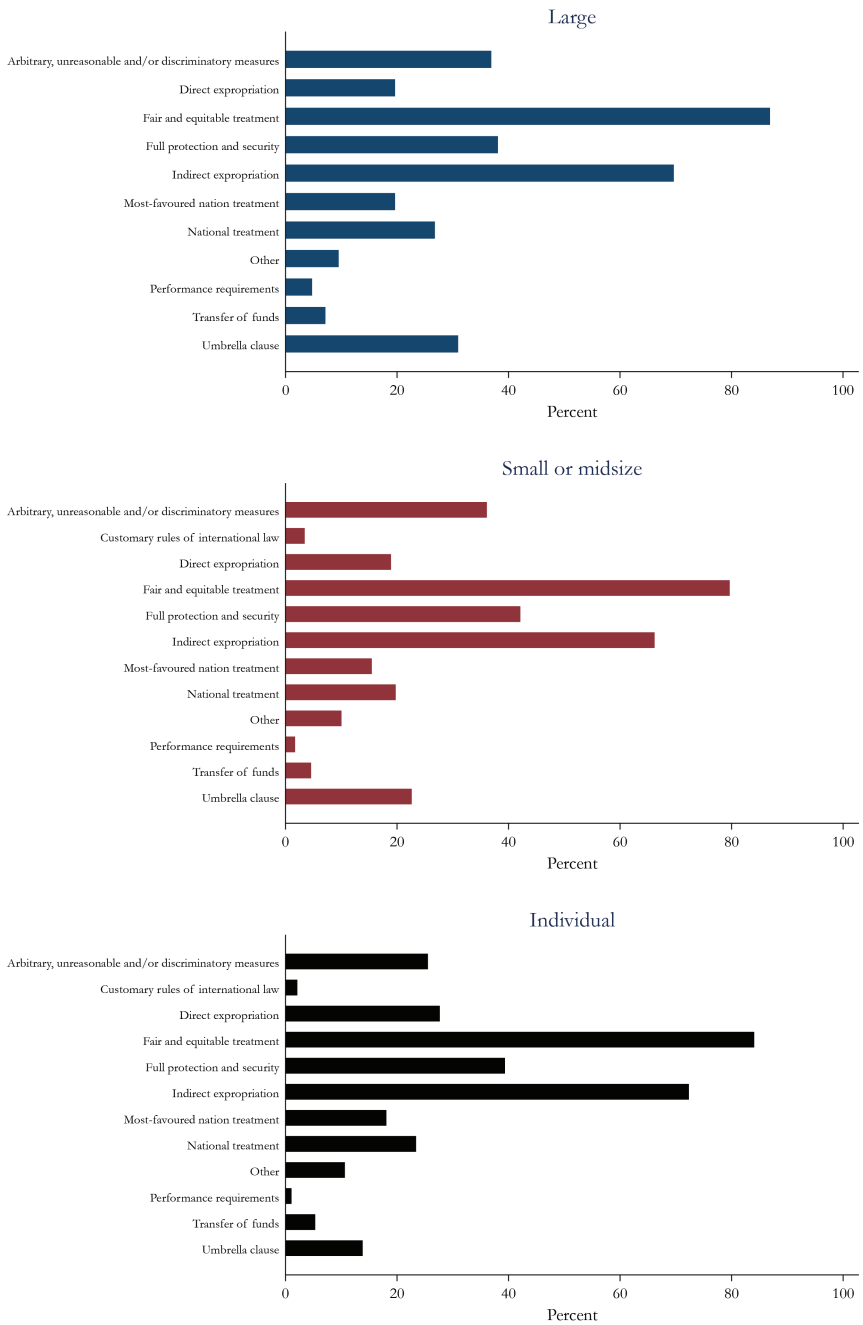


Figure A5: Challenged Measures

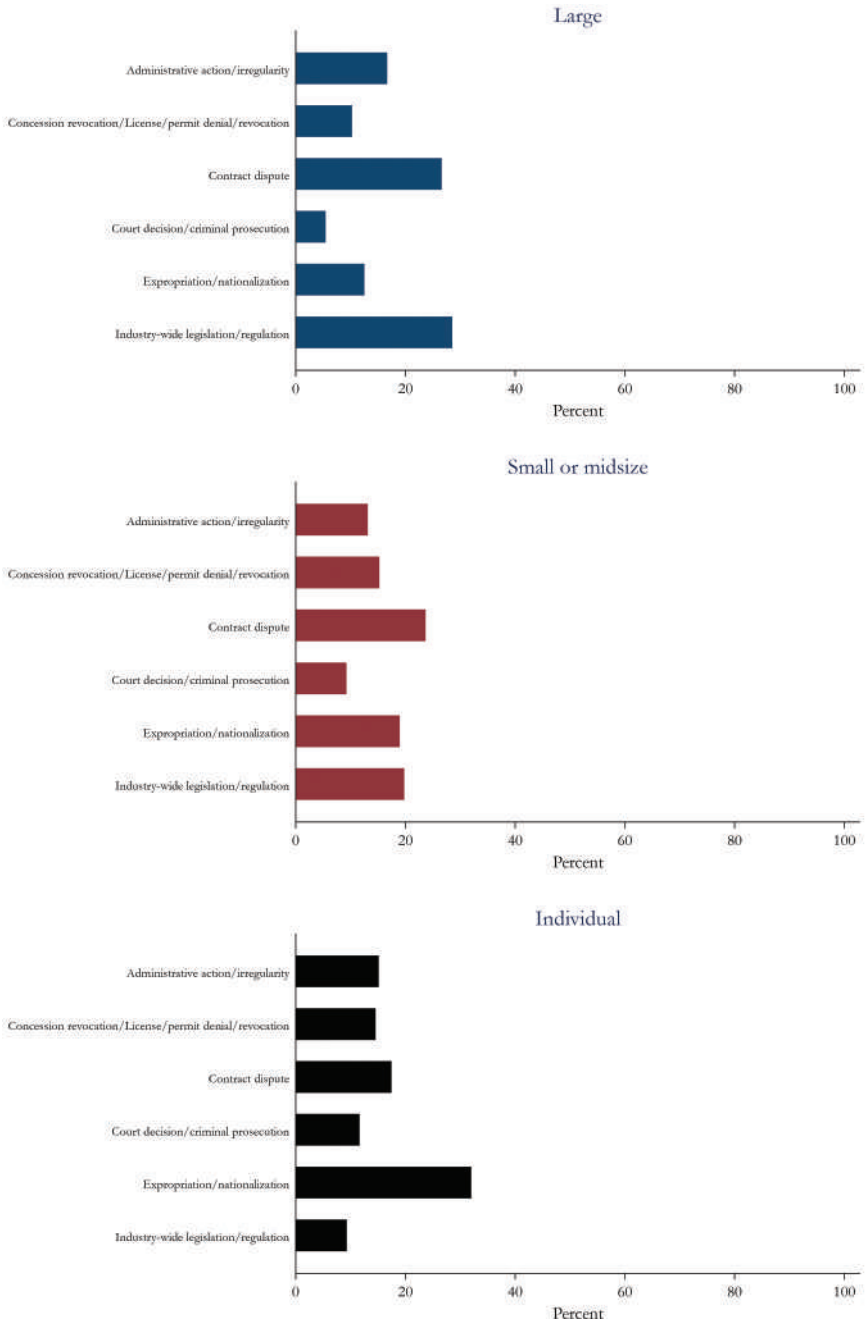


Figure A6: Invoked Instruments