



OCCASIONAL NOTE

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INTERNATIONAL INVESTMENT DISPUTES ON THE RISE

International investment disputes arising from investment agreements are on the increase, at times involving tens of millions of dollars, according to data released today by UNCTAD.¹ They cover a wide range of economic activities and various types of foreign involvement, and relate to key provisions in investment agreements.

The cumulative number of treaty-based cases brought before the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID) has risen from three at year-end 1994 to 106 this month (*figure 1*). In addition, there are at least 54 cases (cumulative) outside ICSID, as compared to two at the end of 1994. The cumulative total of all known cases brought under bilateral, regional (e.g. NAFTA) or plurilateral (e.g. Energy Charter Treaty) agreements that contain investment clauses, or international investment agreements (IIAs), is now 160 (*figure 2*).² Well over half (92) of the 160 known claims were filed within the past three years. Virtually none of them was initiated by governments.³

In view of this recent surge, it is not surprising that the majority of investment treaty arbitration proceedings are still pending before tribunals. With so many known claims still pending, some uncertainty surrounds the concrete meaning to be ascribed to key treaty provisions. "All of this means that governments need to be very careful when negotiating investment treaties", advises Karl P. Sauvant, Director of UNCTAD's Division on Investment, Technology and Enterprise Development.

The investor-State dispute settlement universe is growing in numbers ...

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² International investment disputes can also arise from contracts between investors and governments. A number of such disputes are (or have been) before ICSID **but are not included in these data**.

³ The sole exception is a 2003 State-to-State dispute between Chile and Peru. This claim was lodged by Peru following an investor-State claim filed by a Chilean firm, Lucchetti (Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru, ICSID Case No. ARB/03/4). In other instances, States have set up claims commissions to deal with investor-to-State cases, such as the Iran-United States Claims Tribunal.

Three major factors exert a substantial influence on the number of treaty-based arbitration proceedings and what is publicly known about them. One factor, the unprecedented spate of lawsuits against Argentina, serves to inflate that number, while the other two –the confidentiality of disputes under some arbitral rules, and a decision not to categorize "notices of intent" as official claims – exert downward pressure on the figures. More specifically:

- **Argentina.** The number of recent cases of investor-State disputes has been influenced by the unprecedented volume of international litigation initiated against this single country. Since Argentina's 2001 financial crisis, foreign investors have claimed compensation for losses in such industries as gas and oil production, telecommunications concessions, and electricity and water distribution. In 2003 alone, 20 transnational corporations (TNCs) filed lawsuits against Argentina, alleging violation of investment treaty guarantees. A further eight ICSID cases had been launched as of 24 November 2004.⁴ However, even excluding all the Argentine claims to date (37), the number of cases is still on the rise.
- **Confidentiality of disputes.** The ICSID arbitration facility is the only facility to maintain a public registry of claims. A number of claims are known to be proceeding outside of ICSID, however (*figure 3*).⁵ What is not known is how many cases there are in addition to those reflected in figure 3. The number of treaty-based investment disputes is thus likely to be higher than the available figures indicate. While considerable efforts have been undertaken to uncover non-ICSID claims through interviews and searches of media reports and company filings, it remains the case that some investors or governments desire confidentiality – which is why the number of exact cases is difficult to determine.
- **Notices of intent not counted.** A number of investment treaty claims – in the form of a notice of intent, or the submission of a request to ICSID – were omitted from UNCTAD's database, either because they had not proceeded to formal arbitration at press time or because the existence of an arbitration could not be verified.⁶

ICSID claims are publicly disclosed only when they have been officially registered by the ICSID secretariat. Meanwhile, outside of ICSID, notices of intent to arbitrate against a host State may or may not be publicized, but an actual arbitration will not necessarily be set into motion until a request for arbitration or claim has been filed. For example, in the case of claims brought

⁴ On 14 October 2004, the Government of Argentina issued a dismissal of the claims filed against it in ICSID, arguing that none of the cases was justified (Comunicado de Prensa, Ministerio de Economía y Producción).

⁵ Numerous IIAs allow investors to choose between ICSID (including ICSID's Additional Facility) and ad hoc arbitration procedures, using UNCITRAL arbitration rules, for example. Other institutional facilities available for use are the ICC Court of Arbitration in Paris, the Stockholm Chamber of Commerce Arbitration, the London Court of International Arbitration and various regional arbitration centres, particularly Singapore and Cairo. The fact that the total number of arbitration proceedings remains unknown is partly a result of this option, as only ICSID provides a list of cases. Information is not always available from these other arbitration institutions.

⁶ Because claims may be filed in different manners, depending on the applicable treaty and arbitral rules, there is no obvious common standard for assessing when arbitration proceedings have been launched. NAFTA requires "notices of intent"; bilateral investment treaties (usually) do not.

under NAFTA, a notice of intent to arbitrate does not set in motion an arbitration – it merely signals intent.

For this reason, the list of the 160 known arbitration cases excludes instances where intent has been notified to arbitrate pursuant to NAFTA or some other treaty (through the commencement of a mandatory waiting period under a treaty, for example) but where a request for arbitration is still forthcoming or could not be confirmed.

... involving both developed and developing countries ...

According to UNCTAD's database, at least 50 governments – 31 of them in the developing world, 11 in developed countries and eight in transition economies – have faced investment treaty arbitration. Argentina leads them all with 37 claims, 34 of which relate at least in part to that country's financial crisis. Mexico has the second highest number of known claims (14), most of them falling under NAFTA, and a handful under various bilateral investment treaties (BITs). The United States has also faced a sizeable number (10), all of them pursuant to NAFTA and not to the several dozen BITs concluded by that country. Poland (seven claims) and Egypt (six) also figure prominently, along with four countries that have each faced four claims: Canada, Chile, Czech Republic and Ukraine.

... in all sectors and in crucial issues ...

Investor-State arbitration proceedings concern investments at both the pre-establishment phase and the operational stages and involve all kinds and types of investments, including privatization contracts and state concessions. They cover a broad range of measures that are being challenged: emergency laws put into place during a financial crisis, value-added taxes, re-zoning of land from agricultural use to commercial use, measures on hazardous waste facilities, issues related to the intent to divest shareholdings of public enterprises to a foreign investor, treatment at the hands of media regulators, etc. Investor claims deal with issues related to fair and equitable treatment, non-discrimination, expropriation (regulatory takings or measures "tantamount to" expropriation) and the scope and definition of agreements.

The economic sectors that have seen treaty-based disputes include construction, water and sewage services, brewing, telecommunications concessions, banking and financial services, hotel management, television and radio broadcasting, hazardous waste management, textile production, gas and oil production, and various forms of mining.

... and sometimes involve very large sums ...

Information about the level of damages being sought by investors tends to be sporadic and unreliable. Even ascertaining the amounts sought by foreign investors can be difficult, as the bulk of cases is still at a preliminary stage and under the ICSID system, claimants are not obliged to quantify their claims until after the jurisdictional stage has been completed. Claims proceeding under other rules of arbitration may also not be quantified at an early stage, and even when they are, counsel and investors tend to be reticent about disclosing such information.

It is nonetheless clear that some claims involve large sums:

- In 2003, the Czech Republic was ordered to pay some \$270 million plus substantial interest to a Dutch-based broadcasting firm following a tribunal's finding that the Republic's media regulatory authorities had violated the terms of an investment treaty with the Netherlands.
- Occidental's 2002 claim against Ecuador led to an award of \$71 million plus interest.

But not all claims lead to the requested awards being granted. The amount awarded for a claim is not necessarily an indication of the real financial magnitude of a case, since there are no penalties for claimants filing particularly high claims. Very large claims often end up yielding very small awards. The Metalclad vs. Mexico claim for \$43 million, for example, led to an award of less than \$17 million, and S.D. Myers, in its \$70-to-\$80 million claim against Canada, was awarded \$6 million, i.e. less than 10% of the amount sought.

Nor do all claims brought by businesses succeed. Indeed, a significant number of cases are won by States. But even defence costs money.

... with sometimes substantial arbitration costs...

Investment treaty arbitration proceedings are not inexpensive to mount. The Metalclad Corporation is reported to have spent some \$4 million on lawyers' and arbitrators' fees in an arbitration against Mexico.⁷ The Czech Republic reportedly spent \$10 million on its defence against two major claims brought by a European-based broadcasting firm and one of its major shareholders.⁸ More recently, the Czech government announced expected legal fees of \$3.3 million in 2004, and \$13.8 million next year, to fight off similar claims.⁹

A cursory review of cost decisions in recent awards suggests that the average legal costs incurred by governments are \$1-to-\$2 million, including lawyers' fees; the costs for the tribunal, about \$400,000 or more; and the costs for the claimant about the same as for the defendant.¹⁰

...and the number of disputes is likely to rise even further

UNCTAD believes that foreign investors may well turn increasingly to international investor-State dispute settlement procedures under IIAs to challenge measures taken by authorities that they perceive as adversely affecting their investments. Even

⁷ See J.C. Thomas, "A reply to Professor Brower", *Columbia Journal of Transnational Law*, Vol. 40 (2002), No. 3. This case was also reviewed by a Canadian court, the cost of which is not included in this figure.

⁸ See Luke Eric Peterson, "Czech Republic hit with massive compensation bill in investment treaty dispute", *INVEST-SD News Bulletin*, 21 March 2003, available at http://www.iisd.org/pdf/2003/investment_investsd_march_2003.pdf.

⁹ See Luke Eric Peterson, "Croatian firm invokes investment treaty to challenge Czech eviction notice", *INVEST-SD News Bulletin*, 1 October 2004, http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf.

¹⁰ Preliminary results of a CEPMLP/Dundee research project on economic analysis of transnational dispute management.

discounting the spate of claims against Argentina, it is evident that the number of arbitration proceedings is growing steadily and is likely to continue to do so.

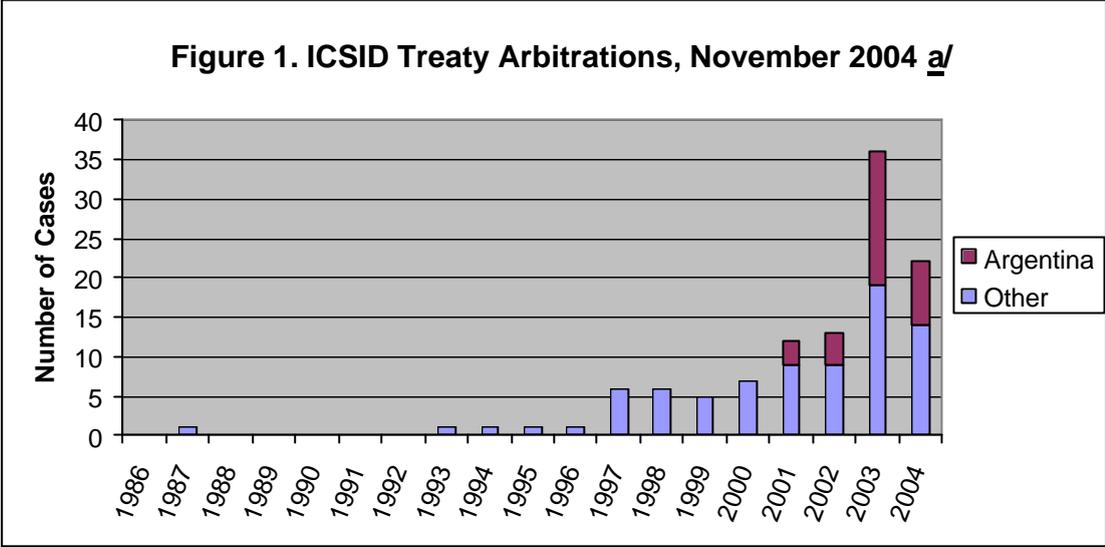
In addition, more investment may lead to more occasions for disputes – and more occasions for disputes combined with more IIAs are likely to lead to more cases.¹¹ The increasing prominence of complicated infrastructure projects is particularly relevant here.¹² The increase in disputes may also reflect an apparently growing tendency among foreign investors to litigate, following well-publicized claims.

Given the complexity of the content of IIAs, this means that governments need to be judicious in negotiating such agreements. They also need to follow the developments of disputes to be sensitive to actions that could trigger litigation.

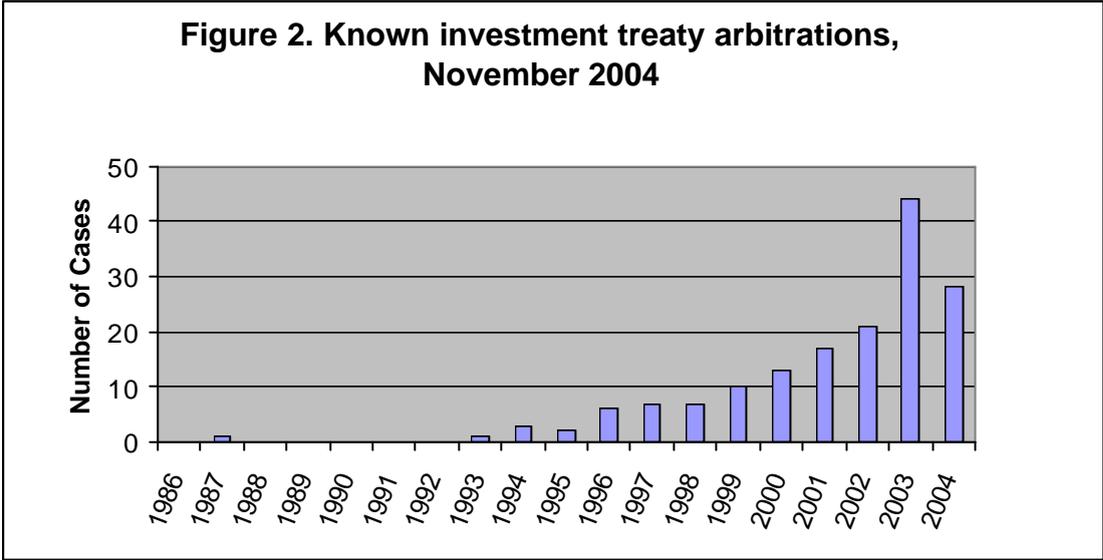
UNCTAD is convening an ad-hoc expert meeting in Geneva today to look into various substantive and procedural issues related to dispute settlement.

¹¹ For documentation of the growth of IIAs, see the various *World Investment Reports*, at www.unctad.org/wir. BITs are documented at www.unctad.org/ia, where the texts of more than 1,800 BITs can also be found. See also in this context press release UNCTAD/PRESS/PR/2004/036, on the rise of South-South investment agreements.

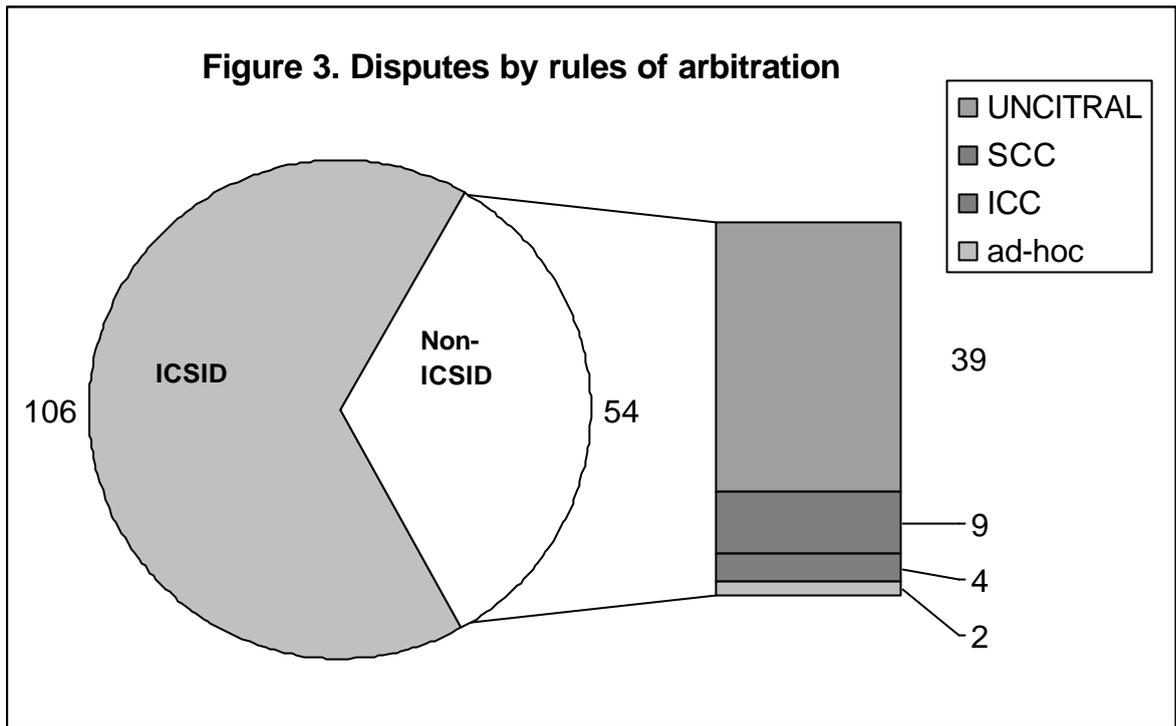
¹² Although not counted here, there may also be an increase in contracts between foreign investors and governments, including in the form of stabilization agreements that developing-country governments conclude with domestic and foreign private investors. (Peru alone, for example, has concluded over 400 such agreements between 1993 and 2004; see www.proinversion.gob.pe/english/convenios.) Many of these contracts, particularly those involving foreign investors, contain international investor-State dispute settlement provisions.



Source: UNCTAD.
^{a/} Argentina since 2001.



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