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Latest Developments in Investor-State Dispute Settlement

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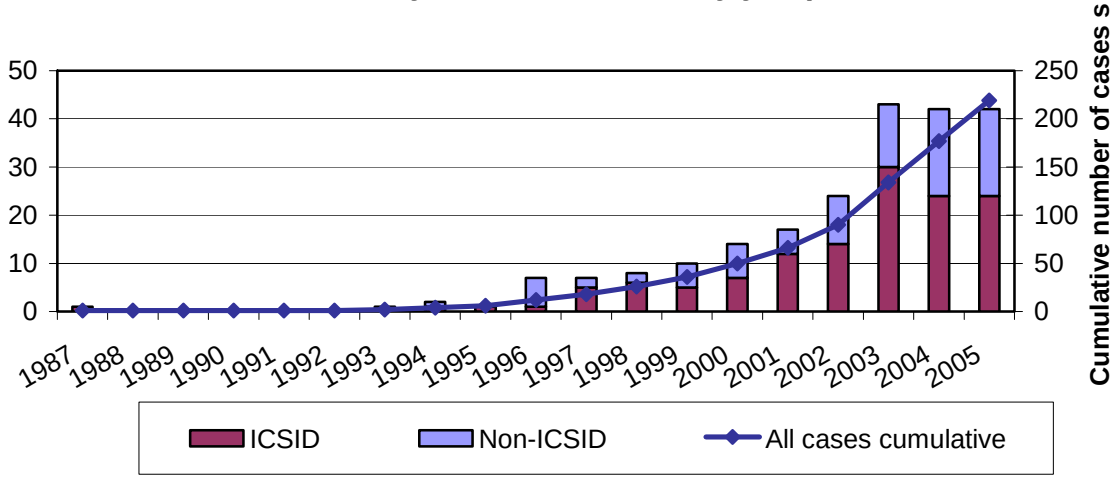
In 2005, investor-State dispute settlement cases continued to grow …

Investor-State arbitrations under international investment agreements (IIAs) continue to grow unabated, with at least 42 cases launched in the first 11 months of 2005.[1] This brings the cumulative number of known treaty-based cases to 219 by November 2005 (figure 1).

Figure 1. Known investment treaty arbitrations, (cumulative and newly instituted cases, by year) a/



Source: UNCTAD. a/ As of November 2005.

132 of these have been brought before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) (including ICSID's Additional Facility) and 87 before other

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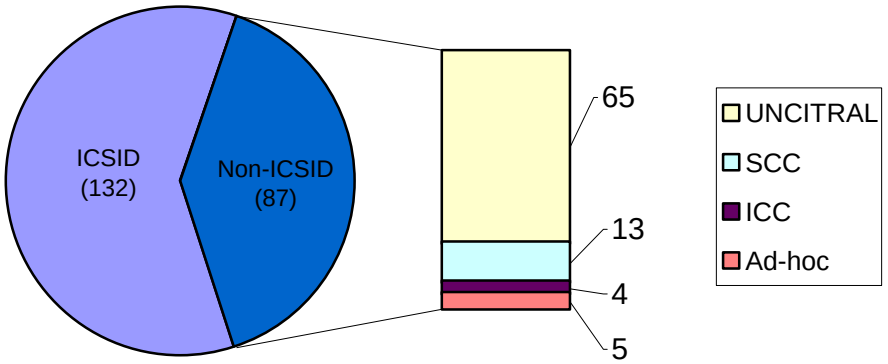
[1] International investment disputes can also arise from contracts between investors and governments; a number of such disputes are (or have been) brought under ICSID, other institutional arbitration systems or ad-hoc arbitration but are not included in this data, except where there is also a treaty-based claim at hand.

arbitration forums (figure 2).[2] Almost two-thirds (69%) of the 219 known claims were filed since the beginning of 2002, with virtually none of them initiated by governments.[3]

Figure 2. Disputes by forum of arbitration a/



Source: UNCTAD.

a/ As of November 2005.
Note: SCC = Stockholm Chamber of Commerce; ICC = International Chamber of Commerce.

These figures do not include cases where a party signaled its intention to submit a claim to arbitration, but has not yet actually commenced the arbitration; if these cases are ultimately submitted to arbitration, the number of pending claims will grow further. Some disputes are settled either before an arbitration is launched or after the arbitration procedure has started.[4]

The total number of these treaty-based investment arbitrations is impossible to measure; UNCTAD's figures are based on extensive research and interviews, but represent only those claims which were disclosed by the parties or arbitral institutions.[5] Even where the existence of a claim has been made public, such as in the case of a claim listed on the ICSID registry, often the information about such a claim is quite minimal. Similarly, from

[2] The new figure of 219 includes new cases launched since UNCTAD's earlier reporting on this issue (see UNCTAD 2004), as well as a number of earlier cases that were only recently uncovered.
[3] The sole exception is a 2003 State-to-State dispute between Chile and Peru that was lodged in response to 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). The State-State procedure was discontinued, and the investor-State case was only recently decided. In other instances, States have set up claims commissions to deal with investor-to-State cases, such as the Iran-United States Claims Tribunal.
[4] UNCTAD's database includes all claims that have been brought to arbitration, including those that were settled after they had been registered.
[5] While the ICSID facility maintains a public registry of claims, other arbitral mechanisms do not, meaning that no official records of all claims filed are available. Further, in some cases the investors or governments involved in a dispute wish to keep the dispute confidential, with the result that the disputants themselves may not reveal the existence of a claim

the information on the ICSID database it is not possible to ascertain whether a claim is based on an investment treaty or on a State contract. Under other arbitration rules, the details of a claim and its resolution are likely to become public only if one of the disputants discloses such information. As such, it is significant that 40% of the discovered claims occur under these rules. The actual number of claims instituted under non-ICSID rules is very likely larger than what is known.

The increase in the number of claims can be attributed to several factors. First, increases in international investment flows lead to more occasions for disputes, and more occasions for disputes combined with more IIAs are likely to lead to more cases.[6] Second, with larger numbers of IIAs in place, more investor-State disputes are likely to involve an alleged violation of a treaty provision and more of them are likely to be within the ambit of a dispute settlement provision.[7] Another reason may be the higher complexity of recent IIAs, and the regulatory difficulties in their proper implementation. Further, as news of large, successful claims spreads, more investors may be encouraged to utilize the investor-State dispute resolution mechanism. Greater transparency in arbitration (e.g. within the North American Free Trade Agreement (NAFTA)) may also be a factor in giving greater visibility to this legal avenue of dispute settlement.

… involving a growing number of countries …

At least 61 governments – 37 of them in the developing world, 14 in developed countries and 10 in Southeast Europe and the Commonwealth of Independent States – have faced investment treaty arbitration (annex). 42 claims have been lodged against Argentina, 39 of which relate at least in part to that country's financial crisis. The number of claims against Argentina peaked in 2003 with 20 claims, and receded to 8 new claims in 2004 and 5 new cases in the first 10.5 months of 2005. Mexico has the second highest number of known claims (17), most of them falling under NAFTA, and a handful under various BITs. The United States has also faced a sizeable number (11). India (9 claims), the Czech Republic (8), Egypt (8), Poland (7 claims), the Russian Federation (7) and Ecuador (7) also figure prominently, followed by Canada (6) and the Republic of Moldova (5).

In several instances, there have been a multitude of claims lodged in relation to a single investment or against a particular government action. In the Argentine cases, a series of emergency measures and policies have occasioned suits from several dozen companies. In the case of India, the disputed Dabhol Power project lead to a least 2 BIT claims by the project companies, as well as 7 BIT claims by the project lenders. All of these claims against India have since been settled. At other times, a single arbitration may have dozens upon dozens of individual claimants, as is the case in a NAFTA arbitration against Mexico

[6] The worldwide inward FDI stock has grown from $2.8 trillion at the end of 1995 to $8.9 trillion at the end of 2004 (see www.unctad.org/wir).

[7] The universe of IIAs has grown considerably over the past decade. At the end of 2004, it consisted of 2,392 bilateral treaties for the promotion and protection of investment (or bilateral investment treaties/BITs) (compared to 1,097 BITs at the end of 1995), 2,559 treaties for the avoidance of double taxation (or double taxation treaties/DTTs) (1,663 in 1995), and some 215 other bilateral and regional trade and investment agreements as well as various multilateral agreements that contain a commitment to liberalize, protect and/or promote investment (77 in 1995) (see www.unctad.org/iia).

by individual investors in tourist real estate, and in the case of a NAFTA arbitration against the United States brought by more than 100 individual claimants in the beef industry.[8]

2005 saw efforts towards consolidation in major NAFTA cases. On request by the United States, three softwood lumber cases, Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America were consolidated. On the other hand, Mexico requested the establishment of a Tribunal to consider the consolidation of three claims, all concerning an excise tax on certain soft drinks. The Consolidation Tribunal in its order of May 2005, however, decided against the consolidation on grounds that the United States based companies involved were in direct and major competition.

… arising in all sectors, and concerning key treaty provisions …

Recent cases have involved the whole range of investment activities and all kinds of investments, including privatization contracts and State concessions. Measures that have been challenged include emergency laws put in place during a financial crisis, value added taxes, rezoning 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, and treatment at the hands of media regulators. Disputes have involved provisions such as those on fair and equitable treatment, non-discrimination, expropriation, and the scope and definition of agreements. These disputes are yielding awards that interpret the legal obligations of the agreements, which in turn has caused some parties to reexamine and reconsider the scope and extent of such obligations.

In 2005, the vast majority of claims have been brought under BITs, several of the cases involving also contractual disputes between the State and the investor. Several recent cases also involve disputes under the Energy Charter Treaty.

… with 2005 seeing important tribunal decisions in terms of interpretation of treaty provisions …

Tribunals have rendered decisions in the last year that could have significant substantive implications:

- On most-favored-nation treatment, two recent decisions (Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan[9] and Plama Consortium Limited v. Republic of Bulgaria[10]) have significantly departed from the broad approach taken by the Maffezini and Siemens cases in 2000 and 2004 on the scope of the MFN provision. These two recent decisions on jurisdiction reaffirm the distinction that must be drawn between substantive and jurisdictional provisions of

[8] In UNCTAD's database, the beef cases against the United States are counted as one case, rather than 100, following the United States practice on its website. Furthermore, all of these cases pertain to the same facts and the same treaty. By contrast, the 7 Dabhol banks cases are counted as individual cases, because they pertain to the same facts, but different investment treaties.

9 Decision on Jurisdiction, 9 November 2004 (ICSID Case No. ARB/02/13).

10 Decision on Jurisdiction, 8 February 2005 (ICSID Case No. ARB/03/24).

treaties in order to identify the scope of protection offered by an MFN provision and the importance of the wording of the basic treaty.[11]

- On the umbrella effect of treaties, in recent decisions tribunals have followed a broad approach. However, in an April 2005 decision (Impregilo S.p.A. v. Islamic Republic of Pakistan[12]), the tribunal has limited treaty jurisdiction over contractual claims to claims involving the State itself and not State-owned entities. In the recent Consortium Groupement L.E.S.I. - DIPENTA v. Algeria,[13] the tribunal emphasized the requirement that contractual claims brought before a treaty-based tribunal must also amount to a violation of the treaty standards themselves.[14]

- The ruling on national treatment in the August 2005 decision on Methanex Corporation vs. United States of America[15] takes a narrow approach to the test of the requirement "in like circumstances", comparing the foreign investor to those economic activities comparable in the domestic sphere, rather than taking a broad approach as used for example in the S.D. Myers, Inc. v. Canada decision.[16]

- The first ICSID decision on the question of interpretation of awards as under Article 50 of the ICSID Convention was rendered by an arbitral tribunal. In the case Wena Hotels Limited v. the Arab Republic of Egypt,[17] Wena sought the interpretation of the concept of expropriation as used in the award. The tribunal found that there was indeed a dispute between Wena and Egypt as to the interpretation of the term "expropriation".

Another development worth mentioning is the attention paid by tribunals in two recent NAFTA cases to Amicus Curiae submissions.[18]

… in terms of awards …

Although the financial implications of the investor-State dispute resolution process can be substantial, the information available thus far does not provide a clear picture of their full nature. Information about the quantum of damages sought by investors tends to be sporadic and unreliable, in part because many claims are still in a preliminary stage and claimants

11 See, for example, the Plama decision, as follows: "… the principle with multiple exceptions as stated by the tribunal in the Maffezini case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them" (Plama Consortium Limited v. Bulgaria (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, paragraph 223).

[12] Decision on Jurisdiction, 22 April 2005 (ICSID Case No. ARB/02/2).

[13] Decision on Jurisdiction, 10 January 2005 (ICSID Case No. ARB/03/8).

[14] See Emmanuel Gaillard, "Treaty-based jurisdiction: broad dispute resolution clauses" *in International Arbitration Law*, *New York Law Journal*, 6 October 2005.

[15] Final Award, 3 August 2005, UNCITRAL (NAFTA).

[16] Final Award, 30 December 2002, UNCITRAL (NAFTA).

[17] Decision on Application for Interpretation of Award, 31 October 2005 (ICSID Case No. ARB/98/4).

[18] See the Methanex v. United States and UPS v. Canada decisions, Final Award, 3 August 2005, UNCITRAL (NAFTA), and Award on Jurisdiction, 22 November 2002, UNCITRAL (NAFTA).

are often not required to quantify their claims until a later stage in the proceedings. Nevertheless, it is known that some claims involve large sums, in some cases in the hundreds of millions of dollars. Recent examples include:

- In February 2005, an UNCITRAL tribunal awarded France Telecom $266 million after finding the Republic of Lebanon to be in breach of the France-Lebanon BIT. Lebanon has sought to challenge that verdict in the courts of Switzerland, where the arbitration was sited. The arbitral award has not been published by the parties.[19]

- In May 2005, an ICSID tribunal awarded a United States energy company some $133 million after finding Argentina in breach of its obligations under contracts and the United States-Argentina BIT. In September, Argentina introduced a procedure to annul the tribunal's award under Article 52 of the ICSID Convention.[20]

- In August 2005, an UNCITRAL tribunal dismissed in its entirety a set of claims by the Canadian-based Methanex Corporation, alleging violations of investment protections found in the NAFTA. Methanex had claimed some $970 million in damages.[21]

- Recently, a series of three arbitrations were mounted by the majority shareholders in the Yukos Corporation, alleging a violation by the Russian Federation of the Energy Charter Treaty. These claims are for a reported total of $33 billion, making them the largest known claims in investment arbitration history.[22]

Because the number of awards issued to date is relatively small, it remains unclear how frequently large claims will be successful. Even assuming that a claim is unsuccessful, the cost of defense can be significant.

... and in terms of costs for litigation.

Two recent decisions are noteworthy in as far as the allocation of costs and attorney's fees by the tribunals are concerned:

- The Methanex tribunal in its decision of 3 August 2005 on the merits awarded the burden of the full costs to the unsuccessful claimant, including the United States' legal costs.[23]

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[19] See Luke Eric Peterson, "France multinational wins treaty arbitration against Lebanon", *Investment Law and Policy News Bulletin*, 10 March 2005, http://www.iisd.org/pdf/2005/investment_investsd_mar10_2005.pdf.

[20] See Luke Eric Peterson, "Argentina moves to annul award in dispute with CMS Company over financial crisis", *Investment Treaty News*, 26 October 2005, http://www.iisd.org/pdf/2005/investment_investsd_oct26_2005.pdf.

[21] See http://www.state.gov/s/l/c5818.htm.

[22] See Luke Eric Peterson, "Menatep's Yukos claim is largest in investment treaty history, others in offing?", *Investment Law and Policy News Bulletin*, 22 February 2005, http://www.iisd.org/pdf/2005/investment_investsd_feb22_2005.pdf.

[23] See footnote 14.

- The annulment Committee in a recent decision rendered against the Seychelles,[24] has decided that all the costs of the annulment procedures should be borne by the State that had challenged the first award, seemingly in an attempt to discourage frivolous annulment procedures. The Committee made clear that an annulment proceeding does not offer a displeased litigant a fresh opportunity to second-guess an ICSID Tribunal's findings.

In the last year, the number of annulment procedures against ICSID awards has also been on the rise, with some 7 pending procedures introduced before the ICSID secretariat by States but also by investors.

The dramatic growth of investor-State dispute settlement cases has given rise to concerns and triggered several reactions on part of governments.

The surge in investment disputes arising from IIAs in and by itself is not necessarily an unhealthy development – after all, it is an expression of the rule of law, and hence an expression of the fact that IIAs "work" towards creating a favorable investment climate in host countries. However, there have been some concerns with regard to both the substantive aspects of the IIAs that have given rise to arbitrations and some procedural issues of existing investor-State dispute settlement mechanisms (UNCTAD 2004 and 2005).

These concerns have led to calls for a reform of the ICSID system, on the one hand, and to the revision of several model BITs, on the other. The latter include significant innovations regarding investor-State dispute settlement procedures. Greater and substantial transparency in arbitral proceedings, including open hearings, publication of related legal documents, and the possibility for representatives of civil society to submit "*amicus curiae*" notes to arbitral tribunals is foreseen. In addition, other very detailed provisions on investor-State dispute settlement are included in order to provide for a more legally oriented, predictable and orderly conduct at the different stages of this process. Thus, for example, the Canadian model BIT includes specific standard waiver forms to facilitate the filing of waivers as required by article 26 of the Agreement for purposes of filing a claim. The United States-Uruguay BIT, on the other hand, not only provides for a special procedure available at the early stages of the dispute settlement process aimed at discarding frivolous claims or to seek interim injunctive relief, but also envisages the possibility to set up a mechanism for appellate review, in order to foster a more consistent and rigorous application of international law in arbitral awards.

One key concern for developing countries is to increase their ability to manage the investor-State disputes effectively.

However, some broader development concerns and policy implications for developing countries remain to be addressed. Their vulnerability in this regard is based on their limited technical capacity to handle investment disputes coupled with the increasing number of such disputes, the potentially high costs involved of conducting such procedures, and the

[24] CDC Group plc v. Republic of the Seychelles, Case No. ARB/02/14. Note that this arbitration is not treaty-based.

potential impact of awards on the budget and a country's reputation as an investment location.

At the same time, the proper functioning of the dispute settlement system is dependent on well-informed partners. Technical assistance seems necessary required to enable countries to make effective and efficient use of the investor-State dispute settlement system as part of an overall endeavor to improve the investment climate, the rule of law and ensuing that IIAs contribute to countries' efforts to attract and benefit from foreign direct investment.

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Annex

Country	Number of claims
Argentina	42
Mexico	17
United States	11
India	9
Czech Republic	8
Egypt	8
Ecuador	7
Poland	7
Russian Federation	7
Canada	6
Moldova, Republic of	5
Chile	4
Congo, Democratic Republic of	4
Kazakhstan	4
Romania	4
Ukraine	4
Hungary	3
Pakistan	3
Venezuela	3
Algeria	2
Burundi	2
Estonia	2
Georgia	2
Jordan	2
Latvia	2
Lebanon	2
Morocco	2
Philippines	2
Sri Lanka	2
Turkey	2
United Arab Emirates	2
Albania	1
Bangladesh	1
Barbados	1
Bolivia	1
Bulgaria	1
Croatia	1
El Salvador	1
France/United Kingdom	1
Germany	1
Ghana	1
Guyana	1
Indonesia	1
Kyrgyzstan	1

Lithuania	1
Malaysia	1
Mongolia	1
Myanmar	1
Paraguay	1
Peru	1
Portugal	1
Saudi Arabia	1
Serbia-Montenegro	1
Slovenia	1
Spain	1
Tanzania, United Republic of	1
Trinidad and Tobago	1
Tunisia	1
Viet Nam	1
Yemen	1
Zimbabwe	1
Unknown	9

Source: UNCTAD.