

# Investor-to-State Dispute Settlement (ISDS) Some facts and figures

<u>Disclaimer:</u> this paper has been compiled for information purposes, based on publicly available studies and statistical overviews by external sources. It is not intended to constitute an exhaustive document.

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# 1. WHAT IS INVESTOR-TO-STATE DISPUTE SETTLEMENT?

Investor-State Dispute Settlement (ISDS) is a mechanism included in international investment agreements to ensure that commitments that countries have made to one another to protect mutual investments are respected.

These agreements date back to the 1960s. Today there are more than 3000 international investment agreements containing Investor-to -State dispute settlement provisions. EU member States account for 1400 of these.

In these investment agreements, countries have agreed upon a number of limited rules ("investment protection standards") on how to treat foreign investors established in their country (i.e. not to discriminate, but to provide fair treatment, to compensate in case of expropriation, and to allow the investor to transfer funds freely). If an investor considers that these basic rules have been breached, the investment agreements provide the possibility for investors to bring the matter before specialised investment tribunals set up under international rules on arbitration (UN or World Bank rules), i.e. Investor-to –State Dispute Settlement.

International enforcement mechanisms are a normal feature of most international agreements. The intention is to provide a neutral forum to solve disputes (e.g. the WTO dispute settlement system).

Also, international agreements, including investment agreements, are based on international law and most often do not form part of the domestic legal system. As a result they cannot be invoked before domestic courts, (which are competent to rule on disputes brought on the basis of national law). This is the *raison d'être* for international tribunals, including for investment matters.

## 2. WHO BRINGS ISDS CASES?

Investors bringing ISDS cases represent a very varied group which includes companies, associations and individuals.

Research carried out in the OECD<sup>1</sup> of around 100 decided ISDS cases (period 2006 to 2011) indicates that:

Gaukrodger, D. and K. Gordon (2012), "<u>Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community</u>", OECD Working Papers on International Investment, 2012/03, OECD Publishing (see P17-19)

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"nvestor claimants range from individuals with quite limited international experience (e.g. an association of retirees) to major multinational enterprises with tens of thousands of employees and global operations'.

In the OECD survey, it is shown that:

- ➤ 48 % of the cases were brought by medium and large enterprises, varying in size from several hundred employees to tens of thousands of employees.
  - only 8% of these were extremely large Multinationals i.e. those appearing in UNCTAD's list of top 100 multinational enterprises;
- ➤ 22% of the claimants in the sample were either individuals or very small corporations with limited foreign operations (one or two foreign projects);
- ➤ In 30 % of the cases, there was little or no public information on the type of claimant.

## 3. WHAT ARE ISDS CASES ABOUT?

Most ISDS cases concern administrative acts by the executive branches of governments affecting foreign investors, such as the cancellation of licences or permits, land zoning or breaches of contract.

UNCTAD's annual review of ISDS in 20142 states that.

'the two types of State conduct most frequently challenged by investors in 2014 were: (i) cancellations or alleged violations of contracts or concessions (at least nine cases); and (ii) revocations or denials of licences or permits (at least six cases).'

Another study commissioned by the Dutch Government also argues that that 90% of ISDS cases concern administrative measures. It notes that the other 10% of cases that are directed against general legislative measures are "hardly, if ever", successful<sup>3</sup>.

<sup>&</sup>lt;sup>2</sup> UNCTAD, IIA Issues Note N°1, February 2015, <u>Recent trends in IIAs and ISDS</u> (see P7)

<sup>&</sup>lt;sup>3</sup> The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24/06/2014 (see P127, para 283)

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As regards sectors, statistics from UNCTAD show that ISDS cases are lodged by a wide variety of investors. In 2013, more than 70% of all new claims concern investments in the services sectors (including the supply of electricity and gas, telecommunications, construction, tourism, banking, real estate services, retail trade, media and advertising and other)<sup>4</sup>.

Results for 2014 were broadly similar, with some 61% of new cases filed concerning the services sector, 28% primary industries and the remaining 11% investments in manufacturing<sup>5</sup>.

# 4. USE OF ISDS<sup>6</sup>

Based on UNCTAD data, there has until end 2014 been a total of 608 known ISDS claims (of which **356 cases are concluded)**.

➤ Investors from the EU Member State are the largest users of ISDS. Cases brought by investors from the European Union total 327, thus accounting for more than 50 % of ISDS cases initiated. Investors from almost all EU Member States have brought ISDS cases (except Estonia, Slovakia, Romania, Bulgaria, Malta and Ireland).

Combined, investors from the **Netherlands, the UK, Germany, France, Spain and Italy** have launched 236 cases, representing 72 % of all EU based cases and 39 % of ISDS cases at global level.

- EU Member States have rarely been challenged by investors <u>from</u> <u>outside the EU</u>. In total there have been **29 cases** (investors from Russia, Norway, Switzerland, India, Israel, Turkey, Lebanon, US and Canada). These represent less than 5% of all ISDS cases globally.
- ➤ EU Member States have been challenged most frequently by EU based investors (99 cases, mainly against Czech Republic, Slovakia, Hungary, Poland, Estonia, Hungary, Romania, Spain).

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<sup>&</sup>lt;sup>4</sup> UNCTAD, IIA Issues Note N°1, April 2014, <u>Recent developments in ISDS</u> (see P4)

<sup>&</sup>lt;sup>5</sup> <u>Recent trends in IIAs and ISDS</u> (see P7)

<sup>&</sup>lt;sup>6</sup> See: Recent trends in IIAs and ISDS

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These cases are either based on the ISDS provisions contained in the Energy Charter Treaty (to which the EU and all 28 EU Member States are party) or the **194 Bilateral Investment Treaties in force between EU Member States** concluded before enlargement and still remain in force.

The ten countries that have historically been most often challenged consist of both developing and developed countries: Argentina (56 cases), Venezuela (36), the Czech Republic (29), Egypt (24), Canada (23), Mexico and Ecuador (21), India and Ukraine (16), Poland and the United States (15).

In terms of the legal basis for the claims, the **most-often used instruments were the Energy Charter Treaty** (ECT), with 60 cases, the North-American Free Trade Agreement (NAFTA) with 53 cases and the Argentina-US Bilateral Investment Treaty (BIT) with 17 cases.

## 5. **DEVELOPMENTS IN 2013 AND 2014**<sup>7</sup>

UNCTAD figures show that 42 new ISDS cases were initiated in 2014. Although there are significant annual variations, this appears to be in line with an annual average of some 40 cases since 2004. In 2013 and 2012, the number of new cases had been higher – 59 and 54 respectively.

- Most ISDS cases were brought by EU investors both in 2013 (33) and 2014 (27). In 2014, EU Investors were behind 64% of all new ISDS cases worldwide, compared with 56% in 2013. In comparison, US investors initiated 6 cases in 2013 and 5 cases in 2014; Canadian investors initiated 2 new cases in 2013 and 3 in 2014.
- ➤ EU investors brought 16 cases in 2014 against non-EU Member States, notably against Montenegro, Argentina, Indonesia, India and Senegal. This compares to 10 cases (e.g. against Egypt, Albania, Mexico, Burundi and Serbia) in 2013.

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<sup>&</sup>lt;sup>7</sup> See: <u>Recent developments in ISDS</u> for 2013 and <u>Recent trends in IIAs and ISDS</u> for 2014. See also the <u>UNCTAD</u> database of ISDS cases

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➤ **EU Member States as defendants:** in 2014, a total of 15 out of 42 (36%) of all new ISDS cases and in 2013, 24 out of 57 (41%) cases were launched against EU Member States.

However in 2014, **only 3 claims** against EU Member States (Romania, Cyprus, Slovakia) **originated from investors from outside the EU.** 

In the remaining 12 claims brought against EU Member states (mainly against Slovakia, Czech Republic, Spain, Romania), the claimant was an EU national (from DE, NL, Cyprus, UK, Sweden). In 2013, the number was even higher with 23 cases out of 24 (96 %) against EU Member States brought by EU companies.

As a result, by the end of 2014, the total number of intra-EU investment arbitrations has reached 99 known cases – almost **three-quarters of all cases involving an EU Member State as defendant** 

#### 6. Success rate of ISDS cases

In many instances, disputes remain confidential. It is therefore difficult to make a complete assessment of this aspect. However, a number of studies by UNCTAD and ICSID have examined claims and awards across a large number of ISDS cases and come to the conclusion that **on average States were significantly more successful than investors**.

According to UNCTAD<sup>8</sup>, out of an overall number of <u>concluded cases of 356</u> by the end of 2014:

- > 37% (132 cases) had been decided in favour of the State, with all claims dismissed either on jurisdictional grounds or on the merits;
- > 28% (101 cases) had been settled:
- > 25% (87 cases) were found in favour of the investor, with monetary compensation awarded;
- > 8% (29 cases) had been discontinued for reasons other than settlement or for unknown reasons;

<sup>&</sup>lt;sup>8</sup> Recent trends in IIAs and ISDS (see P8)

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➤ 2% (7 cases) had found in favour of the investor, yet no monetary compensation had been awarded.

**EU Member States have been even more successful than the average State in getting claims dismissed.** Specific data from ICSID on the EU<sup>9</sup> shows the following figures for disputes against EU Member States:

- > In 44% of the cases, all claims were dismissed or jurisdiction was declined;
- > In **36% of the cases, the dispute was settled** or otherwise discontinued;
- In 20% of the cases, the dispute led to an award upholding claims in part of in full.

# 7. MONETARY CLAIMS AND COMPENSATION AWARDED

A complete overview is difficult because information on the amounts claimed and awarded is not always disclosed, even in cases that are public.

However, studies point to the fact that where the Tribunals have found in favour of the investor (which is in 25 % of all ISDS cases according to UNCTAD), **investors are on average granted only a small part of their original claim.** 

One of the first detailed studies, looking at 82 ISDS cases, was published in the North Carolina Law review<sup>10</sup>. It concluded that there was a striking difference between the average amounts claimed and awarded: The average amount claimed was about \$343 million, yet the average amount of damages awarded by tribunals was US\$10.4 million.

A more recent study<sup>11</sup> quotes forthcoming results based on an enlarged and updated dataset that broadly confirm these findings. In this sample,

'the average inflation-adjusted damage claimed [...] was around \$622.6 million" while "the average amount awarded (including settlements and

<sup>10</sup> Empirically evaluating claims about investment treaty arbitration, Susan D. Franck, North Carolina Law Review, December 2007

<sup>&</sup>lt;sup>9</sup> ICSID case load – special focus European Union, ICSID, World Bank, 01/01/2015

<sup>&</sup>lt;sup>11</sup> <u>Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide</u>, Susan D. Franck, Washington & Lee Public Legal Studies Research Paper Series, February 2, 2014 (see P14)

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discontinuances where public records reflected a State transferred funds to the claimants) was around \$16.6 million'.

# 8. How much does it cost to arbitrate?

Research by the OECD<sup>12</sup> indicates that the average legal and arbitration costs for a claimant are around \$8 million.

- The largest cost component is the expense incurred by each party (investor and state) for **their own legal counsel and experts** (about 82 % of the cost of an ISDS case).
- > **Arbitrator fees** average about 16% of costs.
- > **Institutional costs** payable to organisations that administer the arbitration and provide secretariat are low, generally amounting to about 2% of the costs.

<sup>&</sup>lt;sup>12</sup> Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community (see P19)