

# Kluwer Arbitration Blog

## Is the focus of investment state arbitration switching from Latin America? If so to where?

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It is commonly understood that Latin American countries have played an important dominant role as respondents in ICSID cases. This has led to the withdrawal from the ICSID Convention by several Latin American countries. Interestingly, however, according to recent ICSID statistics, cases filed against Latin American countries have decreased. In this regard, only 3 requests for arbitration have been filed against Latin American countries while 8 have been filed against European countries and 4 against African countries in the current year. Is it the beginning of the end of ICSID investor-state arbitration against Latin American countries? If so, which countries are now sitting under the ICISID forum as respondents?

### 1. Latin America

According to ICSID caseload statistics, Latin American states have now been parties to approximately 35% of the total of the 474 cases registered at ICSID since its founding in 1966. It is remarkable that so far only 3 out of the 15 cases registered at ICSID in 2014 have been filed against Latin American countries: two against Venezuela and one against Costa Rica. This seems to follow the trend of 2013 when only 6 out of the 40 cases registered were initiated against Latin American countries. Such figure indicates a sharp decrease compared with 2012, when 12 cases were registered against Latin American countries, being Venezuela sued 9 times.

This decrease could be explained by the fact that some Latin American countries seem to be taking conciliatory steps and projecting a more investor-friendly stance. Indeed, one of the most traditionally hostile countries regarding the enforcement of ICSID awards, Argentina, has recently settled with Repsol, agreeing on a US\$5 billion payment in sovereign bonds as compensation for the nationalization of the oil and gas operator YPF. Similarly, Paraguay settled a long running ICSID claim issuing around US\$21 million in treasury bonds to French investors last year. Such measures have reinforced a more positive image and seem to reflect a bigger commitment towards foreign investors.

Interestingly, certain BITs include a time frame to submit claims to arbitration once the controversy arises, such as the Spain-Colombia BIT and the Spain-Mexico BIT. Considering this more friendly investor stance, the decrease in Latin American countries ICSID files might be a matter of fact.

Furthermore, certain Latin American countries, because of unfavorable ICSID awards and critics of the system itself, are trying to set up a new Latin American dispute resolution center under the scope of UNASUR, as an alternative to the ICSID framework. Such measure could imply the revival of the so-called Calvo Doctrine and explain the current decrease in ICSID files. Finally, it should be added that Latin Americas' current economic growth in GDP of 2.72% in 2013 could lead to a more investor friendly stance limiting future claims.

## 2. New regions under the spotlight

Until today, it has been commonly argued that mostly developing countries were facing ICSID claims. However, according to ICSID statistics, many developed countries are nowadays facing claims by investors. Indeed, 12 out of the 40 cases registered in 2013, were filed against European countries. In the current year, European countries are facing 8 out of the 15 cases registered up to date. This could imply a new trend in ICSID arbitration. A glance to the economy of the new players could further explain this new trend.

As it is well known, Europe is currently facing an economical crisis with a 0.1% growth in GDP according to Eurostat. According to ICISD statistics, 13% of all cases registered in 2013 involved a Western European State Party versus 2% of all cases registered during ICSID's overall history. For instance, Spain has seen an important increase in its role as respondent from the regulatory energy measures that the government issued in recent years. Another example is Greece, which is facing an ICISD claim from losses suffered by sovereign bondholders due to the 2012 Greek Bondholder Act adopted during its financial crisis.

Even though it is not the scope of this review to analyze other dispute resolution *fora*, it is remarkable that European countries are currently facing twenty four arbitrations proceeding on the basis of intra-EU BITs and Energy Chapter Treaty claims. Such fact shows again that investor state arbitration is switching from Latin American countries to other regions, possibly triggered by measures adopted in these regions as a consequence of the economic downturn.

Other important players that are recently sitting as respondent are African countries. According to ICISD statistics, 14 out of the 40 cases were filed against African and Middle Eastern countries, which represents a 35% of 2013 ICSID caseload while in the historic data they represent a 27%. In the current year, this trend seems to continue as 4 out of the 15 registered cases have been filed against African and Middle Eastern countries. Egypt has continued its role as respondent adding another investor-state claim this year to the 6 claims that were already launched the previous year, having an overall of 25 cases in its historical caseload. African countries rarely appear as defendants at ICSID, as is the case of Sudan, that recently received its first ICSID claim after ratifying the ICSID Convention. On another note, South Africa has terminated several BITs and announced that some more will be also terminated, following the same steps as certain Latin American countries. Anyway, the continuous growth of claims indicates that African countries might be important players in the near future.

Regarding the role of Asian countries, no claims have been filed under ICSID in the current year, although India received note of a dispute on 31 March and Indonesia settled an ICSID claim with Japanese investors. Last year, only 2 claims were filed against Pakistan and Papua New Guinea. Nonetheless the presence of Asian and Pacific countries as respondents in ICSID has never been a reality as their BITs include both ICSID and UNCITRAL arbitration, and there is a trend to pursue arbitration under the later. For instance, among others, Vietnam is facing a new UNCITRAL claim

from a French investor.

There appears to be a connection between the economy of a host state and the breach of protections granted under the relevant BIT, reason why European developed countries are starting to face new ICSID claims. However, it would be too premature to draw any conclusions from this short review. Therefore, time will let us know if the economic downturn in developed economies leads to further ICSID claims and a switch from the investor state dispute scenario that we have known.

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