# Kluwer Arbitration Blog

## Looking behind the Statistics for Investment Arbitration

Esmé Shirlow (Associate Editor) (Australian National University) · Tuesday, February 24th, 2015

Both UNCTAD and ICSID have recently released documents designed to provide snapshots of key developments and trends in investor-State arbitration. Both documents draw upon a statistical analysis of case filings and outcomes to generate overviews of the lay of the land in this area of law. The documents highlight a number of important trends, and provide easily digestible at-a-glance updates on key issues and developments in investment arbitration. While there is much to be commended in this work, an accurate understanding of such trends necessitates both looking more deeply into what is included in these documents, and accounting for what is not.

***Trends in Investment Arbitration***

On 19 February, UNCTAD released a document providing an overview of trends in investment treaty practice and a statistical run-down of cases filed and/or completed in 2014. The UNCTAD statistics reveal that 2014 was a significant year for investment arbitration. From the perspective of treaty practice, the document indicates that some 27 treaties with investment protection provisions were concluded. As UNCTAD notes, this equates to "one every other week". On case filings, the statistics indicate that:

> In 2014, claimants initiated 42 known treaty-based ISDS cases. With 40 per cent of new cases initiated against developed countries, the relative share of cases against developed countries has been on the rise (compared to the historical average of 28 per cent)…The two types of State conduct most commonly challenged by investors in 2014 were cancellations or alleged violations of contracts, and revocation or denial of licences.

A prominent issue during 2014 was the compatibility with EU law of investment treaties between EU Member States ("intra-EU BITs"). On 23 January, ICSID produced a document providing an overview of cases registered with ICSID up to March 2014 involving EU Member States. The ICSID statistics present an overview of such cases, without engaging in, or endorsing either side of, the underlying debate. The ICSID statistics indicate that, as of 1 March 2014, 463 cases had been registered under the ICSID Convention and Additional Facility (AF) Rules. Of these:

- 54% (some 260 cases) involved a claimant that was from an EU Member State; and
- 12% (55 cases) involved a respondent State that was a member of the EU.

Of the 55 cases involving an EU Member State as respondent, 71% (31 cases) invoked intra-EU BITs (and so involved a claimant and respondent from within the EU). In these 55 cases, Hungary (11 cases) and Romania (9 cases) were the EU Member States most frequently represented as respondents. At first glance, then, the ICSID statistics indicate that investors from the EU are highly active as claimants in ICSID proceedings and that EU Member States are much more likely to be party to an "intra-EU" claim than to a claim filed by an investor from outside of the EU.

### *Looking into the Substance behind the Statistics*

Despite their evident utility, the documents produced by UNCTAD and ICSID must be read with some caution.

One key caveat is that UNCTAD is necessarily only able to report statistics for "known" cases. This is a particular methodological problem for any statistical analysis of non-ICSID cases. This is because, unlike ICSID cases, non-ICSID proceedings are as yet not subject to any specific reporting or transparency framework. As such, even basic data about non-ICSID cases, including party details or indeed the case's very existence, will not necessarily be in the public domain. In fact, it may be years before the details of cases filed and/or concluded in 2014 begin to surface, if indeed they ever do. This is significant principally because of the number of cases upon which the UNCTAD statistics are based. For example, UNCTAD is only speaking of 16 cases when it says that 40% of new cases initiated in 2014 were brought against developed countries. Assuming that previous years recorded a similar number of filings as in 2014 (i.e. 42 cases), the "historical average" of claims filed against developed countries was 11 cases per year. Evidently, even 4 or 5 unaccounted for cases can have a significant effect on these statistics. This caveat is equally, if not more, applicable when speaking of the types of measures under challenge, where the statistics are based upon single digit numbers.

While the UNCTAD statistics are weakened by being over-inclusive but incomplete, the ICSID statistics are weakened because they are complete but under-inclusive. The ICSID statistics are under-inclusive primarily because they rely on data from only ICSID and ICSID(AF) cases. While this is quite understandable given that they are produced by ICSID to focus upon ICSID cases, it does mean that care needs to be taken when using the statistics to comment upon investment treaty arbitration more generally. As with the UNCTAD statistics, the non-inclusion of cases in the dataset has the potential to significantly skew the statistics. Relatedly, though, it is important to emphasise that cases will generally only end up being registered at ICSID where the States Parties to a particular BIT are members of the ICSID Convention and/or specifically agree in the BIT that investor-State disputes will be subject to ICSID arbitration. In this respect, particular States show different preferences and treaty drafting practice. That is to say: some States will be more or less likely to refer disputes to ICSID arbitration, and, as a result, ICSID may be likely to receive more cases involving particular States as respondent, or more claimants of one particular nationality than of another. This is significant only because ICSID's document seeks to

analyse the characteristics of case filings based upon the nationality of claimants or respondents party to ICSID cases. Treaty drafting practice could be one explanation for why 71% of ICSID cases involving an EU Member State have been brought under an intra-EU BIT (insofar as EU Member States might be more likely to conclude BITs referring disputes to ICSID arbitration than non-EU States). Similarly, it could explain why States like Hungary or Romania feature most frequently among their EU counterparts as respondents to those claims.

Finally, in identifying disputes involving an "EU Member State", it is important to note that the ICSID statistics assess membership status as at 1 March 2014 but cover all ICSID disputes ever having involved that State. This means that proceedings filed and concluded before a State became an EU Member are nevertheless recorded as having been brought against an "EU Member State". In fact, of the 55 cases in which "EU Member States" are reported to have been respondents, some 17 were filed before the relevant State became an EU Member. Five alone were brought against Romania before it attained EU Membership in January 2007. This may make no difference depending upon the use to be made of the statistics, but it is worth noting that a temporal mapping of claims against the date of the relevant State's accession presents a very different picture.

***Conclusion***

Statistical analysis of investment treaty claims provides a useful tool for policy-makers, investors and States respondent to arbitral proceedings. The aim of this post has been to highlight a number of caveats that must be borne in mind when considering data of the type produced by ICSID and UNCTAD in recent months. Despite some weaknesses, the documents can be welcomed as a best efforts representation of trends in investment arbitration by year and subject-matter. In this respect, it is to be hoped that UNCTAD's calls for information-sharing about as-yet non-public proceedings are answered, leading to the ability to create a more fulsome statistical overview of investment arbitration activity in 2014 and beyond.

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