

IV Annual Forum for Developing Country Investment Negotiators

Background Papers

New Delhi, October 27-29, 2010

**Recent Developments in
International Investment Agreements:
Negotiations and disputes**

Mahnaz Malik

iisd

International
Institute for
Sustainable
Development

Institut
international du
développement
durable



**IV Annual Forum for
Developing Country
Investment Negotiators
Background Papers
New Delhi, October 27-29, 2010**

**Recent Developments
in International
Investment
Agreements:
Negotiations and
disputes**

Mahnaz Malik

© 2011 International Institute for Sustainable Development (IISD)

Published by the International Institute for Sustainable Development

IISD contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change and energy, measurement and assessment, and natural resources management, and the enabling role of communication technologies in these areas. We report on international negotiations and disseminate knowledge gained through collaborative projects, resulting in more rigorous research, capacity building in developing countries, better networks spanning the North and the South, and better global connections among researchers, practitioners, citizens and policy-makers.

IISD's vision is better living for all—sustainably; its mission is to champion innovation, enabling societies to live sustainably. IISD is registered as a charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Government of Canada, provided through the Canadian International Development Agency (CIDA), the International Development Research Centre (IDRC) and Environment Canada, and from the Province of Manitoba. The Institute receives project funding from numerous governments inside and outside Canada, United Nations agencies, foundations and the private sector.

International Institute for Sustainable Development
161 Portage Avenue East, 6th Floor
Winnipeg, Manitoba
Canada R3B 0Y4
Tel: +1 (204) 958-7700
Fax: +1 (204) 958-7710
Email: info@iisd.ca
Website: www.iisd.org

1.0 International Investment Treaty: Negotiations

Trends

Global¹ foreign direct investment (FDI) inflows are expected to touch US\$1.2 trillion this year, rise further to \$1.3–1.5 trillion in 2011 and head towards \$1.6–2 trillion in 2012.² Half of these FDI inflows will go to developing and transition economies.³ The regime governing these FDI flows comprises a complex and growing web of over 3,000 International Investment Agreements (IIAs),⁴ which include bilateral, regional, sectoral and investment chapters in trade agreements.⁵

According to UNCTAD, as many as 102 new IIAs were concluded in 2009, including 82 Bilateral Investment Treaties (BITs) and 20 other IIAs.⁶ In 2008, a comparatively lower number—59 new BITs and 16 international agreements with investment provisions other than BITs—were concluded.⁷ The total number of IIAs other than BITs was 273 by the end of 2008.⁸ In 2007, only 44 new BITs were signed, bringing their total number to 2,608 at the end of the year.⁹ That year also saw the conclusion of 12 new IIAs other than BITs, bringing the total of such agreements to 254.¹⁰

It is too early to tell if 2010 will replicate the intense activity in IIAs of 2009. The first five months of this year saw the conclusion of 13 IIAs, comprising six BITs and seven other IIAs;¹¹ however, the low number could be due to the delayed reporting of agreements, and this number may rise once more complete data is available.

¹ This paper is a summary and analysis of several UNCTAD and other sources, including: Latest developments in investor–State dispute settlement, IIA Issues Note No. 1 (2010); Recent developments in International Investment Agreements (2008–June 2009), IIA Monitor No. 3 (2009); Recent developments in International Investment Agreements (2007–June 2008), IIA Monitor No. 2 (2008); and the World Investment Report 2010: Investing in a low-carbon economy (UNCTAD/WIR/2010)

² UNCTAD (2010, July 22). *World Investment Report 2010: Overview* (UNCTAD/WIR/2010[Overview]), p. 1. Retrieved from: www.unctad.org/en/docs/wir2010overview_en.pdf

³ Ibid.

⁴ 2,750 BITs and 295 other IIAs. UNCTAD. (2010, July 22). *World Investment Report 2010: Investing in a low-carbon economy* (UNCTAD/WIR/2010), p. 81. Retrieved from: www.unctad.org/en/docs/wir2010ch3_en.pdf

⁵ UNCTAD (2010, July 22). *World Investment Report 2010: Overview* (UNCTAD/WIR/2010[Overview]), p. 21. Retrieved from: http://www.unctad.org/en/docs/wir2010overview_en.pdf

⁶ Ibid.

⁷ UNCTAD (2009). *Recent developments in International Investment Agreements* (2008–June 2009), IIA Monitor No. 3 (2009), p. 2. Retrieved from: http://www.unctad.org/en/docs/webdiaeia20098_en.pdf.

⁸ Ibid, p. 8.

⁹ The figure of 44 BITs includes several renegotiated agreements. UNCTAD. (2008). *Recent developments in International Investment Agreements* (2007–June 2008), IIA Monitor No. 2, p. 2, n. 1. Retrieved from: http://www.unctad.org/en/docs/webdiaeia20081_en.pdf.

¹⁰ Ibid, p. 8, note 11: These agreements include, for example, closer economic partnership agreements, regional economic integration agreements or framework agreements on economic cooperation.

¹¹ UNCTAD (2010, July 22). *World Investment Report 2010: Overview* (UNCTAD/WIR/2010[Overview]), p. 21.

South-South cooperation intensified in 2009 as 19 of the 82 BITs and eight of the 20 other IIAs concluded were between developing countries.¹² Asian and Oceania countries are parties to approximately 41 per cent of the world's BITs.¹³

2009 saw intense activity in the conclusion of new IIAs, higher than seen in the previous two years. It is too early to tell if 2010 will follow the trend set by 2009.

Recent Developments: Revolution or Evolution?

Aside from the growth in the number of IIAs, with nearly a third more BITs concluded in 2009 in comparison with 2008, the following is an overview of the interesting developments in the IIA landscape.

In Europe, we saw the entry into force of the Lisbon Treaty, which transferred FDI competencies from Member States to the EU last year.¹⁴ Post Lisbon Treaty EU policies on existing and future BITs involving EU Member States are currently under deliberation. The final outcome could impact approximately half of the world's BITs. It is estimated that there are about 1,100 BITs between EU Member States and third countries alone. In addition, the European Court of Justice rendered three decisions, finding that certain BITs of EU members (Austria, Finland and Sweden) violated European law.

There is also a growing trend to create regional investment areas and include investment provisions in broader economic agreements. For example, the ASEAN Comprehensive Investment Agreement and ASEAN–New Zealand–Australia Free Trade Agreement (FTA).

We have also seen a growing number of countries examining their international investment policies to better align their compatibility with domestic development agendas, including by adopting or revising their model BITs (for example, South Africa, Turkey and Norway).¹⁵ The last couple of years have also seen the termination of BITs by a few countries to pursue certain domestic policies and agendas (for example, Venezuela and Ecuador).

There has also been an increase in the renegotiation of BITs. Previously, there were on average nine to 15 renegotiated BITs each year (since 2000), but last year 19 BITs, almost a quarter of the total

¹² UNCTAD. (2010, July 22). *World Investment Report 2010: Investing in a low-carbon economy* (UNCTAD/WIR/2010), p. 82.

¹³ UNCTAD. (2008). *Recent developments in International Investment Agreements* (2008–June 2009), p. 3.

¹⁴ UNCTAD (2010, July 22). *World Investment Report 2010: Overview* (UNCTAD/WIR/2010[Overview]), p. 22.

¹⁵ Ibid.

BITs concluded in 2009, were renegotiated ones. The Czech Republic, China and Romania have been particularly active in renegotiating BITs.

Many of the recent IIAs, whether new or renegotiated, signal that governments, both from developed and developing countries, are formulating their agreements more precisely than previously, including by clarifying the scope and meaning of specific guarantees, in order to preserve legal space for States to regulate. Additionally, we also see an increasing use of environmental and labour clauses (for example, Belgium-Ethiopia BIT).¹⁶ A few examples of changes in typical IIA provisions follow from *World Investment Report* (2010)¹⁷:

Clarifying the scope and meaning of specific obligations:

(i) FET¹⁸: specifying that the concept of FET does not require treatment in addition to, or beyond, that which is required under customary international law (Mexico-Singapore BIT (2009)) or even limiting FET to denial of justice only (ASEAN-China Investment Agreement [2009]);

(ii) full protection and security: clarifying that the standard relates to police protection (Australia-Chile FTA [2008]) and thus concerns only physical security, rather than other types of security (legal, economic, etc.);

(iii) MFN¹⁹: clarifying whether the MFN obligation encompasses ISDS provisions and thus allows an investor to invoke more favourable ISDS provisions from IIAs with a third country or not (Ethiopia-United Kingdom BIT (2009) and ASEAN China Investment Agreement [2009]);

(iv) indirect expropriation: introducing language that draws a line between a compensable indirect expropriation and the adverse effects endured by a foreign investor as a result of bona fide regulation in the public interest (Common Market for Eastern and Southern Africa [COMESA] Common Investment Area [2007]);

(v) expropriation: specifying that the issuance of compulsory licenses (in relation to intellectual property rights in accordance with the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) does not amount to an expropriation (Malaysia-New Zealand FTA [2009]);

¹⁶ Ibid.

¹⁷ UNCTAD. (2010, July 22). *World Investment Report 2010: Investing in a low-carbon economy* (UNCTAD/WIR/2010), pp. 87–88.

¹⁸ FET: Fair and Equitable Treatment

¹⁹ MFA: most-favoured nation

(vi) umbrella clauses: omitting such clauses from the treaty altogether (Canada-Czech Republic BIT [2009], Belgium/Luxembourg-Colombia BIT [2009]).

Environmental clauses: adding specific language to ensure the protection of the environment is not compromised—but instead enhanced—by IIAs. To this end, some countries have:

(i) included examples such as environmental protection measures in the general exceptions clauses (India-Republic of Korea CEPA [2009]);

(ii) confirmed that each party has a right to establish its own level of environmental protection (Belgium/Luxembourg-Tajikistan BIT [2009]);

(iii) committed to refrain from relaxing domestic environmental legislation to encourage investment (expressed as a binding obligation, as in the Panama- Taiwan, Province of China FTA [2003], or as a soft law clause);

(iv) carved out environment-related disputes from ISDS (Belgium/Luxembourg-Colombia BIT [2009]); or

(v) included language aimed at enhancing coherence between IIAs and multilateral environmental agreements (Canada-Peru FTA [2008]).

Ensuring appropriate corporate behaviour, including with respect to environmental and social practices: While absent in traditional BITs, provisions aimed at rebalancing rights and obligations of foreign investors and host countries can be found in a number of recent FTAs and regional integration agreements. Such provisions vary considerably, ranging from a simple reiteration that foreign investors shall comply with the laws and regulations of the host countries (Southern African Development Community Protocol on Finance and Investment [2006]), to more elaborate provisions on anti-corruption requirements, respect of environmental and labour standards and the establishment of local community liaison processes (Caribbean Forum of African Caribbean and Pacific States-European Community Economic Partnership Agreement [2008]). Some have proposed including provisions that commit investors to transparency, which include publishing information on payments made by foreign investors to public authorities in host countries. While IIA references to issues related to corporate social responsibility (CSR) are usually of a non-binding nature, obligations for investors are starting to emerge in the CSR framework (in relation to reporting).

Although international investment arbitration remains the main avenue for resolving investment treaty disputes, a number of countries have been refining the investor-State dispute settlement provisions in their IIAs, seeking to reduce their exposure to investor claims or increase the efficiency and legitimacy of the dispute settlement process. Examples identified in the *World Investment Report 2010* report include:²⁰

- Carve-outs from and limitations on the application of investor-State arbitration;
- Adopting time limitations for IIA claims;
- Addressing frivolous claims and allowing for consolidation; and
- Improving transparency of arbitral proceedings and allowing for amicus briefs.

In addition, several sets of international arbitration rules—including those of the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL)—have been or are being revised. A few developing countries are turning away from international arbitration processes, denouncing the ICSID Convention (e.g., Ecuador and Bolivia) or looking into alternative dispute resolution and prevention mechanisms.

There are a number of interesting developments in the IIA landscape, ranging from evolutionary to revolutionary. The final outcome of the transfer of competency to the EU from Member States is still awaited; States are modifying the traditional template in BITs agreements; and at the same time a few States have terminated their existing BITs, and opted out of the ICSID system.

²⁰ UNCTAD. (2010, July 22). *World Investment Report 2010: Investing in a low-carbon economy* (UNCTAD/WIR/2010), pp. 88–90.

2.0 Trends in Investor-State Disputes

At least 32 new investor-State cases were initiated in 2009 and 44 decisions rendered, bringing the total of known cases ever filed to 357, and those concluded to 164 by the end of the year.²¹ Fifty-seven per cent of these known cases were initiated during the last five years (starting in 2005).²²

The majority, 225 of the 357 known disputes, were filed with ICSID or under the ICSID Additional Facility; 91 under the UNCITRAL rules; 19 with the Stockholm Chamber of Commerce; eight were administered by the Permanent Court of Arbitration in the Hague; five with the ICC; and four are ad hoc cases.²³ One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In four cases the applicable rules are unknown so far.²⁴

The overwhelming majority of these 357 cases were initiated by investors from developed countries, with developing and transition countries most often on the receiving end.²⁵ For example, at the end of 2009, only 23 cases were filed by investors from developing countries and nine cases originated from investors headquartered in transition economies.²⁶

In 2009 the number of countries that have faced investment treaty arbitrations grew to 81. Last year, four countries also had to defend investment treaty arbitration for the first time (Belize, Cambodia, the former Yugoslav Republic of Macedonia [two cases] and Turkmenistan).²⁷ In all, 49 developing countries, 17 developed countries and 15 countries with economies in transition have been involved

²¹ UNCTAD. (2010). *Latest developments in investor-State dispute settlement*, IIA Issues Note No. 1, p. 2. Retrieved from: http://www.unctad.org/en/docs/webdiaeia20103_en.pdf. Since the International Centre for Settlement of Investment Disputes (ICSID) is the only arbitration facility to maintain a public registry of claims, the total number of actual treaty-based cases is likely to be higher. This number does not include cases that are exclusively based on investment contracts (State contracts) and cases where a party has so far only signalled its intention to submit a claim to arbitration, but has not yet commenced the arbitration (notice of intent). If these latter cases are submitted to arbitration, the number of pending cases will increase. Due to new information becoming available for 2008 and earlier years, the number of total known IIA-based ISDS cases at the end of 2008 was revised upwards to 325 (instead of 317 as reported in the UNCTAD's 2009 IIA Monitor No. 1).

²² Ibid.

²³ Ibid, note 3: For detailed information on ICSID cases and statistics, see *The ICSID Caseload: Statistics*, which provides a profile of the ICSID caseload, historically and for 2009. It is based on cases registered or administered by ICSID as of December 31, 2009. <http://www.worldbank.org/icsid>.

²⁴ Ibid.

²⁵ UNCTAD (2010, July 22). *World Investment Report 2010: Overview* (UNCTAD/WIR/2010[Overview]), p. 21.

²⁶ UNCTAD. (2010). *Latest developments in investor-State dispute settlement*, IIA Issues Note No. 1, p. 2.

²⁷ Ibid.

in investor-State disputes to date.²⁸ Argentina, the Bolivarian Republic of Venezuela, Canada, El Salvador, Kazakhstan and the United States faced two new cases each in 2009.²⁹

At the same time, the stakes of investor-State arbitration also grew greater. In March 2010, a tribunal found that Ecuador had violated the United States-Ecuador BIT and awarded Chevron and Texaco Petroleum Company approximately US\$700 million in principal damages and interest pending further proceedings to determine applicable taxes, compound interest and costs.³⁰ Equally staggering are the amounts claimed by investors. Recently, Gold Reserve Inc. submitted a US\$1.928 billion claim to ICSID against Venezuela for violation of the Canada-Venezuela BIT.

As mentioned above, of the 44 decisions rendered in 2009, there were 20 awards on the merits, seven decisions on jurisdiction, four decisions on the challenge of arbitrators and three decisions on annulment.³¹ Other decisions concerned the admissibility of ancillary claims, provisional measures and settlement agreements.³²

In all, by the end of 2009, 164 cases had been brought to conclusion. Out of these, 38 per cent were decided in favour of the State (62) and 29 per cent in favour of the investor (47), while 34 per cent (55 cases) were settled. For 26 cases, the current state of affairs or the outcome is unknown, and 167 cases were still pending at the end of 2009.³³

While the number of wins for States and investors shows a similar score, the large of number of “settlements” (34 per cent) whose terms are not known could well change this figure if the terms of settlement are considered not in favour of the State. Moreover, the costs of defending an arbitration claim can be substantial, and States may still have to bear these costs even if they are “successful” in defending the investor’s claims. We have also seen that investors now have increasing access to contingency fee arrangements (where lawyers agree to receive a percentage of the damages from their client in the event the claim is successful) and third party financing to fund the litigation of investment treaty claims in return for a share of damages.

The continuing rise of investment treaty claims, the increase in the flow of investments, evolving regulatory structures and increasing options for investors to finance investment treaty claims indicate that the phenomenon of investor-State arbitration is here to stay and grow. It is likely that more developing and developed countries will face investment treaty claims in the near future.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Award dated March 30, 2010, <http://www.chevron.com/news/press/release/?id=2010-03-30>.

³¹ UNCTAD. (2010). *Latest developments in investor-State dispute settlement*, IIA Issues Note No. 1, p. 3.

³² Ibid.

³³ Ibid.