Current Trends in Investment Law & Arbitration

5th Meeting of the Asia-Pacific Foreign Direct Investment Network
Meg Kinnear, ICSID Secretary-General
November 2, 2015
Negotiating the ICSID Convention
Features of ICSID

• Impartial and delocalized facility
• Secretariat expertise
• Cost-effective fee structure
• Access to facilities internationally
• Transparency
• Only institution that can administer ISDS under the three main set of rules (ICSID Convention, Additional Facility and UNCITRAL)
ICSID Today – 151 Members
UNCTAD – ISDS Caseload

Figure III.7. Known ISDS cases, annual and cumulative, 1987–2014

Source: UNCTAD, World Investment Report 2015
ICSID Caseload
(By Fiscal Year)

Cases Registered under the ICSID Convention and Additional Facility Rules by Fiscal Year

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UNCITRAL Cases at ICSID

- Investor-State UNCITRAL Arbitrations
- Other Cases
Increase in Global FDI

Source: UNCTAD, FDI/MNE database (www.unctad.org/fdistatistics)
More Investment Treaties

Source: UNCTAD, IIA database
Source of Consent

- Bilateral Investment Treaty (BIT) 51%
- Energy Charter Treaty (ECT) 22%
- North American Free Trade Agreement (NAFTA) 2%
- Investment Law of the Host-State 12%
- Investment Contract between the Investor and the Host-State 8%
- Dominican Republic-United States-Central America Free Trade Agreement (DR-CAFTA) 1%

Canada-Peru Free Trade Agreement (Canada-Peru FTA) 2%
Central America-Panama Free Trade Agreement 2%

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Trend to Regional Treaty-Making

- Failed MAI in 1998; failed FTAA in mid 2000’s
- Renewed interest in treaty-making on a regional basis
  - EU – Lisbon Treaty – EU-Singapore; EU-Canada; other negotiations, including US & China
  - TPP
  - Pacific Alliance
  - ASEAN Comprehensive Investment Agreement 2012
  - RCEP

- South America: 25%
- Central America & the Caribbean: 7%
- North America (Canada, Mexico & U.S.): 4%
- Eastern Europe & Central Asia: 25%
- Western Europe: 5%
- Sub-Saharan Africa: 16%
- Middle East & North Africa: 10%
- South & East Asia & the Pacific: 8%

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## ICSID Cases by State Party

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<th>Middle East &amp; North Africa</th>
<th>South &amp; East Asia &amp; the Pacific</th>
<th>Central America &amp; the Caribbean</th>
<th>South America</th>
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Outcomes of Tribunal Awards – June 30, 2015

- Award declining jurisdiction: 25%
- Award deciding that the claims are manifestly without legal merit: 1%
- Award dismissing all claims: 29%
- Award upholding claims in part or in full: 45%
New Scope for Investment Treaties

• Broad State consensus that investment treaties should be maintained, but refined to enhance:
  – Cost-benefit and linkage to domestic economic goals
  – Predictability
Revised Approaches to Drafting

• Definition of investor/investment
• Direct and indirect expropriation
• Fair and Equitable Treatment
• Most Favoured Nation Treatment
• Umbrella Clauses
• Exceptions to ensure regulatory space
• Denial of Benefit Clauses
Revised Approaches to Procedure

• Increased pre-conditions to access: waiver, exhaustion, limitations, etc.
• Frivolous Claims
• Role of States
• Codes of Conduct for Arbitrators & Counsel
• Mediation
Transparency

• 3 Aspects:
  – Access to Documents
  – Access to Process
  – Amicus

• ICSID Rules – 2006
• Mauritius Convention – 2014
• See ICSID Website
Arbitrators

North America (Canada, Mexico & U.S.)
- Appointments by ICSID: 57
- Appointments by the Parties: 316

South America
- Appointments by ICSID: 52
- Appointments by the Parties: 127

Central America & the Caribbean
- Appointments by ICSID: 22
- Appointments by the Parties: 16

Middle East & North Africa
- Appointments by ICSID: 28
- Appointments by the Parties: 45

Sub-Saharan Africa
- Appointments by ICSID: 21
- Appointments by the Parties: 16

South & East Asia & the Pacific
- Appointments by ICSID: 72
- Appointments by the Parties: 101

Eastern Europe & Central Asia
- Appointments by ICSID: 14
- Appointments by the Parties: 17

Western Europe
- Appointments by ICSID: 223
- Appointments by the Parties: 596

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Questions of Access

• Use by individuals and SMEs
• Mass/Class Claims
• Potential for “Small Claims” capacity?
• Issues Concerning Third-Party Funding
Other Discussions

• Appellate Body proposal
• Party appointment v. Institutional appointment v. Standing court
• Remedies
• Extending Reciprocity of Obligations – Corporate Social Responsibility
• Role of REIO in Arbitration
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