

International Investment Arbitration

Prof. Dr. **Gabriel M. Lentner**

Department of Law and International Relations
Danube University Krems, Austria
TTLF Fellow, Stanford Law School



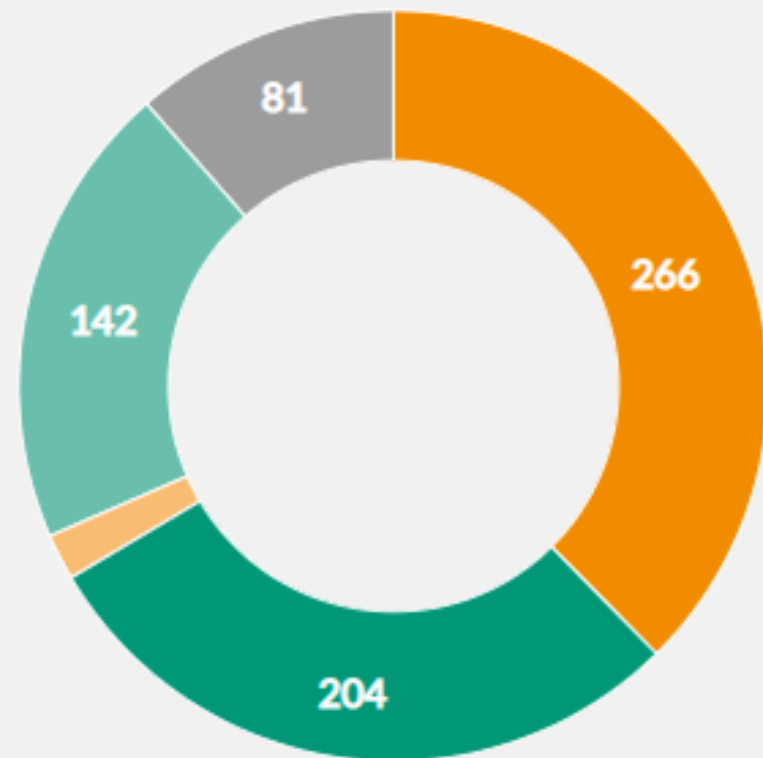
Content

- ▶ Investment Arbitration Book
- ▶ Basics of Investor-State Dispute Settlement (ISDS)
- ▶ Typical Disputes and Standards of Protection
- ▶ Procedure, Annulment and Enforcement
- ▶ Outlook: ISDS between Reform, Critique and the Status Quo

Investment Arbitration Boom

- ▶ Investment or so-called treaty arbitration based on
 - close to 3000 bilateral investment treaties (BITs)
 - Chapter 11 of NAFTA (now USMCA with more limited ISDS)
 - other investment chapters of Free Trade Agreements and multilateral treaties (e.g. Energy Charter Treaty)
- ▶ Since the mid-1990s: dramatic increase in use of ICSID 1965 (entry into force 14 Oct.1966)
- ▶ ICSID Additional Facility 1978 as well as UNCITRAL and other investment arbitration (LCIA, SCC, PCA, ICC, etc.)
- ▶ Rationale: private investment is most important factor in economic development (link btw investment protection and FDI?)

Concluded original arbitration proceedings:



Known treaty-based ISDS cases:

Total: 1061
Pending: 346
Concluded: 707
Unknown: 8

Updated as of 31 July 2020

- Decided in favour of State
- Decided in favour of investor
- Decided in favour of neither party (liability found but no damages awarded)
- Settled
- Discontinued

Investor-State Dispute Settlement (ISDS)

- ▶ between an investor of one contracting state and another contracting state
- ▶ **Scope:**
 - concerning the observation / breach of the investment agreement
 - broader scope: umbrella clause
e.g. US-Argentina BIT 1991, Article 2
“(2)(c) Each Party shall observe any obligation it may have entered into with regard to investments.”
- ▶ Features of ISDS:
 - the disputing parties are unlimited: investors are numerous
 - Consent to arbitration by states interpreted broadly

Typical Subject Matters of Investment Disputes

- ▶ Disputes between states and private investors, e.g.
 - **Expropriation**
 - **Regulatory measures** (→ indirect expropriation?)
 - **Lack of legal protection** before national courts (fair trial, access to court, etc.)
 - breach of fair and equitable treatment?
 - **Lack of protection against harmful acts** by third parties (riots, destruction, etc.)
 - breach of full protection and security?

Centre for Settlement of Investment Disputes at the World Bank

1965 Washington Convention on the Settlement of Investment Disputes
between States and Nationals of Other States

- ▶ 155 Contracting States (Mar 2021)
- ▶ More than 830 cases registered (Mar 2021)

Dispute Settlement

Art. VII (3) Argentina-US BIT:

3. (...) the national or company concerned (...) may choose to consent in writing to the submission of the dispute for settlement **by binding arbitration:**

(i) to the **International Centre for the Settlement of Investment Disputes** ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (...) provided that the Party is party to such convention or

(ii) to the **Additional Facility of the Centre**, if the Centre is not available or

(iii) in accordance with the Arbitration Rules of the **United Nations Commission on International Trade Law (UNCITRAL)** or

(iv) to **any other arbitration institution**, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

Jurisdiction

Article 25 ICSID Convention:

“(1) The jurisdiction of the Centre shall extend to any legal **dispute arising directly out of an investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

Definition of Investment in a BIT

Art. 1 Argentina-US BIT:

"1. For the purposes of this Treaty,

a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

...

Definition of Investment in a BIT

Art. 1 (1) Argentina US BIT:

...

(iii) a claim to money or a claim to performance having economic value and directly related to an investment;

(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law"

Applicable Law

Art. 42 ICSID

→ no substantive standards

→ direction to Tribunals how to find applicable rules to particular disputes

Art. 10 (7) Argentina-Netherlands BIT:

“The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.”

Treatment Standards

- ▶ Fair and equitable treatment
- ▶ Full protection and security
- ▶ National treatment
- ▶ Most-favored nation treatment
- ▶ Important Provision contained in almost all BITs
- ▶ Distinction between
 - Direct and
 - Indirect Expropriation

Effects of Awards

Article 53 ICSID Convention:

“(1) The award shall be **binding on the parties** and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party **shall abide by and comply** with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

Effects of Awards

Article 54 ICSID Convention:

“(1) Each Contracting State **shall recognize an award** rendered pursuant to this Convention **as binding** and **enforce** the pecuniary **obligations imposed** by that award within its territories **as if it were a final judgment of a court in that State**. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”

Annulment of Awards

Article 52 ICSID Convention:

“(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was **not properly constituted**;

(b) that the Tribunal has **manifestly exceeded its powers**;

(c) that there was **corruption** on the part of a member of the Tribunal;

(d) that there has been a **serious departure from a fundamental rule of procedure**; or

(e) that the **award has failed to state the reasons** on which it is based.”

Latest Developments towards a Multilateral Investment Court

Working Group III mandate

In 2017, UNCITRAL entrusted **Working Group III** with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS):

- (i) first, identify and consider **concerns** regarding ISDS;
- (ii) second, consider whether reform was **desirable** in light of any identified concerns; and
- (iii) third, **if** the Working Group were to conclude that reform was desirable, develop any relevant **solutions** to be recommended to the Commission

Conclusions

- ▶ ISDS provides for effective settlement of investment disputes btw investors and states
- ▶ Substantive investment law is significantly developed through arbitral practice
- ▶ Critique of biases and structural issues need to be addressed
- ▶ Reform will take time

Thank you for your
attention!

Prof. Dr. **Gabriel M. Lentner**
gabriel.lentner@donau-uni.ac.at

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Danube University Krems, Austria
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