UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
UNCTAD
50 UNCTAD 1964
PROSPERITY FOR ALL
IIA ISSUES NOTE
Nº. 1
April 2014

RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

Highlights

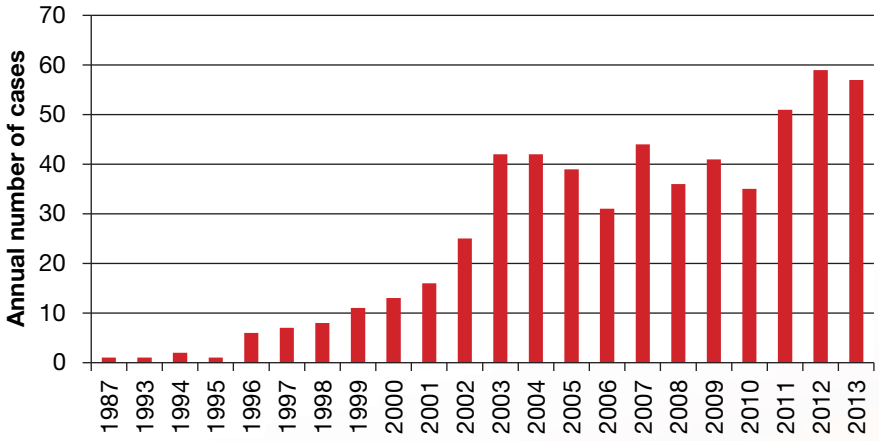
- In 2013, investors initiated at least 57 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs). This comes close to the previous year's record high number of new claims.
- An unusually high number of cases (almost half of the total) were filed against developed States; most of these have the Member States of the European Union as respondents.
- Of the 57 new cases, 45 were brought by investors from developed countries and the remaining by investors from developing countries.
- Claimants have challenged a broad range of government measures, including changes related to investment incentive schemes, alleged breaches of contracts, alleged direct or *de facto* expropriation, revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions, invalidation of patents, and others.
- Thirteen of the new cases arise from two sets of government measures (regarding renewable energy), adopted by the Czech Republic and Spain. Two cases relate to the Greek financial crisis. Several arbitrations have an environmental dimension.
- By end of 2013, 98 States have been respondents in a total of 568 known treaty-based cases.
- Together, claimants from the EU and the United States account for 75 per cent of all cases.
- In 2013, ISDS tribunals rendered 37 known decisions, 23 of which are in the public domain, including decisions on jurisdiction, merits, compensation and applications for annulment.
- In seven out of the eight decisions on the merits, the tribunal accepted – at least in part – the claims of the investors. The award of USD 935 million in the *Al-Kharafi v. Libya* case is the second highest known award in history.
- The overall number of concluded cases reached 274. Of these, approximately 43 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 26 per cent of cases were settled.
- The public discourse about the usefulness and legitimacy of ISDS continues to gain momentum, especially in the context of important IIA negotiations that are currently ongoing.

I. Statistical Update: 2013

A. New claims[1]

In 2013, investors initiated at least 57 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs) (see figure 1 and annex 1).[2] This comes close to the previous year's record high number of new claims.

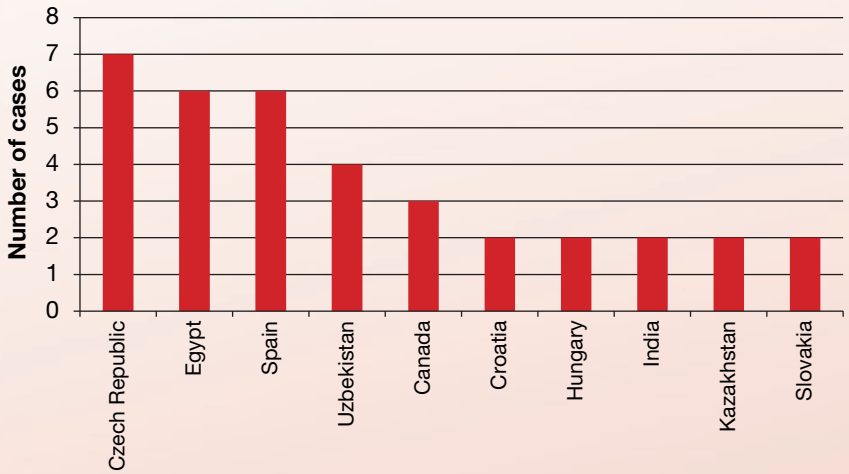
Figure 1. Known ISDS cases, annual (1987-2013)



Source: UNCTAD

Respondent States. Last year witnessed an unusually high number of cases against developed States (27); the remaining cases have developing (19) and transition (11) economies as respondents (figure 2). Last year's most frequent respondent was the Czech Republic (7), followed by Egypt (6), Spain (6), Uzbekistan (4) and Canada (3). Venezuela, the previous year's most frequent respondent, received only one claim in the review period. Cyprus, Greece and Madagascar have to contend with their first-known ISDS claims (one each).

Figure 2. Most frequent respondent States (2013)



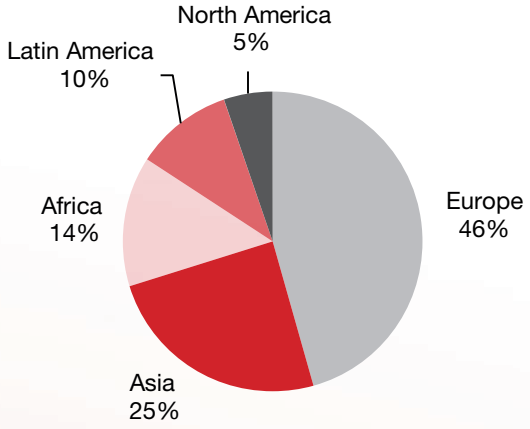
[1] Information about 2013 claims has been compiled on the basis of public sources, including specialized reporting services such as the *Investment Arbitration Reporter* and *Global Arbitration Review*. We are grateful for additional information received from the ICSID Secretariat, the Energy Charter Treaty Secretariat, the Permanent Court of Arbitration, the London Court of International Arbitration and the IA Reporter.

[2] This Note does not cover cases that are exclusively based on investment contracts (State contracts) or national investment laws, nor cases where a party has so far only signaled its intention to submit a claim to ISDS, but has not yet commenced the arbitration.

Multiplicity of claims. In 2013, there were at least two instances where a measure, or a set of related measures, gave rise to more than one claim. More specifically, the same changes in energy regulations in the Czech Republic resulted in seven separate claims against it.[3] Similarly, Spain faced six separate cases in which investors challenge the same government regulations that adversely affected solar energy producers.[4] (The energy cases against the Czech Republic and Spain are discussed further below.)

Regional distribution of respondent States. The greatest number of 2013 cases were brought against countries in Europe (26 cases, of which two are against countries not members of the European Union (EU) – Albania and Serbia), followed by Asia (14),[5] Africa (8) and Latin America (6). Three cases were brought against a North American country (Canada) last year (figure 3).

Figure 3. Regional distribution of respondent States (2013)



Intra-EU disputes. Twenty four arbitrations (42 per cent of all cases) were brought against EU Member States. The range of countries involved is broad and includes both "new" and "old" Member States, namely the Czech Republic (7 cases), Spain (6), Croatia (2), Hungary (2), Slovakia (2), Bulgaria (1), Cyprus (1), France (1), Greece (1), and Slovenia (1). In all of these arbitrations except for one,[6] the claimants are also EU nationals; they started the proceedings on the basis of either intra-EU bilateral investment treaties (BITs) or the Energy Charter Treaty (ECT), sometimes relying on both at the same time. The year's developments brought the overall number of intra-EU investment arbitrations to 88, i.e. approximately 15 per cent of all cases globally.[7]

Home country of investor. Of the 57 new cases, 45 were brought by investors from developed countries and 12 were brought by investors from developing countries. This ratio roughly corresponds to the earlier trend. Investors from the following home States brought the largest numbers of new claims (figure 4): the Netherlands (7 cases), Germany, Luxembourg and the United States (6 each), Turkey and the United Kingdom (5 each), and Cyprus, France, Jordan and Spain (3 each).[8]

---

3 Initially, six of the seven claims were brought as one consolidated claim by a group of ten investors. The respondent State objected to the consolidation of the claims and appointed arbitrators in what it considered to be six separate cases, only agreeing to the consolidation of claims if the claimants were affiliates or if they had allegedly invested in the same operation. See S. Perry and K. Karadelis, "Sun rises on Czech energy claims", *Global Arbitration Review*, 19 February 2014, available at http://globalarbitrationreview.com/news/article/32436/sun-rises-czech-energy-claims/ (accessed on 25 February 2014).

4 All claims were brought separately.

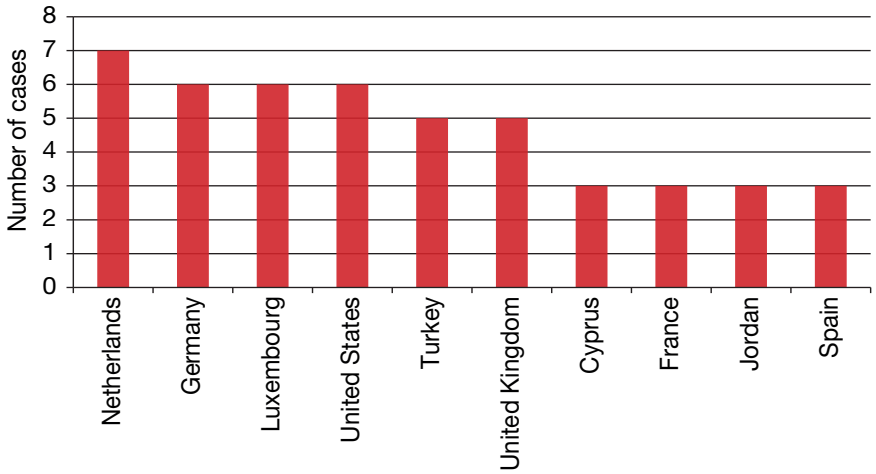
5 Nine of the 14 Asian cases are against transition economies in Central Asia (Kazakhstan, Kyrgyz Republic, Turkmenistan and Uzbekistan).

6 The case of *Erbil Serter v. French Republic* (ICSID Case No. ARB/13/22) was brought by a Turkish national, under the France-Turkey BIT.

7 When calculating intra-EU disputes, the time factor (i.e., when a particular State joined the EU) has been disregarded; disputes between all States that are currently members of the EU are counted as intra-EU disputes.

8 A number of cases include co-claimants of different nationalities.

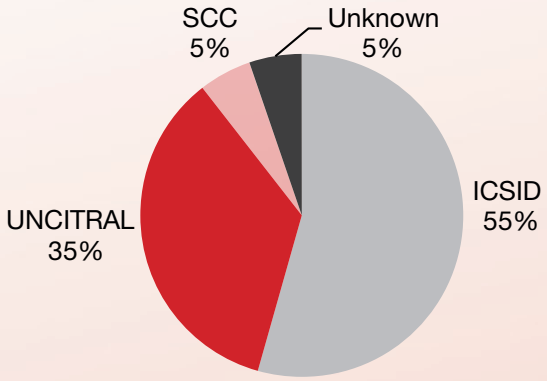
Figure 4. Most frequent home States (2013)



Economic sectors involved. More than 70 per cent of all new claims concern investments in the services sector, including the supply of electricity or gas, telecommunications, construction, tourism, banking, real estate services, retail trade, media and advertising, and others. The majority of the remaining claims involve investments in the primary sector (oil and gas, mining), while six cases relate to manufacturing industries.

Arbitral forums/rules. Of the 57 new disputes, 31 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (of which two cases are under the ICSID Additional Facility Rules), 20 under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and three under the Stockholm Chamber of Commerce (SCC). For three cases, the applicable arbitration rules/venues are unknown (figure 5). All of the UNCITRAL cases were filed pursuant to IIAs concluded prior to 2014 and, therefore, the new UNCITRAL Transparency Rules[9] do not apply to any of them, unless the disputing parties agree to their application in their specific dispute.[10]

Figure 5. Arbitral forums/rules (2013)



Applicable investment treaties. The majority of new cases were brought under BITs. Ten cases were filed pursuant to the provisions of the Energy Charter Treaty (sometimes in conjunction with a BIT), three cases under the North American Free Trade Agreement (NAFTA), two cases under the Moscow Convention on the

[9] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

[10] There is also an option for the States parties to the treaty to agree that disputes brought pursuant to their pre- 2014 IIAs (i.e., IIAs concluded before 1 April 2014) will be subject to the UNCITRAL Transparency Rules. Moreover, the UNCITRAL Working Group on Arbitration also commenced work on the preparation of a multilateral convention on transparency, which, if adopted, would serve as a mechanism to create the agreement necessary to apply the Rules to pre-2014 IIAs.

Protection on Investor Rights,[11] and one case under the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA).

Amounts claimed. Information regarding the amount sought by investors is scant. For cases where this information has been reported, the amount claimed ranges from USD 27 million[12] to about USD 1 billion.[13]

B. New claims in 2013: some highlights

Challenged measures. Similar to previous years, investors challenged a broad range of government measures. These include: changes related to investment incentive schemes (at least 14 cases), cancellation or alleged breaches of contracts by States (at least 10), alleged direct or *de facto* expropriation (at least 5), revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions, creation of a State monopoly in a previously competitive sector, allegedly unfair tax assessments or penalties, invalidation of patents, and legislation relating to sovereign bonds. The subject matter of several disputes is unknown.

Renewable energy cases. 2013 is notable for a large number of cases filed by investors in solar energy installations against the Czech Republic and Spain. In fact, nearly a quarter of all arbitrations initiated in 2013 involve challenges to the regulatory actions by those two countries that affected the renewable energy sector.[14] With respect to the **Czech Republic**, investors are challenging the 2011 amendments that placed a levy on electricity generated from solar power plants. They argue that these amendments undercut the viability of the investments and modified the incentive regime that had been originally put in place to stimulate the use of renewable energy in the country.[15] The claims against **Spain** arise out of a seven per cent tax on the revenues of power generators and a reduction of subsidies for renewable energy producers.[16]

In addition to the solar energy claims, there is another case where an investor is complaining of the revocation of an investment incentive (VAT subsidy).[17]

Greek financial crisis. Two of the cases brought in 2013 relate to the Greek financial crisis. Marfin Investment Group (MIG) filed a claim against Cyprus in connection with the Government's effective takeover of the Cyprus Popular Bank (in 2012, by decree, the State increased its stake in the Bank to 84 per cent). The Government's actions were taken to stabilize the Bank, which was suffering from broad exposure to defaulted Greek sovereign debt and other non-performing loans in Greece. The claimant alleges that the Government unlawfully diluted the claimant's stake in the bank, mismanaged the bailout and "*arbitrarily and illegally*" replaced the former management team, which "*led to the large losses subsequently incurred by the bank*."[18] According to the investor, these actions violated the Cyprus-Greece BIT. The claimant is seeking EUR 824 million in compensation.

---

[11] Signed in 1997 by a number of countries belonging to the Commonwealth of Independent States (Armenia, Belarus, Moldova, Tajikistan, Kazakhstan, the Kyrgyz Republic and Russia).

[12] *Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain* (SCC).

[13] *Khaitan Holdings Mauritius v. India* (UNCITRAL); *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus* (ICSID Case No. ARB/13/27).

[14] In 2014, two more cases were filed by investors in the solar power sector – one against Spain and one against Italy.

[15] C. Spalton, "Solar investors cast cloud over the Czech Republic", *Global Arbitration Review*, 17 May 2013, available at http://globalarbitrationreview.com/news/article/31589/solar-investors-cast-cloud-czech-republic/ (accessed on 25 February 2014); S. Perry and K. Karadelis, "Sun rises on Czech energy claims", *Global Arbitration Review*, 19 February 2014, available at http://globalarbitrationreview.com/news/article/32436/sun-rises-czech-energy-claims/ (accessed on 25 February 2014).

[16] Law 15/2012 of 27 December 2012, available at http://www.boe.es/boe/dias/2012/12/28/pdfs/BOE-A-2012-15649.pdf (accessed on 25 February 2014) and Law 2/2013 of 1 February 2013, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-1117 (accessed on 25 February 2013).

[17] *Spentex Netherlands, B.V. v. Republic of Uzbekistan* (ICSID Case No. ARB/13/26).

[18] Press Release by Marfin Investment Group, 23 January 2013, available at http://www.marfininvestmentgroup.com/en/view/press-releases (accessed on 25 February 2014).

The second crisis-related claim was brought against Greece by Poštová banka, a Slovak bank, together with its Cypriot shareholder. The claimants allege that, as owners of Greek sovereign bonds, they suffered losses of EUR 275 million, arising from the 2012 Greek Bondholder Act. Allegedly, the Act "*retroactively and unilaterally*" amended the terms of the bonds by inserting a "*collective action*" clause, which permitted the "*imposition of new terms upon bondholders against their consent if a supermajority of other bondholders consent[ed].*"[19] The claimants contend that Greece used this clause to force Poštová banka to exchange its bonds for new securities of substantially less value.[20]

Enforcement of a host State's court decision. Cases where investors challenge the conduct of the domestic courts of the host State are not infrequent. However, apparently for the first time, an investor resorted to international arbitration to *enforce* the decision of the host State's highest court. In *Transglobal Green Energy v. Panama*, the claimant alleges that the government's executive branch failed to implement the decision of Panama's Supreme Court (to reinstate the investor's company as a concessionaire in a hydroelectric project) and thereby breached the Panama-United States BIT.[21]

Challenge to a prospective measure. Another unusual claim was initiated by Achmea against the Slovak Republic. Achmea, a Dutch insurance company, is seeking to preclude the host State from expropriating Achmea's stake in a Slovak health insurer (the relevant draft law is under consideration by the Slovak Parliament). The right of States to expropriate property is well-established under international investment law as long as certain conditions are met. Achmea is claiming that some of these conditions would be breached (requirement of public interest, non-discrimination and due process) if the expropriation goes ahead.[22]

Environment-related disputes. Several arbitrations launched in 2013 have an environmental dimension. In two disputes against Canada, investors are challenging measures introduced on environmental grounds. The first, a claim by Lone Pine Resources, arose out of Quebec's moratorium on hydraulic fracturing (fracking) that led to the revocation of the company's gas exploration permits.[23] The second dispute relates to Ontario's moratorium on offshore wind farms (pending research on their health and environmental effects); the claimant contends that the temporary ban breaches its contract for the electricity supply which it had concluded with the Ontario Power Authority for a 20-year period.[24]

Two further disputes both relate to failed developments of beachfront resorts in environmentally sensitive areas. In *Spence v. Costa Rica*, the claimants contend that the land they had acquired was expropriated to create a beachfront ecological park, without prompt or effective compensation paid to them. They also suggest that the government's decisions were marred by conflicts of interest of the decision makers,

---

19 "Bondholders' Claim against Greece is Registered at ICSID, as Mandatory Wait-Period Expires on Another Threatened Arbitration", *IA Reporter*, 30 May 2013, available at http://www.iareporter.com/articles/20130530_2 (accessed on 25 February 2013).

20 *Ibid.*

21 *Transglobal Green Energy LLC and Transglobal Green Panama, S.A. v. Republic of Panama* (ICSID Case No. ARB/13/28), Request for Arbitration, 19 September 2013, available at http://www.italaw.com/cases/2242 (accessed on 28 February 2014).

22 Press-release by Achmea, 5 February 2013, available at http://news.achmea.nl/achmea-undertakes-legal-steps-against-slovak-republic (accessed on 28 February 2014); L. Franc-Menget, «ACHMEA II – Seizing Arbitral Tribunals to Prevent Likely Future Expropriations: Is it an Option?», available at http://kluwerarbitrationblog.com/blog/2013/03/28/achmea-ii-seizing-arbitral-tribunals-to-prevent-likely-future-expropriations-is-it-an-option/ (accessed on 28 February 2014). The case raises novel legal issues regarding the possibility of challenging prospective measures and exclusively resort to non-pecuniary remedies (order the respondent to abstain from certain actions).

23 *Lone Pine Resources Inc. v. The Government of Canada* (UNCITRAL), Notice of Arbitration, 6 September 2013, available at http://www.italaw.com/cases/1606 (accessed on 28 February 2014).

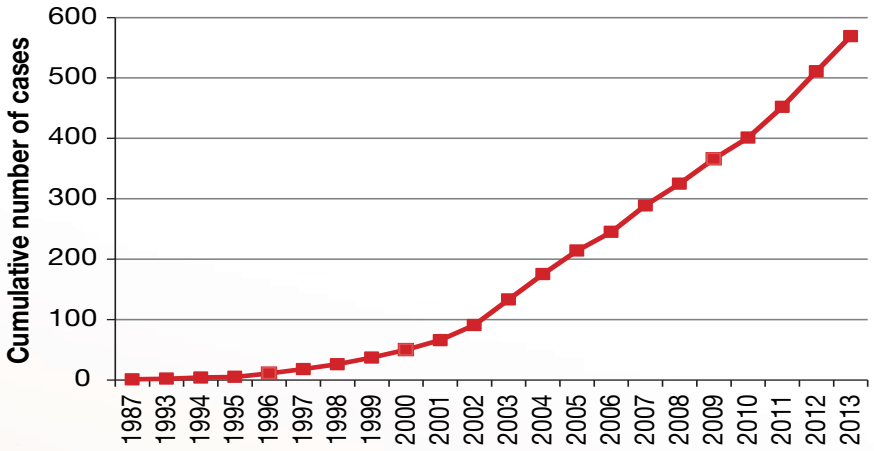
24 *Windstream Energy LLC v. Government of Canada* (UNCITRAL), Notice of Arbitration (Amended), 5 November 2013, available at http://italaw.com/cases/1585 (accessed on 28 February 2014).

and that their decisions were not unbiased or objective.[25] In *Lieven Riet et al. v. Croatia*, the claimants maintain that due to the misleading assurances they received from the local zoning office, they purchased land where residential development was barred, which did not allow their beach resort project to proceed.[26]

C. Total claims by end 2013

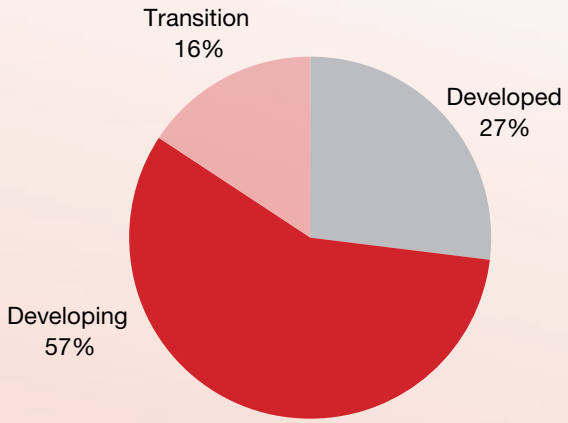
The total number of known treaty-based cases reached 568 by the end of 2013 (figure 6).[27] Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.

Figure 6. Known ISDS cases (total as of end 2013)



Respondent States. In total, over the years at least **98 governments** have been respondents to one or more investment treaty arbitration (see annex 2). About three-quarters of all known cases were brought against developing and transition economies (figure 7).

Figure 7. Respondent States by development status (total as of end 2013)



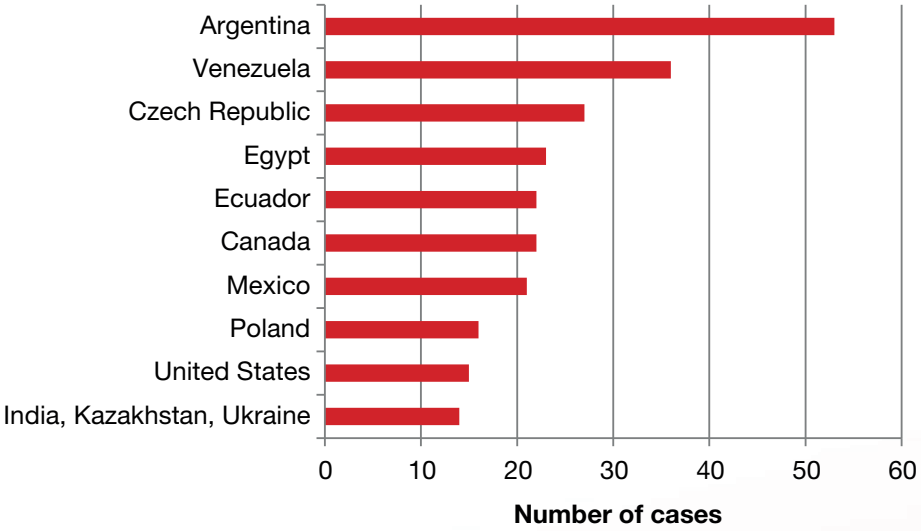
[25] *Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brette E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion v. The Government of the Republic of Costa Rica* (UNCITRAL), Notice of Arbitration and Statement of Claim, 10 June 2013, available at http://italaw.com/sites/default/files/case-documents/italaw1502.pdf (accessed on 28 February 2014).

[26] L. E. Peterson, "As Croatia Joins EU, it Faces ICSID Arbitration Over Thwarted Resort Development on Dalmatian Coast", IA Reporter, 4 July 2013, available at http://www.iareporter.com/articles/20130704_1 (accessed on 28 February 2014).

[27] Following a verification exercise, the number of total known IIA-based ISDS cases at the end of 2012 was revised down to 511 from 514, as reported in UNCTAD's 2013 IIA Issue Note No. 1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf. The verification process led to the addition of a number of previously unknown cases and the deletion of a number of cases where information was too scarce to ensure accurate reporting.

Argentina (53 cases) and Venezuela (36) continue to be the most frequent respondents. The Czech Republic (27) and Egypt (23) replaced last year's Ecuador and Mexico as number three and four respectively (figure 8).

Figure 8. Most frequent respondent States (total as of end 2013)



Home States. The overwhelming majority (85 per cent) of ISDS claims were brought by investors from developed countries (figure 9).

Figure 9. Home States by level of development (total as of end 2013)