APPEALS AND CHALLENGES TO INVESTMENT TREATY AWARDS: IS IT TIME FOR AN INTERNATIONAL APPELLATE SYSTEM?

British Institute of International and Comparative Law
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Comment: Testing the Procedural Limits of the Treaty System: The Argentinean Experience

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34 pending cases against Argentina

- Cases related to emergency measures (30) - 87%
- Other cases (4) - 13%
30 cases related to emergency measures

- ICSID arbitrations (26), 87%
- UNCITRAL arbitrations (4), 13%

1 case is over 87%
ICSID Cases (pending)

- Cases against other states (44) - 59%
- Cases against Argentina (30) - 41%
Classification of cases related to the emergency by type of measure

- 74% restructuration public utilities system (22)
- 13% retention on exports (4)
- 13% financial measures (4)
cases on emergency by nationality

- **USA**: 43%
  - Population: 13
- **UK**: 13%
  - Population: 4
- **FRA**: 23%
  - Population: 7
- **SPN**: 7%
  - Population: 2
- **CHI**: 7%
  - Population: 2
- **BNL**: 7%
  - Population: 2
Who are the claimants?

- Local companies that allegedly qualify as a foreign investor because they are controlled by foreigners (E.g. French BIT).
- Controlling shareholders.
- Indirect controlling shareholders.
- Non controlling shareholders. (CMS v. Arg.)
- Indirect non controlling shareholders. (Enron v. Arg)

Note 1: there are at least three pairs of cases in which different shareholders in the same local company have filed indirect claims for the measures affecting such company.

Note 2: circa 80% of the claims are indirect claims.

Note 3: In some cases local companies have started proceedings before local courts based on the same facts and involving common issues of law.
When were the tribunals constituted? (ICSID cases)

<table>
<thead>
<tr>
<th>Time in Quarters</th>
<th>Number of Cases</th>
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<tbody>
<tr>
<td>1Q 2002</td>
<td>2</td>
</tr>
<tr>
<td>2Q 2003</td>
<td>4</td>
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<tr>
<td>3Q 2003</td>
<td>1</td>
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<tr>
<td>4Q 2003</td>
<td>3</td>
</tr>
<tr>
<td>1Q 2004</td>
<td>7</td>
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</tbody>
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(time in quarters (1 = 1st quarter 2002)}
Summary

- 1 factual background (emergency).
- 3 basic government measures.
- 6 BITS.
- 30 cases.
- 80% of indirect claims.
- 29 arbitrators.
- 10 law firms.
- Some pending proceedings before local courts involving common points of law/fact.
Sources of multiplicity

• The “explosive cocktail”. Combination of:
  – i) blanket protection
  – ii) massive offer of jurisdiction to beneficiaries of blanket protection.
  – iii) ad hoc decentralized adjudication
  – iv) availability of multiple jurisdictional remedies (local – international / ICSID – UNCITRAL)
  – v) No provisions on consolidation (treaties and arbitration rules).
  – vi) Multiple different BITs.

• Indirect claims and the problem of the “almighty shareholder”

• Formalistic approaches to issues of identity of proceedings: the “labelling game”.