

INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES (VOLUME I)  
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The study of the United Nations Conference on Trade and Development (UNCTAD) on key issues in international investment agreements (IIAs) is perfectly timed. The role of foreign investments as one of the critical factors of international economic relations has increased dramatically in recent years. The last two decades witnessed the emergence of new policy trends with respect to foreign investments. Host countries have focused on the most efficient ways of attracting foreign investments, eliminated restrictions on the entry and operations of foreign investments, and offered guarantees against measures harmful to the foreign investors' interests. As a direct result of these trends, there have been significant developments in the legal regime of foreign investments. As the UNCTAD study notes on its first page, "[a]n international legal framework for FDI has begun to emerge. It consists of many kinds of national and international rules and principles, of diverse form and origin, differing in strength and degree of specificity. The entire structure rests on the twin foundations of customary international law and national laws and regulations and relies for its substance on a multitude of international investment agreements (IIAs) and other legal instruments."

Indeed, there has been an exponential growth of the number of IIAs during the last decade. The most illustrative example is the growth in the number of BITs, which has nearly doubled since the second half of the 1990s. By the end of 2003, some 176 countries had entered into more than 2,200 such treaties, creating an interlocking web of legal protections for investors that, in the overwhelming majority of the treaties, is backed by the option to resort to arbitration.<sup>1</sup> Along with the increasing number of bilateral investment treaties (BITs), there has been a growth of the numbers of regional and plurilateral international agreements with a significant impact on the legal regime of foreign investments.

<sup>1</sup> See UNCTAD, World Investment Report 2004, at xvii, 6, & fig. I.3.

The principal focus of IIAs is liberalizing the national investment regimes and granting protections, such as guarantees for the free transfer of investment proceeds, protections against expropriation, discrimination and other types of unfair and inequitable treatment, etc. The UNCTAD study, again at page 1, identifies one of the critical features of IIAs: "They [IIAs] are highly standardized, yet they appear to be capable of adapting to special circumstances." The provisions of IIAs are interpreted and illuminated on the basis of the applicable rules of customary international law and are in constant interaction with domestic laws and policies. They are sufficiently general to offer broad protections to investors and, at the same time, sufficiently flexible to apply to the specific situation of individual investors and investments.

Further, there has been a rapid increase in the number of international arbitrations between foreign investors and host governments in recent years. The total number of investor-state arbitrations brought under IIAs stands at 160, with well over half of the cases (92) filed during the last three years.<sup>2</sup> About two thirds of those cases (106) have been filed before the International Centre for Settlement of Investment Disputes (ICSID); thus, the ICSID statistics are representative of the trend. The first ICSID case under an IIA was registered in 1987. Ten years ago, at the end of 1994, ICSID had before it only three cases between foreign investors and host governments under IIAs.<sup>3</sup> The first year in which more than five ICSID cases were registered was 1997.<sup>4</sup> At the end of 1997, the number of pending cases was 14; at the end of 2001, it was 37; and at the end of 2003, there were 64 pending cases.<sup>5</sup> As of August 2005, ICSID's website listed some 95 pending cases between investors and host states—well over half of which have been filed in since 2003.<sup>6</sup> The vast majority of these cases arise between investors and host governments pursuant to IIAs. At least fifty additional IIA-based cases are understood to be pending before non-ICSID arbitral tribunals.<sup>7</sup>

The decisions of the arbitrators in the numerous investor-state disputes have created a body of law, which has had a significant impact on the development of the legal framework of foreign investments and on the negotiations of new IIAs, even though those decisions do not have the legal force of precedents. Therefore, an examination of the international legal framework of foreign investment

<sup>2</sup> See UNCTAD, Occasional Note: International Investment Disputes on the Rise, UNCTAD/WEB/ITE/IIT/2004/2 (Nov. 29, 2004) at 1.

<sup>3</sup> *Id.* at 1 & fig. 1.

<sup>4</sup> See Emmanuel Gaillard, *La Jurisprudence du CIRDI 2-3* (Paris, 2004).

<sup>5</sup> See Gaillard, *La Jurisprudence du CIRDI 4*.

<sup>6</sup> ICSID, Pending Cases, available at <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Aug. 30, 2005).

<sup>7</sup> See UNCTAD, Occasional Note: International Investment Disputes on the Rise, *supra* note 2, at 1 & fig. 3.





