Trends in International Arbitration: A New World Order

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In an *FTI Journal* article we wrote in 2010, "Dispute Resolution in the Global Economy," we noted a surge in claims in international arbitration arising from the global economic crisis but also identified some longer-term underlying drivers of dispute activity based on cross-border investment flows. We described an emerging shift from established arbitration centers in Europe to the Middle East and Far East and some increase in the size of claims filed.

The global economy has experienced extreme stresses in recent years, beginning with the banking crisis of 2007 and the global recession that followed. The crisis led to additional regulation of the financial sector, turmoil in the commodities and energy markets, and a pivot of the world's economy toward developing markets. This has slowed (but not halted) the growth in cross-border economic activity — a key driver of trends in international arbitration disputes.

A 2014 United Nations Conference on Trade and Development report showed that while the growth in inward foreign direct investment ("FDI") fell in 2008 (when the banking crisis intensified), since then it has grown 8.1 percent a year and that developing economies have greatly expanded their share of the stock of inward FDI, from approximately 25 percent during the period from 1990 to 2004 to 37 percent by the end of 2013.

At the same time, these economies are becoming much more active contributors to FDI. Their share of outbound FDI (investments sourced from these countries) grew from 7 percent in 1990 to 13 percent in 2001 and further to 21 percent in 2013.

But those are aggregate figures. India's outbound FDI grew from $200 million in 1990 to $119.8 billion in 2013, an increase of almost 600 percent, and China's grew from $7.8 billion to $613.6 billion over the same period.

Trade flows give further insight into the scale, growth and direction of developing economy cross-border activity. For example, in 2003, trade between sub-Saharan Africa and its main trading partners was under $200 billion, of which China represented 10 percent. In 2013, that more than doubled to $460 billion, with China representing approximately 37 percent.

What we've seen today is that the recovery of the global economy does not appear to have led to a slowdown in new case filings — with the ongoing growth in cross-border economic activity a key driver of disputes — in both well-established centers such as the International Chamber of Commerce ("ICC") and the International Centre for Settlement of Investment Disputes ("ICSID"), as well as newer centers like the Singapore International Arbitration Centre ("SIAC") and the Dubai International Arbitration Centre ("DIAC").

Volume and Size of Disputes Are on the Rise

There are many factors that make identifying foundational, underlying trends in international arbitration challenging. Filings in any one period may relate to claims following changes in governments or industry-specific developments such as the U.S. shale gas revolution that has dislocated the global energy industry and generated widespread arbitration disputes. But with these and other caveats in mind, and as shown in Table 1, we have found:

- The SIAC has seen a noticeable increase in the number of filings of international disputes since the mid-2000s — 29 new filings in 2005, rising to 223 in 2013 — that also is evident in the value of the claims brought.This surge in filings appears to be the result of the SIAC's efforts to promote Singapore as a venue for arbitration along with revisions to its rules enacted in 2010. A similar trend can be seen at the Korean Commercial Arbitration Board ("KCAB") in South Korea.
- However, other Asian arbitration centers (China's CIETAC and Hong Kong's HKIAC) have seen a decline in the number of cases handled since the late 2000s.
- The growth in filings remains broadly distributed across venues with no one arbitration center dominating filings.

There is a common perception that the amounts in dispute in international arbitration are rising over time, fueled (perhaps) by headlines about large awards such as the recent $50 billion awarded to former majority shareholders in Russian oil company Yukos, $2.2 billion awarded to Dow Chemical in its claim against a Kuwaiti state entity in 2012 (in a case administered by the ICC) and $1.8 billion that Ecuador was ordered to pay Occidental Petroleum, also in 2012, in an ICSID case.

Given the confidential nature of many awards and the disparate arbitration center reporting practices, available statistics are limited. Historically, many arbitration centers filed few, if any, statistics regarding the size of claims filed. However, perhaps reflecting the competition among arbitration centers, more statistics are being made available, and they support the impression that the amounts in dispute in international arbitration cases, on average, are increasing.

These summary statistics can provide a partial picture as they combine smaller, mainly domestic disputes with larger, cross-border disputes involving multinationals or claims against nation states. But our review of cases being handled by leading international arbitration law firms suggests a strong increase in both the number of major claims and the aggregate value of total claims, as shown in Table 2.

This is consistent with the trends observed in the Arbitration Scorecard published by the *American Lawyer*. For example, the 2005 scorecard reported 59 investor treaty arbitrations where the amount in dispute exceeded $100 million. This number almost tripled by 2013, with 165 arbitrations in excess of $100 million.

Behind the Numbers

Although many arbitration centers report filings by industry and by nationality of parties involved, different classifications over time and among centers make direct comparisons (and, therefore, analysis) difficult. As well, the numbers do not fully

Table 1: New Arbitration Case Filings, 2000 to 2013

International Arbitration Cases (Excludes Domestic Cases)[1]

Institution	Country	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
ICSID[2]		12	14	19	31	27	27	23	37	21	25	26	38	50	40
AAA-ICDR		510	649	672	646	614	580	586	621	703	800	888	994	996	1165
BAC		11	20	19	33	30	53	53	37	59	72	32	38	26	N/A
CIETAC		543	562	468	422	461	427	442	429	548	560	418	470	331	N/A
DIS		N/A	N/A	N/A	N/A	N/A	N/A	16	30	22	41	43	55	30	N/A
ICC		541	566	593	580	561	521	593	599	663	817	793	796	759	767
KCAB		40	65	47	38	46	53	47	59	47	78	52	77	85	N/A
LCIA		87	71	88	104	87	118	133	137	215	272	246	224	265	290
SSC		66	68	50	77	45	53	64	81	74	96	91	96	92	86
Subtotal[3]		**1,810**	**2,015**	**1,956**	**1,931**	**1,871**	**1,832**	**1,957**	**2,030**	**2,352**	**2,761**	**2,589**	**2,788**	**2,634**	**N/A**
SIAC		37	39	34	23	39	29	47	55	71	114	140	N/A	N/A	223
SCCAM[2]		N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	52	79	71	66	69	50
VIAC		N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	60	68	75	70	56
Total International		**1,847**	**2,054**	**1,990**	**1,954**	**1,910**	**1,861**	**2,004**	**2,085**	**2,475**	**3,014**	**2,868**	**2,929**	**2,773**	**N/A**

International and Domestic Arbitration Cases

DIAC		N/A	N/A	N/A	N/A	N/A	N/A	N/A	77	100	292	431	440	379	310
HKIAC		298	307	320	287	280	281	394	448	602	429	291	275	293	263
Grand Total		**2,145**	**2,361**	**2,310**	**2,241**	**2,190**	**2,142**	**2,398**	**2,610**	**3,177**	**3,735**	**3,590**	**3,644**	**3,445**	**N/A**

[1] Statistics are for year ending December 31.
[2] Numbers include Additional Facility cases. Some of the other centers also administer bilateral investment treaty disputes but on an ad hoc basis. We have not taken into account any Permanent Court of Arbitration cases for the purpose of this table.
[3] Subtotal numbers include those institutions for which data are available between 2006 and 2012 and ICSID.

N/A = Not available.
Source: Individual institution websites.

Table 2: Number and Value of Arbitration Cases Reported in the GAR 30 — 2010 to 2014

Year	Number of Pending Claims as Counsel	Number of Major Claims[1]	Value of All Pending Claims as Counsel (USD $ billion)
2010	2,040	47	643
2011	2,615	49	1,358
2012	2,484	N/A	1,084
2013	2,986	72	1,602
2014	N/A	102	1,716

[1] GAR classified claims as "bet-the-company hearings," which we have termed "major claims" in this table if they exceeded USD$900 million (2010–2013) and USD$1,000 million (2014).

N/A = Not available.
Source: GAR 100 Surveys, 2010 to 2014.

reflect the impact of two major events on the global economy:

- The 2007 financial crisis and the disputes that resulted from the collapse of Lehman Brothers and other financial institutions, as well as the rescue of a number of leading banks orchestrated by the U.S. and UK governments;
- The growing use of intellectual property ("IP") rights through licenses, franchises and distribution agreements and the shift from manufacturing to services as economies develop and mature. The statistics compiled by arbitration centers identify very few disputes relating to IP rights per se (although these rights may underlie contractual or joint venture disputes and, therefore, are not categorized as IP related).

From FTI Consulting's experience, we note the following developments at an industry/sector level across energy, natural resources, financial markets and IP.

ENERGY DISPUTES

According to Boaz Moselle, Ph.D., an FTI Consulting expert specializing in energy disputes:

We continue to see a high volume of disputes related to pricing in long-term gas supply contracts with continental European buyers, covering piped gas and liquefied natural gas (gas transported in cryogenic ships). Such contracts typically contain clauses that specify periodic price reviews according to various economic criteria, and, in recent years, this review process often has proved contentious. The economic issues in these disputes appear to be becoming more diverse in terms of both the underlying market factors and their implications for price changes. For example, disputes now include: the effects on natural gas demand due to the Fukushima disaster and the consequent switch to gas-fired power generation in Japan, leading to increased price arbitrage among European and Asian markets; the rapid expansion of renewable generation combined with the increasing use of coal-fired generation, which has displaced large amounts of gas-fired generation in parts of Europe; and claims by buyers and sellers alike that various aspects of European Union ("EU") competition law may invalidate elements of the existing contractual arrangements.

NATURAL RESOURCES DISPUTES

According to Howard Rosen, an FTI Consulting expert with in-depth experience in natural resources disputes:

Natural resources, and particularly mining disputes, have and will continue to represent a significant percentage of treaty and commercial arbitration cases. Significant factors that have contributed to this pattern include the global depletion of high-grade resources, the rise of commodity prices through the first decade of this century, the growth of emerging countries' requirements for industrial commodities and the capital markets' thirst for returns. These factors have driven investments in virtually every corner of the globe. Since natural resources are the property of the host country, the balance between extracting economic rents

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from mining companies and providing a fair return to the government and, hence, citizens of the host country, has led to disputes between investors and their hosts. Additionally, with increased attention placed on the environment, the impact of the mining community on host countries has received intensified scrutiny.

FINANCIAL MARKETS DISPUTES

The vast majority of financial markets disputes have arisen in developed economies such as the United States and Europe, which have sophisticated capital markets and a well-established legal system. As a result, most such disputes proceed through domestic courts. Although insurance disputes frequently are resolved through arbitration, this has less often been the case with other financial markets disputes.

According to David Ellis, Ph.D., an FTI Consulting expert who acts in disputes relating to complex financial instruments:

A number of issues may have hindered the use of arbitration to resolve financial markets disputes such as differing duties of confidentiality among territories. The International Swaps and Derivatives Association ("ISDA") published the "2013 ISDA Arbitration Guide," which has brought some clarity on arbitrating financial markets disputes in leading international arbitration venues. And the formation of the Panel of Recognised International Market Experts in Finance, or PRIME, in 2012 may further encourage the use of arbitration in financial markets disputes.

IP DISPUTES

IP rights tend to be governed by a series of national frameworks, with a separate structure for various IP rights (such as patents, utility models, trademarks, copyrights and design rights). Disputes over infringement, therefore, must be pursued at a territorial level. Consequently, IP-related arbitrations tend to be reflected in contract-based disputes or shareholder and joint venture disputes, where one investor contributes valuable IP — such as technology or brands — and the other party provides access to foreign markets.

According to Andrew Wynn, who specializes in IP disputes at FTI Consulting:

There has been a gradual increase in the number of IP disputes resolved through arbitration, but the numbers remain small. However, IP-oriented disputes are more significant than one might think such as the bilateral investment treaty ("BIT") claim brought by a Hong Kong-based subsidiary of Philip Morris International against the Australian government. This arbitration followed the introduction of plain packaging legislation for tobacco products and addressed damage to the value of the Hong Kong entity's investment in its Australian subsidiaries. In effect, this was a claim for damage to the value of Philip Morris' tobacco brands such as Marlboro. Similarly, Eli Lilly has filed a case against the Canadian government relating to pharmaceutical patents. We also are seeing a number of claims against Asian entities for misuse of confidential information and breach of contract in the petrochemicals sector.

Disputes Go Global

Historically, various nationalities have favored several venues for dispute arbitration. Many Indian entities have opted for Singapore, for example, while parties from Eastern Europe and the former Soviet Union have preferred Sweden. Today, however, we can see a general decline in parties from the Americas in nearly all forums, a rise in claimants from Africa and a trend toward a more widespread geographic origin of users of SIAC. This is consistent with the broader economic trends — especially the growth in outbound FDI from emerging economies — previously noted.

This pattern of changing arbitration venue preference speaks to the increasingly complex nature of international trade and investment. According to James Searby, head of FTI Consulting's International Arbitration practice in Singapore:

We are seeing rapid growth in commercial arbitration in East Asia tied to greater investment flows. While natural resources continue to feature strongly in disputes, we also are noticing expansion in arbitration relating to capital equipment, information technology projects and shareholder disputes. In India, we are seeing both domestic and cross-border joint venture and IP disputes. And also in India, as in China, foreign parties seek to arbitrate their disputes offshore to keep them away from local courts. Compared with other regions, there are relatively few investor-state disputes in India, perhaps because investors fear to file suit against certain governments or because investors believe that future success will compensate for current losses.

The Trend Line: A New World Order

The internationalization of the global economy that has underpinned the rapid growth of international arbitration over the last 20 years shows no sign of abating. Despite the misgivings among some investors and other stakeholders, there are few realistic alternatives to international commercial arbitration. We expect the number of commercial cases to continue to increase.

The picture for investment treaty cases, however, is more complex. In recent years, Bolivia, Ecuador and Venezuela

all have denounced the International Centre for Settlement of Investment Disputes Convention, and it is possible other countries will follow suit. Although action shows hostility to bilateral investment treaties, these countries will remain bound by sunset clauses in existing BITs for some years, and many of the countries' BITs provide for dispute resolution through other forums such as the United Nations Commission on International Trade Law and the ICSID Additional Facility Rules.

In 2011, Australia announced that it would reject investor-state arbitration in all trade agreements. This was driven, in part, by Philip Morris Asia's claim following the introduction of plain packaging legislation for tobacco products.

A further negative indication for investment treaty arbitration arises from negotiations over the Transatlantic Trade and Investment Partnership talks between the United States and the EU, which have encountered difficulties based on concerns in Germany and other countries about the mechanisms for the resolution of disputes. These concerns may stem from the ambiguity of evidence over whether bilateral investment treaties promote foreign direct investments between signatory countries. The bottom line is that no clear positive relationship between BITs and FDI has been established.

On the other hand, Argentina recently moved to pay one of the many ICSID awards against it, and the EU, which intends to negotiate EU-wide BITs to replace many of the BITs among EU members and other countries, recently confirmed its intention to make extensive improvements to existing investor-state dispute resolution mechanisms. In its agreements, the EU is including firm transparency obligations so that all documents and hearings will be public.

The long-term future of investment treaty arbitration therefore appears less clear than for commercial arbitration, although whatever developments do occur in investor-state arbitration, it will take some time for them to become widespread.

Globalization has advanced at a remarkable pace over the last 25 years. Not surprisingly, the number of disputes addressed through international arbitration also has exploded during that time. In our view, this has been driven primarily by the complexity that comes with economic activity occurring on a far greater scale — and more broadly distributed — than ever before. The rebalancing of the global economy toward developing economies in general, and particularly Asia Pacific, has coincided with the rise of arbitration institutions based in that region.

Barring unforeseen and dramatic developments in the global political and economic environments, we expect these commercial arbitration trends to continue. The political climate surrounding investment treaty arbitration is more nuanced, with hostility toward international arbitration in general manifested in a number of trade and investment treaties currently under negotiation. But due to factors such as the long lead times in disputes and the existence of sunset clauses in international treaties, we would expect any effects of such hostility to take a number of years to be felt in terms of the number of new investment treaty cases filed.

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