Natalia Petrik [1]
legal counsel
Arbitration Institute of Stockholm Chamber of Commerce
natalia.petrik@chamber.se

Overview of the SCC Investment Caseload
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1. Introduction

As former Justice of the Supreme Court of Sweden Hans Danelius describes in his recent publication, investment arbitration is a distinct procedure that can be distinguished from ordinary commercial arbitration for its unique characteristics.[2] Investment arbitration is mainly based on international bilateral or multilateral treaties where State parties agree that a dispute between a Host-State and an investor from the other Contracting State may be submitted to an international tribunal. At the same time, there are several investment arbitration proceedings under investment agreements negotiated between an investor and a State.

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has been handling investment disputes for almost 20 years, with its first case filed in 1993. By 2012 the SCC investment caseload included approximately 50 cases. No other institution in the world, apart from the specialized International Centre for Settlement of Investment Disputes (ICSID), handles more investment arbitration cases with its own rules than the SCC.[3]

[1] The author is grateful for the co-authorship and research support of Paul Moon, SCC intern.
[2] Hans Danelius "ICSID, UNCITRAL and SCC As Investment Fora" in Kaj Hobér, Annette Magnusson, and Marie Öhström (eds.) *Between East and West: Essays in Honour of Ulf Franke* (Huntington NY: Juris, 2010) p. 107.
[3] Another institution that regularly handles investment arbitration is the Permanent Court of Arbitration but it does not act or administer under its own rules.

SCC investment arbitrations are primarily based on bilateral investment protection treaties (BITs). As far as known, reference to the SCC as a forum is included in 61 BITs, while as appointing authority SCC is mentioned in 64 BITs. The most recent BIT referring to the SCC was entered into between the Belgium and Luxembourg Economic Union and Panama in 2009. In addition, the SCC is one of the two designated institutions (the other is ICSID) where an investor may submit a claim for settlement under the Energy Charter Treaty (ECT).

The SCC has also handled several cases that might be classified as "semi-investment". These cases do not rely on a BIT or a multilateral treaty but are submitted to the SCC under agreements concluded by the parties prior to the dispute. A distinguishing feature of these agreements is that they contain a specific guarantee or similar obligation of the Host State with respect to the investment.

The review below covers the following aspects of SCC cases: the type of agreement or instrument relied upon by investors; the relationship between the average amount of claim and the average amount awarded; the length of proceedings; and costs in investment arbitration.

Based on the SCC investment caseload, this report also highlights certain procedural issues arising in BIT and ECT arbitrations.

2. Type of agreement or instrument relied upon by investors

2.1 Bilateral Investment Treaty (BIT)-based cases

As of May 2012, sixteen (16) BITs have been relied upon by investors in thirty-six (36) proceedings. State parties from Asia, Europe, North America, and South America have appeared as respondents in SCC investment arbitration. Most identified BITs are between a "Western" State and an "Eastern" State but it is also noted that a BIT between two former USSR republics has also been a subject of several SCC proceedings.

Unlike ECT-based cases, disputes brought under BITs are not restricted to the energy sector. Investors from different business branches such as construction, financial services, and telecommunications have initiated proceedings against a State at the SCC.

The Chairperson of the SCC is also designated as an appointing authority under certain BITs such as Article 8(4) of the Netherlands-Slovakia BIT (1991)[4] and Protocol Ad Article 4(b) of the Bulgaria-Germany BIT (1986)[5] that apply the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Recently, the SCC updated the Procedures and Services Under the 2010 UNCITRAL Arbitration Rules.[6]

As an appointing authority, the SCC is capable of the following: appointing a sole or presiding arbitrator; appointing a "second arbitrator" in three-arbitrator cases; deciding on challenges to arbitrators; cost review of fees of arbitrators and deposits of costs; and appointing substitute arbitrators. As of May 2011, the SCC had appointed four (4) chair arbitrators, six (6) "second" arbitrators and made decisions on four (4) challenge to arbitrator applications.

2.2 Energy Charter Treaty (ECT)-based cases

Article 26(4)(c) of the ECT designates the SCC as one of the institutions where investors can submit disputes for resolution under the Treaty. The SCC has registered seven (8) ECT cases as of May 2012. The number may appear insignificant but considering that there have been only twenty-nine (29) ECT disputes since the first ECT arbitration in 2001, it could be argued that the SCC handles a substantial number of ECT disputes amounting to nearly a quarter of the entire Treaty caseload.[7]

[4] Bilateral Investment Treaty between the Netherlands and Slovakia. Available at: <http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_slovakia.pdf> accessed 28 October 2011.
[5] Bilateral Investment Treaty between Bulgaria and Germany. Available at: <http://www.unctad.org/sections/dite/iia/docs/bits/germany_bulgaria.pdf> accessed 28 October 2011.
[6] SCC website – In force as of 15 October 2011. Available at: <http://www.sccinstitute.se/filearchive/4/41678/UNCITRAL_2010_FINAL%203%20October%202011.pdf> accessed 28 October 2011.
[7] *AES Summit Generation Ltd. (UK Subsidiary of US-based AES Corporation) v. Hungary* ICSID Case No. ARB/01/4.

Claimants in ECT-based cases also come from a diverse background ranging from a private investor to corporations and investment companies. Similar to BIT-based cases, the traditional notion of "Western" investors bringing a claim again an "Eastern" State could be found in the SCC caseload. However, similar to BIT-based cases, an increasing tendency is observable of "Eastern" investors bringing a claim against an "Eastern" State.

3. Average amount of claim v. Average amount of award

The rate of actual amount awarded in comparison to each claim ranges from 71.95% to 0 with the average recovery rate in a "won case" of approximately 30 %. There is a huge variation in claim amount with the smallest claim being € 39,642 while the biggest claim on the other hand amounts to approximately € 400 000 000. The average award amounts to €1,216,419. The average amount claimed is € 49,695,845.

Five cases did not result in monetary compensation to investors and one case was fully dismissed on jurisdictional grounds. The claim in these cases ranges from € 10,761,260 to €392,252,343.

The 50% frequency of claimants' failure on the merits is high compared to commercial arbitration. The following are some of the reasons: the claimant failed to prove the liability of the Host State under the applicable law; failure to prove the existence of the investment; failure to prove that the rights claimed constitute an investment within the scope of the BIT protection claimed.

4. Length of proceedings

4.1 Arbitrations under the SCC Rules

Article 37 of the SCC Arbitration Rules 2010 stipulates that each tribunal must render the final award within six (6) months from the date the arbitration was referred to it. On the other hand, the same Article allows the SCC Board to extend the time limit upon a reasoned request from the tribunal or if it considers necessary. The average length of a SCC proceeding varies depending on what type of decision or award is rendered.

The SCC presently has fourteen (14) cases under that were fully resolved with an award under the SCC Rules. Additionally, there are five (5) pending disputes with one (1) that rendered an interim award in 2009. Among those fourteen (14) cases, four (4) disputes were bifurcated into two (2) phases of interim/partial award and final award. On average, an interim/partial award was rendered twenty-four (24) months after a claim had been filed at the SCC. The promptest interim/partial award was issued within thirteen (13) months of filing the case in comparison to one other interim/partial award that took forty-three (43) months.

Out of those fourteen (14) resolved cases, ten (10) awards were rendered without an interim/partial award. Without bifurcation, the average elapsed time was twenty-one (21) months; it is significantly expeditious than the average of all fourteen (14) disputes was thirty (30) months. It is noted that one award took only nine (9) months overall. Different factors contributed to such a swift resolution but it is a contrast to proceedings that took up to fifty-nine (59) months or more.

4.2 Ad hoc arbitrations with SCC as appointing authority

Apart from arbitrations under the SCC Rules, the SCC assists with procedures that facilitate disputes to move forward.

Such procedures could be largely divided into three (3) groups: non-chair arbitrator appointment; presiding arbitrator appointment and decision on challenge to arbitrator.

Article 9(2) of the 2010 UNCITRAL Arbitration Rules entitles the first party to request the appointing authority to appoint the second arbitrator. Under Article 2 of the SCC Procedures and Services under the 2010 UNCITRAL Arbitration Rules ("Procedures and Services") the SCC appoints a "second" arbitrator in three-arbitrator cases. In the past fifteen (15) years, the SCC has appointed six (6) non-chair arbitrators in *ad hoc* proceedings. The average time elapsed for the appointment was six (6) weeks. The promptest appointment was made within four (4) weeks of the application while the longest procedure took eight (8) weeks.

Article 1 of the Procedures and Services cites Article 9 (3) of the 2010 UNCITRAL Rules as the authority that enables the SCC to appoint a presiding arbitrator. The SCC has appointed a chairperson in four (4) different proceedings as of May 2012. The range of time elapsed varies greatly in this procedure as the quickest appointment was made within a week whereas one (1) application took thirty (30) weeks. The other two (2) appointments were made within five (5) weeks of application on average. Therefore, it is rather misleading to summarize that the average SCC appointment of a chairperson takes around ten (10) weeks.

Parties can also challenge an arbitrator who is already appointed as a tribunal member under Article 3 of the Procedures and Services. Four (4) such applications have been registered with the average length of procedure taking around eight (8) weeks. Similar to a non-chair arbitrator appointment, the range of time elapsed is not extensive as the quickest decision was made within four (4) weeks whereas the decision that took the longest was still rendered within twelve (12) weeks.

5. Costs

Costs of investment arbitration could be considered as a sensitive topic for both parties as more awards are becoming public with the current movement towards transparency in treaty-based investor-State arbitration.[8] Articles 43 to 45 of the SCC Arbitration Rules 2010 stipulate provisions related to costs of the arbitration. Article 43 (1) of the Rules specifies that the costs of arbitration consist of the fees of the tribunal, the SCC administrative fee, and the expenses of both the tribunal and the SCC.

Appointment of a "second" arbitrator or presiding arbitrator under the Procedures and Services currently costs € 1,500. The administrative fee for rendering a decision on challenge to an arbitrator is € 3,000.

Costs of fourteen (14) awards and two (2) settlements have been assessed in the figure contained in this paragraph. At the SCC, costs are determined by the Board based on the total amount in dispute. The average overall costs including the three (3) components of the Article 43(1) of the SCC Arbitration Rules 2010 are € 290,936. The range of total costs is quite extensive from € 18,000 to € 1,027,703. Breaking total costs into different components, the average fee for a presiding arbitrator is € 108,108, ranging from €12,500 to € 425,000. An average presiding arbitrator incurred € 4,896 in expenses. A non-chair co-arbitrator was remunerated €74,402 on average. An average co-arbitrator submitted € 7,479 in expenses. The SCC as an administrative institution has charged parties between € 5,000 to € 49,083 depending on the value of the overall claim. The average institutional fee is €27,194.

Out of sixteen (16) cases in total, three (3) tribunals took the "costs follow the event" approach for arbitration costs. The rest ordered each party to pay an equal share of the total costs. A different approach was taken in one case, where the Respondent was ordered to bear the full costs of the arbitration, due to the Respondent's uncooperative attitude.

[8] See the current UNCITRAL Working Group II agenda. Available at: <http://www.uncitral.org/uncitral/commission/working_groups/2Arbitration.html> accessed 28 October 2011.

In terms of each party claiming costs for its counsel and related expenses, three (3) tribunals ordered reimbursement.

6. Procedural issues

Analysis of the SCC investment caseload shows the following common features.

It is not always predictable which of the state agencies will represent the respondent. Nevertheless, the notification of the respondent does not cause problems in most cases. The request for arbitration is usually served on ministries (e.g. ministry of justice) or governments either directly or through the respective embassy.

The SCC Rules allow flexibility in determining the time limits for reply, which enables the SCC to establish longer terms for reply in investment cases. Nevertheless, in almost all cases the respondent state entered into the proceeding with considerable delay. Approximately 20% of cases have been resolved in the absence of the respondent party. Settlements are rare and constitute not more than 10% of the whole caseload.

A tendency to procedural complications is a commonly known feature of investment arbitrations. Jurisdictional objections have been raised in all the investment cases handled under the SCC Rules, while only one of the cases has been dismissed for lack of jurisdiction.

One of the general reasons is variation in the scope of protection established by BITs. BIT dispute settlement provisions might differ considerably. For instance, some Russian BITs expand only over the amount of compensation, while liability issues are excluded from the scope of the arbitration provision (the Russia – Belgium BIT). An issue that has been raised in several arbitrations and which is still subject to debate is whether the MFN provision applies to a BIT arbitration agreement.

The debate on the scope of Most-Favoured-Nation (MFN) clause is an unsettled area of treaty-based arbitration. One side argues that MFN protection covers both substantive and procedural rights including arbitration agreements whereas the other side refutes the applicability of the MFN clause to dispute resolution clauses. In one SCC case, the tribunal held that the MFN clause applies to the dispute settlement clause as well as the substantive guarantee. The tribunal in another case found that it does not derive its jurisdiction by applying the MFN clause. In one instance the arbitrators also held, with one arbitrator dissenting, that MFN protection is restricted to material or substantive protection before dismissing the case for lack of jurisdiction. Therefore, the difference amongst tribunals regarding applicability of the MFN clause to the dispute resolution clause is also evident in SCC investment arbitration.

The last topic selected is observance of notice of claim periods and the "amicable settlement" requirement. Tribunals interpreting numerous treaties are divided over whether it is a procedural requirement or a jurisdictional requirement. One SCC tribunal held that non-compliance does not constitute a bar to jurisdiction but notes that investors still may not ignore the requirement. Another tribunal has taken a different view that if State parties do not respond to investors' attempt to reach an amicable resolution, the requirement is not strictly enforced. However, it should be noted that each case has a different applicable instrument and one award cannot be directly compared to another simply because they deal with the same issue. This qualification applies to the applicability of MFN clauses as well.

7. Conclusion

This report aims to provide potential users with a general overview of SCC investment arbitrations. At the same time, parties should bear in mind that each investment dispute is distinct and there is no general tendency as to how a dispute might proceed. As yet, no application has been made for an emergency arbitrator in investment arbitration but the new Rules apply to all SCC investment arbitration. Common issues found in non-SCC investment

disputes, such as the role of precedents, the MFN clause, and the notice of claim periods requirement, are found in SCC awards as well.

Regardless of which instrument parties rely on, the SCC has proved that it is capable of resolving complex investment disputes.

Mailing address	Visiting address	Phone	Fax	E-mail	Website
Box 16050 SE-103 21 Stockholm Sweden	Malmskillnadsg.46 Stockholm Sweden	+46 8 555 100 50	+46 8 566 316 50	arbitration@chamber.se	www.sccinstitute.com