

Euro-Arab Investor-State Dispute Settlement:
Recent Developments and Future Perspectives

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THE SCC EXPERIENCE OF INVESTMENT ARBITRATION UNDER UNCITRAL RULES

Presented by¹

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1. The Arbitration Institute of the Stockholm Chamber of Commerce

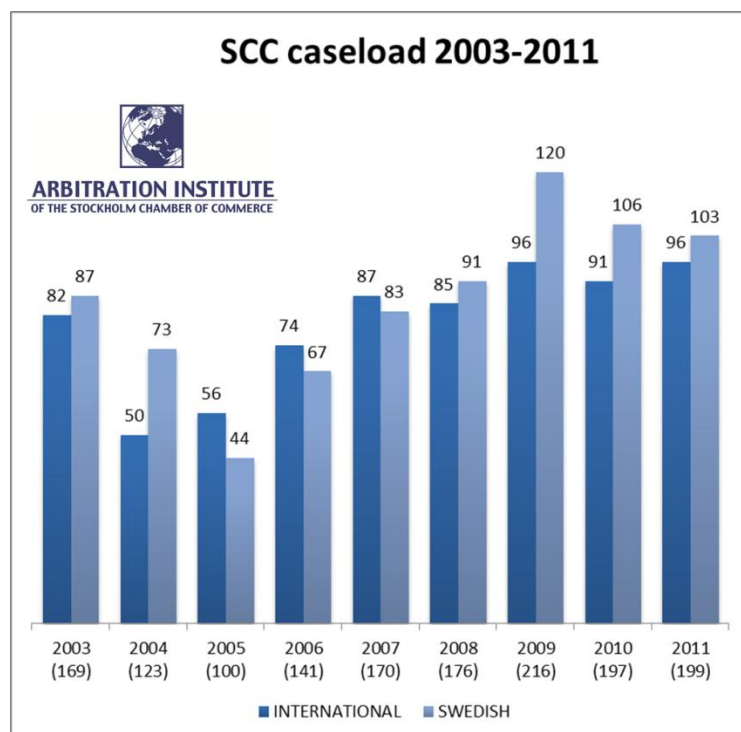
The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) was founded in 1917 and has handled international disputes since the 1970's.

Most disputes at the SCC are decided under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules). The SCC also has adopted rules for Expedited Arbitration, and frequently acts as appointing authority under the UNCITRAL Arbitration Rules.

Roughly 50% of the SCC caseload consists of international cases. The SCC caseload has a strong East-West footprint, however in 2011 parties from more than 35 jurisdictions appeared before SCC. The most frequently represented international parties come from Russia, followed by Germany, the United States, Switzerland and Norway.

SCC and Sweden have also developed into a preferred venue of investment treaty arbitration. In addition, the SCC is one of two institutions listed in the Energy Charter Treaty ("ECT") as a forum to resolve investor-state disputes.

The SCC administers domestic and international disputes in accordance with the SCC's rules; administers domestic and international disputes in accordance with other procedures or rules agreed upon by the parties, serves as appointing authority (e.g. under the UNCITRAL Arbitration Rules), and provides information concerning arbitration and mediation matters.



2. The SCC and Investment Arbitrations

Since 1993, the SCC has seen close to 50 investment treaty arbitrations. The role of the SCC in these cases has been either to manage the case under the SCC Rules, or for the SCC to act as appointing authority, most commonly under the UNCITRAL Arbitration Rules.

Today, 121 known treaties for investment protection incorporate dispute resolution clauses calling for arbitration under the SCC Rules or stipulating that the SCC is to act as appointing authority in *ad hoc* arbitrations. 60 of these investment treaties are Bilateral Investment Treaties (BITs) which include dispute resolution clauses calling for arbitration under SCC Rules, 61 are BITs mentioning the SCC as appointing authority and 13 stipulate Stockholm as the seat of arbitration.

A BIT is the most commonly invoked instrument in investment treaty arbitrations before the SCC.

In addition, the Energy Charter Treaty (ECT), a multilateral agreement signed by 51 states, lists the SCC as one of three options for dispute resolution for investors against states, alongside with ICSID and the UNCITRAL Arbitration Rules. As of September 2012, 8 disputes have been brought before the SCC under the ECT. In total, 33 ECT disputes have been registered since the first dispute in 2001 (as of September 2012). (For an extensive analysis of the first ten years of ECT Arbitration, see the report presented in Stockholm in 2011.²)

As far as can be ascertained from public sources, 64 countries are signatories to BITs that refer to the SCC in their dispute resolution clauses. These countries belong to Europe, Africa, Asia and South America. With 28 BITs, Belgium and Luxembourg Economic Union have the most BITs referring to SCC. The Russian Federation has signed 21 BITs referring to the SCC and China 16, while Italy has entered into 13 treaties opting for SCC arbitration in investor-state disputes.

The BIT-claims before the SCC since 2001 have had an average value of EUR 122.892.936 and amount in total EUR 1.843.394.046. Claims for ECT violations range from EUR 3.718.391 to EUR 445.204.826, amounting in total EUR 912.931.816.

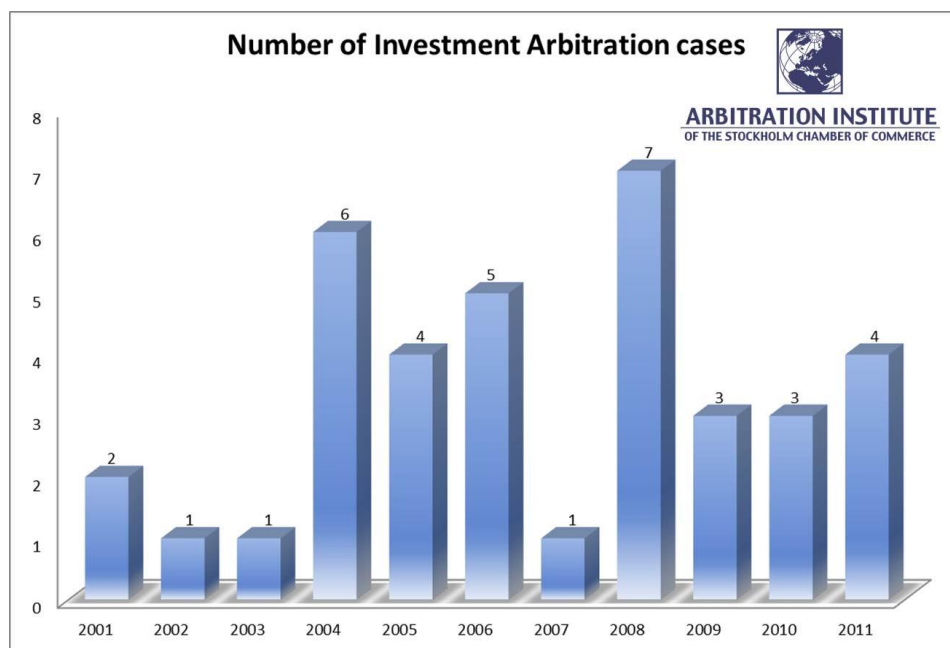
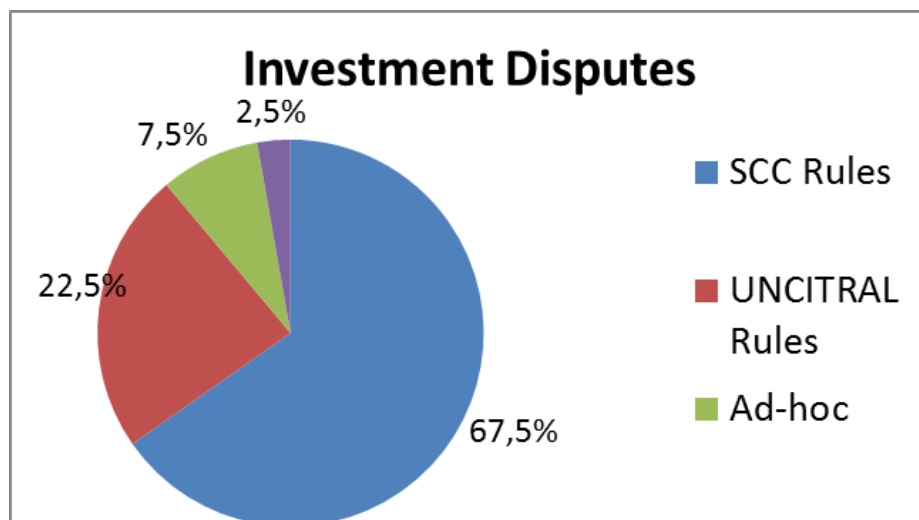
Since 2001 to the present, parties from 29 different jurisdictions have brought 40 claims for the protection of their investments before the SCC. Most of the investment treaty protection disputes have been brought by parties from Moldova (12), followed by Russia (8), Germany (6), Ukraine (3) and Czech Republic (3).

As pointed out above, the majority of cases have been brought under SCC Rules and the UNICTRAL Arbitration Rules.

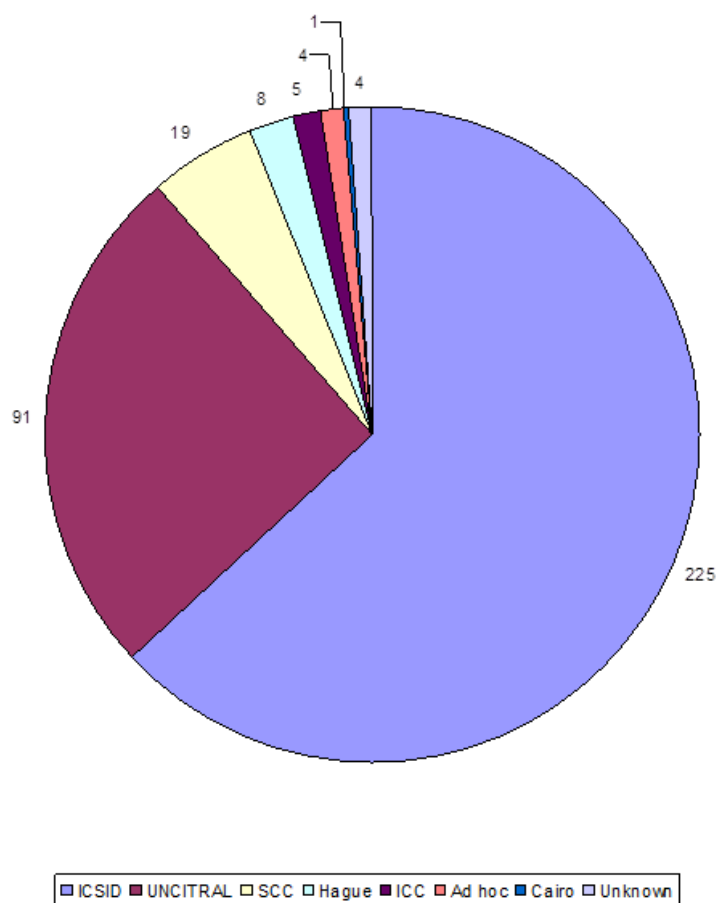
² Nils Eliasson, *10 Years of Energy Charter Treaty Arbitration*, available at http://www.sccinstitute.com/filearchive/4/40960/Nils_Eliasson_Report.pdf



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The numbers described above make the SCC the second largest institution, after ICSID, to handle investment treaty arbitrations under its own rules (see figure below³).



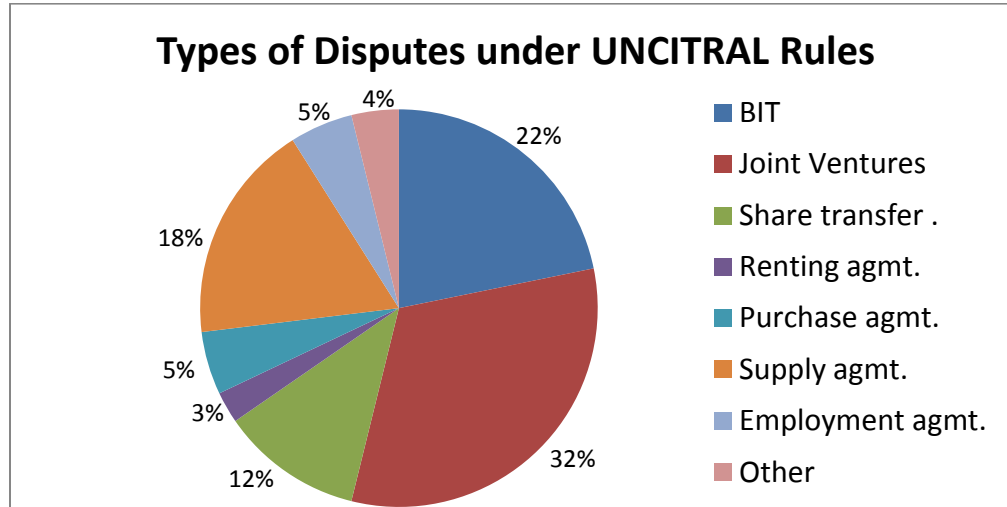
³ Numbers from the UNCTAD Report *Latest Development in Investor-State Dispute Settlement*, IIA ISSUES NOTE No. 1 (2010).

3. The SCC and Investment Arbitrations under UNCITRAL Rules

The SCC frequently provides services as appointing authority and as administrative body in arbitrations under the UNCITRAL Arbitration Rules.

In the last a decade, from 2002 to 2012, 36 disputes before the SCC have been administrated under the UNCITRAL Arbitration Rules. This includes both commercial disputes and investment treaty arbitrations.

A review of the underlying agreements in SCC's UNCITRAL cases to date reveals that joint venture agreements represent 32% of the disputes; BITs appear in 22% of the disputes and supply agreements in 18% of the disputes. Other UNCITRAL disputes brought by parties before the SCC involve share transfer agreements, purchase agreements, and disputes relating to employment issues.



All ECT-based disputes brought before the SCC have been conducted under SCC Rules. In the BIT-based disputes, 9 out of the 32 BIT-based disputes before the SCC since 2001 have been

conducted under the UNCITRAL Rules, 19 under SCC Rules, 4 have been *ad hoc* proceedings.⁴

This means that close to a third of the BIT-based disputes before the SCC since 2001 are conducted under UNCITRAL Rules.

The 9 BIT- disputes under UNCITRAL Arbitration Rules have involved parties from Russia, Germany, Italy, The Netherlands, Algeria, Bulgaria, Czech Republic, Poland, Slovakia and Egypt.

As appointing authority the SCC, upon request from a party, appoints (i) a sole or presiding arbitrator, (ii) a second arbitrator in cases of three-member panels, and (iii) decides challenges to arbitrators, (iv) appoints substitute arbitrators, and (v) review the costs of fees of arbitrators.

In 97% of the treaties that include a clause calling for arbitration under the SCC Rules, SCC arbitration is listed as a non-exclusive option. In 60 out of the 61 treaties where the SCC is listed as appointing authority, it is either the Chairman or President of the SCC who shall make requested appointment.

Different reasons trigger the role of the SCC as appointing authority. Most frequently, in two-thirds of these treaties, the SCC is designated to act as appointing authority when the parties have not observed the time limits to make the relevant appointment. Other treaties refer to the fact that at the SCC shall act as appointing authority when the Washington Convention is not applicable, or simply state that the SCC shall fulfill this function when the case is conducted under UNCITRAL Rules.

In the 9 BIT-based disputes under the UNCITRAL Arbitration Rules since 2004, the SCC has requested to appoint the chairperson (4 cases); appoint a second arbitrator (3 cases); and decide upon challenges to arbitrators (2 cases).

⁴ In one case, the sole role for the SCC was to keep an account for deposits paid by the parties.

4. SCC practice and procedure in UNCITRAL cases

Below follows a brief description of practice and procedure in UNCITRAL cases before the SCC.

The SCC confirms receipt of the request for appointment (“Request”) and reviews the underlying BIT or investment agreement empowering the SCC to act as appointing authority.

The Request is communicated to the Respondent. In the communication the Respondent is usually given time (usually 2 weeks) to submit comments to the Request.

Each party is given an opportunity to present its case. Parties are always notified of each other’s submission and always given an opportunity to submit comments on the other party’s submissions. The SCC takes note of the arguments of the parties when considering candidates for the appointment.

After the parties have submitted their comments, the SCC is prepared to make the appointment. The Secretariat presents case to the SCC Board, suggesting at least three candidates to be appointed as arbitrators. In case of appointment of chairperson the list may be longer, up to 5 or 6 candidates.

In deciding on the appointment of arbitrators, the Secretariat and the SCC Board pay attention to a number of relevant factors (not listed here in any order or priority): the applicable law, the nationality of the parties, the nationality of the co-arbitrators, the language of the proceedings, the seat of arbitration, the substance of the dispute.

Once the list of candidates is approved by the SCC Board, the Secretariat will contact the proposed arbitrator. A confirmation form with a statement of independence and impartiality is sent to the arbitrator upon acceptance. Once the SCC receives back the confirmation from the arbitrator, the parties are informed of the appointment and the case is closed.

5. Case summaries.

The below provides brief information on UNCITRAL investment arbitrations brought before the SCC which will be further discussed on 10-11 October 2012.

(i) Case 103/2012

Instrument	Bilateral Investment Treaty
Nationality of arbitrators	Canada
	France
	Spain (appointed by SCC)
Seat of arbitration	No agreement
Language of proceedings	No agreement
Issues	Appointment of chairperson
	Nationality of the chairperson
	Language of the proceedings

(ii) Case 203/2009

Instrument	Bilateral Investment Treaty
Nationality of arbitrators	USA
	Russia (appointed by SCC)
Seat of arbitration	Stockholm (provided by Treaty)
Language of proceedings	English
Issue	Appointment of co-arbitrator

(iii) Case 009/2011

Instrument	Bilateral Investment Treaty
Nationality of arbitrators	Czech Republic United Kingdom (appointed by SCC)
Issue	Appointment of co-arbitrator

(iv) Case 117/2009 & Case 164/2009

Instrument	Bilateral Investment Treaty
Nationality of arbitrators	Italy Russia (appointed by SCC) Germany (chairperson, appointed by SCC)
Issues	Appointment of co-arbitrator Appointment of chairperson

(v) Case 111/2011

Instrument	Bilateral Investment Treaty
Nationality of arbitrators	USA Slovakia UK
Seat of arbitration	London
Language of proceedings	English
Issue	Challenge of arbitrator



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