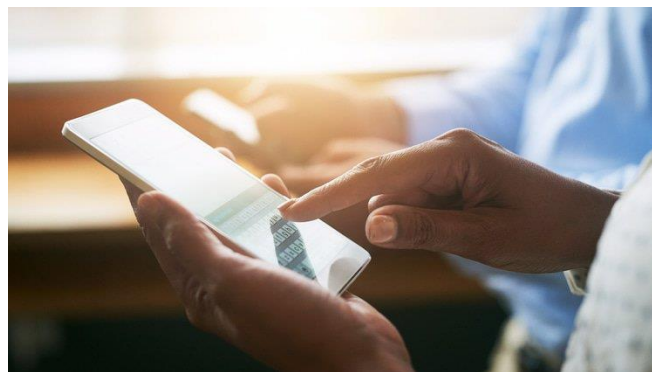


Mobile telecoms arbitrations: keeping pace with industry growth

27 November 2019



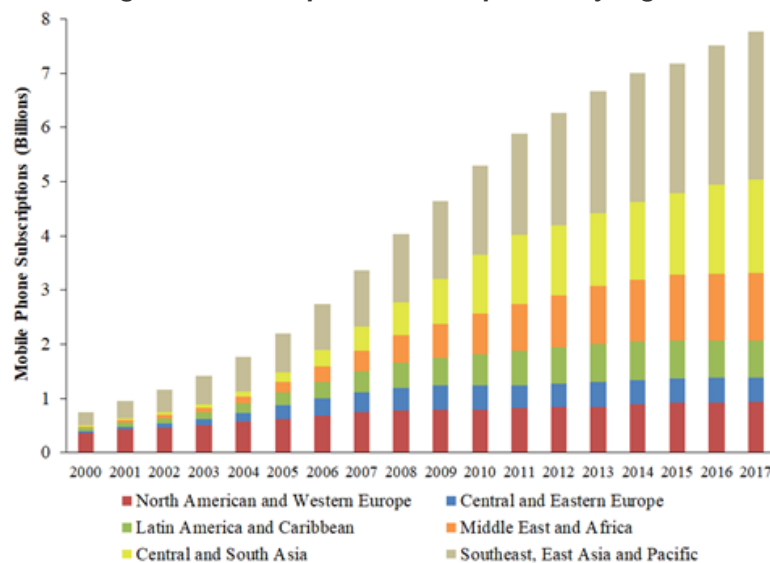
Mobile telephone (Credit: iStock/PeopleImages)

Tiago Duarte-Silva and **Billy (Milinda) Muttiah** of Charles River Associates examine the growth of the mobile telecommunications industry and the accompanying rise in the number of investor-state arbitrations relating to this sector.

As the global mobile telecoms industry grew over the past two decades, the number of investor-state arbitrations in this industry also increased substantially. For example, one-third of all disputes since 1996 were filed in the past five years. We provide an overview of the investor-state arbitrations related to mobile telecoms businesses.

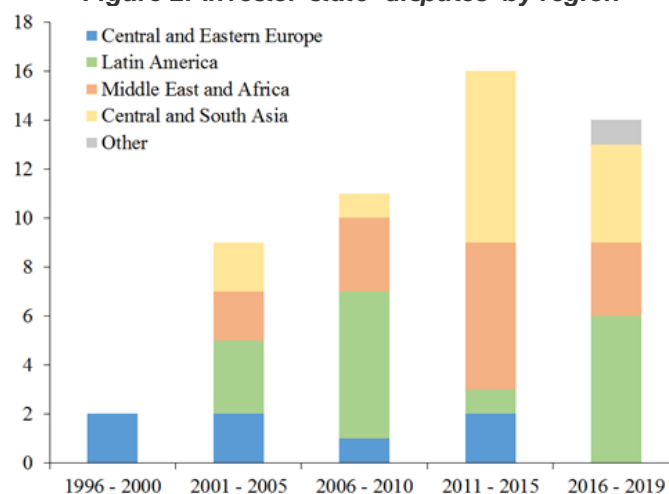
It is common knowledge that the global mobile telecoms industry has grown considerably over the past two decades. The number of mobile phone subscriptions increased tenfold from about 0.8 billion in 2000 to 8 billion in 2017 (GSMA). The estimated global mobile operator revenues reached approximately \$1.05 trillion dollars in 2017. By 2025 the number of subscribers is estimated to reach approximately 9 billion and mobile operator revenues are estimated to reach approximately \$1.1 trillion.

Figure 1: Mobile phone subscriptions by region



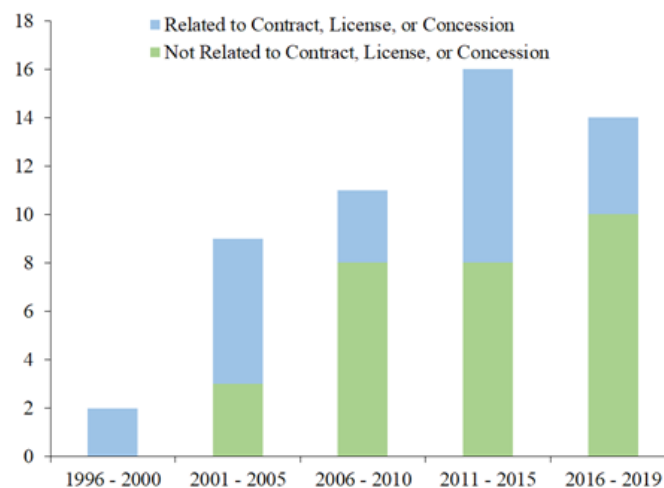
The number of investor-state disputes concerning mobile telecom companies has also increased in recent years. The ICSID and UNCTAD investor-state arbitration databases report 52 registered disputes related to the mobile telecom industry as of June 2019 (of which 31 are at ICSID). As shown in the Figure 2, disputes related to mobile telecoms started gaining momentum after 2001 and picked up the pace in this decade. Almost all of these disputes relate to an investment or opportunity to invest in a mobile or wireless telecom business. These statistics do not include commercial arbitrations, where public information is more limited.

Figure 2: Investor-state disputes by region



As shown in Figure 3, almost half of the disputes filed since 1996 have been related to the cancellation of an existing mobile telecoms licence (eg, *Millicom v Senegal*), withdrawal of a new licence (*Tenoch Holdings v India*), failure to renew a licence (*Orange v Jordan*), or the cancellation of contracts to operate a mobile telecoms system (*Rumeli Telekom v Kazakhstan*).

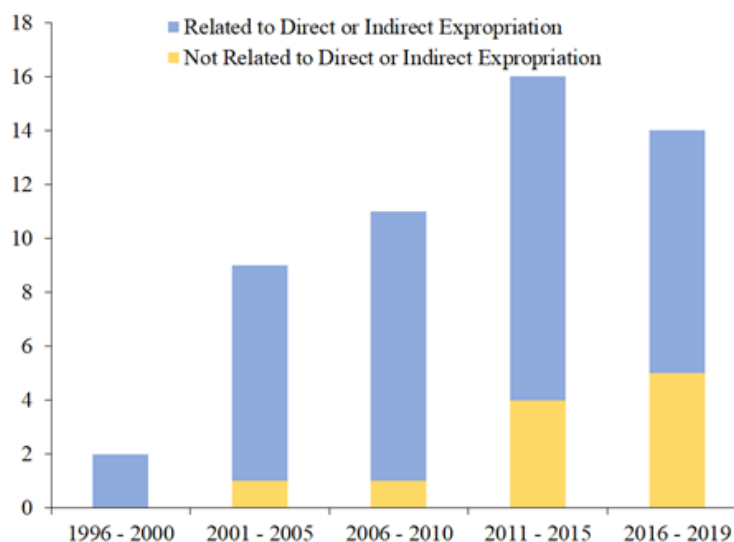
Figure 3: Investor-state disputes related to concessions



As shown in Figure 4, approximately 80% of those disputes since 1996 included allegations of direct or indirect expropriation. And among the 23 arbitrations involving a concession, the claimants have brought an allegation of direct or indirect expropriation in 21 of them. When claiming expropriation, claimants have argued a variety of actions by host states, such as legislation to expropriate assets (*ETI Euro Telecom v Bolivia*), forcing the claimants' assets to be reverted back to the host state after the end of a concession (*América Móvil v Colombia*), acquiring the claimants' assets after alleging criminal wrongdoing (*Abanto v Venezuela*), acquiring the claimant's assets after alleging failure to comply with regulations or terms of the investment (*Globalnet v Ecuador*), or simply coercing claimants to sell all or part of the investment to the host state (*Brandes v Venezuela*).

Other causes of action have included allegations that host states imposed back taxes (*Vodafone v India II*) or penalties (*Orascom Telecom v Algeria*), or prevented access to interconnection services (*Mobile TeleSystems v Turkmenistan*). There are also cases where managers of a telecoms firm were accused of criminal conduct or violating currency laws (*Orascom TMT v Algeria*).

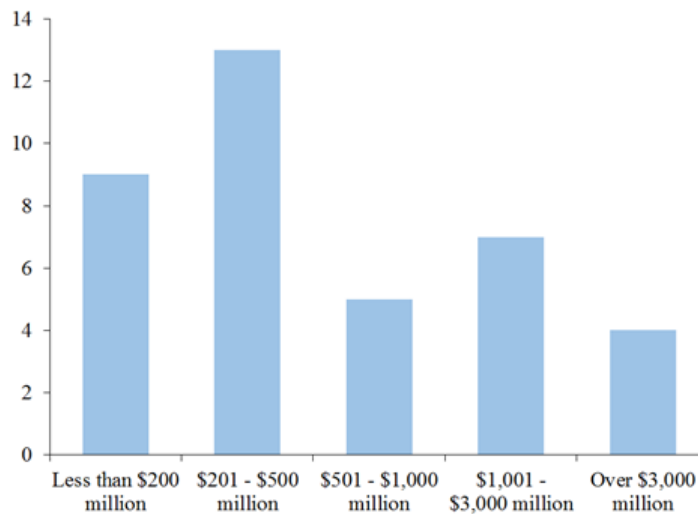
Figure 4: Alleged expropriations vs. other issues



As shown in Figure 5, the initial claimed amounts have ranged from less than US\$200 million to several billion dollars. The claimed amount was above US\$1 billion in 11 of the 38 disputes where the claimed amount was publicly disclosed. The average claimed amounts among the disputes involving alleged

expropriations (approximately US\$1.7 billion) has been higher than among the other disputes (approximately US\$1 billion).

Figure 5: Number of investor-state disputes by size of claim



Of those 52 disputes as of June 2019, 18 are pending, 15 have settled, and 19 were resolved by the tribunals.

So, 44% of the non-pending disputes described above have settled, which is higher than in most sectors. These settlements have been reached from as quickly as one year to as much as seven years after filing (median and average of three years).

Among those resolved arbitrations, almost half were ruled on jurisdiction in favour of the host state for a variety of reasons. Namely, the investor did not have a valid investment due to investors' lack of ownership or control (*Saba Fakes v Turkey*; *Orascom TMT v Algeria*; *Italba v Uruguay*) or entered into an agreement without making a financial investment into the host country (*ACP Axos v Kosovo*; *Turkcell v Iran*) or was not a member national in the investor states (*TSA Spectrum v Argentina*) or failed to show expropriation as required in the BIT (*Telenor v Hungary*), or the state had not consented to arbitration (*Brandes v Venezuela*).

The tribunal issued a partial or full award in just over half of those 19 resolved arbitrations. It decided in favour of the respondent in two cases (*Fouad Alghanim v Jordan*, *William Nagel v Czech Republic*) while in two others the parties settled after confirmation of jurisdiction (*Millicom v Senegal*; *Telefónica v Argentina*). An award was issued in favour of the claimant in the remaining six arbitrations. Table 1 summarises the claims and tribunals' findings in those six arbitrations.

Table 1: Alleged breaches and tribunal findings among disputes with an award in favor of the claimant

Provisions breached (among disputes decided against host-state)	Claimed	Awarded
Fair and Equitable Treatment	6	5
Full Protection and Security	4	-

Expropriation	6	4
Arbitrary, unreasonable and/or discriminatory measures	3	-

Awarded damages

Although a damages award is still pending in two of those six arbitrations (*Deutsche Telekom v India*, *Devas (Mauritius) et al v India*), there were compensation awards in the other 4 arbitrations, which are summarised below.

Rumeli Telekom v Kazakhstan

This claim followed the cancellation by the host state of an investment contract to operate a mobile telephone network in Kazakhstan. According to initial reporting, the claimant asked for US\$458 million in compensation, alleging that the host state breached the 1992 Turkey-Kazakhstan BIT and Kazakhstan's 1994 investment law. The tribunal awarded US\$125 million for indirect expropriation and breach of obligations with regard to fair and equitable treatment (FET) and minimum standard of treatment, including denial of justice.

The tribunal relied on a discounted cash flow analysis as a starting point to determine compensation, and taking into consideration factual value-related information contained in the negotiation of the sale of shares of the telecom business close to the valuation date. The five years from the alleged expropriation date to the award date meant adding US\$40 million in interest (six-month Libor plus 2%), or approximately one-third of the award amount.

Dunkeld International v Belize

This claim was based on the government of Belize's seizure of the shares of Belize Telemedia in 2009 through legislation. The dispute was settled with the parties agreeing to the tribunals' jurisdiction and the expropriation of assets. According to initial reporting, the claimant asked for US\$299 million under the 1982 Belize-UK BIT (1982), bringing claims for direct expropriation and breach of provisions on FET and minimum standard of treatment, including denial of justice, as well as full protection and security and most-favoured nation treatment.

The tribunal decided on a damages award of US\$97 million and pre-award interest of US\$72 million. The tribunal relied on a discounted cashflow analysis to determine the award amount. The tribunal rejected use of a comparable analysis due to the lack of comparable companies and comparable transactions. The tribunal also rejected valuation based on an offer to purchase shares on the basis that it was withdrawn and also rejected a valuation based on a share offering since it was more than a year after the valuation date.

Interest added 74% to the award, given the local rate of more than 8% chosen by the tribunal over seven years.

British Caribbean Bank v Belize

This claim was based on the government of Belize's acquisition of the claimant's interest in loan and security agreements with Belize Telemedia. The claimant asked for US\$45 million in compensation, alleging that the state breached the Belize-UK BIT's provisions on indirect expropriation, FET, full protection and security, and arbitrary, unreasonable and discriminatory measures.

The tribunal ruled that the claimant's assets were expropriated, but also ruled that the claimant failed to prove compensation since the claimant did not provide an estimate of fair market value of the assets. The tribunal also ruled that the respondent failed to provide FET and that compensation should be the face value of loans and security agreements. The tribunal awarded US\$23 million plus pre-award interest of US\$19 million.

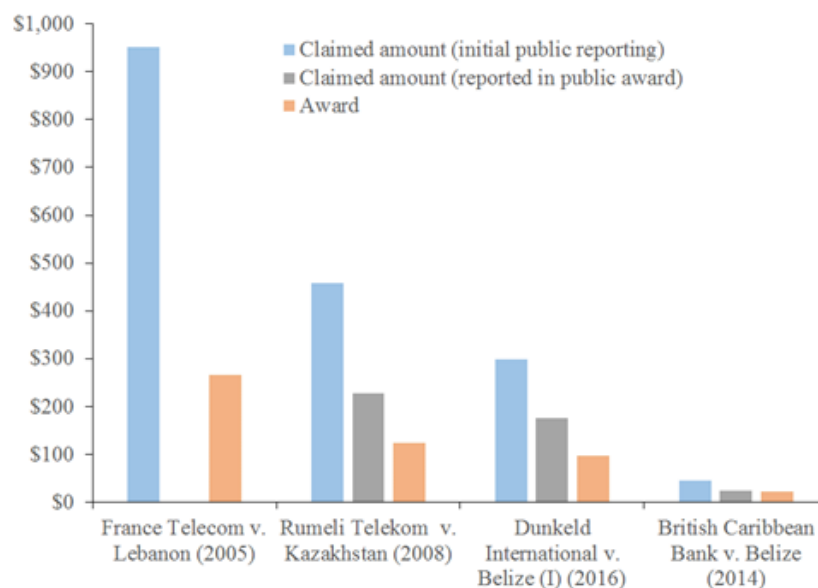
Interest added 83% to the award, given the rate of more than 12% chosen by the tribunal, based on loan and security agreements, over five years.

France Telecom v Lebanon

This claim was based on the cancellation of a build-operate-transfer contract of a mobile telecoms network in Lebanon. The claimant initially asked for compensation of US\$956 million, alleging that the host state breached the 1996 France-Lebanon BIT, including provisions on expropriation and FET.

The tribunal awarded US\$266 million in damages based on the breach of FET. Since the award was not made public, there is no record of the analytical approach taken by the tribunal to determine the award amount.

Figure 6: Amounts claimed and awarded (US\$ millions)



Future trends

With global mobile telecoms revenues at about US\$1 trillion dollars, 40% of which is in developing countries (according to trade body GSMA), and annual capital expenditures reaching US\$150 billion, future state actions that result in expropriation definitely cannot be excluded. Besides new taxes or penalties, the processes to issue new licences and to renew licences will likely be sources of disputes. These can be prompted by, for example, the cancellation of a licence, the failure to renew a licence, or the cancellation of contracts to allow a mobile telecoms business to operate.

Although many new licences have already been awarded and renewed, countries with less developed telecoms infrastructure will still be issuing new licences. The deployment of new technologies such as 5G also means issuing new licenses. The technological changes that have been increasingly facilitating mobile commercial and financial transactions also increasingly face regulatory and licensing hurdles that may become sources of disputes.

Nevertheless, mobile market penetration in most geographic regions is either mature or trending towards that stage (Figure 7). As the industry matures, a number of mobile licences will come up for renewal. As an illustration, the table below shows the number of spectrum licenses ending in the very near term. Like in many extractive industries, the failure to renew a licence or a delay in automatically renewing a license can result in disputes, which affect the operations of the business and therefore, ultimately, its value.

Figure 7: Mobile telephone subscriptions penetration rates (per 100 inhabitants)

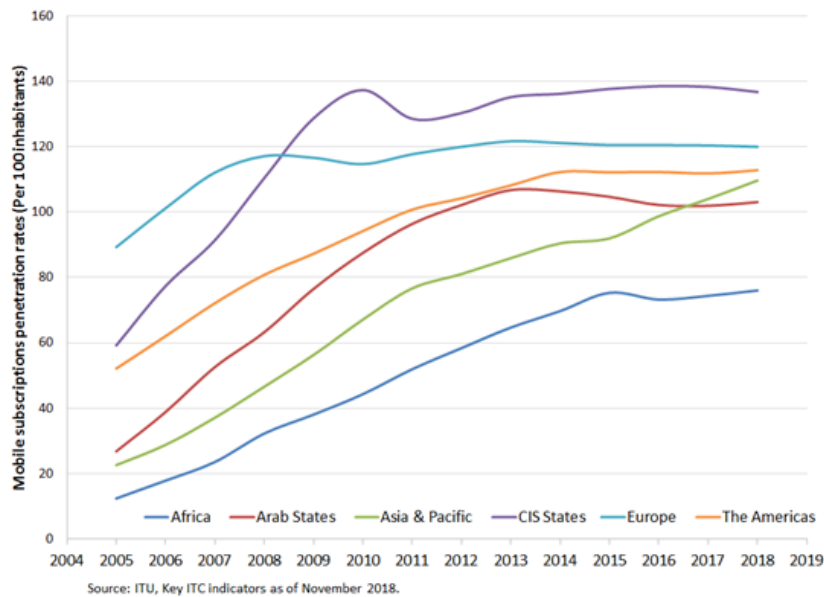


Table 2: Sample of licenses approaching the end of their term

World Region	2019 - 2021	
	# Countries	# Licenses
North America	0	0
Western Europe	10	15
Latin America	3	4
Central and Eastern Europe	7	11
Middle East and Africa	3	3
Asia and Pacific	9	14
World	32	47

Sources: GSMA, "Best Practice in Spectrum License Renewal", 2014 and GSMA, "Best Practice in Mobile Spectrum Licensing", September 2016.

It remains to be seen whether these licences will be granted to incumbent telecoms operators. A recent study of spectrum license renewals across 43 countries (2006-2013) showed that one-third of them were administratively reassigned to another operator, whereas another third were automatically renewed and the remainder were auctioned.

With most mobile markets reaching maturity, most future disputes will likely stem from non-renewal of licences, delays in such process, the non-issuance of licenses for new technologies or markets, or – more plainly – new taxes or penalties or hurdles to the normal operation of a business.

*The views and opinions of the authors do not reflect the views of Charles River Associates or any of the organisations with which the authors are affiliated. **Will Collins, Patricia Hannett, Martin Malabanan** and **Yuki Yu** at Charles River Associates provided research assistance for this article.*