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RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

Highlights

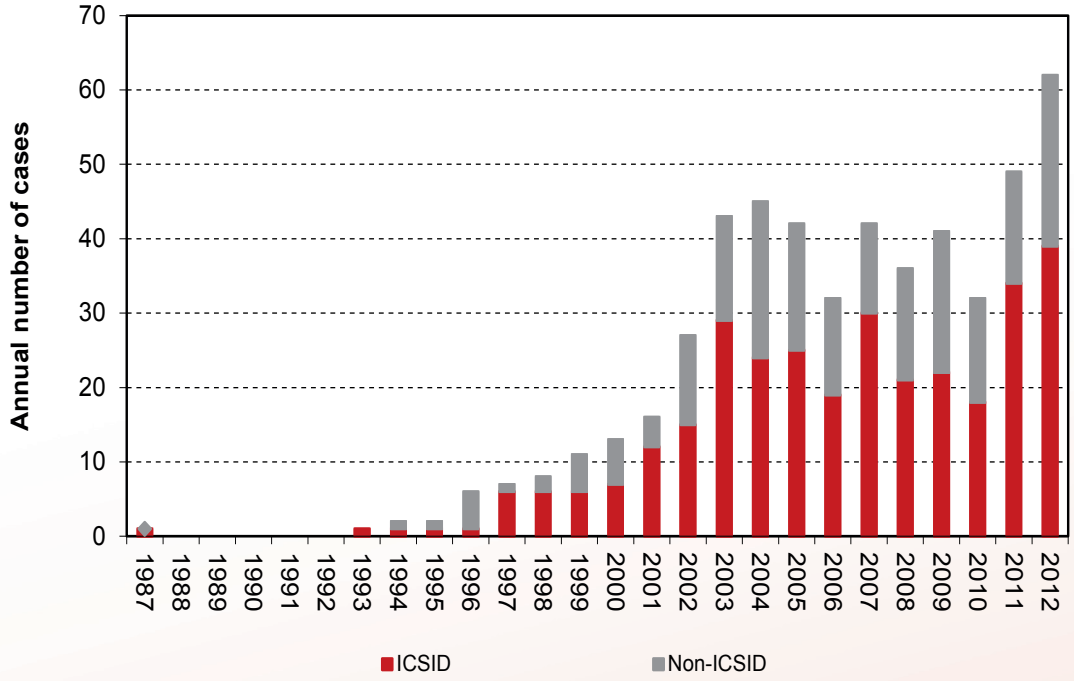
- In 2012, 62 new cases were initiated, which constitutes the highest number of known treaty-based disputes ever filed in one year and confirms that foreign investors are increasingly resorting to investor-State arbitration.
- In 68% of the new cases, respondents are developing or transition economies. While the number of cases initiated by developing country investors has increased, the majority of new cases (63%) still originate from developed countries.
- Claimants have challenged a broad range of government measures, including those related to revocations of licences, breaches of investment contracts, irregularities in public tenders, changes to domestic regulatory frameworks, withdrawal of previously granted subsidies, direct expropriations of investments, tax measures and others.
- At least 42 arbitral decisions were issued in 2012, including decisions on objections to tribunal's jurisdiction, merits of the dispute, compensation and applications for annulment of an arbitral award. 31 of these decisions are in the public domain.
- In 70% of the public decisions addressing the merits of the dispute, investors' claims were accepted, at least in part. Nine public decisions rendered in 2012 awarded damages to the claimant, including the highest award in the history of ISDS (US$ 1.77 billion) in *Occidental v. Ecuador*, a case arising out of a unilateral termination by the State of an oil contract.
- For the first time in treaty-based ISDS proceedings, an arbitral tribunal affirmed its jurisdiction over a counterclaim lodged by a respondent State against the investor.
- The total number of known treaty-based cases reached 518 in 2012, and the total number of countries that have responded to one or more such case increased to 95.
- The overall number of concluded cases reached 244. Of these, approximately 42% were decided in favour of the State and approximately 31% in favour of the investor. Approximately 27% of the cases were settled.
- The public discourse about the usefulness and legitimacy of the ISDS mechanism is gaining momentum, especially given that the ISDS mechanism is on the agenda in numerous bilateral and regional international investment agreements (IIA) negotiations.
- While ISDS reform options abound, their systematic assessment including with respect to their feasibility, expected effectiveness and implementation methods remains wanting. A multilateral policy dialogue could help to develop a consensus about the preferred course for reform and ways to put it into action.

I. Statistical Update: 2012

A. New claims

In 2012, the number of known treaty-based investor-State dispute settlement (ISDS) cases filed under international investment agreements (IIAs) grew by at least 62.[1] This constitutes the highest number of known treaty-based disputes ever filed in one year.

Figure 1. Known ISDS cases



Source: UNCTAD

Of the 62 new disputes (see annex 1), 39 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (of which seven cases are under the ICSID Additional Facility rules), five under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and another five under the Stockholm Chamber of Commerce (SCC). The International Chamber of Commerce (ICC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA) received one new case each. One case was an ad hoc arbitration. For ten cases, the applicable arbitration rules/venues are unknown.[2]

In 42 of the 62 new cases, respondents are developing or transition economies and in 15 cases they are developed countries. For five cases the respondent country is unknown. In 2012, Venezuela, for the second consecutive year, responded to the largest number of cases (9); followed by India (7); Pakistan (4); Algeria, Egypt and Hungary (3 each). In 2012, Belgium, Equatorial Guinea, Republic of Korea and Laos faced their first ISDS claims.

[1] This Note does not cover cases that are exclusively based on investment contracts (State contracts) or national investment laws and cases where a party has so far only signalled its intention to submit a claim to ISDS, but has not yet commenced the arbitration.

[2] Information about 2012 claims has been compiled on the basis of public sources. We are grateful for additional information received from the ICSID Secretariat, the Permanent Court of Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce, the Cairo Regional Centre for International Commercial Arbitration and the London Court of International Arbitration.

Of the 62 new cases, 39 were filed by investors from developed countries. Out of these 39 cases, 29 were filed against developing countries or economies in transition; the remaining ten cases were filed by investors from developed countries against host developed countries. 2012 witnessed a surge in the number of cases filed by investors from developing countries (17, compared to nine in 2011). For six cases the investor's home country remains unknown.

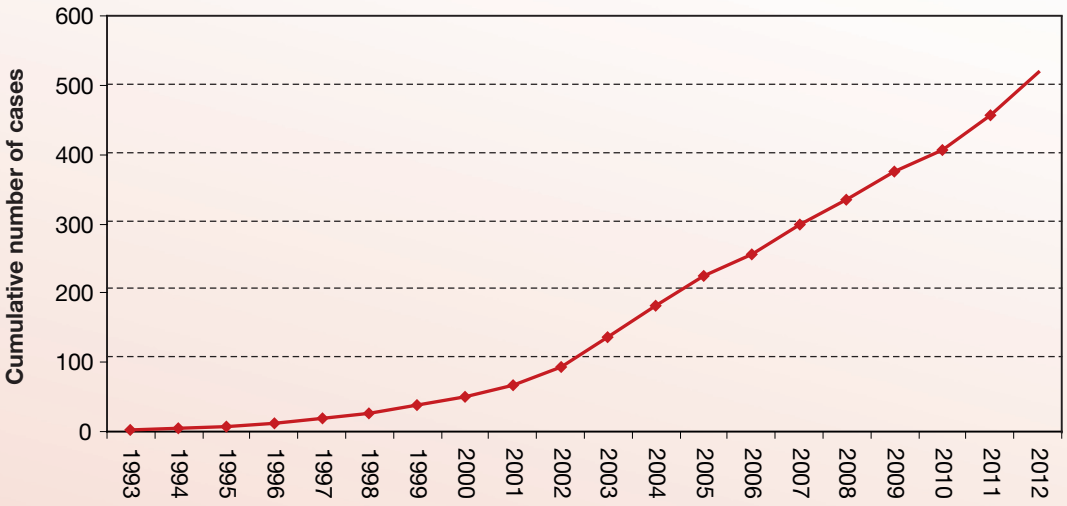
2012 saw at least eight new **intra-EU investment disputes**, i.e. claims by EU investors against EU Member States, which brought the overall number of such claims to 59. Of the eight new claims, two were brought pursuant to the Energy Charter Treaty (to which all Member States are party) and the other six pursuant to provisions of intra-EU bilateral investment treaties (BITs).[3] Hungary was the most popular respondent, having to cope with three new intra-EU claims.

Investors have challenged a **broad range of government measures**, including those related to revocations of licences (e.g., in mining, telecommunications, tourism), alleged breaches of investment contracts, alleged irregularities in public tenders, changes to domestic regulatory frameworks (gas, nuclear energy, marketing of gold, currency regulations), withdrawal of previously granted subsidies (solar energy), direct expropriations of investments, tax measures and others (see also Section III below).

B. Total claims by end 2012

The total number of known treaty-based cases rose to 518 by the end of 2012 (figure 2).[4] Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.

Figure 2. Known ISDS cases (cumulative, as of end 2012)



Source: UNCTAD

The majority of cases have been brought under the ICSID Convention and the ICSID Additional Facility Rules (314 cases) and the UNCITRAL Rules (135).[5] Other

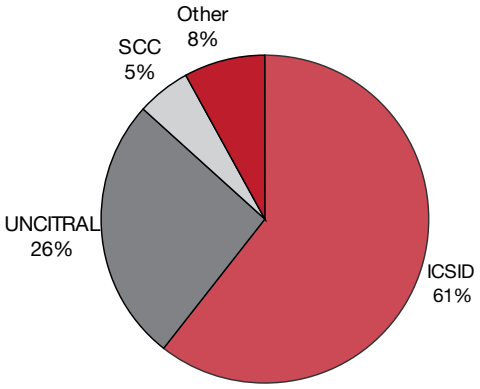
[3] These are BITs between Hungary and the Netherlands, Hungary and the UK, Hungary and Portugal, Bulgaria and the Netherlands, Italy and Romania, Latvia and Lithuania.

[4] Due to new information becoming available for 2011 and earlier years, the number of total known IIA-based ISDS cases at end 2011 was revised upwards to 456 from 450, as reported in UNCTAD's 2012 IIA Issue Note No. 1, available at http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf.

[5] A number of cases under the UNCITRAL rules are administered by the Permanent Court of Arbitration (PCA). By the end of 2012, the total number of PCA-administered ISDS cases amounted to 85, of which 47 were pending. Only 18 of all PCA-administered ISDS cases are public. *Source*: the Permanent Court of Arbitration International Bureau.

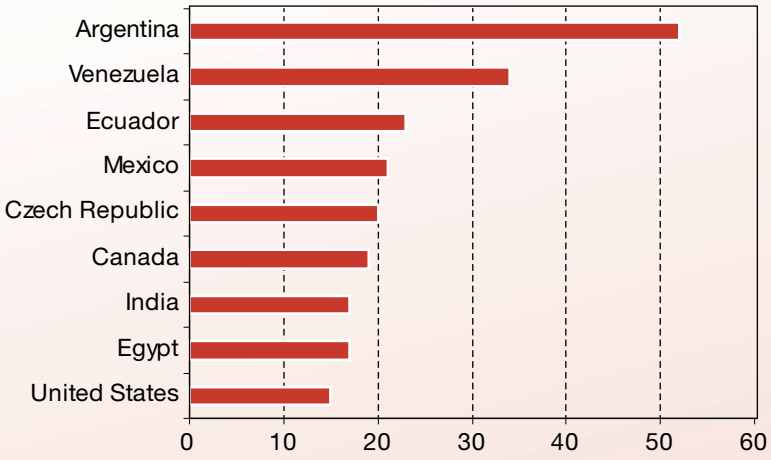
venues have been used only rarely, with 27 cases at the Stockholm Chamber of Commerce and eight with the International Chamber of Commerce (see figure 3).

Figure 3. Distribution of known cases among arbitral institutions/rules
(total as of end 2012)



In total, over the past years at least **95 governments** have responded to one or more investment treaty arbitration: 61 developing countries, 18 developed countries and 16 countries with economies in transition (see annex 2). Argentina continues to be the most frequent respondent (52 cases) followed by Venezuela (34), Ecuador (23) and Mexico (21).

Figure 4. Most frequent respondents in ISDS cases
(total as of end 2012)



Investor-State arbitrations have been initiated most frequently by **claimants from** the United States (123 cases, or 24% or all known disputes), the Netherlands (50 cases), the United Kingdom (30) and Germany (27).

The three **investment instruments most frequently used** as a basis for ISDS claims have been NAFTA (49 cases), the Energy Charter Treaty (29) and the Argentina-United States BIT (17).

C. Outcomes

In 2012, ISDS tribunals rendered at least **42 decisions in investor-State disputes** (see annex 3), 31 of which are in the public domain (at the time of writing).[6] Of the

6 There may have been other decisions issued in 2012 whose existence is not known due to the confidentiality of the dispute concerned.

31 public decisions, twelve addressed jurisdictional issues, with seven decisions upholding the tribunal's jurisdiction (at least in part) and five decisions rejecting jurisdiction. 17 decisions on the merits were rendered in 2012, with twelve accepting – at least in part – the claims of the investors, and five dismissing all of the claims. Compared to previous years, this represents a higher percentage of rulings against the State.

Of the **twelve decisions finding State's liability**, six found a violation of the FET provision, five of the expropriation provision, two of the umbrella clause and one of the prohibition of certain performance requirements. At least nine decisions rendered in 2012 awarded compensation to the investor, among them the highest award in the history of ISDS[7] (some decisions on liability have postponed the question of damages to the next phase of the arbitration).

Two decisions on the application for **annulment** were issued in 2012 by ICSID ad hoc committees, with one partially annulling the arbitral award and the other dismissing all claims for annulment.

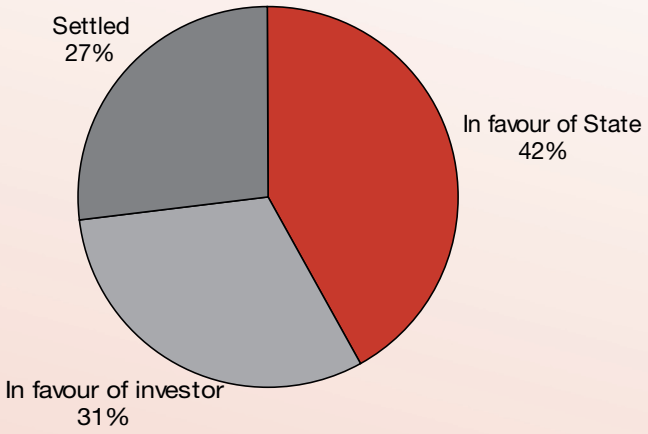
In 2012, individual arbitrators issued **seven dissenting opinions**, up from six in 2011 and three in 2010. The 2012 dissenting opinions touch upon a broad number of issues, including the most favored nation (MFN) clause, the umbrella clause, the definition of investment, expropriation, fair and equitable treatment, non-conforming measures and the assessment of damages.

In addition to investor-State cases, one arbitral award was issued in State-State proceedings between Ecuador and the United States brought under the Ecuador-United States BIT.8 This award is not public.

2012 arbitral developments brought the **overall number of concluded cases** to 244.9 Out of these, approximately 42% were decided in favour of the State and approximately 31% in favour of the investor. Approximately 27% of the cases were settled. In settled cases, specific terms of settlement typically remain confidential.10

Figure 5. Results of concluded cases

(total as of end 2012)



[7] See section III.C "Compensation" below.

[8] *Republic of Ecuador v. United States of America*, PCA Case No. 2012-5, Award, 29 September 2012.

[9] A number of arbitral proceedings have been discontinued for reasons other than settlement (e.g., due to the failure to pay the required cost advances to the relevant arbitral institution). Status of some other proceedings is unknown. Such cases have not been counted as "concluded".

[10] Some settlements have been made public, which allowed for their discussion and analysis (for example, *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (ICSID Case No. ARB/09/6).

II. 2012 Decisions – An Overview[11]

A. Jurisdictional and admissibility issues

On the scope of the ISDS clause, the tribunal in *Iberdrola v. Guatemala* interpreted the reference in the Guatemala-Spain BIT to disputes "*concerning matters governed by this Agreement*". The tribunal found that the treaty does not give "*general consent to submit any kind of dispute or difference related to investments […], but only those related to violations of substantive provisions of the treaty itself.*"[12]

On the jurisdictional threshold of a *prima facie* case, the tribunal in *Iberdrola v. Guatemala* noted that an international tribunal has jurisdiction only if the claimant establishes "*that the facts it alleged, if proven, could constitute a violation of the Treaty*." The tribunal accepted the respondent's objection to jurisdiction with respect to the alleged breaches of the provisions on expropriation, fair and equitable treatment and full protection and security since the claimant had not presented "*clear and concrete reasoning*" on what were, in its opinion, the acts of authority of Guatemala that, in international law, could constitute violations of the Guatemala-Spain BIT.[13]

Similarly, the tribunal in *Chevron v. Ecuador II* noted that, for purposes of the respondent's jurisdictional objections, it had to decide whether or not, if the facts alleged by the claimants are assumed to be true, the challenged conduct would be capable of constituting breaches of the BIT. The tribunal noted that the assumption of truth could be reversed if such factual pleadings were "*incredible, frivolous, vexatious or otherwise advanced by the Claimant in bad faith*."[14] Furthermore, the tribunal decided that requiring the claimant to establish its case with a 51% chance of success (i.e., on a balance of probabilities) would constitute too high a *prima facie* standard and that the claimant's case should be "*decently arguable*" or have "*a reasonable possibility as pleaded*".[15]

On denial of benefits, the tribunal in *Pac Rim Cayman v. El Salvador* determined that the time-limit by which the respondent should decide to deny benefits under CAFTA Article 10.12.2 is set by ICSID Arbitration Rule 41. Rule 41 addresses objections that the dispute is not within the jurisdiction of the Centre or not within the competence of the tribunal. It establishes that those objections "*shall be made as early as possible*" and "*no later than the expiration of the time limit fixed for the filing of the counter-memorial*".[16] This represents a departure from earlier decisions, which held that a State may not deny benefits of the treaty to the investor after the claim was brought.[17]

The tribunal in *Pac Rim Cayman v. El Salvador* also held, with respect to the requirement of substantial business activities in the denial-of-benefits clause, that this requirement "*relates not to the collective activities of a group of companies, but to activities attributable to the 'enterprise' itself*".[18] Although it considered that a

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[11] While the monitor aims to highlight key findings stemming from the decisions investment treaty tribunals rendered in 2012, it is not a comprehensive review. Texts of the relevant arbitral awards can be found at www.italaw.com.

[12] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, para. 306.

[13] *Ibid.*, paras. 323-373.

[14] *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Third Interim Award on Jurisdiction and Admissibility, 27 February 2012 (*Chevron v. Ecuador II*), para. 4.6.

[15] *Ibid.*, para. 4.8.

[16] *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 4.85.

[17] *Plama Consortium Limited v. Bulgaria* (ICSID Case No. Arb/03/24), Decision on Jurisdiction, 8 February 2005, paras. 161-162; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 228), Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 514-515.

[18] *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 4.66.

traditional holding company may carry substantial business activities under CAFTA Article 10.12.2,[19] after finding that the claimant's activities as a holding company were principally to hold assets, namely the shares of its subsidiaries in El Salvador, and no activities were directed at its subsidiaries' business activities in the United States, the tribunal concluded that the claimant did not have substantial activities.[20]

On the definition of "investment" for purposes of establishing the scope of application of (as well as the jurisdiction under) an investment treaty, the tribunal in *Caratube International Oil Company (CIOC) v. Kazakhstan* accepted the respondent's objections to jurisdiction having established that the US national in question did not control the claimant company. The "investment" was understood by the tribunal as "*an economic arrangement requiring a contribution to make profit, and thus involving some degree of risk*". The tribunal found "*no plausible economic motive*" to explain the US national's investment in CIOC, no evidence of a contribution of any kind (the US national's personal guarantees for a loan received by the company from a Lebanese bank were not considered as constituting a sufficient contribution in this case) or any risk undertaken by the US national, and no capital flow between the US national and CIOC.[21]

On the requirement that the dispute concerns "an investment of a national or company of the other contracting party" for purposes of establishing the tribunal's jurisdiction under an investment treaty, the tribunal in *Standard v. Tanzania* found that an indirect chain of ownership linking the British claimant to debt by a Tanzanian borrower did not satisfy the requirement in the Treaty's arbitration provision. The tribunal reasoned that, despite the fact that the claimant owned a substantial equity interest in a Hong Kong company, which in turn held Tanzanian debt acquired from Malaysian financial institutions, it could not be said that those loans were the claimant's investments.[22] The tribunal noted that in order to "*benefit from Article 8(1)'s arbitration provision, a claimant must demonstrate that the investment was made at the claimant's direction, that the claimant funded the investment or that the claimant controlled the investment in an active and direct manner*."[23]

On the definition of "investment" for purposes of establishing jurisdiction under Article 25 of the ICSID Convention, decisions rendered in 2012 seem to focus their attention principally on three factors: contribution, risk and duration. For example, the tribunal in *Electrabel v. Hungary* noted that "*[w]hile there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment*." The tribunal also noted that, while the economic development of the host State was one of the objectives of the ICSID Convention (and a desirable consequence of the investment),[24] it was "*not necessarily an element of an investment*."[25]

Similarly, in the assessment of the tribunal in *Deutsche Bank v. Sri Lanka*, the development of ICSID arbitral practice suggested that only three criteria were relevant for the purpose of defining an investment, namely contribution, risk and

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19 *Ibid.*, para. 4.72.

20 *Ibid.*, paras. 4.74, 4.78.

21 *Caratube International Oil Company LLP v. The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012, para. 455.

22 *Standard Chartered Bank v. The United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award, 2 November 2012, paras. 196-197.

23 *Ibid.*, para. 230.

24 The investment's contribution to the economic development of the host State is one of the elements of the jurisdictional test established in Salini v. Morocco (ICSID Case No ARB/00/04), Decision on Jurisdiction, 23 July 2001.

25 *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43.

duration. On the contrary, a contribution to the economic development of the host State and a regularity of profit and return should not be used as additional benchmarks. The tribunal also noted that "*the existence of an investment must be assessed at its inception and not with hindsight*."[26]

Applying these three criteria to the hedging agreement at issue,[27] the tribunal found that all of them were fulfilled. In particular, it found that the hedging agreement involved a contribution to Sri Lanka (noting that a contribution can take any form and it is not limited to financial terms but also includes know-how, equipment, personnel and services).[28] The tribunal also found that the investment was of a certain duration, even if the commitment was originally for twelve months and despite the fact that it was terminated after 125 days (noting that short-term projects are not deprived of "investment" status solely by virtue of their limited duration and that duration is to be analysed in light of all the circumstances and of the investor's overall commitment).[29]

A similar approach was also followed by the tribunal in *Quiborax v. Bolivia*, according to which the commitment of resources, risk and duration are all part of the ordinary definition of an investment, while a contribution to the development of the host State, conformity with the laws of the host State and respect of good faith are not.[30] In applying the element of contribution or commitment of resources to one of the Chilean shareholders of the local corporation holding mining concessions in Bolivia, the tribunal agreed with the distinction made by the respondent "*between the objects of an investment, 'such as shares or concessions [...] and the action of investing'*".[31] In particular, the tribunal considered that "*[w]hile shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets*".[32] In that case, there was no evidence of an original contribution (i.e., an original payment for the share) nor of a subsequent contribution of that shareholder to the exploitation of the mining concessions.

On the definition of "investor" for purposes of establishing the jurisdiction under an investment treaty, the tribunal in *Pac Rim Cayman v. El Salvador* had to consider if the claimant had abused the provisions of CAFTA and the international arbitration process by changing Pac Rim Cayman's nationality from the Cayman Islands to a CAFTA Party (USA) in order to bring a pre-existing dispute to arbitration.[33] The tribunal opined that the dividing line in determining whether a change of nationality can become an abuse of process occurs "*when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy [...]. The answer in each case will, however, depend upon its particular facts and circumstances...*"[34] In the present case the tribunal found that since the basis of the claim (El Salvador's *de facto* ban on mining in 2008) occurred *after* Pac Rim Cayman's change of nationality in 2007, the dispute could not have been foreseen by the claimant.[35] Therefore, it rejected respondent's objection to jurisdiction.

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[26] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, para. 295.

[27] The hedging agreement at issue was concluded to protect Sri Lanka against the impact of rising oil prices.

[28] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, para. 297.

[29] *Ibid.*, paras. 303-304.

[30] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012, para. 219.

[31] *Ibid.*, para. 233.

[32] *Ibid.*

[33] *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012, paras. 2.16-17.

[34] *Ibid.*, para. 2.99.

[35] *Ibid.*, para. 2.109.

On the (6 month) amicable settlement requirement, the tribunal in *Teinver v. Argentina* found that Article X(1) of the Argentina-Spain BIT did not impose a requirement on the claimant to give formal notice to the respondent State of the existence of a dispute in order to commence settlement negotiations.[36]

On the treaty requirement that litigation before domestic courts be pursued for at least 18 months as a precondition for international arbitration, the tribunal in *Teinver v. Argentina* found that as long as the local proceedings dealt with the same subject-matter as the one brought to international arbitration, the treaty requirement is met. Equally, the tribunal noted that the underlying BIT permits either party (including the respondent State) to initiate the domestic litigation for the recourse-to-local-courts requirement to be fulfilled.[37]

The tribunal in *ICS Inspection v. Argentina* found that it lacked jurisdiction due to the claimant's failure to comply with the mandatory 18-month recourse-to-local-courts requirement set forth in Article 8 of the Argentina-UK BIT. In its reasoning, the tribunal noted that the trend in public international law (as evidenced for example in the recent decision of the ICJ in the *Georgia v. Russia* case[38]) has clearly favoured the strict application of procedural prerequisites.[39] The tribunal also held that the 18-month recourse-to-local-courts requirement constitutes a condition to the respondent State's consent to arbitration.[40] Moreover, the tribunal decided that it could not ignore the 18-month recourse-to-local-courts requirement on the basis that the litigation would be futile or inefficient. While the tribunal found that the futility had not been demonstrated, the tribunal stressed that it could not "*create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract*."[41]

The tribunal in *Daimler v. Argentina* took a similar view of the 18-month recourse-to-local-courts requirement set forth in Article 10 of the Argentina-Germany BIT. According to the tribunal, "*since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere 'procedural' or 'admissibility-related' matter*".[42]

On the legality of claimant's investment, the tribunal in *Teinver v. Argentina* rejected the respondent State's objection to jurisdiction based on the definition of investment in Article I(2) of the Argentina-Spain BIT, which requires investment to be "*acquired or effected in accordance with the legislation of the country receiving the investment*". According to the tribunal, the Treaty made clear that the critical time period for determining an investment's legality is the time when the investment was made, and the relevant law for purposes of determining whether the investment was legally made is the law of the host State.[43] The tribunal rejected the respondent's objection as it failed "*to demonstrate that claimants, as a factual matter, committed illegalities in the process of acquiring their investment in the Argentine Airlines*."[44]

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[36] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012, para. 112.

[37] *Ibid.*, paras. 130-136.

[38] *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation) (International Court of Justice), Decision on Preliminary Objections, 1 April 2011, paras. 133-135.

[39] *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012, para. 250

[40] *Ibid.*, paras. 258-262.

[41] *Ibid.*, paras. 267-269.

[42] *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012, para 194. Both the ICS Inspection and the Daimler tribunals were chaired by Professor Pierre Marie Dupuy.

[43] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012, paras. 318-323.

[44] *Ibid.*, para. 324.

The *SAUR v. Argentina* case addressed a different facet of the issue of "illegality". The applicable Argentina-France BIT did not contain an explicit requirement that investments be made in accordance with the legislation of the host State. The tribunal held, however, that the principle of legality and good faith exists regardless of whether the treaty expresses it in explicit terms. In the tribunal's view, this principle would preclude investors who engage in "*serious violation of the legal order*" of the host State from benefitting from treaty protection.[45] On the facts of the case, however, the tribunal did not find such violations on the part of the claimant.

On the question of whether the claimant's sale of the investment affects jurisdiction, in *Daimler Financial Services AG v. Argentine Republic*, Argentina contested the tribunal's jurisdiction on the ground that the claimant, Daimler Financial Services, had sold its shares in the harmed subsidiary, DaimlerChrysler Services Argentina, to the claimant's parent company, DaimlerChrysler AG Stuttgart, before the filing of the arbitration.[46] The tribunal did not accept this argument holding that ICSID claims were "*at least in principle separable from their underlying investments*" and thus the claimant's ICSID claims "*were [not] necessarily and automatically transferred along with the shares by operation of law*." Instead, the tribunal stated that any qualifying investor who suffered damages as a result of the governmental measure, at the time those measures were taken, should retain standing to bring a claim, provided they did not otherwise relinquish their right to that claim.[47] The tribunal noted further that the question of the ultimate beneficiary of the award was not relevant to the jurisdiction of the tribunal, but should be addressed at the damages phase.[48]

On the claimant's transfer of rights to a third-party funder, the tribunal in *Teinver v. Argentina* noted that "*international case law has consistently determined that jurisdiction is generally to be assessed as of the date the case is filed*".[49] Accordingly, since the claimants transferred their rights or interests in this case to the third-party funder after initiating the arbitration, the tribunal rejected the respondent's objection to jurisdiction.[50]

On the relevance of European Union (EU) law for purposes of establishing the jurisdiction under the Energy Charter Treaty (ECT), the tribunal in *Electrabel v. Hungary* rejected the submissions put forward by the European Commission as a non-disputing party. The latter contended that the case was "*an intra-EU dispute*" between a Belgian investor and an EU Member State, governed by EU law, which should be decided by Community courts and not by an international tribunal. In dismissing these arguments, the tribunal recognized the special status of EU law operating as a body of supranational law within the EU and the role of the Court of Justice of the EU as the arbiter and gate-keeper of EU law. However, the tribunal stated that, while it was required to interpret (and apply) EU law to the dispute at hand, it was not required to adjudicate upon the validity of EU law.[51] The tribunal explained further that the claimant was not bringing a case against the Community and was not challenging a Community measure and that the Respondent State consented in the ECT to arbitration under the ICSID Convention.[52]

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45 *SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, para. 308.

46 *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012, para. 105.

47 *Ibid*., para. 145.

48 *Ibid*, paras. 147-156. The Tribunal noted that "*in the event that some future tribunal should find itself faced with a parallel claim by* [DaimlerChrysler AG Stuttgart], *that tribunal would have ample legal tools at its disposal to prevent any double recovery against the Respondent arising out of the same set of facts and circumstances as the present claim*." *Ibid.*

49 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012, para. 255.

50 *Ibid*, para. 259. See *Renta 4 v. Russia* for the implication of a third-party funding arrangement to the question of the award of legal costs (below).

51 *Ibid*, paras. 4.197-4.198.

52 *Ibid*, paras. 5.33-5.37.

B. Substantive issues

On the most-favoured-nation (MFN) clause as it applies to jurisdictional matters, several decisions rendered in 2012 continue to show a significant divergence between different tribunals and among arbitrators sitting on the same tribunal. For example, the majority of the tribunal in *Teinver v. Argentina* concluded that the claimant could rely on the MFN clause found in the Argentina-Spain BIT to make use of the (more favourable) dispute resolution provisions contained in Article 13 of the Argentina-Australia BIT.[53] The tribunal noted that the broad "*all matters*" language of the MFN clause was unambiguously inclusive.[54]

On the other hand, the tribunal in *ICS Inspection v. Argentina* found that the MFN clause in Article 3 of the Argentina-UK BIT did not apply in such a way as to permit the claimant to avail itself of the dispute resolution provisions of the Argentina-Lithuania BIT. The tribunal first of all noted that "*a State's consent to arbitration shall not be presumed in the face of ambiguity [and] where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined*."[55] Secondly, according to the tribunal, the term "*treatment*", in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary, while the settlement of disputes remained an entirely distinct issue, covered by a separate and specific treaty provision.[56] Thirdly, the reference to "*treatment in its territory*" in the MFN clause clearly imposed a territorial limitation, which consequently excluded international arbitration proceedings from the scope of the MFN clause.[57] Finally, on the basis of the aggregate comparison of the entire dispute settlement mechanism in the two treaties at issue (Argentina-UK and Argentina-Lithuania BITs), the tribunal concluded that Lithuanian investors were not necessarily accorded more favourable treatment by Argentina as compared to the UK investor.[58]

Similarly, the majority of the tribunal in *Daimler v. Argentina* denied the use of the MFN clause to circumvent the local litigation requirement in the Argentina-Germany BIT. The majority determined that the language of the Argentina-Germany BIT's MFN clause was territorially limited, that "*treatment*" was intended by the parties to refer only to treatment of the investment, and that the BIT did not extend MFN treatment to "*all matters*" subject to the BIT.[59] This decision is noteworthy, not only because of the strong dissent by one of the arbitrators,[60] but particularly because one of the two arbitrators in the majority of the tribunal wrote a concurring statement with regard to the MFN issue. In his statement, the arbitrator explained his reasons for subscribing to the award in *Daimler*, the result of which differs from that of the earlier *Siemens* case (based on the same applicable BIT), in which the same arbitrator had participated.[61]

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53 In contrast to Article X of the Argentina-Spain BIT, Article 13 of the Argentina-Australia BIT provides neither the 6-month waiting period requirement nor the 18-month recourse-to-local-courts requirement.

54 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012, para. 186.

55 *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012, para. 280.

56 *Ibid*, para. 296.

57 *Ibid*, at para. 296.

58 *Ibid*, paras. 319-323. Unlike the Argentina-UK BIT, the Argentina-Lithuania BIT did not contain the 18-month recourse-to-local-courts requirement. However, it included a 6-month waiting period requirement. The tribunal reasoned that: "*Although there are costs and delay involved in litigating before the Argentine courts if this fails to achieve a resolution, in many circumstances, this may be more favourable than direct access to international arbitration after only six months of amicable negotiations*." (Ibid., para. 323.)

59 *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012, paras. 224, 230-231, 236.

60 *Ibid*, Dissenting Opinion of Judge Charles N. Brower, 15 August 2012.

61 *Ibid*, Opinion of Professor Domingo Bello Janeiro, 16 August 2012.

On the application of MFN to substantive treaty obligations, the tribunal in *EDF v. Argentina* concluded that the MFN clause in the applicable Argentina-France BIT permitted recourse to the "umbrella" clause found in Argentina's BITs with other countries. In the tribunal's view, to ignore the MFN clause in this case would permit more favourable treatment of investors protected under Argentina's BITs with third countries, which is exactly the result that the MFN clause is intended to prevent.[62]

On the fair and equitable treatment (FET) clause, decisions rendered in 2012 confirm the variety of approaches that investment tribunals take in applying one of the most important provisions in IIAs. While the tribunal in *Deutsche Bank v. Sri Lanka* noted that the FET clause in the Germany-Sri Lanka BIT was intended as an autonomous standard, the tribunal recognized that "*the actual content of the Treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law, as recognised by numerous arbitral tribunals and commentators*."[63]

Borrowing from the decision in *Waste Management II*, the tribunal distilled the standard to include: (i) protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment; (ii) good faith conduct, although bad faith on the part of the State is not required for its violation; (iii) conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary; (iv) conduct that does not offend judicial propriety, that complies with due process and the right to be heard.[64] Having found improper motives, bad faith, lack of transparency, due process, and excess of powers, the tribunal concluded that Sri Lanka had breached the FET standard.[65]

In the context of determining the content of the FET standard, the tribunal in *Bosh International v. Ukraine* agreed with the view of the tribunal in *Bayindir v. Pakistan*, which stated that unless there are compelling reasons to the contrary, tribunals ought to follow solutions established in a series of consistent cases, comparable to the case at hand.[66] The *Bosh International* tribunal adopted the reading of the FET standard from the *Lemire v. Ukraine* decision.[67] Accordingly, in order to establish a breach of the FET standard, the action or omission by the State needs to violate "*a certain threshold of propriety*" and among the relevant factors to be considered the tribunal referred to the host State's specific representations to the investor, lack of due process or transparency, harassment, coercion, abuse of power, bad faith, arbitrariness, discrimination or inconsistency.[68]

The tribunal in *Occidental v. Ecuador* noted that "*the obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality*."[69] The tribunal there was called upon to determine whether the

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62 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012, para. 932.

63 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, paras. 418-419. Also in *SAUR v. Argentina*, the tribunal the discussion about whether the autonomous FET standard was different from the minimum standard of treatment of aliens under customary international law "*dogmatic and conceptualist*". For the tribunal, the treatment required by both standards was the same. See *SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, paras. 491-494.

64 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, para. 420.

65 *Ibid*, para. 491.

66 *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October 2012, para. 211.

67 *Joseph Charles Lemire v. Ukraine* (ICSID Case No ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, para. 284.

68 *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October 2012, paras. 212-217. The tribunal eventually rejected the claimant's FET claims.

69 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012, para. 404.

Government's termination of the investor's concession (due to the investor's failure to notify the government of a partial transfer of its rights, which was in breach of the concession agreement) represented a breach of the FET clause. Following a detailed examination of the circumstances of the case, the tribunal concluded that Ecuador had breached the FET clause as the price paid by the claimants – total loss of an investment worth many hundreds of millions of dollars – was out of proportion to the wrongdoing, and similarly out of proportion to the importance and effectiveness of the "*deterrence message*", which the Respondent might have wished to send to the wider oil and gas community.[70]

The tribunal in *Swisslion v. Macedonia* deemed it unnecessary to engage in an extensive discussion of the FET standard and limited itself to subscribe "*to the view expressed by certain tribunals that the standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors*."[71] The tribunal found a breach of the FET standard as it determined that the host State failed "*to engage with the investor on a timely basis and deal forthrightly with it*"[72] and was "*motivated to subject Swisslion to additional administrative proceedings outside of the contractual litigation*".[73] While the tribunal noted that its findings were "*a close call*", it also concluded that the breach was not "*de minimis*" (i.e., not insignificant).[74]

Citing the recent decision in *Impregilo v. Pakistan*,[75] the tribunal in *Bureau Veritas & BIVAC v. Paraguay* determined that in order to succeed in a claim alleging violation of the FET clause, the claimant must show that "*the conduct of Paraguay reflects an act of 'puissance publique', that is to say 'activity beyond that of an ordinary contracting party'*."[76] The tribunal in *Bureau Veritas* found that Paraguay had not availed itself of the kinds of powers that are normally available to a sovereign and not available to the ordinary contracting party. It noted that "*[n]o legislation or regulatory acts have been adopted, no police powers used, no judgment of any court has been ignored*."[77]

Recent decisions also appear to attribute different relevance to the investor's legitimate expectations. The tribunal in *Electrabel v. Hungary* noted what it considered a widely accepted view, namely, that the "*most important function*" of the FET standard is the protection of the investor's reasonable and legitimate expectations[78] and that while "*specific assurances may reinforce investor's expectations, such assurance is not always indispensable*".[79] The tribunal also noted that it was "*well-established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest*" and that, therefore, "*the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably*".[80] The tribunal went on to

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70 *Ibid*, para. 450.

71 *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012, para. 273.

72 *Ibid*, para. 289.

73 *Ibid*, para. 296.

74 *Ibid*, para. 300.

75 *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005.

76 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay* (ICSID Case No. ARB/07/9), Further Decision on Objections to Jurisdiction, 9 October 2012, para. 211.

77 *Ibid*, para. 241. However, while it concluded that, at this point in time, Paraguay has not, by its failure to make payment on the outstanding debt under the contract, violated the FET clause of the Netherlands-Paraguay BIT, the *Bureau Veritas* tribunal stayed the proceedings (for three months) to allow the claimant to exercise its right to have recourse to the contractual forum (the Asunción tribunals). Ibid., para. 284.

78 *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.75.

79 *Ibid*, para. 7.78.

80 *Ibid*, para. 7.77.

find that it had not been reasonable or legitimate for the claimant to expect that pricing under long-term power purchase agreements would be fixed in accordance with factors established at the time of privatization or that the so called yearly commercial agreement (YCA) for 2006 would be the same as for earlier periods that preceded market liberalisation and economic changes consequent upon Hungary's accession to the European Union.[81]

On the other hand, the tribunal in *Ulysseas v. Ecuador* adhered to the "*much narrower conceptions of the fair and equitable standard in the context of the recognition that one of the major components of this standard is the parties' legitimate and reasonable expectations.*" In particular, the tribunal quoted with approval the holding of the tribunal in *EDF v. Romania* according to which, in the absence of specific promises or representations made by the State to the investor, the latter cannot have a legitimate expectation that there will be no changes in the host State's legal and economic framework.[82]

Similarly, the tribunal in *Toto v. Lebanon* noted that, in the absence of a stabilisation clause or similar commitment, changes in the regulatory framework would be considered as breaches of the duty to grant FET "*only in case of a drastic or discriminatory change in the essential features of the transaction.*" The tribunal rejected the claims as the claimant failed to establish that the respondent, in changing taxes and customs duties, brought about such a drastic or discriminatory consequence. In the tribunal's view, the additional cost resulting from increased taxes and custom duties was small compared to the overall amount of the project.[83]

On the customary minimum standard of treatment of aliens as reflected in NAFTA and CAFTA, the tribunal in *Mobil & Murphy v. Canada* noted in particular that in determining whether that standard has been violated "*it will be a relevant factor if the treatment is made against the background of (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and (ii) were, by reference to an objective standard, reasonably relied on by the investor, and (iii) were subsequently repudiated by the NAFTA host State.*"[84] It also noted that the minimum standard "*does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent*" and that NAFTA Article 1105 protects only against "*egregious behaviour*".[85]

The tribunal in *RDC v. Guatemala* agreed with previous NAFTA decisions concluding that the minimum standard of treatment is constantly in a process of development, including since *Neer*'s formulation,[86] and adopted the "*balanced description*" of the minimum standard of treatment adopted by the tribunal in *Waste Management II*.[87] It concluded that the respondent had breached the minimum standard of treatment in CAFTA Article 10.5 as its conduct was arbitrary, grossly unfair and unjust as well as in breach of representations made by the respondent upon which the claimant reasonably relied.[88]

On denial of justice (within FET), the tribunal in *Iberdrola v. Guatemala* noted that the claimant had failed to substantiate its claim that the standard of denial of

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81 *Ibid*., para. 7.140.

82 *Ulysseas, Inc. v. The Republic of Ecuador (*UNCITRAL), Final Award, 12 June 2012, paras. 248-249 quoting *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012, para 217.

83 *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* (ICSID Case No. ARB/07/12), Award, 7 June 2012, para. 244.

84 *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and Principles of Quantum, 22 May 2012, para. 152.

85 *Ibid*, para. 153.

86 *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012, para. 218.

87 *Ibid*, para. 219.

88 *Ibid*, para. 235.

justice included in the FET clause is broader than that recognized under customary international law.[89] Accordingly, the tribunal reviewed the conduct of the host State on the basis of the concept of denial of justice in the current state of customary international law.[90]

On the relationship between the FET clause and the prohibition of unreasonable measures, the tribunal in *Swisslion v. Macedonia* noted that most of the measures complained of under Article 4(1) of the Macedonia-Switzerland BIT (prohibition to impair investments by unreasonable measures) were duplicative of the measures that had already been examined within the context of the breach of the FET standard in Article 4(2). In the view of the tribunal, the Article 4(1) claim was better addressed under Article 4(2) and accordingly the Article 4(1) claim was dismissed.[91] The tribunal further noted that "*the claimed breach of Article 4(1) adds little to the Claimant's case, and would not in any event increase the measure of damages.*"[92]

On the prohibition of discriminatory and arbitrary measures, the tribunal in *Ulysseas v. Ecuador* noted that for a measure to be discriminatory it was sufficient that, objectively, two similar situations were treated differently and there was no need to establish that the discrimination was somehow related to the nationality of the investor(s) concerned.[93] On the question of arbitrariness, citing the decision in *Enron v. Argentina*, the *Ulysseas* tribunal stated that, for a violation to be found, some important measure of impropriety must be manifest.[94] The tribunal dismissed the claims of discrimination and arbitrariness.

On the definition of indirect expropriation, decisions rendered in 2012 have continued to point out the relevance of various elements, with a primary emphasis on the host State measure's adverse effect on the investor. The majority of the tribunal in *Burlington v. Ecuador*, for example, agreed with past decisions focusing on whether the measure has resulted in substantial deprivation.[95] The majority explained that a loss of management or control over the investment was not a necessary element of substantial deprivation: "*what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return*."[96]

The *Burlington* majority further noted that the criterion of loss of the economic use or viability of the investment applied to "*the investment as a whole*". Consequently, a windfall profit tax could not be tantamount to expropriation. According to the majority of the tribunal, "*[b]y definition, such a tax would appear not to have an impact upon the investment as a whole, but only on a portion of the profits. On the assumption that its effects are in line with its name, a windfall profits tax is unlikely to result in the expropriation of an investment*".[97] The majority of the tribunal thus

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89 *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, para. 427.

90 *Ibid.* The tribunal reached this conclusion in light of the language of the FET provision of the Guatemala-Spain BIT, which provides for no "less favourable treatment than that required by International Law." See also Jan Oostergetel v. Slovakia (UNCITRAL), Final Award, 23 April 2012, paras. 276-299 (distinguishing between procedural and substantive denial of justice).

91 *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012, para. 328.

92 *Ibid*.

93 *Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012, para. 293. See also *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20), Award, 16 May 2012, para. 262 ("*In order to prevail regarding an allegation of discriminatory treatment, a Claimant must demonstrate that it has been subjected to unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation.*")

94 *Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012, para. 319.

95 *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012, para. 396.

96 *Ibid.*, para. 397.

97 *Ibid.*, para. 404.

found that neither of the two changes in the fiscal regime (windfall tax at 50% and 99%) had the effect of rendering the investment "*worthless and unviable*", and thus were not tantamount to expropriation.[98]

The tribunal in *Electrabel v. Hungary* emphasized that in order to prove indirect expropriation, the claimant must prove that its investment lost all significant economic value following the early termination of the power purchase agreement (PPA).[99] Furthermore, the tribunal noted that "*both in applying the wording of Article 13(1) ECT and under international law, the test for expropriation is applied to the relevant investment as a whole, even if different parts may separately qualify as investments for jurisdictional purposes.*"[100] Having determined that the PPA was only part of the claimant's overall investment in Dunamenti, the tribunal found that the claimant had failed to meet the test for indirect expropriation.[101]

The tribunal in *Renta 4 v. Russia* emphasized that indirect expropriation must be deduced from a pattern of conduct, observing its conception, implementation, and effects, even if the intention to expropriate is disavowed at every step. Noting the possibility of overlap between the elements of indirect expropriation and the conditions for a lawful expropriation, the tribunal determined that the "*fact that individual measures appear not to be well founded in law, or to be discriminatory, or otherwise to lack bona fides, may be important elements of a finding that there has been the equivalent of an indirect expropriation*", independently of the question of lawfulness of the expropriation under the IIA.[102]

On the test for direct expropriation, the tribunal in *Burlington v. Ecuador* stated that a governmental measure constituted (direct) expropriation under the treaty if (i) the measure deprived the investor of his investment; (ii) the deprivation was permanent; and (iii) the deprivation found no justification under the police powers doctrine.[103] Having determined in particular that there was no justification for the dispossession of the claimant's oil fields, the tribunal concluded that such dispossession constituted expropriation.[104]

On the scope and meaning of umbrella clauses, recent decisions confirm the lack of consensus in this area. The tribunal in *SGS v. Paraguay* noted that there was nothing in Article 11 of the Paraguay-Switzerland BIT that stated or implied that a government would only fail to observe its commitments if it abuses its sovereign authority.[105] Accordingly, if the respondent failed to observe any of its contractual commitments, it breached Article 11 and no further examination of whether respondent's actions are properly characterized as "*sovereign*" or "*commercial*" in nature was necessary.[106] Furthermore, the tribunal in *SGS v. Paraguay* rejected the respondent's argument that the investor's claims under the umbrella clause be resolved by the contractually designated forum (i.e., the local courts).[107]

On the other hand, the tribunal in *Bosh International v. Ukraine* concluded that the term "Party" in Article II(3)(c) of the Ukraine-US BIT[108] referred to any situation where the Party was acting *qua* State, meaning that where the conduct of entities

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98 *Ibid*., paras. 430 and 456.

99 *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 6.53.

100 *Ibid.*, para. 6.58.

101 *Ibid.*, paras. 6.58-6.64.

102 *Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012, para. 45.

103 *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012, para. 506.

104 *Ibid.*, para. 529.

105 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay* (ICSID Case No. ARB/07/29), Award, 10 February 2012, para. 91.

106 *Ibid.*, para. 95.

107 *Ibid.*, paras. 105-109.

108 Article II(3)(c) provides as follows: "*Each Party shall observe any obligation it may have entered into with regard to investments*".

could be attributed to the host State, such entities should be considered to be "the Party" for the purposes of Article II(3)(c).[109] The tribunal also concluded that "*where a contractual claim is asserted under an umbrella clause, the claimant in question must comply with any dispute settlement provision included in that contract*."[110]

Similarly, noting the ambiguity in the parties' contractual relationship, the tribunal in *Swisslion v. Macedonia* rejected the claim that the respondent had failed to "*constantly guarantee*" the observance of its commitments. The tribunal noted: "*At the end of the day, there were issues pertaining to the investor's compliance with the contract on which reasonable persons could disagree. The Ministry did not unilaterally terminate the contract, but rather put the issue before the courts. The Tribunal is therefore unable to find that in resolving to seek the termination of the contract and in submitting the matter to the jurisdiction of the courts, as provided for in the contract, the Ministry breached any obligation to constantly guarantee the observance of its commitments.*"[111]

The tribunal in *Burlington v. Ecuador* analysed whether the umbrella clause protection applied to obligations entered into not between the respondent and the claimant, but between the respondent and the claimant's local subsidiary. Noting support by previous ICSID decisions, the majority of the tribunal concluded that the umbrella clause implies that the claimant and the respondent themselves are parties to the contact concerned.[112] The majority's conclusion was based on the analysis of the ordinary meaning of the word "obligation". Since the treaty did not define this term, the tribunal looked to national law and concluded that under Ecuadorian law the non-signatory parent of a party to a contract may not directly enforce its subsidiary's rights under the contract.[113]

On the prohibition of performance requirements, the tribunal in *Mobil & Murphy v. Canada* determined that, while Article 1106 NAFTA did not expressly refer to research and development (R&D) and education and training (E&T) in the list of prohibited requirements,[114] the ordinary meaning of the term "services" was broad enough to encompass R&D and E&T.[115]

On the state of necessity under customary law, the tribunal in *EDF v. Argentina* found that the respondent had failed to meet its burden to demonstrate three key elements: (i) that the emergency legislation was the only way to safeguard Argentina's essential interests, (ii) that Argentina had not contributed to the situation of necessity; and (iii) that Argentina had not returned to the pre-necessity status quo when that became possible.[116] The tribunal also noted that in light of the language of Article 27 of the ILC Articles on State Responsibility, "*the successful invocation of the necessity defense [under customary law] does not per se preclude payment of compensation to the injured investor for any damage suffered as a result of the necessity measures enacted by the State.*"[117]

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[109] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October 2012, paras. 243 and 246.

[110] *Ibid.*, paras. 251-252.

[111] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012, para. 324.

[112] *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012, para. 220.

[113] *Ibid.*, paras. 214-215.

[114] Article 1106(1)(c) NAFTA prohibits requirements "*to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory*".

[115] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and Principles of Quantum, 22 May 2012, paras. 215-216.

[116] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012, para 1171.

[117] *Ibid.*, para.1177.

On the relevance of human rights, the tribunal in *EDF v. Argentina* noted that the tribunal should be sensitive to international *jus cogens* norms, including basic principles of human rights.[118] Without calling into question the potential significance or relevance of human rights in connection with international investment law, the tribunal was not persuaded that the "*Respondent's failure to re-negotiate tariffs in a timely fashion, so as to re-establish the economic equilibrium to which Claimants were entitled under the Concession Agreement's Currency Clause, was necessary to guarantee human rights*."[119]

In *SAUR v. Argentina*, the tribunal acknowledged that the law of human rights in general, and the right to water in particular, constitutes one of the sources of law applicable to the resolution of the dispute.[120] The tribunal noted further that these rights must be "*counterbalanced*" with the rights of the investor under the BIT, meaning that the sovereign powers relating to people's right to water must not be exercised by a public authority in an "*absolute*" manner that would defeat the investor's BIT rights.[121]

On the relevance of the doctrine of the margin of appreciation (with respect to the assessment of the allegedly expropriatory State conduct), the tribunal in *Renta 4 v. Russia* resisted applying the said doctrine to investment treaties in light of the difference between IIAs and human rights conventions. In the tribunal's view, while human rights conventions establish minimum standards to which all individuals are entitled, irrespective of any act of volition on their part, "*investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them.*"[122] In light of this difference, the tribunal suggested that IIAs "*should not be diluted*" by the notions of "*margins of appreciation*", which are relevant for (and justified in the context of) human rights instruments.[123]

C. Compensation

On damages, at least nine decisions rendered in 2012 awarded them to the investor. The highest amount – which also represents the highest known award of damages in the history of investment treaty arbitration – featured in *Occidental v. Ecuador II* where the investor was awarded US$ 1.77 billion plus pre- and post-award compound interest by the majority of the tribunal. In *EDF v. Argentina* the claimant was awarded US$ 136.13 million plus compound interest, while in *Deutsche Bank v. Sri Lanka*, the claimant was awarded US$ 60.36 million plus interest. In *SGS v. Paraguay*, the claimant was awarded US$ 39.02 million plus interest and in *RDC v. Guatemala*, the claimant was awarded US$ 11.2 million plus compound interest. Smaller awards were granted in *Marion and Reinhard Unglaube v. Costa Rica* (US$ 3.1 million plus interest), *Renta 4 v. Russia* (US$ 2 million plus compound interest), *Antoine Goetz v. Burundi* (US$ 2 million plus interest), and *Swisslion v. Macedonia* (€350,000 plus compound interest).

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[118] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012, para. 909.

[119] *Ibid.*, para. 914. A similar approach was adopted by the tribunal in SAUR *International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, 6 June 2012, paras. 328-332.

[120] By contrast, the tribunal in *Von Pezold v. Zimbabwe* and *Border Timbers v. Zimbabwe* stated that "*the reference [in the BITs' applicable-law provision] to 'such rules of general international law as may be applicable' […] does not incorporate the universe of international law into the BITs or into disputes arising under the BITs.*" The tribunal made this statement when considering whether the *amicus curiae* submission, which made references to the international human rights law on indigenous peoples, would assist the tribunal in the determination of a factual or legal issue related to the proceeding. See *Bernhard Von Pezold and others v. Zimbabwe* (ICSID Case No. ARB/10/15), and *Border Timbers Limited and others v. Zimbabwe* (ICSID Case No. ARB/10/25), Procedural Order No. 2, 26 June 2012, para. 57.

[121] *SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, paras. 330-332.

[122] *Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012, para. 22. The tribunal suggested that foreigners "may invoke a higher standard of protection than nationals". Ibid., para. 21.

[123] *Ibid.*, para. 22.

On the condition for the award of damages, the tribunal in *RDC v. Guatelmala* determined that, while reparation was due to the claimant to compensate it fully for the injury suffered, the payment of the amount awarded should be subject to the claimant's relinquishing its rights under all the contracts. Since the claimant's local subsidiary, FVG, was the party to the usufruct contracts, the tribunal conditioned payment of the award upon the transfer of the claimant's shares in FVG to the respondent.[124]

On valuation methods, the tribunal in *Occidental v. Ecuador* found that "*the discounted cash flow method is the most widely used and generally accepted method in the oil and gas industry for valuing sales or acquisitions*"[125] and that "*it can derive no assistance from an analysis of the seven transactions which the respondent has submitted as comparable sales [since each oil and gas property presents a unique set of value parameters].*"[126]

On the award of future lost profits, in *Mobil and Murphy v. Canada*, the tribunal – having found that Canada admitted a continuing breach of NAFTA Article 1106 inflicting the ongoing damage to the claimants' interests in the investment – held that it would award compensation for past damage (including past lost profits) but rejected the claim for future lost profits (projected by the claimant up to the year 2036) because it said it would not be able to estimate those damages with "*reasonable certainty*". The tribunal suggested, instead, that the claimants should bring new arbitral proceedings in the future to collect damages "*for losses which [will] have accrued*" by the relevant point in time as by that time the damages will become "*fully ascertainable*" and "*actual*".[127]

With regard to additional circumstances relevant for quantifying the losses, three findings by the majority of the tribunal in *Occidental v. Ecuador*[128] are worth emphasizing (in particular as one of the arbitrators was in "*complete disagreement*"[129] with the findings of the majority). First, the majority decided to disregard certain "*value-depressing measures*" taken by the respondent (before the measure under review was adopted) because those measures (for example, Law 42 providing for a windfall profit tax of 99%) were taken in breach of the applicable BIT.[130] Second, the tribunal concluded that the respondent must compensate the claimants for 100% of their interest in the investment despite the fact that the claimant may be liable vis-à-vis third-parties.[131] Third, the tribunal discounted 25% of the total loss suffered by the investor because of the investor's "*material and significant wrongful act*" (linked to the investor's failure to fully disclose the nature of the assignment agreement with a third party). Citing the legal principles of contributory negligence, the tribunal found that the claimants had contributed to the extent of 25% to the prejudice which they suffered following the host State's termination of the concession agreement and that "*the resulting apportionment of responsibility as between the claimants and the respondent, to wit 25% and 75%, is fair and reasonable in the circumstances of the present case*."[132]

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[124] *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012, para. 267.

[125] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012, para. 779.

[126] *Ibid.*, para. 787.

[127] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012, paras. 473-478.

[128] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012.

[129] *Ibid.*, Professor Brigitte Stern's Dissenting Opinion, 20 September 2012, para. 1.

[130] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012, para. 527.

[131] *Ibid.*, para. 656.

[132] *Ibid.*, para. 687.

On the investor's duty to mitigate damages, the tribunal in *EDF v. Argentina* stated that it would be patently unfair to allow the claimants to recover damages for loss that could have been avoided by taking reasonable steps as the duty to mitigate damages is a well-established principle in investment arbitration.[133] It further added that whether the aggrieved party had taken reasonable steps to reduce the loss was a question of fact, not law and what was reasonable depended largely upon the facts of the individual case.[134]

On the calculation of interest, the tribunal in *Occidental v. Ecuador* noted that while the traditional norm was to award simple interest, this practice has changed and the majority of recent awards provided for compound interest.[135]

The tribunal in *SGS v. Paraguay* noted that the virtually universal principle of international law and international arbitration practice in the case of a delayed payment of monetary obligations due is to apply interest as of the date payment became due. The tribunal noted that the claimant adopted the conservative approach of requesting interest only as from the date of contract termination, rather than from the date when each invoice became due.[136]

D. Other issues: counterclaims, provisional measures, due process, previous decisions, amicus curiae briefs and legal fees

On counterclaims by a respondent State, the *Goetz v. Burundi* decision became the first one in IIA arbitration where the tribunal affirmed its jurisdiction over a respondent State's counterclaim. Specifically, Burundi sought US$ 1 million from the claimants for their bank's failure to honour the terms of a local operating certificate. The tribunal found that despite the applicable BIT's silence on the matter, it was competent to consider the counterclaim pursuant to Article 46 of the ICSID Convention as the counterclaim fell within the jurisdiction of ICSID (i.e., related to the investment), was covered by the consent of the parties and directly related to the object of the dispute. Having admitted the counterclaim, the tribunal went on to dismiss it on the merits.[137]

On provisional measures, the tribunal in *Tethyan v. Pakistan* stated – in line with past practice – that provisional measures may be ordered where the situation is urgent and the requested measures are necessary to preserve the asserted right from irreparable harm.[138]

The tribunal in *Burlington v. Ecuador* rejected the claimant's argument that the non-compliance with an order for provisional remedies constituted expropriation of the claimant's right to pursue ICSID arbitration. While the tribunal did not excuse the respondent's failure to abide by the provisional measures, it noted that an order for provisional remedies only created procedural rights during the arbitration and could not be assimilated to a court's decision to annul a final award (such as it was in the case of *Saipem v. Bangladesh*).[139]

On due process in the arbitration proceedings, the tribunal in *Iberdrola v. Guatemala* noted that post-hearing briefs were memorials of conclusions and they

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[133] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012, paras. 1301-1302.

[134] *Ibid.*, para. 1306.

[135] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012, para. 834.

[136] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay* (ICSID Case No. ARB/07/29), Award, 10 February 2012, para. 184. The tribunal believed appropriate to apply in that specific case, the LIBOR rate plus one percentage point. (*Ibid.*, para. 188.)

[137] *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi* (ICSID Case No. ARB/01/2), Award, 21 June 2012, paras. 267-287.

[138] *Tethyan Copper Company v. Pakistan* (ICSID Case No. ARB/12/1), Decision on Provisional Measures, 13 December 2012, para. 118.

[139] *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012, para. 481.

did not provide a new opportunity for the parties to reformulate their applications or arguments. In the tribunal's view, to allow parties to introduce changes to the petitum or to the structure of the claims in the post-hearing briefs "*would constitute a clear violation of right of reply and introduce chaos into the process.*"[140]

On the role of previous decisions, the tribunal in *Renta 4 v. Russia* held that it was not bound by either *RosInvest v. Russia* (treaty arbitration) or *Yukos v. Russia* (ECHR case), which related to the same facts but were brought under different legal instruments. At the same time, it noted that "*the lengthy texts of those decisions go over much of the same ground that has been covered in this case, and it is natural to examine them in the light of many of the arguments made here as well.*"[141]

In *Bosh International v. Ukraine*, the tribunal stated that while it did not consider itself bound by past decisions of other arbitral tribunals, it recognised that it should pay due regard to their conclusions. It also reiterated the view that in the absence of compelling reasons to the contrary, tribunals ought to follow solutions established in a series of consistent cases, comparable to the case at hand.[142]

On amicus curiae briefs, the tribunal in *Von Pezold v. Zimbabwe* and *Border Timbers v. Zimbabwe* rejected the petition for leave to submit an *amicus curiae* (friend of the court) brief by the European Center of Constitutional and Human Rights (ECCHR) and four indigenous communities of Zimbabwe because they did not satisfy any of the criteria under Rule 37(2) ICSID Arbitration Rules. The tribunal noted *inter alia* that (i) the circumstances of the *amici*'s application gave rise to legitimate doubts as to their independence or neutrality;[143] (ii) consideration of rights of indigenous peoples under international law, to which the *amicus* brief referred, was not part of the tribunal's mandate under either the ICSID Convention or the applicable BITs;[144] (iii) in light of its mission and expertise, the ECCHR did not have a "*significant interest in the proceeding*".[145]

On legal fees, the tribunal in *Deutsche Bank v. Sri Lanka* decided to grant to the claimant a full recovery of its costs, legal fees and expenses emphasizing that (i) the claimant was the successful party; (ii) the respondent's jurisdictional challenges failed as well as its attempts to resist findings against it; and (iii) breaches by the respondent were egregious and the respondent acted in bad faith.[146]

The tribunal in *Bosh International v. Ukraine* found that while in some cases, where the unsuccessful claimant has engaged in some form of abusive conduct, arbitral tribunals have ordered that the claimant pay all or a significant part of the respondent's costs, the present case did not fall into this category. However, the tribunal considered it appropriate to order the claimant to make a contribution to the costs incurred by the respondent linked to the hearings being delayed twice following requests by the claimants. The tribunal ordered the claimants to pay one-sixth of the respondent's costs.[147]

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[140] *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, para. 347.

[141] *Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012, para. 24. The tribunal noted further: "*The arbitrators understand that the same arguments may be affected not only by differences in the norms articulated in the relevant legal texts, but also by the pleadings and evidence put forward in support of those arguments. Bearing in mind all of these qualifications, the present Tribunal will nevertheless pay respectful heed to the analysis and conclusions of the distinguished arbitrators and judges in these two cases. Indeed they must do so, as both sides in this case have made submissions as to their implications and relative persuasiveness.*" *Ibid*., para. 25.

[142] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October 2012, para. 211, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* (ICSID Case No ARB/03/19), Award, 27 August 2009, para. 145.

[143] *Bernhard Von Pezold and others v. Zimbabwe* (ICSID Case No. ARB/10/15) and *Border Timbers Limited et al v. Zimbabwe* (ICSID CASE No. ARB/10/25), Procedural Order No. 2, 26 June 2012, para. 56.

[144] *Ibid.*, para. 59.

[145] *Ibid.*, para. 61.

[146] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, paras. 588-590.

[147] *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October

The tribunal in *ICS Inspection v. Argentina* noted that the traditional position in investment treaty arbitration, in contrast to commercial arbitration, had been to follow the normal practice under public international law that the parties bear their own costs of legal representation and assistance. While it accepted that a number of investment tribunals have opted instead to apply the principle of awarding legal costs, and that this practice may be appropriate in some cases, the tribunal preferred to follow the public international law practice unless the circumstances of the case justified a departure from that practice.[148] Despite its finding against the claimant, the tribunal decided that the parties should bear their own legal costs.[149]

In *Renta 4 v. Russia*, the claimants, who had broadly prevailed in the arbitration, requested that the tribunal award them costs in the overall amount of US$ 14.57 million. The tribunal pointed out that this particular dispute was unusual as it was entirely financed by a third party, Menatep, and the claimant did not bear any enforceable legal duty to compensate that third party. Thus, the tribunal rejected the request for costs on the grounds that the claimants had not actually incurred any costs.[150]

E. Annulment and judicial review

The *ad hoc* committee in *AES v. Hungary* recognized that the application for the annulment of an award based on the failure of an arbitral tribunal to state reasons for its decision did not allow entering "*into an assessment of the merits of the dispute, either directly or indirectly.*"[151] However, in the committee's view, annulment may be possible in the exceptional circumstance where a tribunal's reasons are "*so contradictory*" or "*frivolous or absurd in nature*" that they effectively "*amount to no reasons at all*".[152]

The *ad hoc* committee in *Victor Pey Casado v. Chile* annulled part of the award *inter alia* on the ground that there had been "*a serious departure from fundamental rules of procedure*" in the meaning of Article 52(1)(d) of the ICSID Convention (the disputing parties had not been given an opportunity to make arguments regarding damages for a breach of the FET standard). In reaching its decision, the committee noted that an applicant was not required to show that it would have won the case, if the rule had been respected.[153] Furthermore, noting the contrary view expressed in many recent decisions of other ad hoc committees, the *Victor Pey Casado* committee concluded that it had "*no discretion not to annul an award if a serious departure from a fundamental rule is established*."[154]

On decisions of domestic courts reviewing arbitral awards, the United States Court of Appeals for the D.C. Circuit reversed the decision of the District Court and vacated the final award in *BG v. Argentina*.[155] The Court of Appeal stated that the arbitral tribunal rendered its decision without regard to the contracting parties' agreement establishing a precondition to arbitration (in the form of the 18-month recourse-to-local-courts requirement). The Court of Appeals noted first that, unless

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2012, paras. 291-292.

148 ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012, para. 340.

149 *Ibid.*, para. 343.

150 *Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012, paras. 221-223.

151 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Decision on Annulment, 29 June 2012, para. 52.

152 Ibid., paras. 53-54.

153 *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012, para. 78.

154 Ibid., para. 80. In the committee's view, the only available discretion concerned the point of determining whether the departure from a rule of procedure was "serious" for purposes of Article 52 of the ICSID Convention.

155 *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007.

specified in the applicable treaty, "*the question of arbitrability is an independent question of law for the court to decide.*"[156] The Court of Appeals then stated that there could be "*only one possible outcome on the arbitrability question before it, namely, that the foreign investor was required to commence a lawsuit in Argentina's courts and wait 18 months before filing for arbitration pursuant to the UK-Argentina BIT*."[157]

III. Some systemic challenges

2012 developments in ISDS brought to light a number of cross-cutting issues and concerns.

Divergent findings. Different interpretations of the same or similar IIA provisions persist. A vivid example for 2012 is the "umbrella" clause – a clause which obliges the contracting States to honour commitments extended to individual investors, (e.g. by means of investment contracts). Tribunals adopted contradictory decisions on three key issues: (i) whether an IIA claim under the umbrella clause can proceed if the underlying investment contract sets out its own dispute resolution mechanism, (ii) whether the relevant State conduct must be an exercise of sovereign powers (*ius imperii*), and (iii) whether the parties in IIA arbitration need to be the parties to the investment contract concerned (i.e. for example whether it is enough for the claimant in the IIA arbitration to be a majority shareholder in the company that concluded an investment contract with the State).[158] Sometimes, divergent outcomes can be – at least partially – explained by the differences in wording of a specific IIA applicable in a particular case; however, for the most part they represent the differences in the views of individual arbitrators. In the absence of a mechanism that would ensure uniformity of IIA interpretation, divergent findings can be expected to persist.

Claims arising out of crisis-related and financial austerity measures. In 2012, a number of cases emerged that have their origin in the recent financial crisis and the ongoing economic recession. For example, a pair of Chinese investors brought an ISDS claim against Belgium relating to that Government's treatment of Fortis, a Belgian-Dutch financial institution, in the midst of the financial crisis.[159] The claimants reportedly allege damages of US$ 2.3 billion. A Cypriot bank notified its intention to initiate arbitration proceedings against Greece arguing that the latter had discriminated against the claimant's Greek subsidiary when implementing its bank bail-out programme.[160] Similarly, a number of claims have been brought, or threatened, against governments who have introduced austerity measures affecting renewable energy producers. Reportedly, Italy, the Czech Republic and Spain have been put on notice with respect to possible arbitrations regarding those countries' withdrawal of subsidies for solar energy, introduced at a time of a more favourable economic climate.[161]

Challenges to environmental measures. In 2012, States have continued to face investor claims concerning measures of general application introduced on environmental grounds. Thus, Canada was put on notice with respect to two potential NAFTA claims – one arising out of the moratorium on offshore wind

[156] *Argentina v. BG Group PLC* (United States Court of Appeals for the District of Columbia Circuit), No. 11-7021, 17 January 2012, p. 13.
[157] Ibid., p. 17.
[158] See the paragraphs "On the scope and meaning of umbrella clauses" in Part I.B above.
[159] *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* (ICSID Case No. ARB/12/29).
[160] "Investment Treaty Arbitration against Greece Looms after Foreign Bank Gives Notice of Dispute Due to 'Discriminatory' Bail-out", IA Reporter, 27 March 2013, http://www.iareporter.com/articles/20130327.
[161] See V. Jha, "Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy", *Investment Treaty News*, 19 July 2012.

farms introduced by the Government of Ontario (pending further research into such farms' environmental and health effects), which allegedly destroyed the claimant's contractual rights;[162] the other regarding a ban by the Government of Quebec on oil and gas activities in certain areas.[163] A Swedish investor filed a case against Germany under the Energy Charter Treaty demanding compensation for the damage allegedly incurred due to the Government's announced phase-out of nuclear power plants.[164]

Enforcement of arbitral awards. Enforcing awards against sovereign States remains a difficult issue as some governments continue not paying earlier arbitral awards rendered against them. Some investors prefer to settle with the respondent State,[165] often for an amount lower than that awarded but with a guarantee of prompt payment, or with the monetary award being fully or partially replaced by other benefits. Other claimants seek to locate respondent State's assets abroad and start enforcement procedures in the relevant third countries.[166] Still others bring the non-payment of awards to the attention of their home governments, with a view to receiving their support. One such example from 2012 is the United States excluding Argentina from the list of countries benefitting from trade preferences, until Argentina pays on ICSID awards in favour of US investors.[167]

Transparency of ISDS. A notable development has been the UNCITRAL Working Group's completion of a legal standard on transparency in IIA arbitrations. Until now, ISDS proceedings under the UNCITRAL Arbitration Rules have been characterized by a high level of confidentiality and, frequently, the very existence of a dispute has been unknown.[168] In January 2013, the UNCITRAL Working Group II agreed on a set of rules (still to be formally adopted by the UNCITRAL itself) that provide for a significantly increased level of transparency, including a public registry of disputes, open oral hearings as well as publication of key documents (notices of arbitration, pleadings, transcripts, and all decisions and awards issued by the tribunal). These rules will apply to arbitrations under *future* IIAs that refer to UNCITRAL rules (unless the parties to these future treaties expressly opt out), and thus exclude the multitude of existing IIAs from their coverage. State parties to the existing treaties may separately agree to apply the new UNCITRAL transparency rules to disputes under existing treaties, if they so wish.[169]

Also noteworthy is the decision of the Warsaw District Administrative Court of 13 December 2012. Reportedly, the court held that arbitral awards rendered under investment treaties constitute public information eligible for release by the

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[162] *Windstream Energy LLC v. Government of Canada*, Notice of Intent to Submit a Claim to Arbitration, 17 October 2012, available at http://italaw.com/cases/1585.

[163] *Lone Pine Resources Inc. v. Government of Canada*, Notice of Intent to Submit a Claim to Arbitration, 8 November 2012, available at http://italaw.com/cases/1606.

[164] *Vattenfall AB and others v. Federal Republic of Germany,* ICSID Case No. ARB/12/12. See "Germany is Sued at ICSID by Swedish Energy Company in Bid for Compensation for Losses Arising out of Nuclear Phase-out", IA Reporter, 1 June 2012, http://www.iareporter.com/articles/20120601_1.

[165] As, for example, in the *Cargill v. Mexico* case, see IA Reporter, 22 February 2013, http://www.iareporter.com/articles/20130222. See also "Republic of Georgia agrees to pay 1/3rd of ICSID award", IA Reporter, 31 December 2011, http://www.iareporter.com/articles/20111231_6.

[166] See, e.g., "UK Court orders Republic of Laos to post $70 million while legal fight continues over unpaid arbitral award", IA Reporter, 22 November 2012, http://www.iareporter.com/articles/20121122_4.

[167] United States, Presidential Proclamation "To Modify Duty-free Treatment Under the Generalized System of Preferences and for Other Purposes", *Federal Register*, 26 March 2012.

[168] The following fact is telling: at the end of 2012 the Permanent Court of Arbitration reported to have administered 85 ISDS cases under UNCITRAL Rules, only 18 of these disputes were publicly known. *Source:* the Permanent Court of Arbitration International Bureau.

[169] See Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013), available at http://www.uncitral.org/pdf/english/workinggroups/wg_arb/765-e-draft-as-submitted-website.pdf. The agreement reached is yet to be formally adopted by the Commission.

Polish government. Although under appeal, the decision may eventually oblige the Government to release the unpublished award. At a broader level, there is the possibility that freedom-of-information laws – in those countries where they exist – can help bring to light disputes and arbitral awards that have thus far been unknown.[170]

Third party funding (TPF) of claims. The practice of involving specialized firms to finance IIA claims against States in exchange for a share in a possible future award or settlement in favour of the claimant has been gaining prominence in the past year and attracted the attention of commentators and scholars.[171] The practice of litigation finance exists in a few countries (Australia, the United States, the United Kingdom and some others) and, in some circumstances, can be viewed as giving access to justice to those claimants who do not have the means to pay hefty legal fees and other litigation costs. On the other hand, there are serious policy reasons against TPF of IIA claims – for example, it may increase the filing of questionable claims.[172] From a respondent State's perspective, such frivolous claims, even if most of them fail, can take significant resources and may cause reputational damage. There are other concerns which put the practice of TPF into direct or indirect conflict with professional ethical rules in some countries.[173] While there is no international regulation of TPF and public knowledge about financing of claims is limited, IIA-related TPF developments need to be monitored closely with a view better to understand trends and their policy implications.

* * *

The 2012 peak in the number of new cases confirms that foreign investors continue relying on IIA-based ISDS. The increasing number of victories for claimants (70% in 2012) and, on some occasions, high amounts of damages awarded (e.g. US$ 1.77 billion in the case of *Occidental v. Ecuador*) demonstrate the protective potential of the IIA/ISDS regime. The continuing trend of investors challenging generally applicable public policies, contradictory decisions issued by tribunals, an increasing number of dissenting opinions, concerns about arbitrators' potential conflicts of interest all illustrate the problems inherent in the system.

Accordingly, the public discourse about the usefulness, legitimacy and deficiencies of the ISDS mechanism is gaining momentum, especially given that the ISDS mechanism is on the agenda in numerous bilateral and regional IIA negotiations. While reform options abound, their systematic assessment including with respect to their feasibility, expected effectiveness and implementation method (e.g. at the level of IIAs, arbitral rules, institutions) remains wanting. A multilateral policy dialogue on ISDS could help to develop a consensus about the preferred course for reform and ways to put it into action.

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[170] "Polish court rules on release of investment arbitration awards under Freedom of Information law", IA Reporter, 2 January 2013, http://www.iareporter.com/articles/20130102_3.

[171] L. Bench Nieuwveld and V. Shannon (eds.), *Third-Party Funding in International Arbitration* (Wolters Kluwer, 2012); E. De Brabandere and J. Lepeltak, "Third Party Funding In International Investment Arbitration", Grotius Centre Working Paper No. 2012/1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2078358; P. Eberhardt and C. Olivet, "Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom" (Corporate Europe Observatory and Transnational Institute, 2012), available at http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf; W.H. Van Boom, "Third-Party Financing in International Investment Arbitration", March 2012, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114;.

[172] TPF companies, who build a "portfolio" of claims, have an economic incentive to put money even into weak cases that have at least some chance of a high monetary award.

[173] See, e.g., L. Bench Nieuwveld; «Third Party Funding: Why the Fuss? The Insurance Industry Holds the Answer» TDM 7 (2012), www.transnational-dispute-management.com.

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Annex 1. Known treaty-based cases initiated in 2012

	Case Title	Home Country
1	*Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary* (ICSID Case No. ARB/12/3)	United Kingdom
2	*Ampal-American Israel Coproation and Others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11)	United States, Germany
3	*Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1)	Canada
4	*Axiata Group v. India*	Mauritius
5	*Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB 12/20)	Barbados
6	*Bycell v. India*	Russian Federation
7	*Capital Global and Kaif Investment v. India*	Mauritius
8	*Churchill Mining PLC v. Republic of Indonesia* (ICSID Case No. ARB/12/14)	United Kingdom
9	*Dan Cake (Portugal) S.A. v. Hungary* (ICSID Case No. ARB/12/9)	Portugal
10	*Elecnor S.A. and Isolux Corsán Concesiones S.A. v. Republic of Peru* (ICSID Case No. ARB/12/5)	Spain
11	*Emmis International Holding B.V., Emmis Radio Operating B.V., MEM Magyar Electronic Media Kereskedelmi Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2)	Netherlands, Switzerland
12	*Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/21)	Netherlands
13	*Gazprom v. The Republic of Lithuania* (ICC)	Russian Federation
14	*Gazprom v. Lithuania II* (UNCITRAL)	Russian Federation
15	*Gelsenwasser AG v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/32)	Germany
16	*Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39)	Austria
17	*Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea* (ICSID Case No. ARB(AF)/12/2)	Spain
18	*Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of* (ICSID Case No. ARB/12/31)	Netherlands
19	*Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain* (ICSID Case No. ARB/12/17)	Venezuela
20	*Karkey Karadeniz Elektrik Uretim A.S. (Turkey) v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1)	Turkey
21	*Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6)	Netherlands
22	*LSF-KEB Holdings SCA and others v. Republic of Korea* (ICSID Case No. ARB/12/37)	Luxembourg
23	*Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25)	Italy
24	*Mercer International, Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3)	United States
25	*MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro* (ICSID Case No. ARB(AF)/12/8)	Netherlands
26	*Mr. Ali Allawi v. Pakistan* (UNCITRAL)	United Kingdom
27	*Mr. Yosef Maiman and Others v. Egypt* (UNCITRAL)	Poland
28	*Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6)	Turkey

[174] Every effort was made to ensure the accuracy and completeness of the information. Comments, corrections and additions can be sent to iia@unctad.org.

29	*Novera AD, Novera Properties B.V. and Novera Properties N.V. v. Republic of Bulgaria* (ICSID Case No. ARB/12/16)	Netherlands
30	*Orascom Telelcom Holding v. Algeria* (UNCITRAL)	Egypt
31	*Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35)	Luxembourg
32	*Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium* (ICSID Case No. ARB/12/29)	China
33	*Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/40)	Australia
34	*Progas Energy Ltd. v. Pakistan*	Mauritius
35	*Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38)	Spain
36	*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5)	Canada
37	*Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13)	France
38	*Sanum Investments Ltd. v. Laos* (ad hoc)	China
39	*Sistema JFSC v. India*	Russian Federation
40	*Slovak Gas Holding BV, GDF International SAS and E.ON Ruhrgas International GmbH v. Slovak Republic* (ICSID Case No. ARB/12/7)	France, Germany, Netherlands
41	*Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4)	Spain
42	*Telefónica S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/12/4)	Spain
43	*Telenor v. India*	Singapore
44	*Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/23)	Luxembourg, Portugal
45	*Ternium S.A. and Consorcio Siderurgia Amazonia S.L. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/19)	Spain
46	*Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1)	Australia
47	*The Children Investment Fund v. India*	United Kingdom
48	*Transban Investments Corp. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/24)	Barbados
49	*Tullow Uganda Operations PTY LTD v. Republic of Uganda* (ICSID Case No. ARB/12/34)	United Kingdom
50	*UAB Energija (Lithuania) v. Republic of Latvia* (ICSID Case No. ARB/12/33)	Lithuania
51	*Valeri Belokon v. Kyrgyz Republic* (UNCITRAL)	Latvia
52	*Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/18)	Spain
53	*Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12)	Sweden
54	*Venoklim Holding B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/22)	Netherlands
55	*Veolia Propreté v. Arab Republic of Egypt* (ICSID Case No. ARB/12/15)	France
56	*Vodafone v. India*	Netherlands

Source: UNCTAD.

In addition, in at least six arbitrations initiated in 2012, the claimant and the respondent have not been disclosed (five at the Stockholm Chamber of Commerce and one at Cairo Regional Centre for International Commercial Arbitration).

Annex 2. Known investment treaty claims, by respondents

Country	Cases
Argentina	52
Venezuela, Bolivarian Republic of	34
Ecuador	23
Mexico	21
Czech Republic	20
Canada	19
Egypt	17
India	17
United States	15
Poland	14
Ukraine	14
Kazakhstan	11
Slovak Republic	11
Hungary	10
Bolivia, Plurinational State of	9
Romania	9
Russian Federation	9
Turkey	9
Pakistan	8
Peru	8
Georgia	7
Moldova, Republic of	7
Algeria	6
Turkmenistan	6
Costa Rica	5
Indonesia	5
Jordan	5
Kyrgyzstan	5
Lithuania	5
Albania	4
Congo, Democratic Republic of	4
Mongolia	4
Philippines	4
Belize	3
Bulgaria	3
Chile	3
Croatia	3
El Salvador	3
Estonia	3
Germany	3
Guatemala	3
Latvia	3
Lebanon	3
Macedonia, TFYR	3
Paraguay	3
Sri Lanka	3
Uzbekistan	3
Vietnam	3

Zimbabwe	3
Armenia	2
Azerbaijan	2
Bangladesh	2
Burundi	2
Dominican Republic	2
Ghana	2
Lao People's Democratic Republic	2
Malaysia	2
Morocco	2
Serbia	2
Slovenia	2
Spain	2
Tanzania, United Republic of	2
United Arab Emirates	2
United Kingdom	2
Yemen	2
Australia	1
Belgium	1
Bosnia and Herzegovina	1
Cambodia	1
China	1
Ethiopia	1
France	1
Gabon	1
Grenada	1
Guyana	1
Iran, Islamic Republic of	1
Italy	1
Montenegro	1
Myanmar	1
Nicaragua	1
Nigeria	1
Oman	1
Panama	1
Portugal	1
Republic of Equatorial Guinea	1
Republic of Korea	1
Saudi Arabia	1
Senegal	1
South Africa	1
Tajikistan	1
Thailand	1
Trinidad and Tobago	1
Tunisia	1
Uruguay	1
Unknown	13

Source: UNCTAD.

Annex 3. Decisions rendered in 2012

A. Decisions upholding jurisdiction (at least in part)

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Third Interim Award on Jurisdiction and Admissibility, 27 February 2012	Ecuador-United States BIT	United States	2006
2	*H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB 09/1), Decision on Jurisdiction, 5 June 2012	Egypt-United States BIT	United States	2009
3	*Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012	Bolivia-Chile BIT	Chile	2006
4	*Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay* (ICSID Case No. ARB/07/9), Further Decision on Jurisdiction, 9 October 2012	Netherlands-Paraguay BIT	Netherlands	2007
5	*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic (*ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 and Separate Opinion	Argentina-Spain BIT	Spain	2009
6	*Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012	Energy Charter Treaty	Belgium	2007
7	*Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic* (ICSID Case No. ARB/07/26), Decision on Jurisdcition, 19 December 2012	Argentina-Spain BIT	Spain	2007

B. Decisions rejecting jurisdiction

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012	Argentina-United Kingdom BIT	United Kingdom	2009
2	*Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on Jurisdiction, 1 June 2012	CAFTA-DR	United States	2009
3	*Caratube International Oil Company LLP v. The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012	Kazakhstan-United States BIT	United States	2008
4	*Standard Chartered Bank v. The United Republic of Tanzania* (ICSIDCase No. ARB/10/12), Award, 2 November 2012	Tanzania- UK BIT	United Kingdom	2010
5	*Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012	Argentina-Germany BIT	Germany	2005

C. Decisions finding State's liability for IIA breaches (at least in part)[1]

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay* (ICSID Case No. ARB/07/29), Award, 10 February 2012	Paraguay-Switzerland BIT	Switzerland	2007
2	*Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20), Award, 16 May 2012	Costa Rica-Germany BIT	Germany	2008 2009
3	*Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and Principles of Quantum, 22 May 2012 and Partial Dissenting Opinion, 17 May 2012	NAFTA	United States	2007
4	*SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, 6 June 2012	Argentina-France BIT	France	2004
5	*EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012	Argentina-France BIT; Argentina-Belgium/Luxembourg BIT	France	2003

[1] These decisions may also include findings on jurisdiction and on compensation.

6	*Antoine Goetz and Others and S.A. Affinage des Metaux v. Republic of Burundi* (ICSID Case No. ARB/01/2), Award, 21 June 2012	Belgium/ Luxembourg-Burundi BIT	Belgium	2001
7	*Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012	CAFTA-DR	United States	2007
8	*Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012	Macedonia-Switzerland BIT	Switzerland	2009
9	*Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012	Spain-U.S.S.R BIT	Spain	2006
10	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012 and Dissenting Opinion	Ecuador-United States BIT	United States	2006
11	*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012 and Dissenting Opinion	Germany-Sri Lanka BIT	Germany	2009
12	*Burlington Resources Inc. v. Republic of Ecuador (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador))* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012 and Dissenting Opinion	Ecuador-United States BIT	United States	2008

D. Decisions dismissing all of the investors' claims

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL), Final Award (Redacted), 23 April 2012	Netherlands-Slovak Republic BIT	Netherlands	2006
2	*Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* (ICSID Case No. ARB/07/12), Award, 7 June 2012 and Concurring Opinion	Italy-Lebanon BIT	Italy	2007
3	*Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012	Ecuador-United States BIT	United States	2009
4	*Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012	Guatemala-Spain BIT	Spain	2009
5	*Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine* (ICSID Case No. ARB/08/11), Award, 25 October 2012	Ukraine-United States BIT	United States	2008

E. Decisions on the application for annulment

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Decision on Annulment, 29 June 2012	Hungary-United Kingdom BIT	United Kingdom	2001
2	*Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012	Chile-Spain BIT	Spain	1998

F. Decisions awarding compensation

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay* (ICSID Case No. ARB/07/29), Award, 10 February 2012	Paraguay-Switzerland BIT	Switzerland	2007
2	*Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20), Award, 16 May 2012	Costa Rica-Germany BIT	Germany	2008 2009
3	*Antoine Goetz and Others and S.A. Affinage des Metaux v. Republic of Burundi* (ICSID Case No. ARB/01/2), Award, 21 June 2012	Belgium/Luxembourg-Burundi BIT	Belgium	2001
4	*Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012	CAFTA-DR	United States	2007
5	*EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012	Argentina-France BIT; Argentina-Belgium/Luxembourg BIT	France	2003
6	*Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/16), Award, 6 July 2012	Macedonia-Switzerland BIT	Switzerland	2009
7	*Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012	Spain-U.S.S.R BIT	Spain	2006
8	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012 and Dissenting Opinion	Ecuador-United States BIT	United States	2006
9	*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012 and Dissenting Opinion	Germany-Sri Lanka BIT	Germany	2009

G. Decisions not publicly available

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*Konsortium Oeconomismus v. Czech Republic,* Award, 1 February 2012	Czech Republic-Switzerland BIT	Switzerland	2009
2	*Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Jurisdiction, 29 February 2012	Germany-Turkmenistan BIT	Germany	2009
3	*Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case No. ARB/08/8), Award, 1 March 2012	Germany-Ukraine BIT	Germany	2008
4	*Intertrade Holding GmbH v. Czech Republic,* Award, 7 June 2012	Czech Republic-Germany BIT	Germany	2008
5	*Hesham T. M. Al Warraq v. Republic of Indonesia,* Decision on Jurisdiction, 21 June 2012	OIC Investment Agreement	Saudi Arabia	2011
6	*Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Award, 16 July 2012 and Dissenting Opinion	Netherlands-Turkey BIT	Netherlands	2008
7	*Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia* (ICSID Case No. ARB/08/19), Award, 9 August 2012	Georgia-Turkey BIT	Turkey	2008
8	*European American Investment Bank AG (EURAM) v. Slovak Republic* (UNCITRAL), Award on Jurisdiction, 22 October 2012	Austria-Slovak Republic BIT	Austria	2010
9	*Achmea B.V. v. The Slovak Republic(formerly Eureko B.V. v. The Slovak Republic)* (UNCITRAL, PCA Case No. 2008-13), Award, 7 December 2012	Netherlands-Slovak Republic BIT	Netherlands	2009
10	*Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal* (ICSID Case No. ARB/08/20), Award, 27 November 2012	Netherlands-Senegal BIT	Netherlands	2008
11	*TRACO Deutsche Travertin Werke GmbH v. Poland*	Germany-Poland BIT	Germany	Unknown

H. State-State Arbitration

	Case Title	Legal Instrument	Investor's home country	Year case was initiated
1	*Republic of Ecuador v. United States of America* (PCA Case No. 2012-5), 29 September 2012 (not public)	Ecuador-United States BIT	N.A.	2011

Source: UNCTAD.

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