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INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE SETTLEMENT: REFORM OR REJECT?

A REVIEW OF RECENT INVESTMENT ARBITRATION DECISIONS: 2012-13

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INTRODUCTION

While countries are signing fewer investment treaties, they face an increasing number of investment treaty-based arbitrations. An average of four investment treaties were signed per week at the peak in 1990s. Over the past three years, however, that has dropped to an average of one treaty per week.¹ Despite the slowdown, decades of negotiations have resulted in thousands of treaties; by the end of 2012, there were about 3,200 international investment agreements, including more than 2,800 bilateral investment treaties (BITs). Meanwhile, the total number of known treaty-based investor–state arbitrations rose to 514 by the end of 2012.² In 2012 alone, at least 58 investment treaty-based arbitrations were filed—the largest number of known cases in a single year.

This paper reviews investment arbitration decisions rendered between August 31, 2012 and September 1, 2013, drawing primarily from the International Institute for Sustainable Development’s (IISD’s) *Investment Treaty News*.³ IISD is aware of 34 decisions rendered over this period: 19 on jurisdiction and 15 on merit. Of these, 23 are in the public domain, while 11 remain confidential. An annex at the end of this report provides a full list of the decisions rendered over the review period.

¹ United Nations Conference on Trade and Development (UNCTAD). (2013). *World Investment Report 2013, Global Value Chains: Investment and Trade for Development*, pp. 101–102. Available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=588>.

² UNCTAD. (2013). *World Investment Report 2013, Global Value Chains: Investment and Trade for Development*, pp. 110–111. Available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=588>.

³ *Investment Treaty News* is a quarterly publication providing news and analysis on international investment law. The publication has been providing concise summaries of new investment arbitration decisions since 2002. For more information, see www.iisd.org/itn.

Some of these decisions made headlines—either because of money involved, or the obvious link to public policy. Ecuador and Uruguay are involved in two such cases: Ecuador was ordered to pay a record US\$1.77 billion in damages to an American oil company in one decision; while jurisdiction was established in a case against Uruguay, this one involving a dispute with the tobacco company Philip Morris, which objects to branding regulations that seek to discourage smoking. The second-highest known award to date—US\$935 million—was also awarded over the review period; this one in favour of a Kuwaiti company in a dispute against Libya under the Unified Agreement for the Investment of Arab Capital in the Arab States.⁴ But most of the cases described in this paper slipped under the public radar, despite the high stakes for the countries involved.

In addition to describing the subject matter of the disputes in recent arbitral decisions, this paper also highlights some of the more prominent legal issues that have arisen over the last year. Broadly speaking, there is nothing particularly “new” here: the major legal questions in investment law have been around for many years. They remain as divisive as ever, with tribunals interpreting the same—or very similar—provisions in different ways. Within tribunals, there appears to be an increasing number of dissenting opinions.⁵ Indeed, according to the United Nations Conference on Trade and Development, individual arbitrators dissented from a final decision in three known cases in 2010, but there were six dissenting opinions in 2011 and seven in 2012.⁶ The result of these diverging and competing decisions is an unpredictable playing field, for governments and investors alike, in which the rules of game change depending on the referee. We turn now to the subject matter of the disputes involved in decisions over the last year, before discussing the legal issues that featured most prominently.

SUBJECT MATTER OF THE DISPUTES

⁴ *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award.

⁵ A recent study by Albert Jan van den Berg examined 150 jurisdictional and merit decisions rendered by the end of 2008, and found 35 dissenting opinions, equivalent to about 22 per cent of the cases. The study’s annex shows that only five dissenting opinions were rendered before 2000. From 2000 to 2008, an average of three dissenting opinions was issued per year. An outlier is the nine dissenting opinions in 2007. The study’s primary finding is even more remarkable. In 34 of the 35 cases a party-appointed arbitrator filed a dissenting opinion, almost always siding with the losing party that had appointed him or her. In only one case was it the presiding arbitrator who dissented. Albert Jan van den Berg. (2011). “Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration.” in Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*. p. 825 and pp. 838–843. Available at http://www.arbitration-icca.org/media/0/12970228026720/van_den_berg--dissenting_opinions.pdf.

⁶ UNCTAD. (2013, May). *Recent Developments in Investor–State Dispute Settlement (ISDS), Updated for the Multilateral Dialogue on Investment, 28-29 May 2013* (IIA Issues Note, No. 1). p. 5.

Disputes related to investment in oil, gas and energy

The oil, gas and energy sector traditionally sees a relatively large number of investment-related disputes, a trend that continued in 2012 and 2013. Nine of the decisions rendered in the review period involved investments in this sector.⁷ The stakes in these disputes are often high—claims for hundreds of millions, and even billions, of dollars in damages are not unusual. Even so, an award rendered on October 5, 2012, in which the Republic of Ecuador was ordered to pay a record US\$1,769,625,000 in damages, raised eyebrows. It is the largest award to be handed down in a case at the World Bank’s International Centre for Settlement of Investment Disputes (ICSID), the most popular facility for arbitrating disputes between foreign investors and states. In this case the tribunal determined that Ecuador’s decision to terminate an American oil company’s participation contract was tantamount to expropriation.⁸ The participation contract between Occidental and Ecuador granted the company rights to explore and exploit oil in the Amazon region, and keep a share of the oil that it produced. While the tribunal agreed with Ecuador that the claimants breached the participation contract, it nonetheless ruled that Ecuador’s response to that violation was disproportionate. Ecuador’s nominee to the tribunal, Prof. Brigitte Stern, disagreed with the majority’s decision on the amount of damages awarded to Occidental. In another dispute between a U.S. oil company (Burlington Resources) and Ecuador,⁹ an ICSID tribunal held Ecuador liable for unlawfully expropriating the company’s investment. Ecuador imposed a windfall tax on Burlington’s profits and, following the claimant’s non-payment of the tax, took possession of the company’s exploration areas. In its December 14, 2012, decision on liability, the majority ruled that only the takeover constituted expropriation, while the claimant’s nominee, Prof. Francisco Orrego Vicuña, considered that Ecuador’s other measures also amounted to expropriation.

⁷ Decisions involving the oil and gas sector over the review period include: *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; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11; *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8; *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3; and *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12.

⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award.

⁹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability.

Turning to Europe, in a May 6, 2013 award, an ICSID tribunal ruled in favour of the Dutch company Rompetrol, which had investments in the Romanian oil sector.¹⁰ The company's claims related to criminal investigations against Rompetrol managers carried out by Romanian authorities for alleged tax evasion, fraud and money laundering. Rompetrol claimed that the investigations were politically motivated, while Romania maintained that they were part of a broader anti-corruption strategy in the course of the country's EU accession process. While the tribunal found breaches of fair and equitable treatment provisions, it did not award damages due to Rompetrol's failure to prove that it suffered economic loss or damages through the breaches. Meanwhile, the Swedish energy company Vattenfall and the Republic of Germany are also locked in a dispute—the second case that Vattenfall has initiated against Germany under the Energy Charter Treaty.¹¹ The claim stems from Germany's May 2011 decision to phase out its nuclear power plants, in which eight plants have been shuttered and the remaining nine plants to be closed over the next decade. On July 2, 2013, an ICSID tribunal rejected Germany's preliminary objections to jurisdiction in an as-yet unpublished decision.¹² The case has moved on to the merits stage.

Disputes related to agreements between foreign investors and state-owned companies, organs of the state or local authorities

A large number of decisions—12 over the period examined—involved disputes linked to agreements between foreign investors and state-owned companies, organs of the state or local authorities.¹³ In these types of cases, tribunals often grapple with the question of whether the

¹⁰ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award.

¹¹ In April 2009 Vattenfall sought 1.4 billion Euros in damages related to environmental restrictions imposed by the City of Hamburg on a coal-fired power plant. That dispute was settled in March 2011 when Vattenfall was granted a modified water-use permit and released from previously imposed requirements at the Moorburg power plant. See *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6.

¹² *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on Jurisdiction (not public).

¹³ Decisions involving agreements between foreign investors and state-owned companies, organs of the state or local authorities over the review period include: *Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/11/8; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/2; *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1; *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23; *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28; and *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6.

alleged treaty infractions are attributable to the state. That question loomed large in a dispute involving Bosh International, a company that entered into a joint venture to develop and operate a hotel complex with a university in Kiev in 2003. After an audit of the agreement uncovered a number of “irregularities,” the university commenced court proceedings to terminate the joint venture. In its October 25th, 2012 award, the tribunal rejected Bosh’s claim, in part because it decided that the university could not be considered a state organ.¹⁴

However, tribunals upheld jurisdiction in the majority of the cases reviewed. For example, on July 3, 2013 a tribunal accepted jurisdiction over a claim by a company incorporated in the United Kingdom, Garanti Koza LLP, which was contracted by the state-owned Turkmenautoyollari (Turkmen Road) to construct highway bridges and overpasses.¹⁵ The company complained that Turkmenistan employed state powers to force changes to the contract, leading to losses and the eventual confiscation of its assets. Turkmenistan countered that it terminated the contract due to Garanti’s failure to complete the work according to the agreed schedule.

An ICSID tribunal also accepted jurisdiction on March 5, 2013, in a case involving a Dutch claimant who invested in a Turkish real-estate project.¹⁶ The claimant’s business partner in that venture, Emlak, was owned by Turkey’s Housing Development Administration (TOKI). Some four years into the project, Emlak terminated the contract with Tulip for delays in the project, and soon after seized control of the construction site. The claimant argued that Emlak ended the contract as a pretext to seize its assets, and complains that Emlak was the responsible for the delays.

Perhaps the most striking decision in this category involved a decision on jurisdiction and merits rendered on March 22, 2013, relating to a land-leasing contract signed with Libya’s Tourism Development Authority.¹⁷ The tribunal delivered a 400-page award that affirmed jurisdiction and ruled Libya responsible for breaches of obligations under treaty, contract and national law. The tribunal’s views both on jurisdictional and merits issue raised controversy. The tribunal was instituted under the Unified Agreement for the Investment of Arab Capital in the Arab States. The tribunal determined that the agreement gave it jurisdiction to arbitrate the dispute and that it also had the competence to rule on the “scope of extension of the arbitration clause”¹⁸ contained in the contract. However, the agreement is commonly considered not to contain the signatory states’ advance consent to such arbitration and Libya claimed the agreement was not

¹⁴ *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award.

¹⁵ *Garanti Koza LLP v. Turkmenistan*, ICSID case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent.

¹⁶ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue.

¹⁷ *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award.

¹⁸ *Ibid.*, p. 391.

applicable to the case. The tribunal's interpretation of the agreement's scope, particularly with regard to its dispute settlement provision, seems to have little precedent.

As to the merits, the Kuwaiti company claimed that Libya had impeded the execution of the land-leasing contract. The company alleged that it was assaulted by municipal guards and other persons who occupied the land, claimed ownership and created other obstacles. According to the claimant, it was for these reasons that it could not start building the planned hotels, apartments, and malls on the land.

The tribunal found it evident that "administrative corruption" was involved. Even if not "organized or deliberated" by the Libyan state, it had committed "gross negligence and disregard of investment" rules, the tribunal determined.¹⁹ Since the land was not "free of occupancies," Libya breached a primary obligation of the leasing contract. It did not consider that Libya's offer to provide the Kuwaiti company with alternative land was sufficient to disprove these findings.

The tribunal saw it as another main breach of contract that the Libyan Ministry of Economy had annulled the approval of the investment project and thereby made invalid the land-leasing contract. Libya's assertion that the Ministry cancelled the approval due to a four-year delay in construction was deemed "irrelevant" by the tribunal. As compensation for the established breaches, the tribunal ordered Libya to pay US\$5 million for "value of losses and expenses" suffered by the Kuwaiti company as well as an unusual high amount of US\$900 million alone for "lost profits resulting from real and certain lost opportunities" and US\$30 million for moral damages. The disproportion between the actual investments on the one hand, and the compensation for lost future profits and moral damages on the other, raised doubts as to the accuracy of the award. In the course of the proceeding, the claimant had increased the compensation claim to US\$2 billion covering lost future profits for 83 years, corresponding to the length of the later revoked land-leasing contract.

Disputes related to concessions

Concession agreements—which grant rights, land or property—are also a common subject of investment disputes. And that trend also continued in 2012–2013, with seven decisions involving some type of concession agreement.²⁰

¹⁹ *Ibid.*, p. 287.

²⁰ Decisions involving concessions in the review period include: *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; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2; and *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26.

Numerous claims facing Argentina, most arising out of the policies introduced to combat its financial crisis in 1999–2002, involve concessions offered to foreign investors for the supply of essential services. More than 10 years after that crisis, many of these disputes remain in arbitration, having progressed at a snail’s pace. On December 19, 2012, for instance, an ICSID tribunal accepted jurisdiction to hear a claim by Spanish claimants who invested in water and sewage services in Argentina.²¹ The claimants, Urbaser and Consorcio de Aguas Bilbao Bizkaia, held a share in an Argentine company with a concession to supply drinking water and sewage services in Buenos Aires. As Argentina entered a deep recession, tariffs were reduced and frozen. Later, the Province of Buenos Aires reversed the privatization of certain public services, which ultimately pushed AGBA into liquidation. Argentina responds that its dealings with AGBA tell a “story of a total failure to comply with the expectations that the State had.”²² Even before the emergency measures were introduced to respond to the financial crisis, Argentina holds that AGBA failed to meet its contractual obligations.

Concession agreements are also common in the mining sector, where governments grant the right to explore or extract natural resources. That type of agreement was involved in a September 27, 2012 decision, in which an ICSID arbitral tribunal upheld jurisdiction in a case against Bolivia.²³ Quiborax, a Chilean mining company, claimed that Bolivia unlawfully revoked its mining concessions. Bolivia counters that the investment was made in breach of its laws.

While concessions for the supply of public services, or for the extraction of natural resources, are some of the most common subjects of investment disputes—a broad range of concessions are agreed to by states (or state agencies). For example, an ICSID tribunal found Moldova in breach of the fair and equitable treatment with respect to a French investor’s duty-free business at Chisinau airport and ordered the restitution of the investment or payment of damages.²⁴ Charles Arif had won a tender to operate duty-free stores on the Romania–Moldova border and at Chisinau airport, but he alleged that various acts of state interference, including the closure of some stores due to alleged failure of complying with fire safety regulations and cancellation of lease contracts signed with local customs offices, amounted to denial of justice and expropriation.

Disputes related to the financial sector

²¹ *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 Jurisdiction.

²² *Ibid.*, p. 11 (para. 40).

²³ *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.

²⁴ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award.

A smaller number of disputes—five in total—related to banking, financial products and insurance.²⁵ In these cases, the parties often disagree on whether the financial product is a protected investment under the ICSID Convention and the respective BIT, something we discuss in more detail in the next section of this paper. This is a particularly important question in a series of cases involving Argentina’s sovereign debt restructuring in the wake of its financial crisis. The largest of these cases is *Abaclat and others v. Argentina*, in which some 60,000 claimants have banded together to sue Argentina under the Italy–Argentina BIT. A majority of the tribunal accepted jurisdiction in that case in 2011. More recently, on February 8, 2013, the majority of an ICSID tribunal accepted jurisdiction over another claim by some 90 Italian bondholders against the Argentine government.²⁶ In coming to that decision, arbitrators Judge Bruno Simma and Professor Karl-Heinz Böckstiegel drew heavily on the *Abaclat and others v. Argentina* decision on jurisdiction.

Meanwhile, in a dispute involving a major German bank, Deutsche Bank AG, and Sri Lanka, the majority of an ICSID tribunal considered that an agreement that implied derivative transactions to “hedge” against rising oil prices constituted an investment in the sense of both the BIT and the ICSID Convention.²⁷ Sri Lanka has been ordered to pay US\$60.4 million in damages, and has since moved to annul the award.

Disputes on other subject matters

Although not figuring prominently in terms of numbers, three decisions related to mining, tobacco and pharmaceutical disputes are noteworthy:

- A Canadian pharmaceutical company lost a NAFTA investment claim against the US government on June 14, 2013.²⁸
- An ICSID tribunal affirmed its jurisdiction over claims by Philip Morris against Uruguay in a high-profile dispute over restrictions to the marketing of tobacco products.²⁹

²⁵ Disputes involving the financial sector over the review period include: *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*); *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2; *European American Investment Bank AG (EURAM v. Slovak Republic)*, UNCITRAL; and *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13.

²⁶ *Ambiente Ufficio S.p.A. and others (Case formerly known as Giordana Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility.

²⁷ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award.

²⁸ *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility.

²⁹ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Decision on Jurisdiction.

- A claim by Vanessa Ventures against Venezuela was rejected on its merits, with the tribunal concluding in a January 16, 2013 decision that Venezuela had responded properly to contractual violations.³⁰ The Canadian company had sought over US\$1 billion in damages, arguing that its newly acquired stake in a Venezuelan gold mining operation was expropriated.

PROMINENT JURISDICTIONAL ISSUES

The “protected investment” criterion

As discussed, a wide variety of “investments” have been the subjects of decisions rendered over the last year—from complex financial instruments to the branding of tobacco products. Not surprisingly, a common question facing tribunals is, should these be considered “investments” as intended by the state parties to the treaty? For a tribunal to have jurisdiction, the subject of the dispute must be an investment as defined by the applicable investment treaty. In the case of ICSID arbitrations, it must also be an investment as understood by the ICSID Convention. In many cases, however, investment treaties define “investment” broadly, and the ICSID Convention is intentionally silent on what it considers an investment. That gives tribunals a lot of discretion in terms of what they accept as a protected investment in a given dispute.

The boundaries of what is considered an investment have been remarkably enlarged in the sovereign bond cases facing Argentina. As noted, Argentina faces three of these cases, and jurisdictional decisions have been rendered in two. The most recent is the February 2013 decision in *Ambiente Ufficio S.p.A. v. Argentine Republic*.³¹ Like its predecessor, *Abaclat v. Argentina*, a majority of the tribunal concluded that the sovereign bond instruments held by Italian’s were indeed investments under the ICSID Convention and the Argentina–Italy BIT. While noting the controversy in case law and academic writing over the exact meaning of “investment” under the Convention, the majority found that it was the deliberate decision of the ICSID signatories to leave the definition open and thereby cover a broad range of economic operations. The majority also considered that the Argentina–Italy BIT provided an open-ended list covering different types of investments, including bonds. Assessing Argentina’s assertion that the investment lay outside of its territory and was therefore not covered by the BIT, the tribunal found the most important criterion to be that Argentina had been the beneficiary of the investment, and the investment had contributed to its economic development, which was deemed sufficient to establish that the investment was made “in the territory” of Argentina.

³⁰ *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award.

³¹ *Ambiente Ufficio S.p.A. and others (Case formerly known as Giordana Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility.

That decision was strongly contested by Mr. Torres Bernárdez in his dissenting opinion.³² He maintained that his co-arbitrators incorrectly interpreted the ICSID Convention and crucial parts of the Argentina-Italy BIT, and thereby overstepped the tribunal's jurisdictional limits. In the first place Mr. Torres Bernárdez found that the ICSID tribunal had no jurisdictional basis to adjudicate the case because neither sovereign bond instruments or any "of the economic transactions at stake qualified as a protected investment under the ICSID Convention and/or the Argentina-Italy BIT."³³ He also considered that, independent of the wording of the BIT and the question of the parties' consent, the ICSID Convention provided objective "outer limits" for the Centre's jurisdiction. He deemed that the present case involved "mere commercial transactions," not protected investments under the ICSID Convention. Furthermore, Mr. Torres Bernárdez held that the transactions in the primary and secondary markets did not constitute a "single economic operation" or a single investment, as alleged by the majority, but were "unconnected" and created different financial instruments. Finally, Mr. Torres Bernárdez emphasized that the BIT contained a clear requirement for protected investment to be made in the country's territory and in accordance with its laws and regulations. Since Mr. Torres Bernárdez was of the opinion that "[s]overeign bonds are intangible capital flows without physical implantation in a given host country's territory,"³⁴ he considered that they did not constitute investments made in Argentina's territory. He found it even more difficult to see how the security entitlements at issue in the case fulfilled the territorial requirement.

The criterion for a protected investment featured in another high-profile decision in the review period, involving the dispute between Philip Morris and Uruguay.³⁵ As noted, the dispute involves regulations on tobacco packaging and marketing aimed at deterring smoking. Uruguay, insisting on the *Salini* test,³⁶ argued that the claimants' activities should not be considered an "investment" on the basis of their alleged failure to contribute to the economic development of Uruguay. Specifically, the direct health-care costs incurred from the consumption of tobacco products outweighed their contribution to the country's economic development, according to Uruguay.

³² There was also a strong dissent in *Abaclat v. Argentina*, in this case by Professor Georges Abi-Saab. See http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf

³³ *Ambiente Ufficio S.p.A. and others (Case formerly known as Giordana Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernárdez, pp. 52-53 (para. 156).

³⁴ *Ibid.*, p. 101 (para. 316).

³⁵ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Decision on Jurisdiction.

³⁶ The so-called Salini test, derived from *Salini v. Morocco*, holds that an ICSID investment must include the following criteria: (i) a contribution; (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks; and (iv) a contribution to the host State's development. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction.

However, the tribunal dismissed this objection by holding the contribution-to-development criterion was not a mandatory legal requirement of an investment under the ICSID Convention. The tribunal noted that the four constituent elements of the *Salini* test were merely the “typical features of investments under the ICSID Convention,” but not “a set of mandatory legal requirements.”³⁷ Therefore, they could “assist in identifying or excluding in extreme cases the presence of an investment,”³⁸ but should not be used to defeat the broad and flexible notion of the term investment under the ICSID Convention. The tribunal also concluded that the Switzerland–Uruguay BIT did not feature definitional restrictions that posed a problem to the “investment” that Philip Morris referred to in its claim.

Pre-arbitration requirements

Arguably the most prominent jurisdictional issue to arise in 2012-13—and one that has pre-occupied many tribunals in years past—is how to treat various pre-arbitration requirements stipulated in investment treaties. Some treaties require that investors give sufficient notice to states that there is an investment dispute, which, if not resolved, is eligible to be settled through arbitration. Treaties may also require that investors attempt to settle the dispute amicably, and bring the dispute to a domestic court for a certain period, before it is “ripe” for arbitration. In cases where investors have side-stepped these requirements, tribunals have come to different conclusions on what that means for their jurisdiction. At least seven decisions dealt with this issue over the review period.

In the Italian bondholder case *Ambiente v. Argentina*, for example, Argentina argued that the claimants had failed to fulfill the BIT requirement to attempt amicable consultations and submit the dispute to an Argentinian domestic court before the initiation of international arbitration.³⁹ While Argentina argued that these were two “mandatory jurisdictional requirements,” the claimants argued that the provision at question “merely provides for procedural prerequisites which do not need to be strictly followed.”⁴⁰ The tribunal accepted these as binding prerequisites, but—as a majority of tribunals have done—found reasons why an exception should be granted. In this case, the tribunal concluded that various circumstances made constructive consultations with the Argentine government impossible. Similarly, although the claimants also failed to submit the case to domestic courts before initiating international arbitration, the majority concluded

³⁷ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Decision on Jurisdiction, p. 67 (para. 206).

³⁸ *Ibid.*

³⁹ *Ambiente Ufficio S.p.A. and others (Case formerly known as Giordana Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility.

⁴⁰ *Ibid.*, p. 188 (para. 560).

that such an effort would have been “futile,” and therefore an exception to the 18-month domestic court requirement was justified.

Mr. Santiago Torres Bernárdez’s rejected that view. In his opinion, Argentina’s consent to arbitration contained mandatory preconditions that foreign investors had to meet before they could initiate international arbitration. And as a general rule, foreign investors have no right to alter or waive the conditions for states’ offers of consent to arbitration. More specifically, he found that there was no legal basis for a “futility exception.” The majority decision was said to be based on “speculative” arguments advanced by the claimants.

A similar scenario featured in a decision on December 19, 2012, in which the ICSID tribunal upheld jurisdiction to hear a claim by Spanish claimants that invested in water and sewage services in Argentina.⁴¹ Here the tribunal asked two questions: “were Claimants required to submit the dispute to the competent tribunals of the Republic of Argentina before resorting to ICSID arbitration?”; and second, “was Argentina deprived of a fair opportunity address the dispute within the framework of its own domestic legal system because of Claimants’ disregard of the 18 months litigation requirement?”⁴² In answering those questions, the tribunal affirmed that the treaty indeed presents a “precondition” to accessing arbitration. Yet it went on to state that the agreement also implies an obligation on the part of the host state. Specifically, the host state must allow “its courts to operate in a manner that the opportunity to reach a suitable remedy is provided in efficient terms.”⁴³ According to the tribunal, Argentina failed to provide such an opportunity to the claimants. The options available would “far exceed” 18 months before reaching a decision on the substance, and it would therefore be unfair to the claimants to insist on proceedings that had no hope of reaching a conclusion within that time frame.

In other cases, the most-favoured nation (MFN) clause has been successfully used by claimants to avoid pre-arbitration requirements that could otherwise doom their claims. That was the case in *Garanti Koza LLP v. Turkmenistan*—the case mentioned above in which Garanti was contracted to construct highway bridges and overpasses.⁴⁴

Here, Turkmenistan asserted that it did not consent to ICSID jurisdiction under the U.K.–Turkmenistan BIT and, moreover, such consent cannot be imported from a different BIT in the absence of the express consent in the basic BIT. The tribunal focused on the interpretation of paragraphs (1) and (2) of Article 8 of the U.K.–Turkmenistan BIT. Article 8(1) concerns the host state’s consent to settle disputes by means of international arbitration, and Article 8(2) provides

⁴¹ *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 Jurisdiction.

⁴² *Ibid.*, p. 39 (para. 129).

⁴³ *Ibid.*, p. 40 (para. 131).

⁴⁴ *Garanti Koza LLP v. Turkmenistan*, ICSID case No. ARB/11/20

options for the arbitration process. Notably, UNCITRAL arbitration is the default selection, while ICSID and ICC are available upon the consent of the parties.

In deciding whether the MFN clause encompasses dispute-resolution provisions—and thus would allow the claimant to bypass the UNCITRAL-only condition in Article 8(2)—the tribunal turned to the wording of the MFN clause at stake and its coverage. Article 3(3) of the basic BIT states that the MFN clause is applicable to the provisions of Articles 1 to 11. As such, the tribunal decided that the MFN clause applied to the dispute resolution provisions contained in Article 8. The majority of the tribunal therefore entitled the claimant to invoke more favourable dispute resolution provisions (i.e., those allowing for ICSID arbitration) which were found in Turkmenistan’s treaties with Switzerland, France, Turkey, India, and under the Energy Charter Treaty. In doing so, the tribunal rejected Turkmenistan’s argument that the application of the MFN clause to the dispute-resolution provision would deprive the basic BIT of its *effet utile* (practical effectiveness). Turkmenistan noted that in 1995 (the date of signature of the U.K.–Turkmenistan BIT) the United Kingdom was already a party to other treaties that provided consent for ICSID arbitration. As such, a conscious decision to extend the MFN clause to dispute settlement, while simultaneously carefully restricting consent only to UNCITRAL arbitration, would have been contradictory. However, the tribunal stated that the MFN clause’s own “practical effectiveness” was at stake. In the tribunal’s words “the MFN clause itself would be deprived of *effet utile* if it could never be used to override another provision of the treaty.”⁴⁵

Over the review period, other tribunals have declined jurisdiction based on a claimant’s failure to abide by pre-arbitration requirements. That was the case with a Turkish claimant’s dispute with Turkmenistan in an ICSID decision dated July 2, 2013.⁴⁶ In this case the claimant (a company named Kiliç) argued that the domestic court requirement should be considered an issue of “admissibility” rather than “jurisdiction.” On that basis, the claimant asserted that the tribunal could suspend the proceedings while allowing the claimant to “perfect” the admissibility requirements by pursuing its case before Turkmenistan’s courts. However, this line of reasoning held little sway with the majority of the tribunal. Rather than a question of admissibility, the tribunal determined that the critical issue was the contracting state’s consent to arbitration—and any conditions placed on that consent.

In his dissent, Professor Park agreed with the claimant that the tribunal should have suspended the proceedings to allow time for the claimant to file a case with Turkmenistan’s courts. In his words: “If a timely judgment proves acceptable to the investor, proceedings end. If the investor remains aggrieved, arbitration resumes for claims falling within the scope of the BIT.”⁴⁷ Professor

⁴⁵ Ibid., pp. 26-27 (para. 54).

⁴⁶ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award.

⁴⁷ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Separate Opinion of Professor William W. Park, p. 1 (para. 8).

Park's advice to the Turkish and Turkmen treaty negotiators is nonetheless useful to treaty negotiators more broadly: be direct. If the negotiators intended that domestic litigation was tied to their consent to arbitration, then more direct language would have been better. A statement like "investors are entitled to arbitrate only after going to local courts,"⁴⁸ would have delivered a clear message to arbitrators, said Professor Park.

Most-favoured nation and dispute settlement

Another perennially contentious issue in investment arbitration are the limits to the most-favoured nation (MFN) provision; and more specifically with respect to jurisdiction, whether an MFN provision may be used by claimants to access more favourable dispute-settlement provisions in third-party treaties. This question often arises in conjunction with pre-arbitration requirements discussed above. Here is a scenario: a Spanish claimant operating under the Argentina–Spain BIT is required to litigate the dispute in local courts for a minimum of 18 months, but has failed to do so. However, the claimant argues that Argentina has other treaties that do not contain similar requirements, and, therefore, Argentina is offering other investors "more favourable treatment" which must also be extended to Spanish investors.

That was the situation in the December 21, 2012 decision on jurisdiction in *Teinver v. Argentina*.⁴⁹ In this case, the tribunal found that all pre-arbitration requirements had been fulfilled, but decided to address the claimants' argument on the MFN clause. The investors claimed that this provision allowed them to rely on the Australia–Argentina BIT, which contained no pre-arbitration requirements. The tribunal found that the broad language of the MFN clause and the absence of any limitation as to its scope allowed the claimants to invoke the dispute resolution provision contained in the Australia–Argentina BIT.

This question of the MFN provision's link to dispute settlement was given greater attention in the July 2, 2013 jurisdictional decision in *Kiliç v. Turkmenistan*.⁵⁰ Here the tribunal stressed that dispute-resolution provisions should not "be *presumed* to fall within the scope of MFN clauses."⁵¹ First, the tribunal said it would consider the treaty's broader context, and how the MFN provision "fits into the BIT as a whole."⁵² In this regard, the tribunal gave importance to the treaty's structure, which separated "*substantive rights* in relation to investments, and *remedial procedures* in relation to those rights."⁵³ In the tribunal's opinion, this "distinction suggests

⁴⁸ Ibid., p. 3 (para. 30).

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.

⁵⁰ *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award.

⁵¹ Ibid., p. 81 (para. 7.6.4).

⁵² Ibid., p. 77 (para. 7.1.3).

⁵³ Ibid., p. 79 (para. 7.3.9).

strongly that the ‘treatment’ of ‘investments’ for which MFN rights were granted was intended to refer only to the scope of the *substantive rights* ...”⁵⁴

The tribunal also noted that Turkey had signed numerous BITs prior to its agreement with Turkmenistan, some of which did not require that disputes be submitted to local courts as a condition to its consent to arbitration. It would have made little sense, the tribunal reasoned, for Turkey to have intended the MFN clause to extend to dispute resolution in its treaty with Turkmenistan. Doing so would mean that the “carefully crafted jurisdictional preconditions”⁵⁵ in the Turkey–Turkmenistan BIT could be immediately by-passed by a claimant.

Placing the treaty in historical context—it was signed in 1992—the tribunal concluded that it had most likely never crossed the negotiators’ minds that the MFN clause could extend to dispute resolution provisions in the treaty. It was not until the *Maffezini v. Spain* decision on jurisdiction in 2000 that an investment tribunal first ruled that linking the MFN to dispute resolution was appropriate.

Finally, turning to the decisions relied on by the claimant to bolster its claim that the MFN should extend to dispute resolution, the tribunal highlighted how the MFN clauses in those cases differed from the one found in the Turkey–Turkmenistan BIT. The treaties in these cases tended to have broader MFN clauses—for example, clauses in which MFN encompassed “all matters subject to this agreement”⁵⁶—compared to the clause found in the Turkey–Turkmenistan BIT. For all of these reasons, the tribunal concluded that the claimant could not rely on the MFN clause to avoid pre-arbitration conditions.

PROMINENT MERIT ISSUES

A different set of issue arose as tribunals—having determined that they held jurisdiction—turned to the merits of investor claims. As with the jurisdictional questions discussed above, a number of these are contentious and continue to divide arbitrators.

Umbrella clause

A typical umbrella provides that both parties to the treaty shall observe “any obligation” they may have entered into with regard to investments. The catch-all “any obligation” opens up a whole range of alleged non-treaty breaches (such as breaches of domestic law, contracts, or other international commitments) that could potentially be brought into the fold of the investment treaty’s dispute-resolution provisions. That, in turn, could allow claimants to avoid

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p. 80 (para. 7.4.3).

⁵⁶ *Ibid.*, p. 82 (para. 7.6.9).

the dispute-resolution provisions that have been designed for those other areas of law (i.e., a contract may stipulate that disputes are to be litigated in domestic court, rather than international arbitration). The scope of umbrella clauses is controversial, and tribunals have interpreted them in a variety of ways.

At least two decisions during the review period focused on umbrella clauses. In both cases, the claimants argued that alleged breaches of contractual agreements were also breaches of an investment treaty, by way of these clauses. And in both decisions, the tribunals focused on the actual parties to those agreements, and whether they could be attributed to the state. As mentioned earlier, on October 25, 2012, an ICSID tribunal rejected all claims against the Ukraine by Bosh International, Inc., and B&P Ltd Foreign Investments Enterprise, which entered into a joint venture to develop and operate a hotel complex with Taras Shevchenko University in Kiev in 2003.⁵⁷ The claimants' referred to the BIT's umbrella clause and argued that the Ukraine was responsible for contractual breaches by the university. The tribunal considered whether the reference to "Each Party" in the umbrella clause referred only to state parties, or also extended to entities controlled by the state. In this respect, the tribunal noted that the BIT distinguishes between the terms "Party" and "State enterprise" as legal entities. The tribunal decided that the "Party" referred to in the umbrella clause refers to a party acting in the capacity of the state. Given its earlier decision that the university's agreement with B&P could not be attributed to the state, the tribunal concluded that Ukraine had not entered into an "obligation" with respect to the claimants. The tribunal found itself "fortified" by the fact that, in its review of 20 cases involving claims under an umbrella clause, none entailed a "contract entered into by the investor with an entity akin to the University."⁵⁸

Notably, however, for "the sake of completeness," the tribunal considered how it would have ruled if the university's conduct could be attributed to the state. Aligning itself with the decisions in cases such as *Société Générale de Surveillance v. Republic of the Philippines*,⁵⁹ the tribunal determined that an umbrella clause should not "override" the dispute-resolution provisions in a contract. Rather, before invoking the umbrella clause, "the claimant in question must comply with any dispute settlement provision included in that contract."⁶⁰ In the case of the claimants' contract with the university, disputes were to be settled in accordance with Ukrainian legislation. As the contract dispute between B&P and the university had already been considered by Ukrainian courts, and the contract terminated by an order of the court, the tribunal determined

⁵⁷ *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award.

⁵⁸ *Ibid.*, p. 70 (para. 248).

⁵⁹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction.

⁶⁰ *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, p. 74 (para. 252).

that the claimants could not now assert a claim for breach of the contract under the umbrella clause.

In another decision rendered on December 14, 2012, an ICSID tribunal ruled that Ecuador expropriated an American oil and gas company's (Burlington Resources) investment in violation of the U.S.-Ecuador BIT.⁶¹ Before coming to that decision, however, it rejected the claimant's claim with respect to the umbrella clause. The claimant's subsidiary, Burlington Oriente, entered into production sharing contracts (PSCs) with Ecuador to explore and exploit oil reserves in several blocks in Ecuador. Due to the fact that it was Burlington's subsidiary that signed the PSCs, rather than Burlington itself, Ecuador argued there was no privity of contract between itself and Burlington. As a result, Ecuador insisted that Burlington could not rely on the umbrella clause to enforce contractual rights that did not belong to it. In deciding whose right was correlated to the obligation under the umbrella clause, the tribunal resorted to the law governing the PSCs (in this case Ecuadorian law) which stipulates that a non-signatory parent of a contracting party is not allowed to directly enforce its subsidiary's rights. The majority also noted that the majority of ICSID case law requires privity between the investor and the host state. The majority therefore decided that Burlington could not rely on the umbrella clause to enforce its subsidiary's rights under the PSCs, and as such jurisdiction over Burlington's umbrella clause claim in relation to the PSCs was declined.

Fair and equitable treatment

Most investment treaties contain a provision that requires host governments to accord "fair and equitable treatment" (FET) to foreign investors. Violation of this standard of treatment is the most frequent claim in investment arbitration, alongside direct and indirect expropriation claims. While tribunals have delivered widely differing interpretations of the FET obligation, in numerous cases the clause has allowed investors to succeed where other claims have failed. As such, it has become a "catch-all" clause for investor claims, increasingly covering not only cases of denial of justice, but also legitimate expectations and lost future profits. Under this provision, tribunals have also addressed a state's failure to act in a transparent manner in administrative decision making and inconsistent actions of host state agencies vis-à-vis an investor. Besides the question of whether a single act constituted a breach, some tribunals have also examined whether the cumulative effect of measures amounted to a violation of the standard. Furthermore, other tribunals assessed the FET obligation in light of the "proportionality" of measures or acts taken with respect to a foreign investor.

In the claim by Bosh International, Inc, and B&P Ltd Foreign Investments Enterprise against

⁶¹ *Burlington Resource Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability.

Ukraine, the claimants charged that the Ukraine breached its commitments on FET, and expropriation under the U.S.–Ukraine BIT.⁶² In support of the FET and expropriation claims, the claimants argued that an office of the Ministry of Finance had directed the university to terminate its agreement with Bosh International, and exceeded its mandate in doing so. With respect to FET, they also argued that an audit by the Ministry’s office was arbitrary and lacked due process. Another breach of the obligation was allegedly committed by Ukrainian courts. The claimants asserted that the courts failed to respect the principle of *res judicata* and act in a consistent manner. However, in rejecting those claims, the tribunal found that the courts acted consistently with Ukrainian law. And viewed through the lens of international law, the tribunal also decided that the courts had not offended a sense of judicial propriety. In an award rendered partly in favour of the Dutch company Rompetrol, a tribunal found that the criminal investigations against Rompetrol managers carried out by Romanian authorities were to a limited extent in breach of FET.⁶³ Although confirming some of Rompetrol’s allegations, the tribunal rejected the claim that there was a “broad campaign of orchestrated harassment”⁶⁴ against the claimant. In coming to its decision, the tribunal also considered that the cumulative effect of acts could amount to a breach of FET under certain conditions, for example, depending on their seriousness and persistence. Referring to the investor’s legitimate expectations, the tribunal also noted that even during criminal law enforcement, the state should limit harmful effects on a foreign investor’s interests. However, it emphasized that “it would not regard any breach, or indeed any series of breaches, of procedural safeguards provided by national or international law in the context of a criminal investigation or prosecution as giving rise to the breach of an obligation of fair and equitable treatment.”⁶⁵ It would depend on the facts in a particular case whether such breaches could be established.

Proportionality

As noted, whether or not a state has breached the FET standard may hinge on the tribunal’s determination on whether the state’s actions are “proportional.” The most expensive damages award to date, the US\$1.77 billion ordered of Ecuador in an October 5, 2012 decision, hinged on this issue of proportionality.⁶⁶ While the tribunal agreed with Ecuador that the claimants—Occidental Petroleum Corporation and Occidental Exploration and Production Company

⁶² *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award.

⁶³ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award.

⁶⁴ *Ibid.*, p. 149 (para. 277).

⁶⁵ *Ibid.*, pp. 150-151 (para. 279).

⁶⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award.

(OEPC)—breached a contract with the state, it nonetheless ruled that Ecuador’s response to that violation was disproportionate. Having made that determination, the tribunal had “no hesitation” in finding that it amounted to a breach of fair and equitable treatment and was tantamount to expropriation under the Ecuador-U.S. BIT.

Under Occidental’s participation contract with Ecuador, the company was granted rights to explore and exploit oil in the Amazon region, and keep a share of the oil that it produced. The seeds of the dispute were planted in a “farmout” agreement with Alberta Oil Corporation (AEC), which gave the Canadian firm a 40 per cent economic interest in Occidental’s operations. A key point of contention was whether Occidental required the government of Ecuador’s approval to enter into the farmout agreement with AEC. Under the terms of Occidental’s participation contract with Ecuador, government approval was required to transfer rights under the participation contract to third parties. Occidental argued that the farmout agreement only provided AEC with an economic interest in the project; it would not be until the second stage of the agreement, when AEC would be granted legal title, that rights would be transferred. In siding with Ecuador, however, the tribunal determined that AEC was granted more than an economic interest, it also gained managerial and voting rights under its agreement with Occidental. As such, the tribunal concluded that Occidental had made a “serious mistake” in not gaining government approval.

The tribunal went on to consider whether the government’s decision to terminate its contract with Occidental was a proportionate response to the oil company’s violation. After considering the principle of proportionality in Ecuadorian and international law, it decided that it was not. Influencing that decision was the conclusion that the farmout agreement had not caused economic harm to Ecuador. The tribunal noted that AEC was already an approved operator in Ecuador, and that “it is overwhelmingly likely that approval would have been given in authorization had been sought in October 2000.” The tribunal also implied that Ecuador’s response was motivated in part by the fact that it had recently lost an arbitration case with Occidental in an investment treaty claim over value-added tax. That award provoked a significant political and public backlash against Occidental.

The tribunal also emphasized that other, less severe options were open to the government, including demanding a transfer fee from Occidental, and revising the production contract in order to improve the terms for Ecuador. It noted that the Ministry of Energy and Mines had not resorted to terminating contracts for similar infractions by other companies. Having determined that Ecuador’s response was not proportionate in the context of Ecuadorian and international law, the tribunal had “no hesitation” in finding that it amounted to a breach of fair and equitable treatment and was tantamount to expropriation under the Ecuador–U.S. BIT.

Counterclaims

Investment treaties are usually silent on the issue of counterclaims, although states' defences against investor claims frequently involve accusations against the investor. However, given that the ICSID Convention's jurisdiction over counterclaims is fairly limited, it is often considered that ICSID tribunals have little scope to entertain counterclaims in investor–state disputes.⁶⁷ Nonetheless, in several cases, states' counterclaims were admitted. Among other, states have used counterclaims to substantiate the proportionality of their actions, or to demand damages from the investor. At the merit stage, tribunals' considerations commonly centre on whether the respondent provided convincing evidence in support of its counterclaims.

In defence against Occidental's claims,⁶⁸ for example, Ecuador alleged that the company had breached an oil participation contract with Ecuador before the country decided to terminate it. And as noted, the tribunal found that Occidental did not obtain government approval for a farmout agreement it entered with a Canadian oil firm related to the contract, and therefore agreed with Ecuador that under the terms of the participation contract, government approval was required and, consequently, Occidental committed a breach of contract. The tribunal nonetheless ruled that Ecuador's response to that violation was disproportionate and tantamount to expropriation. Yet, because of Occidental's "own wrongful act," the tribunal deducted the damages Ecuador was ordered to pay to the company by 25 per cent. Ecuador also filed other counterclaims against the American oil company, for instance accusing the claimants of abuse of process and bad faith related to the ICSID proceedings and further breaches of the participation contract. However, the tribunal dismissed these counterclaims.

Ecuador also filed counterclaims in a dispute with Burlington, alleging damages to the environment and the infrastructure in two blocks in the Amazon Region.⁶⁹ On the basis of a submission agreement specifically reached on this matter between Burlington and Ecuador, Burlington refrained from raising jurisdictional objections. In its decision on liability the tribunal did not explicitly dismiss Ecuador's counterclaims. However, it was not convinced by Ecuador's argument that the country acted out of concern for environmental damages or economic loss when it expropriated the oil and gas company's investment, finding that there was insufficient evidence to prove significant risks.

⁶⁷ Jean E. Kalicki. (2013, January). "Counterclaims by States in Investment Arbitration," in *ITN Quarterly*. Available at http://www.iisd.org/pdf/2013/iisd_itn_january_2013_en.pdf

⁶⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award.

⁶⁹ *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.

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ANNEX: Summary of Decisions August 31, 2012 – September 1, 2013

Decisions on jurisdiction

(Note: those decisions that fully or partly reject the respondent's jurisdictional or preliminary objections are categorized as "in favour of the claimant." Where the tribunal could not establish any jurisdiction over claims, the decisions are categorized as "in favour of the respondent.")

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
1	Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2)	Bolivia	ICSID	Bolivia–Chile BIT	mining concession	Prof. Gabrielle Kaufmann-Kohler (president), Hon. Marc Lalonde, Prof. Brigitte Stern	Decision on Jurisdiction	September 27, 2012	In favour of the claimant
2	Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay (ICSID Case No. ARB/07/9)	Paraguay	ICSID	Netherlands –Paraguay BIT	services agreements	Prof. Dr. Rolf Knieper (president), L. Yves Fortier, Prof. Philippe Sands	Further Decision on Objections to Jurisdiction	October 9, 2012	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
3	European American Investment Bank AG (EURAM) v. Slovak Republic (UNCITRAL)	Slovakia	UNCITRAL	Austria–Slovakia BIT	insurance company	Judge Christopher Greenwood (president), Prof. Brigitte Stern (Slovakia’s nominee), Alexander Petsche (EURAM’s nominee)	Award on Jurisdiction (not public)	October 22, 2012	n/a
4	Standard Chartered Bank v. The United Republic of Tanzania (ICSID Case No. ARB/10/12)	Tanzania	ICSID	Tanzania–U.K. BIT	power purchase agreement	Prof. William W. Park (president), Mr. Barton Legum, Prof. Michael C. Pryles	Award (finding lack of jurisdiction)	November 2, 2012	In favour of the respondent
5	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (ICSID Case No. ARB/07/26)	Argentina	ICSID	Argentina–Spain BIT	water services concession	Prof. Andreas Bucher (president), Prof. Pedro J. Martinez-Fraga, Prof. Campbell McLachlan	Decision on Jurisdiction	December 19, 2012	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
6	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)	Argentina	ICSID	Argentina-Spain BIT	air transportati on services	Thomas Buergenthal (president), Henri Alvarez (claimants' nominee), Kamal Hossain (Argentina's nominee)	Decision on Jurisdiction	December 21, 2012	In favour of the claimant
7	Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary (ICSID Case No. ARB/12/3)	Hungary	ICSID	U.K.– Hungary BIT	radio broadcasting enterprises	Arthur W. Rovine (president), Hon. Marc Lalonde, Donald M. McRae	Decision on Respondent's Objection under Arbitration Rule 41(5)	January 16, 2013	In favour of the claimant
8	Ambiente Ufficio S.p.A. and others v. Argentine Republic (ICSID Case No. ARB/08/9) (formerly Giordano Alpi and others v. Argentine Republic)	Argentina	ICSID	Argentina– Italy BIT	debt instruments	Bruno Simma (president), Karl-Heinz Boeckstiegel, Santiago Torres Bernardez	Decision on Jurisdiction and Admissibility	February 8, 2013	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
9	Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5)	Venezuela	ICSID	Barbados–Venezuela BIT; Venezuelan Law on the Promotion and Protection of Investments	maritime-support services	Prof. Campbell McLachlan (president), Dr Andrés Rigo Sureda, Prof. Brigitte Stern	Decision on Jurisdiction	February 8, 2013	In favour of the claimant
10	Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan (ICSID Case No. ARB/11/8)	Pakistan	ICSID	Kuwait-Pakistan BIT	customs clearance services	L. Yves Fortier (president), Charles N. Brower (claimant's nominee) Salim Moollan (Pakistan's nominee)	Decision on Jurisdiction (not public)	February 27, 2013	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
11	Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28)	Turkey	ICSID	Netherlands–Turkey BIT	residential and commercial construction project	Dr. Gavan Griffith (president), Mr. Michael Evan Jaffe, Prof. Dr. Rolf Knieper	Decision on Bifurcated Jurisdictional Issue	March 5, 2013	In favour of the claimant
12	Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (ICSID Case No. ARB/04/16)	Argentina	ICSID	Argentina–United States BIT	gas production concessions	Gustaf Möller (president), Piero Bernardini (claimant’s nominee) Antonio Remiro Brotons (Argentine nominee)	Decision on Jurisdiction and Liability (not public)	April 10, 2013	In favour of the claimant
13	Pan American Energy LLC v. Plurinational State of Bolivia (ICSID Case No. ARB/10/8)	Bolivia	ICSID	Bolivia–United States BIT	exploration and exploitation of hydrocarbons (energy)	Bernardo Cremades (president), Francisco Orrego Vicuna (claimant's nominee), Rodrigo Oreámuno (appointed by ICSID)	Decision on the Respondent's Preliminary Objections (not public)	April 26, 2013	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
14	Burimi SRL and Eagle Games SH.A v. Republic of Albania (ICSID Case No. ARB/11/18)	Albania	ICSID	Italy–Albania BIT	gaming industry	Mr. Daniel M. Price (president), Prof. Bernardo M. Cremades, Prof. Ibrahim Fadlallah	Award (finding lack of jurisdiction)	May 29, 2013	In favour of the respondent
15	Apotex Inc. v. The Government of the United States of America (UNCITRAL)	United States	UNCITRAL	NAFTA	pharmaceutical company	Mr. Toby T. Landau (president), Hon. Fern M. Smith (respondent's nominee), Mr. Clifford M. Davidson (claimant's nominee)	Award on Jurisdiction and Admissibility	June 14, 2013	In favour of the respondent
16	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7) (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v.	Uruguay	ICSID	Switzerland–Uruguay BIT	tobacco industry	Prof. Piero Bernardini (president), Mr. Gary Born (claimant's nominee), Prof. James Crawford (respondent's nominee)	Decision on Jurisdiction	July 2, 2013	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
	Oriental Republic of Uruguay)								
17	Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan (ICSID Case No. ARB/10/1)	Turkmenistan	ICSID	Turkey–Turkmenistan BIT	construction projects	Mr J. William Rowley (president), Prof. William W. Park, Prof. Philippe Sands	Award (finding lack of jurisdiction)	July 2, 2013	In favour of the respondent
18	Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12)	Germany	ICSID	Energy Charter Treaty	nuclear power	Albert Jan van den Berg (president), Vaughan Lowe Charles N. Brower	Decision on Jurisdiction (not public)	July 2, 2013	N.A. (in favour of the claimant, since case is proceeding to merits)

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
19	Garanti Koza LLP v. Turkmenistan (ICSID Case No. ARB/11/2)	Turkmenistan	ICSID	Turkmenistan-United Kingdom BIT	construction project	John M. Townsend (president), George Constantine Lambrou, Laurence Boisson de Chazournes	Decision on the Objection to Jurisdiction for Lack of Consent	July 3, 2013	In favour of the claimant

Decisions on merit

(Note: those decisions that on the merits rule fully or partly in favour of the claimants are categorized as “in favour of the claimant.” Where the tribunal rejected all claims, the decisions are categorized as “in favour of the respondent”).

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
1	TRACO Deutsche Travertin Werke GmbH v. Poland	Poland	UNCITRAL	Germany–Poland BIT	Extraction of stone	V.V. Veeder (president), Christoph Schreuer (investor’s nominee), Brigitte Stern (respondent’s nominee)	Award (not public)	September 5, 2012	In favour of the respondent
2	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No. ARB/06/11)	Ecuador	ICSID	Ecuador–United States BIT	hydrocarbon concession	Mr. L. Yves Fortier (president), Mr. David A.R. Williams, Prof. Brigitte Stern	Award	October 5, 2012	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
3	Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine (ICSID Case No. ARB/08/11)	Ukraine	ICSID	Ukraine–United States BIT	hotel development project	Dr. Gavan Griffith (president), Prof. Philippe Sands (claimant’s appointee), Prof. Donald McRae (respondent’s appointee)	Award	October 25, 2012	In favour of the respondent
4	Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/2)	Sri Lanka	ICSID	Germany–Sri Lanka BIT	hedging agreement	Bernard Hanotiau (president), Makhdoom Ali Kahn, David Williams	Award	October 31, 2012	In favour of the claimant
5	Electrabel S.A. v. Republic of Hungary (ICSID Case No. ARB/07/19)	Hungary	ICSID	Energy Charter Treaty	electricity generation	V.V. Veeder (president), Gabrielle Kaufmann-Köhler, Brigitte Stern	Decision on Jurisdiction, Applicable Law and Liability	November 30, 2012	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
6	Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic)	Slovakia	UNCITRAL	Netherland–Slovak Republic BIT	health insurance	Vaughan Lowe (president), V.V. Veeder, Albert Jan van den Berg	Award (not public)	December 7, 2012	In favour of the claimant
7	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)	Ecuador	ICSID	Ecuador–United States BIT	hydrocarbon concession	Prof. Gabrielle Kaufmann-Kohler (president), Prof. Francisco Orrego Vicuña (claimant’s nominee), Prof. Brigitte Stern (respondent’s nominee)	Decision on Liability	December 14, 2012	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
8	Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)04/6)	Venezuela	ICSID	Canada–Venezuela BIT	gold and copper mining project	Vaughan Lowe (president), Charles N. Bower (claimant's nominee), Brigitte Stern (respondent's nominee)	Award	January 16, 2013	In favour of the respondent
9	Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others	Libya	CRCICA	The Unified Agreement for the Investment of Arab Capital in the Arab States; contracts and domestic law	tourist resort investment	Dr. Abdel Hamid El-Ahdab (president), Dr. Ibrahim Fawzi (claimant's nominee), Justice Mohamed El-Kamoudi El-Hafi (respondent's nominee)	Final Arbitral Award	March 22, 2013	In favour of the claimant
10	Mr. Franck Charles Arif v. Republic of Moldova (ICSID Case No. ARB/11/23)	Moldova	ICSID	France–Moldova BIT	duty free concession	Prof. Dr. Bernardo M. Cremades (president), Prof. Dr. Bernard Hanotiau, Prof. Dr. Rolf Knieper	Award	April 8, 2013	In favour of the claimant

	Case name	Respondent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
11	Abengoa, S.A. y COFIDES, S.A. v. United Mexican States (ICSID Case No. ARB(AF)/09/2)	Mexico	ICSID AF	Spain–Mexico BIT	waste disposal enterprise	Alexis Mourre (president), Juan Fernandez-Armesto, Eduardo Siqueiros T	Award (not public)	April 18, 2013	In favour of the claimant
12	The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3)	Romania	ICSID	Netherlands–Romania BIT	oil refinery	Franklin Berman (president), Donald Francis Donovan (claimant’s nominee), Marc Lalonde (respondent’s nominee)	Award	May 6, 2013	In favour of the claimant
13	Luigiterzo Bosca v. Lithuania (UNCITRAL)	Lithuania	UNCITRAL	Italy–Lithuania BIT	alcohol industry	Marc Lalonde (president), Daniel Price, Brigitte Stern	Award (not public)	May 17, 2013	In favour of the claimant
14	Convia Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru (ICSID Case No. ARB/10/2)	Peru	ICSID	Argentina–Peru BIT	highway construction project	Yves Derains (president), Eduardo Zuleta, Brigitte Stern	Award (not public)	May 21, 2013	N.A.

	Case name	Respond-ent state	Arbitral rules	Legal basis	Subject matter (type of investment)	Arbitrators	Type of decision	Date of decision	Outcome of decision
15	Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13)	Indonesia	ICSID	United Kingdom–Indonesia BIT	banking enterprise	Gavan Griffith (president), Joan Donoghue, Muthucumaraswamy Sornarajah	Award (not public)	July 16, 2013	In favour of the respondent