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LATEST DEVELOPMENTS IN INVESTOR–STATE DISPUTE SETTLEMENT*

I. Recent trends

In 2010, the number of known treaty-based investor–State dispute settlement (ISDS) cases filed under international investment agreements (IIAs) grew by at least 25, bringing the total number of known treaty-based cases to 390 by the end of 2010 (figure 1).[1] This constitutes the lowest number of known treaty-based disputes filed annually since 2001. Since most arbitration forums do not maintain a public registry of claims, the total number of actual treaty-based cases could be higher.[2]

Of the 25 new disputes, 18 were filed with the International Centre for Settlement of Investment Dispute (ICSID) or the ICSID Additional Facility, four under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL),[3] and one with the Stockholm Chamber of Commerce (SCC). For two of the

Highlights

- In 2010, at least 25 new cases were filed, bringing the total number of known treaty-based cases to 390 and the total number of countries that have responded to investment treaty arbitration to 83.
- 20 awards, five decisions on liability and 11 decisions on jurisdiction were rendered, as well as 11 other decisions on interim measures, discontinuance of proceedings and costs.
- Of the 20 awards, 14 were in favour of the State, five in favour of the investor and one award embodied the parties' settlement agreement – tilting the overall balance of awards further in favour of the State (with 78 won against 59 lost cases).
- Out of the five decisions on liability all were in favour of the investor.
- Out of the nine publically available decisions on jurisdiction, the tribunals upheld their jurisdiction in eight cases and rejected it in one.

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The arbitral and judicial decisions reviewed for this note were issued in 2010. When referenced, these cases will be cited in short form, with the full citations contained in Annex 2. Where references are made to decisions not issued in 2010, the full citation will be referenced in the footnote, and the case will not be listed in Annex 2.

[1] This number does not include cases that are exclusively based on investment contracts (State contracts) and cases where a party has so far only signalled its intention to submit a claim to arbitration, but has not yet commenced the arbitration (notice of intent). If these latter cases are submitted to arbitration, the number of pending cases will increase. Due to new information becoming available for 2009 and earlier years, the number of total known IIA-based ISDS cases at end 2009 was revised upwards to 365 instead of 357, as reported in the UNCTAD's 2010 IIA Monitor No. 1.

[2] UNCTAD's database on investor-State dispute settlement cases (available at www.unctad.org/iia) is continuously updated.

[3] Several cases under UNCITRAL rules are being administered by the Permanent Court of Arbitration (PCA). In 2010, 11 treaty-based cases were registered at the PCA.

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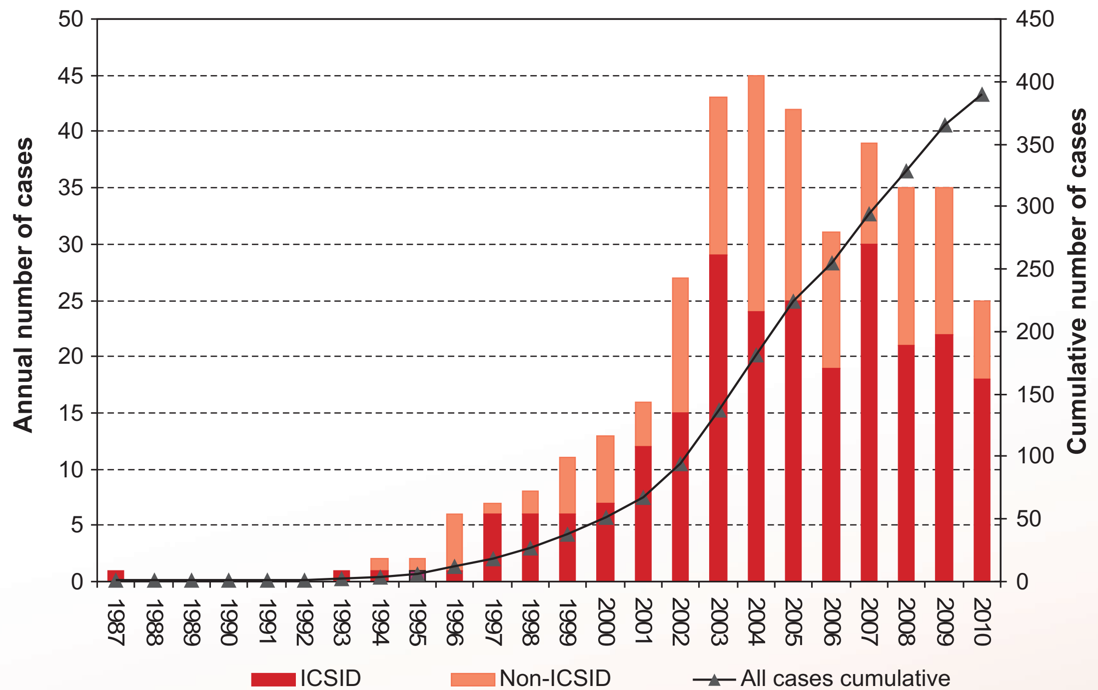
new cases, the applicable arbitration rules are unknown. This follows the past trend, with the majority of cases accruing under ICSID (in total now 245 cases) and UNCITRAL (109). Other venues are used only marginally, with 19 cases at the SCC, six with the International Chamber of Commerce and four ad hoc. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In six of the total of 390 cases, the applicable arbitration rules remain unknown.

Figure 1. Known investment treaty arbitrations (cumulative and newly instituted cases), 1987–2010



Source: UNCTAD.

In 2010, Uruguay and Grenada saw their first claims, with one case each. Other claims were filed against Bolivia (3), Venezuela (3), Kazakhstan (2), Peru (2), Turkmenistan (2), Zimbabwe (2), Canada (1), Guatemala (1), Lithuania (1), Mongolia (1), Poland (1), Romania (1), Slovak Republic (1), Tanzania (1) and Uzbekistan (1). In total, over the past years 83 governments have responded to investment treaty arbitration: 51 developing countries, 17 developed countries and 15 countries with economies in transition (see annex table 1). Most claims were filed against Argentina (51 cases), Mexico (19), Czech Republic (18), and Ecuador (16).

In 2010, 20 awards,[4] five decisions on liability[5] and 11 decisions on jurisdiction were rendered. Eleven other decisions on interim measures, discontinuance of proceedings and costs were also rendered in 2010. Of the 20 awards, 14 were in favour of the State, five in favour of the investor and one award embodied the parties' settlement agreement. Out of the five decisions on liability all were in favour of the investor. From 11 decisions on jurisdiction, nine are public.[6] In those, the tribunals upheld jurisdiction in eight cases and rejected jurisdiction in one.

This brought the number of concluded cases to 197 cases. Out of these, 78 were decided in favour of the State (approximately 40 %) and 59 in favour of the investor (approximately 30%). 60 cases were settled (approximately 30%), and for 29 cases the current state of affairs or the outcome is unknown, and 164 cases were still pending at the end of 2010.

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[4] This number counts the consolidated award in *Fuchs v. Georgia* and *Kardassopoulos v. Georgia* as two.

[5] This number counts the decision on liability in *AWG v. Argentina* and *Suez and Vivendi v. Argentina*, which were consolidated into one decision as two decisions. The other three decisions on liability are *Suez v. Argentina, Lemire v.Ukraine* and *Total S.A. v. Argentina*.

[6] These are *Ulysseas v. Ecuador and SGS v. Paraguay*.

Regarding annulment proceedings, seven decisions on annulment were rendered by ICSID ad hoc annulment committees and four cases were registered by ICSID on the application for annulment. Also relevant in this context are a number of non ICSID arbitration cases, where countries' requests to set aside arbitral awards were reviewed by national courts.

II. Substantive and Procedural Issues

As far as substantive and procedural implications are concerned, tribunals in 2010 rendered significant awards on a variety of issues.

A. Substantive Issues

On the fair and equitable treatment standard, a few tribunals have noted the close link between the FET standard and the notion of legitimate expectations as well as the need to balance investors' expectations with the right of host States to regulate in the public interest. In *Lemire v. Ukraine*, the tribunal noted that actions or omissions of the respondent State are "*contrary to the FET standard if they frustrate legitimate and reasonable expectations on which the investor relied at the time when he made the investment*."[7] However, the tribunal also stated that the protection of foreign investors should be "*balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest*."[8] The tribunal reached this conclusion by emphasizing that, while the main purpose of the BIT is the stimulation of foreign investment and of the accompanying flow of capital, "…*this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries*." In this regard, the tribunal noted that "[e]*conomic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments* per se*, but as an aid to the development of the domestic economy*."[9]

The tribunal in *AWG v. Argentina* also emphasized the relevance of the legitimate expectations of investors in applying the FET standard. The Tribunal stressed that "*it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably*."[10] Furthermore, in light of the BIT's basic goal of fostering economic cooperation and prosperity, the tribunal noted that one must not look single-mindedly at the claimants' subjective expectations but examine them from an objective and reasonable point of view.[11] The tribunal also concluded that "*in interpreting the meaning of fair and equitable treatment to be accorded to investors, the Tribunal must balance the legitimate and reasonable expectations of the Claimants with Argentina's right to regulate the provision of a vital public service*."[12]

Besides these considerations, in both disputes, the tribunals eventually found that the respondent State had breached the FET standard.[13]

On the issue of exhaustion of local remedies as a condition for a breach of the FET standard, the ICSID *ad hoc* Committee in *Helnan v. Egypt* annulled the holding of the arbitral tribunal, which accepted that a challenge by the investor of the decision to terminate its

[7] *Lemire v.Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010, para. 264

[8] *Ibid.*, para. 273

[9] *Ibid.*, para. 273

[10] *AWG v. Argentina*, Decision on Liability, 30 July 2010, para. 226.

[11] *Ibid.*, para. 228

[12] *Ibid.,* para. 336.

[13] *Lemire v. Ukraine,* Decision on Jurisdiction and Liability, 14 January 2010, para. 247; see also *Kardassopoulos v. Georgia* and *Fuchs v Georgia*, consolidated Award, 3 March 2010, paras. 430-452.

management contract in competent Egyptian administrative courts was required in order to demonstrate the substantive validity of its claims. The *ad hoc* Committee noted that the consequences of adopting the tribunal's approach "*could be serious*": a requirement to pursue local court remedies would have the effect of disentitling a claimant from pursuing its direct treaty claim for failure of the executive to afford fair and equitable treatment. It would also "*inject an unacceptable level of uncertainty into the way in which an investor ought to proceed when faced with a decision on behalf of the Executive of the State, replacing the clear rule of the Convention which permits resort to arbitration*."[14]

A different but related issue was addressed by the Tribunal in *Chevron v. Ecuador (I)*. In that case the claimant had argued that egregious delays suffered before domestic courts brought against the host government breached the respondent's obligation under Article II ("Treatment") of the Ecuador-United States BIT. Specifically, the claimant argued that the government breached paragraph 7 which requires "*effective means of asserting claims and enforcing rights with respect to investment*." While reiterating that strict exhaustion of local remedies is not necessary in order to find a violation of Article II(7), the tribunal noted that a claimant is nevertheless "*required to make use of all remedies that are available and might have rectified the wrong complained of*."[15] The tribunal specified further as follows: "*a high likelihood of success of these remedies is not required in order to expect a claimant to attempt them. In the case of undue delay, the delay itself usually evidences the general futility of all remedies except those that specifically target the delay. Resort to these remedies may also be excused if another traditional exemption applies, such as if these remedies were shown to be ineffective or futile in resolving delay*." Moreover, the tribunal noted that the burden of proof in respect of the availability and effectiveness of local remedies rests on different parties: a respondent State must prove that remedies exist before a claimant will be required to prove their ineffectiveness or futility or that resort to them has been unsuccessful.[16]

On the minimum standard of treatment under customary law, the tribunal in *Merrill and Ring v. Canada* distinguished two tracks in the evolution of the minimum standard of treatment. The first track, which finds its pinnacle in the well known decision by the *Neer* Commission, focuses exclusively on personal safety, denial of justice and due process. The second track concerns business, trade and investment.[17] While the standard developed in the context of the first track is a narrow one (i.e., requiring an 'outrageous' conduct of some kind), the standard developed under the second track is an open, unrestricted one protecting "*against all such acts or behaviour that might infringe a sense of fairness, equity and reasonableness*."[18] The tribunal concluded that against the backdrop of this evolution of the minimum standard of treatment, the tribunal was "*satisfied that fair and equitable treatment has become a part of customary law*."[19] The *Merrill* tribunal eventually rejected the investor's claim for breach of Article 1105 NAFTA as the investor failed to establish any damage.[20] It noted that "*a finding of liability without a finding of damage would be difficult to explain in the context of investment law arbitration and would indeed be contrary to some of its fundamental tenets*."[21]

On the definition of indirect expropriation, the tribunals in *AWG v. Argentina* and *Chemtura v. Canada* emphasized the importance of evaluating the effects of the measure under review and adopted a test that focuses on whether the host State measure has "*substantially deprived the investor of the benefit of its investment*."[22] The *Chemtura* tribunal also noted that such determination is "*a fact-sensitive exercise to be conducted in the light of the circumstances*

[14] *Helnan v. Egypt*, Decision on Annulment, 14 June 2010, paras. 52-53.

[15] *Chevron v. Ecuador (I)*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, para. 326.

[16] *Ibid.*, para. 329.

[17] *Merrill & Ring v. Canada*, Award, 31 March 2010, para. 201.

[18] *Ibid.*, para. 210.

[19] *Ibid.*, para. 211.

[20] *Ibid.*, para. 266.

[21] *Ibid.*, para. 245.

[22] *Chemtura v. Canada*, Award, 2 August 2010, para. 247; see also *AWG v. Argentina*, Decision on Liabilty, 30 July 2010, para. 134, "*in applying the provisions of the three BITs applicable to these cases, this Tribunal will have to determine whether they* [i.e. the measures in question] *effected a substantial, permanent deprivation of the Claimants' investments or the enjoyment of those investments' economic benefits*."

of each case" and that "*it would make little sense to state a percentage or a threshold that would have to be met for a deprivation to be 'substantial' as such modus operandi may not always be appropriate*."[23] Both tribunals rejected the claimants' expropriation claims on the facts of the two cases.

The tribunal in *RosInvest v. Russia* also focused its expropriation analysis on whether the measures at issue had the effect of a substantial deprivation of property forming all or a material part of the investment. The tribunal concluded that a series of measures of the respondent (including VAT assessment, profit taxes, repeat offender fines, bankruptcy auctions) constituted expropriation as they had "*in their totality*" the aim and effect to deprive Yukos (the company in which the claimant had invested) from its assets.[24] The *RosInvest* tribunal also concluded that the respondent's measures constituted '*unlawful*' expropriation as the respondent never claimed that those measures had been taken '*for a purpose which is in the public interest*' and the respondent "*did not offer or pay any compensation to claimant for the taking*".[25] Accordingly, the tribunal found Russia to have violated its obligations under its BIT with the United Kingdom.

On the scope of umbrella clauses, the following decisions are noteworthy. Having noted the divergent views expressed on the relevant issue by previous investment tribunals, the tribunal in *Burlington v. Ecuador* considered that umbrella clauses may apply even if no exercise of sovereign power is involved.[26] The tribunal in *Hamester v. Ghana*,[27] concurring with the approach taken in *Impregilo v. Pakistan*,[28] found that contracts concluded between an investor and a legal entity separate from the respondent State (in *Impregilo*, the Pakistan Water and Power Development Authority) do not fall within the scope of an umbrella clause.[29] The tribunal explained that "*the consequence of an automatic and wholesale elevation of any and all contract claims into treaty claims risks undermining the distinction between national legal orders and international law*" and "*this is not a result that is in line with the general purpose of the ICSID/BIT mechanism for the international protection of foreign investments*."[30]

On the full protection and security standard, the tribunal in the consolidated cases of *AWG v. Argentina* and *Suez and Vivendi v. Argentina* concluded that under the three applicable BITs (Argentinean BITs concluded with France, Spain and the United Kingdom) "*Argentina is obliged to exercise due diligence to protect investors and investments primarily from physical injury, and that in any case Argentina's obligations under the relevant provisions do not extend to encompass the maintenance of a stable legal and commercial environment*."[31] It reached this conclusion having considered the specific language of each of the three applicable treaties, the historical development under international law and the recent jurisprudence (including the decisions in *Azurix v. Argentina* and *CME v. The Czech Republic* that had adopted a broader definition of the underlying principle[32]).

On the prohibition of unreasonable or discriminatory measures, the tribunal in *AES v. Hungary*, dealing with Article 10(1) of the Energy Charter Treaty (ECT),[33] emphasized the existence of "*two elements that require to be analyzed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy*."[34] On the first element, the tribunal concluded that Hungary was principally motivated by the politics surrounding so-called luxury profits (by electricity

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[23] *Chemtura v. Canada*, Award, 2 August 2010, para. 249.

[24] *RosInvest v. Russia*, Final Award, 12 September 2010, para. 625.

[25] *Ibid.*, paras. 632-633.

[26] *Burlington Resources v. Ecuador*, Decision on Jurisdiction, 2 June 2010, para. 190.

[27] *Hamester v. Ghana*, Award, 18 June 2010.

[28] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (Italy-Pakistan BIT), Decision on Jurisdiction, 22 April 2005, para. 223.

[29] *Hamester v. Ghana*, Award, 18 June 2010, para. 343.

[30] *Ibid.*, para. 349.

[31] *Suez and Vivendi v. Argentina and AWG v. Argentina*, Decision on Liability, 30 July 2010, para. 179.

[32] *Azurix v. Argentina*, ICSID Case No. ARB/01/12 (Argentina-United States BIT), Award, 14 July 2006; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL (Czech Republic-The Netherlands BIT), Partial Award, 13 September 2001.

[33] Article 10(1) of the ECT provides that "no Contracting Party shall in any way impair by unreasonable or discriminatory measure their [investment's] management, maintenance, use, enjoyment or disposal".

[34] *AES Summit Generation Ltd. v. Hungary*, ICSID Case No. ARB/01/4 (ECT), Settlement, 3 January 2002, para. 10.3.7.

generators), and that it is a perfectly valid and rational policy objective for a government to address luxury profits.[35] On the second element, the tribunal noted that, as renegotiations with the electricity generators failed, the Hungarian parliament voted for the reintroduction of administrative pricing (that had been the practice until the accession of Hungary to the EU), which the parliament considered to be the best option at that moment.[36] The tribunal concluded that both the 2006 Electricity Act and the implementing Price Decrees were "*reasonable, proportionate and consistent with the public policy expressed by the parliament*."[37] On these grounds, the tribunal concluded that the respondent did not breach Article 10(1) of the ECT. As the tribunal did not find any other treaty violations, it dismissed the case.

On the treaty-based emergency exception and customary law defence of necessity, at issue in several arbitrations involving Argentina's economic crisis of 2000-2001, the tribunal in *Suez and Vivendi v. Argentina* emphasized the four strict conditions reflected in Article 25 of the International Law Commission (ILC) Articles on States Responsibility: (1) the act (in violation of international law) must be the only way for it to safeguard an essential interest from grave and imminent peril; (2) the act must not seriously impair an essential interest of the State toward which the obligation exists or toward the international community as a whole; (3) the obligation in question must not exclude the possibility of the defence of necessity; and (4) the State must not have contributed to the situation of necessity. The *Suez* tribunal rejected the respondent's plea of the defence of necessity because the respondent's measures in violation of the BITs were not the only means to satisfy its essential interests, and because the respondent itself contributed to the emergency situation that it was facing in 2001-2003.[38] Accordingly, Argentina's violation of the FET standard could not be justified and the country was found to have violated the BITs.

During 2010, two ICSID *ad hoc* Committees were asked to annul two previous awards that had dealt with the treaty-based emergency exceptions and the customary law defence of necessity. The *ad hoc* Committee in *Sempra v. Argentina* annulled the tribunal's award on the ground of a manifest excess of powers owing to the failure of the arbitral tribunal to apply the proper law. According to the ICSID *ad hoc* Committee, the tribunal had adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the underlying BIT. Interestingly, in a *dictum*, the *ad hoc* Committee admitted the "*possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers*",[39] whereas past practice has excluded the erroneous application of the proper law as a valid reason for annulment.

Similarly, the ICSID *ad hoc* Committee in *Enron v. Argentina* annulled the tribunal's award on the grounds of a manifest excess of powers and failure to state reasons with regard to both treaty-based exceptions and the customary law defence. Specifically, the *ad hoc* Committee concluded that the tribunal had exceeded its powers since it had not applied Article 25 of the ILC but instead applied an expert opinion on an economic issue. In other words, the tribunal had exceeded its powers as it had not properly developed the legal test for the necessity defence (and the related emergency exception), relying exclusively on the conclusion of the expert economist.[40] In addition, the *ad hoc* Committee found that the tribunal had also failed to state reasons for its decision as the basis on which several findings of law were made was "*entirely unclear*".[41]

On the relevance of international human rights law in investment arbitration, the tribunal in *AWG v. Argentina* concluded that, *"[i]n the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or*

[35] *Ibid.*, para. 10.3.35.
[36] *Ibid.*, para. 10.3.36.
[37] *Ibid.*, para. 10.3.37.
[38] *Suez and Vivendi v. Argentina*, Decision on Liability, 30 July 2010, para. 265. It is worth noting that there is no discussion of the treaty-based emergency exception in *Suez and Vivendi v. Argentina* because the underlying treaty in that dispute does not contain such an exception.
[39] *Sempra v. Argentina*, annulment, para. 164.
[40] *Enron v. Argentina*, ad hoc Committee, Decision on Annulment, 30 July 2010, paras. 368-405.
[41] *Ibid.*, paras. 378 and 384.

mutually exclusive." Accordingly, in the tribunal's view, Argentina could and should have respected both types of obligations.[42]

B. Procedural Issues (including Jurisdiction, Damages, Review and Annulment)

On the legality of the investment for purposes of establishing jurisdiction, in *RDC v. Guatemala*, the tribunal was confronted with the respondent's argument that the claimant's investment was not a 'covered investment' under the United States-CAFTA-Dominican Republic Free Trade Agreement (FTA) or the ICSID Convention because the investment was illegal and did not create rights protected under domestic law. The tribunal rejected this argument noting that in line with a long line of case law, the language '*conferred pursuant to domestic law*' in the underlying agreement "*is not a characteristic of the investment to qualify as such but a condition of its validity under domestic law*."[43] The tribunal added that even assuming that the relevant actions were not 'pursuant to domestic law', "*principle of fairness should prevent the government from raising 'violations of its own law as a jurisdictional defense when […it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law*."[44]

The tribunal in *Hamester v. Ghana* emphasized the existence of the following general principles applicable independently of any specific language in the underlying treaty: "*An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law*."[45]

In *Anderson v. Costa Rica*, the tribunal emphasized the importance of the requirement that investments subject to treaty protection be 'made' or 'owned' in accordance with the law of the host country. The tribunal noted that the inclusion of such specific provision in the underlying Canada-Costa Rica BIT "*is a clear indication of the importance that they attached to the legality of investments made by investors of the other Party and their intention that their laws with respect to investments be strictly followed. The assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country*."[46] In the particular case, as the deposits from the claimants were made to financial intermediaries that were operating without the necessary authorization by the Costa Rican Central Bank, the tribunal found that such investments were not made "*in accordance with the law of the host country*". Accordingly, the BIT was inapplicable and the tribunal lacked jurisdiction.[47]

On the definition of investment for purposes of establishing jurisdiction under Article 25 of the ICSID Convention, the tribunal in *Saba Fakes v. Turkey* noted that "*while Article 25(1) of the ICSID Convention provides for an objective definition of an investment, this definition is comprised of three criteria, namely (i) a contribution, (ii) a certain duration, and (iii) an element of risk.*" The tribunal noted moreover that "*neither the text nor the object and purpose of the Convention commands that any other criteria be read into this definition.*"[48] Accordingly, the claim was dismissed for lack of jurisdiction of the tribunal and the Centre over the dispute. This approach distances itself from the so called *Salini* test at least to the extent that it expressly excludes the relevance of the investment's "*contribution to the host State's economic development*".

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[42] *AWG v. Argentina*, Decision on Liability, 30 July 2010, para. 262. In *Chemtura v. Canada*, within the context of an Article 1105 NAFTA analysis, the Tribunal examined Canada's international environmental obligations in order to conclude that Canada had not acted in bad faith vis-à-vis the foreign investor. See *Chemtura v. Canada*, Award, 2 August 2010, paras. 138-139.

[43] *RDC v. Guatemala*, Second Decision on Objections to Jurisdiction, 18 May 2010, para. 140.

[44] *Ibid.*, para. 146

[45] *Hamester v. Ghana,* Award, 18 June 2010, para. 123-124 (citing *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Czech Republic-Israel BIT), Award, April 15, 2009, para. 106).

[46] *Anderson v. Costa Rica*, Award, 19 May 2010, para. 53.

[47] *Ibid.*, paras. 55-60.

[48] *Saba Fakes v. Turkey*, Award, 14 July 2010, para. 121.

Furthermore, in *Global Trading v. Ukraine*, the ICSID tribunal dismissed the investor's claim on an expedited basis as 'manifestly without legal merit' under Article 41(5) of the ICSID Arbitration Rules. The tribunal concluded that the sale and purchase contracts entered into by the claimants are "*pure commercial transactions that cannot on any interpretation be considered to constitute 'investments' within the meaning of Article 25 of the ICSID Convention*."[49]

On the issue of the claimant's non-compliance with the treaty's waiting-period requirement, the tribunals in *Burlington v. Ecuador* and *Murphy v. Ecuador* found that non-compliance with such a requirement will justify dismissal of the claims. Criticizing two earlier decisions,[50] the *Murphy v. Ecuador* tribunal found that "*the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period* [pursuant to Article VI of the Ecuador-United states BIT] *does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules*."[51] As the tribunal found that the claimant had not complied with the requirements, it concluded that it lacked competence to hear the case.[52]

In *Burlington v. Ecuador*, the tribunal reached a similar conclusion with regard to certain specific claims brought by the investor on the basis of the same underlying BIT. The tribunal noted that for purposes of the waiting-period requirement a dispute only arises once an allegation of the treaty breach is made and thus the six-month consultation period only begins to run at that point in time. In that case, the tribunal found that the claimant had not made any allegations of treaty breach in connection with the relevant conduct under review (i.e., the indigenous opposition to certain parts of the investment) prior to filing its request for arbitration, the tribunal concluded that those claims were inadmissible.[53]

The tribunal in *Eureko v. Slovakia*[54] was confronted with the respondent's **objections to jurisdiction based on the Slovak Republic's accession to the European Union (EU)**. Despite the European Commission's arguments that intra-EU BITs (like the one at issue in *Eureko*) are incompatible with mandatory provisions of EU law and with the EU's judicial system, the *Eureko* tribunal rejected all of the respondent's objections. In particular, it rejected the objection based on Article 59 of the Vienna Convention on the Law of Treaties (on implied termination of a treaty by conclusion of a later treaty) as the offer to arbitration in a BIT cannot be likened to the right of EU nationals to bring a claim to the courts of the host State. According to the tribunal the potential for discrimination between EU nationals should be dealt with by recognizing the right to arbitration of all EU nationals rather than cancelling the claimant's wider rights under the BIT.[55] The tribunal also rejected the objection based on the incompatibility of the BIT with EU law as "*any such incompatibility would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction.*"[56]

On the doctrine of collateral *estoppel* (related to the principle of *res judicata*) the tribunal in *RSM v. Grenada* noted that it is a well established general principle of law applicable in

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[49] *Global Trading v. Ukraine*, Award, 1 December 2010, paras. 56-58.

[50] *Ronald S. Lauder v. Czech Republic*, UNCITRAL (Czech Republic-United States BIT), Award, 3 September 2001; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (Pakistan-Swiss Confederation BIT), Decision on Jurisdiction, 6 August 2003.

[51] *Murphy v. Ecuador*, Award, 15 December 2010, para. 149.

[52] *Ibid.*, para. 157.

[53] *Burlington v. Ecuador*, Decision on Jurisdiction, 2 June 2010, para. 336. The Tribunal also noted that "*Article VI does not require the investor to spell out its legal case in detail during the initial negotiation process; Article VI does not even require the investor to invoke specific Treaty provisions at that stage. Rather, Article VI simply requires the investor to inform the host State that it faces allegations of Treaty breach which could eventually engage the host State's international responsibility before an international tribunal. In other words, it requires the investor to apprize the host State of the likely consequences that would follow should the negotiation process break down*." *Ibid.*, para. 338.

[54] *Eureko v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

[55] *Ibid.*, paras. 266-67.

[56] *Ibid.*, para. 272.

international courts and tribunals. Accordingly, a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.[57] The tribunal dismissed the investor's claims as 'manifestly without legal merit' pursuant to ICSID Arbitration Rule 41(5), having accepted the respondent's argument that the legal and factual contentions on which the investor's claims depend have already been fully litigated in a prior contractual arbitration.[58]

On the standard of review, the tribunal in *Lemire v. Ukraine* appears to have adopted a deferential approach. In its analysis of the FET standard, the tribunal emphasized that "*arbitrators are not superior regulators*" and thus "*they do not substitute their judgment for that of national bodies applying national laws*". In the tribunal's view, a claim that a regulatory decision is materially wrong will not suffice; rather, it must be proven "*that the State organ acted in an arbitrary or capricious way*".[59] Equally, in its analysis of the prohibition of performance requirements, the tribunal noted that "*the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community*."[60]

There were two decisions rendered on a **proposal to disqualify arbitrators**. In *Urbaser v. Argentina*, the two other members of the tribunal dismissed the claimant's proposal noting that the arbitrator's scholarly opinions in question do not meet the threshold of presenting an appearance that he is not prepared to hear and consider each parties' position with full independence and impartiality. The two members of the tribunal relied specifically on the third arbitrator's statement on the role of MFN clauses and based on the trust that the two members have in the third arbitrator's ability to examine the matter from a broader perspective.[61]

On provisional measures, the tribunal in *Chevron v. Ecuador (II)* denied the claimant's petition to enjoin enforcement of an anticipated decision in an ongoing, parallel Ecuadorian court dispute (known as the Lago Agrio Case), which could find the claimants liable for environmental pollution. However, the tribunal ordered both parties "*not to exert, directly or indirectly, any unlawful influence or pressure on the* [Lago Agrio] *Court*" as well as "*to maintain, as far as possible the* status quo *and not to exacerbate the procedural and substantive disputes before this Tribunal, including (in particular but without limiting howsoever the generality of the foregoing) the avoidance of any public statement tending to compromise these arbitration proceedings*".[62]

On damages, in at least four decisions rendered in 2010 tribunals awarded damages to the investor. In the two related arbitrations, *Kardossopoulos v. Georgia*[63] and *Fuchs v. Georgia*,[64] the investors were each awarded $45 million in damages and interests. Two other tribunals awarded lower amounts: in *RosInvest v. Russia*,[65] the investor received approximately $3.5 million plus interest (the original claim by the investor was $232.7 million) and in *Alpha Projektholding v. Ukraine*,[66] the investor was awarded approximately $3 million in damages plus interest accruing from 1 July 2004 at a rate of 9.11% compounded annually (the original claim by the investor was approximately $3.5 million). The decision in *RosInvest* should be highlighted for the tribunal's disapproval of an investment by a '*vulture fund*' which acquired

[57] *RSM v. Grenada*, Award, 10 December 2010, paras. 7.1.1-2.
[58] *Ibid.*, para. 7.2.1.
[59] *Lemire v. Ukraine*, Decision on Liability, 14 January 2010, para. 283.
[60] *Ibid.*, para. 505.
[61] *Urbaser v. Argentina*, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, 12 August 2010, para. 58. The disqualification proposal was also dismissed in *Alpha Projektholding v. Ukraine*, Decision on Respondent's Proposal to Disqualify Arbitrator, 8 November 2010.
[62] *Chevron v. Ecuador (II)*, PCA Case No. 2009-23, Order on Interim Measures, 14 May 2010, page 5.
[63] *Kardossopoulos v. Georgia*, Award, 3 March 2010.
[64] *Fuchs v. Georgia*, Award, 3 March 2010.
[65] *RosInvestCo v. Russia*, Final Award, 12 September 2010.
[66] *Alpha Projektholding v. Ukraine*, Award, 8 November 2010.

devalued assets and sought to leverage windfall returns via aggressive litigation. The tribunal designated the investment as '*speculative*' and said that it would be '*inconsistent*' with the aim of the Russia-United Kingdom BIT to reward such a speculative investment.

The tribunal in *Chevron v. Ecuador (II)* preliminarily established that the compensation due to the investor for the respondent State's breach of the treaty obligation to provide for "*effective means of asserting claims and enforcing rights*" could amount up to $700 million plus interest. However, according to the tribunal, in order to reach a final determination of the quantum of damages to be awarded to the investor, applicable domestic tax laws has to be taken into account. Accordingly, the tribunal left such determination to a separate expert procedure on taxes.[67]

On the issue of remedies other than damages, the tribunal in *ATA Construction v. Jordan* ordered that ongoing domestic proceedings be immediately and unconditionally terminated and that the investor be entitled to arbitration pursuant to the arbitration agreement.[68]

On annulment, seven decisions were rendered in 2010 by ICSID *ad hoc* annulment committees.[69] While in four instances the application for annulment was rejected (in *Helnan v. Egypt*, the *ad hoc* committee did annul one holding of the arbitral tribunal),[70] in three it was accepted (and the award annulled in its entirety).[71] Several grounds were used to annul the three awards. The ICSID *ad hoc* Committee in *Fraport* annulled the award pursuant to Article 52(1)(d) ICSID because of a "*serious departure from a fundamental rule of procedure*" as the tribunal denied the parties' right to submit evidence on Philippine law and to make submissions thereon relative to a specific key issue in dispute.[72]

Two further cases that were annulled in 2010 are *Sempra v Argentina and Enron v Argentina*, in both of which the *ad hoc* annulment committees dealt with the necessity defence and the emergency exception.

There were also several **decisions of domestic courts reviewing arbitral awards**. Noteworthy are two decisions by the U.S. District Court for the District of Columbia rejecting the applications to set aside two awards that had been rendered against Argentina stemming from the same emergency legislation adopted by Argentina in 2001. In *Argentina v. BG Group*, the Court rejected the applications as Argentina's attack on the validity of the award was "*premised on nothing more than numerous assertions of error on the part of the arbitral panel*." However, even though the Court admitted that "*under a more searching, appellate-style review, the arguments presented by Argentina in its Petition could very well carry the day*", it emphasized that in the present case the Court does not sit like an appellate court reviewing decisions of lower courts. Accordingly, the Court had "*no choice but to deny the relief sought by Argentina in its Petition*."[73] In *Argentina v. National Grid,* Argentina had failed to serve notice of the petition within the three month limitations period prescribed by United States law.

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[67] *Chevron v. Ecuador (II)*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010.

[68] *ATA Construction v. Jordan*, Award, 18 May 2010.

[69] *Aguas and Vivendi v. Argentina (II)*, Decision on Annulment, 10 August 2010; *Enron v. Argentina*, Decision on Annulment, 30 July 2010; *Fraport v. Philippines*, Decision on Annulment, 23 December 2010; *Helnan v. Egypt*, Decision on Annulment, 14 June 2010; *Rumeli v. Kazakhstan*, Decision of the *ad hoc* Committee, 25 March 2010; *Sempra v. Argentina*, Decision on Annulment, 29 June 2010; *Viera v. Chile*, Decision on Annulment, 10 December 2010.

[70] *Rumeli v. Kazakhstan*, Decision of the ad hoc Committee, 25 March 2010; *Viera v. Chile*, Decision on Annulment, 10 December 2010; *Aguas and Vivendi v. Argentina(II)*, Decision on Annulment, 10 August 2010.

[71] *Fraport v. Philippines*, Decision on Annulment, 23 December 2010; *Sempra v. Argentina*, Decision on Annulment, 29 June 2010; *Enron v. Argentina*, Decision on Annulment, 30 July 2010.

[72] *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, para. 245.

[73] *Argentina v. BG Group*, Memorandum Opinion, 7 June 2010, at 23. In *Argentina v. National Grid*, Order, 7 June 2010, the Court (a) dismissed Argentina's petition to vacate or modify the arbitration award as it was time-barred because Argentina had failed to serve notice of the petition within the three month limitations period prescribed by United States law; and (b) granted National Grid's cross-motion for confirmation, recognition, and enforcement of arbitral award.

Several cases were **settled or discontinued** in 2010. *Vattenfall v. Germany*, the first investment arbitration brought against Germany, was settled by the parties.[74] The dispute involved the construction of a coal-fired power plant located near the city of Hamburg. The terms of the settlement, however, remain unknown and, according to the ICSID website, the proceedings have been suspended, but not yet concluded.[75]

The case *Foresti v. South Africa,* which involved the country's Black Economic Empowerment legislation that allegedly diminished the claimants' mineral mining rights was concluded in 2010. After the granting of new mining rights to the complainants in 2009, the claimants requested discontinuance of the ICSID proceedings. The respondent, however, did not agree to the discontinuation. South Africa argued that some of the claims submitted to the tribunal were in fact abandoned by claimants rather than settled, and requested the tribunal to allocate the legal costs of the proceeding to the claimants. The tribunal agreed and concluded the proceeding accordingly.[76]

ISDS developments in 2010 display a number of interesting features. While investors keep using international arbitration as a means for resolving disputes with their host countries, the 25 new disputes in 2010 constitute the lowest number of known treaty-based disputes filed annually since 2001. Moreover, 2010 has seen a significant number of ISCID annulment decisions showing the increased use of this mechanism in reviewing arbitral awards.

These developments expose important aspects of the relationship between States, investors and tribunals in the ISDS context. It appears as if States were increasingly engaging pro-actively in the process, amongst others, with a view to managing and controlling cases early in the process or to questioning the tribunal's reasoning once a case is concluded. This is supported by the increasing use of mediation and other alternatives to arbitration,[77] suggesting that States strive for a stronger role, re-asserting themselves in the ISDS context.

Specific procedural, jurisdictional and substantive questions arising in ISDS cases are paralleled by important developments regarding the design of new IIAs. As one can observe an emerging trend to re-balance the network of more than 6,000 IIAs,[78] issues of investor responsibility are also gaining ground. All of these developments are embedded in and often emphasize the significance of broader systemic issues, such as how to ensure coherence and build an international investment regime that fosters responsible investment and ensures sustainable development.

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[74] http://www.vattenfall.com/en/news-archive.htm?newsid=3C7FCDE9C82C4CF2A2CF3D313FBE1DBD&WT.ac=search_success.

[75] http://icsid.worldbank.org/ICSID/Index.jsp

[76] http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C90&actionVal=viewCase

[77] *Investor-State Disputes: Prevention and Alternatives to Arbitration. Series on International Investment Policies for Development* (New York and Geneva: United Nations), United Nations publication, Sales No. E.10.II.D.11. Available at: http://www.unctad.org/en/docs/diaeia200911_en.pdf.

[78] *World Investment Report 2010. Investing in a Low-carbon Economy* (New York and Geneva: United Nations), United Nations Publication, Sales No. E.10.II.D.2. Available at: http://www.unctad.org/en/docs/wir2010_en.pdf.

Annex 1. Known investment treaty claims, by respondents

Country	Cases
Argentina	51
Mexico	19
Czech Republic	18
Ecuador	16
Canada	15
Venezuela, Bolivarian Republic of	15
Ukraine	14
United States	14
Poland	11
Egypt	10
Kazakhstan	10
Bolivia, Plurinational State of	9
India	9
Russian Federation	9
Romania	8
Turkey	8
Georgia	7
Hungary	6
Slovakia	6
Jordan	5
Moldova, Republic of	5
Congo, Democratic Republic of	4
Costa Rica	4
Mongolia	4
Peru	4
Algeria	3
Chile	3
El Salvador	3
Estonia	3
Guatemala	3
Kyrgyzstan	3
Lebanon	3
Lithuania	3
Pakistan	3
Paraguay	3
Sri Lanka	3
Turkmenistan	3
Zimbabwe	3
Albania	2
Azerbaijan	2
Bangladesh	2
Burundi	2
Croatia	2

Annex 1. Known investment treaty claims, by respondents

Country	Cases
Dominican Republic	2
Germany	2
Ghana	2
Latvia	2
Macedonia	2
Malaysia	2
Morocco	2
Philippines	2
Slovenia	2
Tanzania, United Republic of	2
United Arab Emirates	2
Uzbekistan	2
Yemen	2
Armenia	1
Belize	1
Bosnia and Herzegovina	1
Bulgaria	1
Cambodia	1
France	1
Gabon	1
Grenada	1
Guyana	1
Indonesia	1
Iran, Islamic Republic of	1
Myanmar	1
Nicaragua	1
Nigeria	1
Panama	1
Portugal	1
Saudi Arabia	1
Senegal	1
Serbia	1
South Africa	1
Spain	1
Thailand	1
Trinidad and Tobago	1
Tunisia	1
United Kingdom	1
Uruguay	1
Viet Nam	1
Unknown respondent	7
Total	390

Annex 2. Cases reviewed

1. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic ("Aguas and Vivendi v. Argentina (II)")*, ICSID Case No. ARB/97/3 (Argentina-France BIT), Decision on Annulment, 10 August 2010.

2. *Alpha Projektholding GmbH v. Ukraine ("Alpha Projektholding v. Ukraine")*, ICSID Case No. ARB/07/16 (Austria-Ukraine BIT), Award, 8 November 2010.

3. *Alpha Projektholding GmbH v. Ukraine ("Alpha Projektholding v. Ukraine")*, ICSID Case No. ARB/07/16 (Austria-Ukraine BIT), Decision on Respondent's Proposal to Disqualify Arbitrator, 19 March 2010.

4. *Alasdair Ross Anderson and others v. Costa Rica ("Anderson v. Costa Rica")*, ICSID Case No. ARB(AF)/07/3 (Canada-Costa Rica BIT), Award, 19 May 2010.

5. *The Argentine Republic v. BG Group ("Argentina v. BG Group")*, U.S. District Court for the District of Columbia, Civil Action No. 08-485 (RBW), Memorandum Opinion, 7 June 2010.

6. *The Argentine Republic v. National Grid PLC ("Argentina v. National Grid")*, U.S. District Court for the District of Columbia, Civil Action No. 09-248 (RBW), Order, 7 June 2010.

7. *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan ("ATA Construction v. Jordan")*, ICSID Case No. ARB/08/2 (Jordan-Turkey BIT), Award, 18 May 2010.

8. *AWG Group Ltd. v. The Argentine Republic ("AWG v. Argentina")*, UNCITRAL (Argentina-United Kingdom BIT), Decision on Liability, 30 July 2010.

9. *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador) ("Burlington Resources v. Ecuador")*, ICSID Case No. ARB/08/5 (Ecuador-United States BIT), Decision on Jurisdiction, 2 June 2010.

10. *Chemtura Corporation v. Government of Canada ("Chemtura v. Canada")*, UNCITRAL (NAFTA), Award, 2 August 2010.

11. *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador ("Chevron v. Ecuador (I)")*, UNCITRAL, PCA Case No. 34877 (Ecuador-United States BIT), Partial Award on the Merits, 30 March 2010.

12. *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador ("Chevron v. Ecuador (II)")*, UNCITRAL (Ecuador-United States BIT), Order on Interim Measures, 14 May 2010.

13. *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic ("Enron v. Argentina ")*, ICSID Case No. ARB/01/3 (Argentina-United States BIT), Decision on Annulment, 30 July 2010.

14. *Eureko B.V. v. The Slovak Republic ("Eureko v. Slovakia")*, PCA Case No. 2008-13, UNCITRAL (Czech Republic-Netherlands and Slovak Republic BIT), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

15. *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa ("Foresti v. South Africa")*, ICSID Case No. ARB(AF)/07/01 (BLEU-South Africa and Italy-South Africa BITs), Award, 4 August, 2010.

16. *Fraport AG Frankfurt Airport Services Worldwide v. Philippines ("Fraport v. Philippines")*, ICSID Case No. ARB/03/25 (Germany-Philippines BIT), Decision on Annulment, 23 December 2010.

17. *Ron Fuchs v. The Republic of Georgia ("Fuchs v. Georgia")*, ICSID Case No. ARB/07/15 (Georgia-Israel BIT), Award, 3 March 2010.

18. *Global Trading Resources Corp. and Globex International, Inc. v. Ukraine (Global Trading v. Ukraine")*, ICSID Case No. ARB/09/11 (Ukraine-United States BIT), Award, 1 December 2010.

Annex 2. Cases reviewed

19. *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana ("Hamester v. Ghana")*, ICSID Case No. ARB/07/24 (Germany-Ghana BIT), Award, 18 June 2010.

20. *Helnan International Hotels A/S v. Arab Republic of Egypt ("Helnan v. Egypt")*, ICSID Case No. ARB/05/19 (Denmark-Egypt BIT), Decision on Annulment, 14 June 2010.

21. *Ioannis Kardassopoulos v. The Republic of Georgia ("Kardassopoulos v. Georgia")*, ICSID Case No. ARB/05/18 (Georgia-Greece BIT and ECT), Award, 3 March 2010.

22. *Joseph Charles Lemire v. Ukraine ("Lemire v. Ukraine")*, ICSID Case No. ARB/06/18 (Ukraine-United States BIT), Decision on Jurisdiction and Liability, 14 January 2010.

23. *Merrill & Ring Forestry L.P. v. Canada ("Merrill & Ring v. Canada")*, UNCITRAL, ICSID Administered Case (NAFTA), Award, 31 March 2010.

24. *Murphy Exploration and Production Company International v. Republic of Ecuador ("Murphy Exploration v. Ecuador")*, ICSID Case No. ARB/08/4 (Ecuador-United States BIT), Award, 15 December 2010.

25. *Railroad Development Corporation ("RDC v. Guatemala") v. Guatemala*, ICSID Case Number ARB/07/23 (United States-CAFTA DR FTA), Second Decision on Objections to Jurisdiction, 18 May 2010.

26. *RosInvestCo UK Ltd. v. The Russian Federation ("RosInvestCo v. Russia")*, SCC Case No. Arb. V079/2005 (Soviet-United Kingdom BIT), Final Award, 12 September 2010.

27. *RSM Production Company and others v. Grenada ("RSM v. Grenada")*, ICSID Case No. ARB/10/6 (Grenada-United States BIT), Award, 10 December 2010.

28. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan ("Rumeli v. Kazakhstan")*, ICSID Case No. ARB/05/16 (Kazakhstan-Turkey BIT), Decision of the *ad hoc* Committee, 25 March 2010.

29. *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20 (Netherlands-Turkey BIT), Award, 14 July 2010.

30. *Sempra Energy International v. The Argentine Republic ("Sempra v. Argentina")*, ICSID Case No. ARB/02/16 (Argentina-United States BIT), Decision on Annulment, 29 June 2010.

31. *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay (SGS v. Paraguay"), ICSID Case No. ARB/07/29 (Paraguay-Switzerland BIT), Decision on Jurisdiction, 19 February 2010 (not public).*

32. *Sociedad Anónima Eduardo Vieira v. Republic of Chile ("Vieira v. Chile")*, ICSID Case No. ARB/04/7 (Chile-Spain BIT), Decision on Annulment, 10 December 2010.

33. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic ("Suez and Vivendi v. Argentina")*, ICSID Case No. ARB/03/19 (Argentina-France and Argentina-Spain BITs), Decision on Liability, 30 July 2010.

34. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interaguas Servicios Integrales del Agua S.A. v. Argentine Republic ("Suez v. Argentina")*, ICSID Case No. ARB/03/17 (Argentina-France and Argentina-Spain BITs), Decision on Liability, 30 July 2010.

35. *Total S. A. v. The Argentine Republic (Total v. Argentina)*, ICISD Case No. ARB/04/01 (Argentina-France BIT), Decision on Liability, 27 December 2010.

36. *Ulysseas, Inc. v. Ecuador ("Ulysseas v. Ecuador"), UNCITRAL (Ecuador-United States BIT), Decision on Jurisdiction, September 2010 (not public).*

37. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic ("Urbaser v. Argentina")*, ICSID Case No. ARB/07/26 (Argentina-Spain BIT), Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, 12 August 2010.

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