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RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)

Highlights

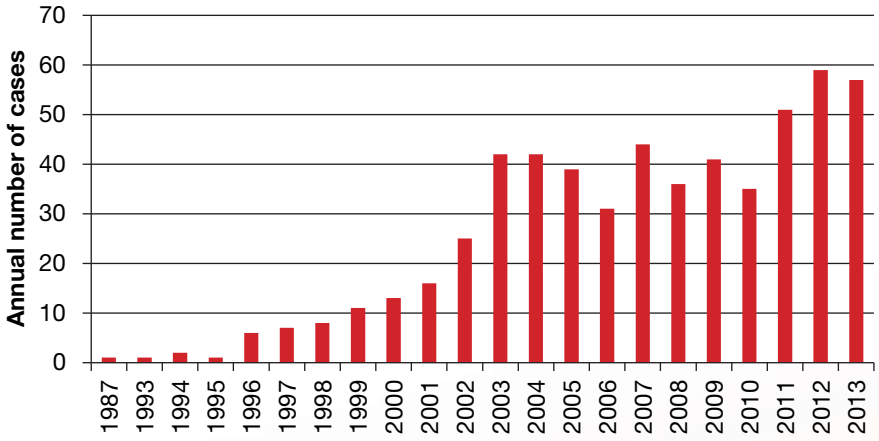
- In 2013, investors initiated at least 57 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs). This comes close to the previous year's record high number of new claims.
- An unusually high number of cases (almost half of the total) were filed against developed States; most of these have the Member States of the European Union as respondents.
- Of the 57 new cases, 45 were brought by investors from developed countries and the remaining by investors from developing countries.
- Claimants have challenged a broad range of government measures, including changes related to investment incentive schemes, alleged breaches of contracts, alleged direct or *de facto* expropriation, revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions, invalidation of patents, and others.
- Thirteen of the new cases arise from two sets of government measures (regarding renewable energy), adopted by the Czech Republic and Spain. Two cases relate to the Greek financial crisis. Several arbitrations have an environmental dimension.
- By end of 2013, 98 States have been respondents in a total of 568 known treaty-based cases.
- Together, claimants from the EU and the United States account for 75 per cent of all cases.
- In 2013, ISDS tribunals rendered 37 known decisions, 23 of which are in the public domain, including decisions on jurisdiction, merits, compensation and applications for annulment.
- In seven out of the eight decisions on the merits, the tribunal accepted – at least in part – the claims of the investors. The award of USD 935 million in the *Al-Kharafi v. Libya* case is the second highest known award in history.
- The overall number of concluded cases reached 274. Of these, approximately 43 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 26 per cent of cases were settled.
- The public discourse about the usefulness and legitimacy of ISDS continues to gain momentum, especially in the context of important IIA negotiations that are currently ongoing.

I. Statistical Update: 2013

A. New claims[1]

In 2013, investors initiated at least 57 known investor-State dispute settlement (ISDS) cases pursuant to international investment agreements (IIAs) (see figure 1 and annex 1).[2] This comes close to the previous year's record high number of new claims.

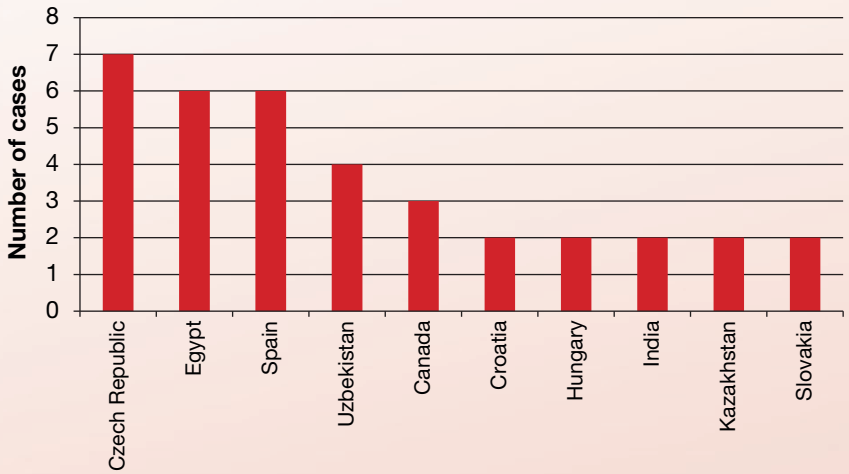
Figure 1. Known ISDS cases, annual (1987-2013)



Source: UNCTAD

Respondent States. Last year witnessed an unusually high number of cases against developed States (27); the remaining cases have developing (19) and transition (11) economies as respondents (figure 2). Last year's most frequent respondent was the Czech Republic (7), followed by Egypt (6), Spain (6), Uzbekistan (4) and Canada (3). Venezuela, the previous year's most frequent respondent, received only one claim in the review period. Cyprus, Greece and Madagascar have to contend with their first-known ISDS claims (one each).

Figure 2. Most frequent respondent States (2013)



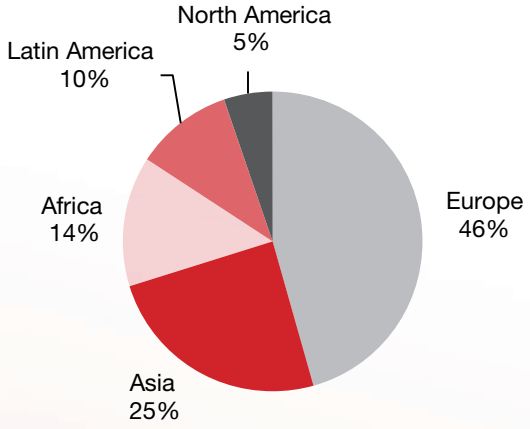
[1] Information about 2013 claims has been compiled on the basis of public sources, including specialized reporting services such as the *Investment Arbitration Reporter* and *Global Arbitration Review*. We are grateful for additional information received from the ICSID Secretariat, the Energy Charter Treaty Secretariat, the Permanent Court of Arbitration, the London Court of International Arbitration and the IA Reporter.

[2] This Note does not cover cases that are exclusively based on investment contracts (State contracts) or national investment laws, nor cases where a party has so far only signaled its intention to submit a claim to ISDS, but has not yet commenced the arbitration.

Multiplicity of claims. In 2013, there were at least two instances where a measure, or a set of related measures, gave rise to more than one claim. More specifically, the same changes in energy regulations in the Czech Republic resulted in seven separate claims against it.[3] Similarly, Spain faced six separate cases in which investors challenge the same government regulations that adversely affected solar energy producers.[4] (The energy cases against the Czech Republic and Spain are discussed further below.)

Regional distribution of respondent States. The greatest number of 2013 cases were brought against countries in Europe (26 cases, of which two are against countries not members of the European Union (EU) – Albania and Serbia), followed by Asia (14),[5] Africa (8) and Latin America (6). Three cases were brought against a North American country (Canada) last year (figure 3).

Figure 3. Regional distribution of respondent States (2013)



Intra-EU disputes. Twenty four arbitrations (42 per cent of all cases) were brought against EU Member States. The range of countries involved is broad and includes both "new" and "old" Member States, namely the Czech Republic (7 cases), Spain (6), Croatia (2), Hungary (2), Slovakia (2), Bulgaria (1), Cyprus (1), France (1), Greece (1), and Slovenia (1). In all of these arbitrations except for one,[6] the claimants are also EU nationals; they started the proceedings on the basis of either intra-EU bilateral investment treaties (BITs) or the Energy Charter Treaty (ECT), sometimes relying on both at the same time. The year's developments brought the overall number of intra-EU investment arbitrations to 88, i.e. approximately 15 per cent of all cases globally.[7]

Home country of investor. Of the 57 new cases, 45 were brought by investors from developed countries and 12 were brought by investors from developing countries. This ratio roughly corresponds to the earlier trend. Investors from the following home States brought the largest numbers of new claims (figure 4): the Netherlands (7 cases), Germany, Luxembourg and the United States (6 each), Turkey and the United Kingdom (5 each), and Cyprus, France, Jordan and Spain (3 each).[8]

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[3] Initially, six of the seven claims were brought as one consolidated claim by a group of ten investors. The respondent State objected to the consolidation of the claims and appointed arbitrators in what it considered to be six separate cases, only agreeing to the consolidation of claims if the claimants were affiliates or if they had allegedly invested in the same operation. See S. Perry and K. Karadelis, "Sun rises on Czech energy claims", *Global Arbitration Review*, 19 February 2014, available at http://globalarbitrationreview.com/news/article/32436/sun-rises-czech-energy-claims/ (accessed on 25 February 2014).

[4] All claims were brought separately.

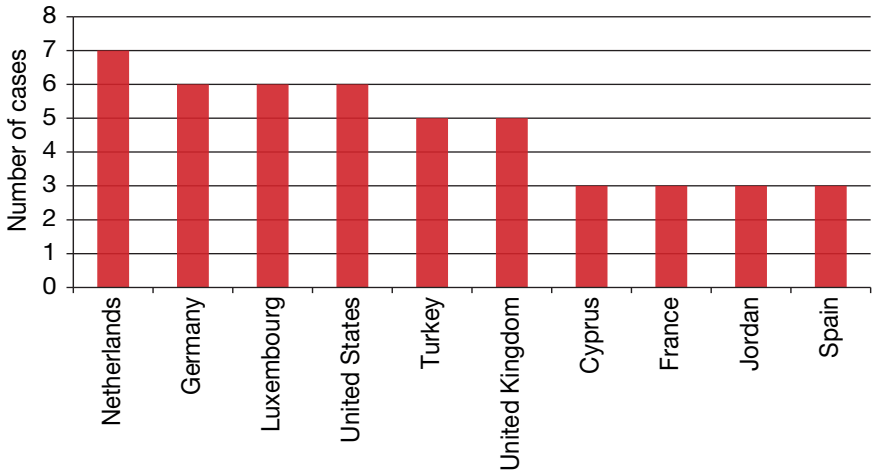
[5] Nine of the 14 Asian cases are against transition economies in Central Asia (Kazakhstan, Kyrgyz Republic, Turkmenistan and Uzbekistan).

[6] The case of *Erbil Serter v. French Republic* (ICSID Case No. ARB/13/22) was brought by a Turkish national, under the France-Turkey BIT.

[7] When calculating intra-EU disputes, the time factor (i.e., when a particular State joined the EU) has been disregarded; disputes between all States that are currently members of the EU are counted as intra-EU disputes.

[8] A number of cases include co-claimants of different nationalities.

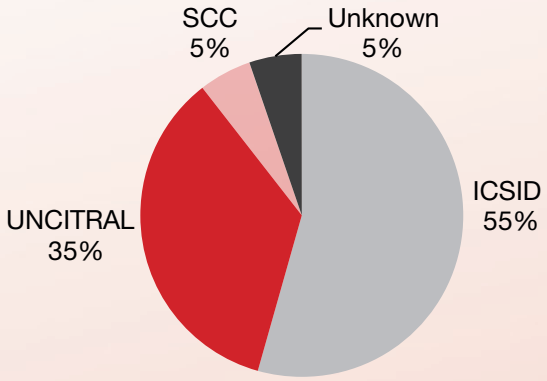
Figure 4. Most frequent home States (2013)



Economic sectors involved. More than 70 per cent of all new claims concern investments in the services sector, including the supply of electricity or gas, telecommunications, construction, tourism, banking, real estate services, retail trade, media and advertising, and others. The majority of the remaining claims involve investments in the primary sector (oil and gas, mining), while six cases relate to manufacturing industries.

Arbitral forums/rules. Of the 57 new disputes, 31 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (of which two cases are under the ICSID Additional Facility Rules), 20 under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and three under the Stockholm Chamber of Commerce (SCC). For three cases, the applicable arbitration rules/venues are unknown (figure 5). All of the UNCITRAL cases were filed pursuant to IIAs concluded prior to 2014 and, therefore, the new UNCITRAL Transparency Rules[9] do not apply to any of them, unless the disputing parties agree to their application in their specific dispute.[10]

Figure 5. Arbitral forums/rules (2013)



Applicable investment treaties. The majority of new cases were brought under BITs. Ten cases were filed pursuant to the provisions of the Energy Charter Treaty (sometimes in conjunction with a BIT), three cases under the North American Free Trade Agreement (NAFTA), two cases under the Moscow Convention on the

[9] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

[10] There is also an option for the States parties to the treaty to agree that disputes brought pursuant to their pre- 2014 IIAs (i.e., IIAs concluded before 1 April 2014) will be subject to the UNCITRAL Transparency Rules. Moreover, the UNCITRAL Working Group on Arbitration also commenced work on the preparation of a multilateral convention on transparency, which, if adopted, would serve as a mechanism to create the agreement necessary to apply the Rules to pre-2014 IIAs.

Protection on Investor Rights,[11] and one case under the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA).

Amounts claimed. Information regarding the amount sought by investors is scant. For cases where this information has been reported, the amount claimed ranges from USD 27 million[12] to about USD 1 billion.[13]

B. New claims in 2013: some highlights

Challenged measures. Similar to previous years, investors challenged a broad range of government measures. These include: changes related to investment incentive schemes (at least 14 cases), cancellation or alleged breaches of contracts by States (at least 10), alleged direct or *de facto* expropriation (at least 5), revocation of licenses or permits, regulation of energy tariffs, allegedly wrongful criminal prosecution, land zoning decisions, creation of a State monopoly in a previously competitive sector, allegedly unfair tax assessments or penalties, invalidation of patents, and legislation relating to sovereign bonds. The subject matter of several disputes is unknown.

Renewable energy cases. 2013 is notable for a large number of cases filed by investors in solar energy installations against the Czech Republic and Spain. In fact, nearly a quarter of all arbitrations initiated in 2013 involve challenges to the regulatory actions by those two countries that affected the renewable energy sector.[14] With respect to the **Czech Republic**, investors are challenging the 2011 amendments that placed a levy on electricity generated from solar power plants. They argue that these amendments undercut the viability of the investments and modified the incentive regime that had been originally put in place to stimulate the use of renewable energy in the country.[15] The claims against **Spain** arise out of a seven per cent tax on the revenues of power generators and a reduction of subsidies for renewable energy producers.[16]

In addition to the solar energy claims, there is another case where an investor is complaining of the revocation of an investment incentive (VAT subsidy).[17]

Greek financial crisis. Two of the cases brought in 2013 relate to the Greek financial crisis. Marfin Investment Group (MIG) filed a claim against Cyprus in connection with the Government's effective takeover of the Cyprus Popular Bank (in 2012, by decree, the State increased its stake in the Bank to 84 per cent). The Government's actions were taken to stabilize the Bank, which was suffering from broad exposure to defaulted Greek sovereign debt and other non-performing loans in Greece. The claimant alleges that the Government unlawfully diluted the claimant's stake in the bank, mismanaged the bailout and "*arbitrarily and illegally*" replaced the former management team, which "*led to the large losses subsequently incurred by the bank*."[18] According to the investor, these actions violated the Cyprus-Greece BIT. The claimant is seeking EUR 824 million in compensation.

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[11] Signed in 1997 by a number of countries belonging to the Commonwealth of Independent States (Armenia, Belarus, Moldova, Tajikistan, Kazakhstan, the Kyrgyz Republic and Russia).

[12] *Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain* (SCC).

[13] *Khaitan Holdings Mauritius v. India* (UNCITRAL); *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus* (ICSID Case No. ARB/13/27).

[14] In 2014, two more cases were filed by investors in the solar power sector – one against Spain and one against Italy.

[15] C. Spalton, "Solar investors cast cloud over the Czech Republic", *Global Arbitration Review*, 17 May 2013, available at http://globalarbitrationreview.com/news/article/31589/solar-investors-cast-cloud-czech-republic/ (accessed on 25 February 2014); S. Perry and K. Karadelis, "Sun rises on Czech energy claims", *Global Arbitration Review*, 19 February 2014, available at http://globalarbitrationreview.com/news/article/32436/sun-rises-czech-energy-claims/ (accessed on 25 February 2014).

[16] Law 15/2012 of 27 December 2012, available at http://www.boe.es/boe/dias/2012/12/28/pdfs/BOE-A-2012-15649.pdf (accessed on 25 February 2014) and Law 2/2013 of 1 February 2013, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-1117 (accessed on 25 February 2013).

[17] *Spentex Netherlands, B.V. v. Republic of Uzbekistan* (ICSID Case No. ARB/13/26).

[18] Press Release by Marfin Investment Group, 23 January 2013, available at http://www.marfininvestmentgroup.com/en/view/press-releases (accessed on 25 February 2014).

The second crisis-related claim was brought against Greece by Poštová banka, a Slovak bank, together with its Cypriot shareholder. The claimants allege that, as owners of Greek sovereign bonds, they suffered losses of EUR 275 million, arising from the 2012 Greek Bondholder Act. Allegedly, the Act "*retroactively and unilaterally*" amended the terms of the bonds by inserting a "*collective action*" clause, which permitted the "*imposition of new terms upon bondholders against their consent if a supermajority of other bondholders consent[ed].*"[19] The claimants contend that Greece used this clause to force Poštová banka to exchange its bonds for new securities of substantially less value.[20]

Enforcement of a host State's court decision. Cases where investors challenge the conduct of the domestic courts of the host State are not infrequent. However, apparently for the first time, an investor resorted to international arbitration to *enforce* the decision of the host State's highest court. In *Transglobal Green Energy v. Panama*, the claimant alleges that the government's executive branch failed to implement the decision of Panama's Supreme Court (to reinstate the investor's company as a concessionaire in a hydroelectric project) and thereby breached the Panama-United States BIT.[21]

Challenge to a prospective measure. Another unusual claim was initiated by Achmea against the Slovak Republic. Achmea, a Dutch insurance company, is seeking to preclude the host State from expropriating Achmea's stake in a Slovak health insurer (the relevant draft law is under consideration by the Slovak Parliament). The right of States to expropriate property is well-established under international investment law as long as certain conditions are met. Achmea is claiming that some of these conditions would be breached (requirement of public interest, non-discrimination and due process) if the expropriation goes ahead.[22]

Environment-related disputes. Several arbitrations launched in 2013 have an environmental dimension. In two disputes against Canada, investors are challenging measures introduced on environmental grounds. The first, a claim by Lone Pine Resources, arose out of Quebec's moratorium on hydraulic fracturing (fracking) that led to the revocation of the company's gas exploration permits.[23] The second dispute relates to Ontario's moratorium on offshore wind farms (pending research on their health and environmental effects); the claimant contends that the temporary ban breaches its contract for the electricity supply which it had concluded with the Ontario Power Authority for a 20-year period.[24]

Two further disputes both relate to failed developments of beachfront resorts in environmentally sensitive areas. In *Spence v. Costa Rica*, the claimants contend that the land they had acquired was expropriated to create a beachfront ecological park, without prompt or effective compensation paid to them. They also suggest that the government's decisions were marred by conflicts of interest of the decision makers,

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19 "Bondholders' Claim against Greece is Registered at ICSID, as Mandatory Wait-Period Expires on Another Threatened Arbitration", *IA Reporter*, 30 May 2013, available at http://www.iareporter.com/articles/20130530_2 (accessed on 25 February 2013).

20 *Ibid.*

21 *Transglobal Green Energy LLC and Transglobal Green Panama, S.A. v. Republic of Panama* (ICSID Case No. ARB/13/28), Request for Arbitration, 19 September 2013, available at http://www.italaw.com/cases/2242 (accessed on 28 February 2014).

22 Press-release by Achmea, 5 February 2013, available at http://news.achmea.nl/achmea-undertakes-legal-steps-against-slovak-republic (accessed on 28 February 2014); L. Franc-Menget, «ACHMEA II – Seizing Arbitral Tribunals to Prevent Likely Future Expropriations: Is it an Option?», available at http://kluwerarbitrationblog.com/blog/2013/03/28/achmea-ii-seizing-arbitral-tribunals-to-prevent-likely-future-expropriations-is-it-an-option/ (accessed on 28 February 2014). The case raises novel legal issues regarding the possibility of challenging prospective measures and exclusively resort to non-pecuniary remedies (order the respondent to abstain from certain actions).

23 *Lone Pine Resources Inc. v. The Government of Canada* (UNCITRAL), Notice of Arbitration, 6 September 2013, available at http://www.italaw.com/cases/1606 (accessed on 28 February 2014).

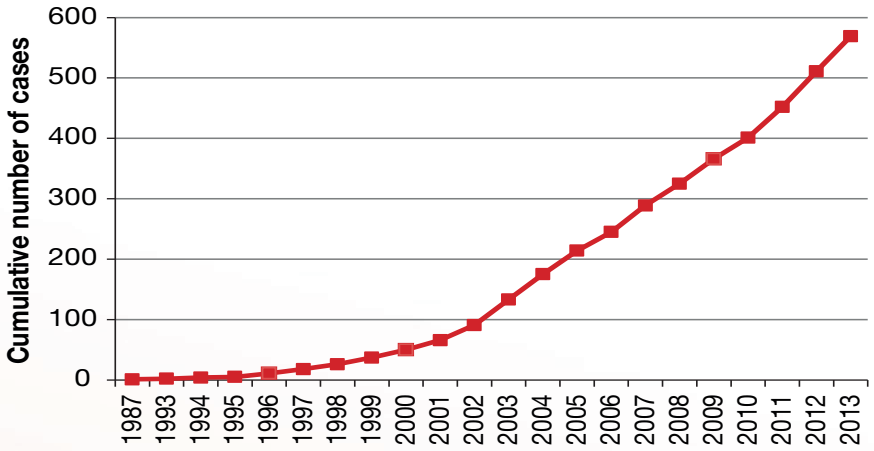
24 *Windstream Energy LLC v. Government of Canada* (UNCITRAL), Notice of Arbitration (Amended), 5 November 2013, available at http://italaw.com/cases/1585 (accessed on 28 February 2014).

and that their decisions were not unbiased or objective.[25] In *Lieven Riet et al. v. Croatia*, the claimants maintain that due to the misleading assurances they received from the local zoning office, they purchased land where residential development was barred, which did not allow their beach resort project to proceed.[26]

C. Total claims by end 2013

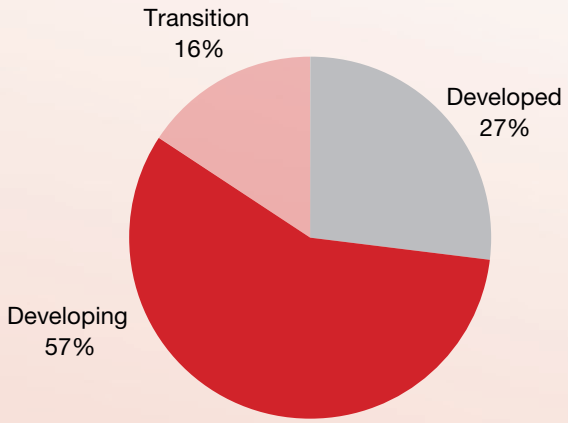
The total number of known treaty-based cases reached 568 by the end of 2013 (figure 6).[27] Since most arbitration forums do not maintain a public registry of claims, the total number of cases is likely to be higher.

Figure 6. Known ISDS cases (total as of end 2013)



Respondent States. In total, over the years at least **98 governments** have been respondents to one or more investment treaty arbitration (see annex 2). About three-quarters of all known cases were brought against developing and transition economies (figure 7).

Figure 7. Respondent States by development status (total as of end 2013)



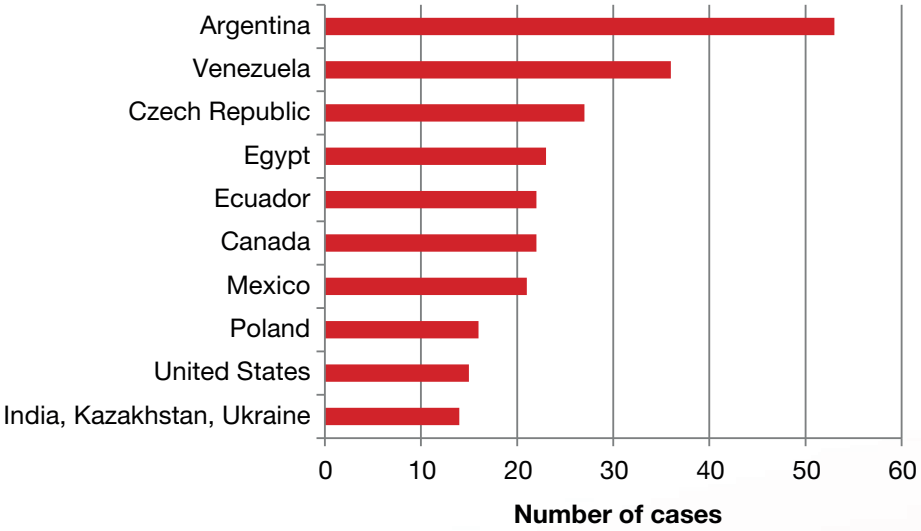
[25] *Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brette E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion v. The Government of the Republic of Costa Rica* (UNCITRAL), Notice of Arbitration and Statement of Claim, 10 June 2013, available at http://italaw.com/sites/default/files/case-documents/italaw1502.pdf (accessed on 28 February 2014).

[26] L. E. Peterson, "As Croatia Joins EU, it Faces ICSID Arbitration Over Thwarted Resort Development on Dalmatian Coast", IA Reporter, 4 July 2013, available at http://www.iareporter.com/articles/20130704_1 (accessed on 28 February 2014).

[27] Following a verification exercise, the number of total known IIA-based ISDS cases at the end of 2012 was revised down to 511 from 514, as reported in UNCTAD's 2013 IIA Issue Note No. 1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf. The verification process led to the addition of a number of previously unknown cases and the deletion of a number of cases where information was too scarce to ensure accurate reporting.

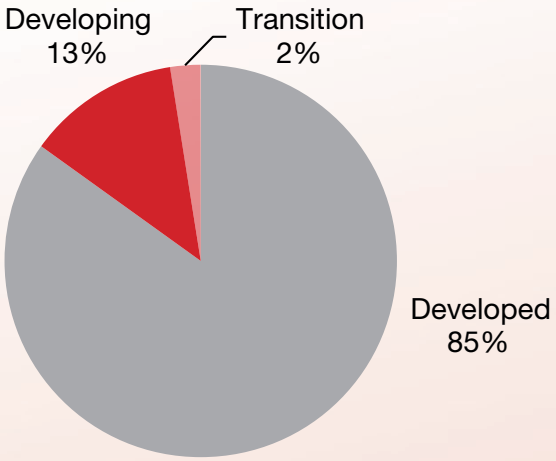
Argentina (53 cases) and Venezuela (36) continue to be the most frequent respondents. The Czech Republic (27) and Egypt (23) replaced last year's Ecuador and Mexico as number three and four respectively (figure 8).

Figure 8. Most frequent respondent States (total as of end 2013)



Home States. The overwhelming majority (85 per cent) of ISDS claims were brought by investors from developed countries (figure 9).

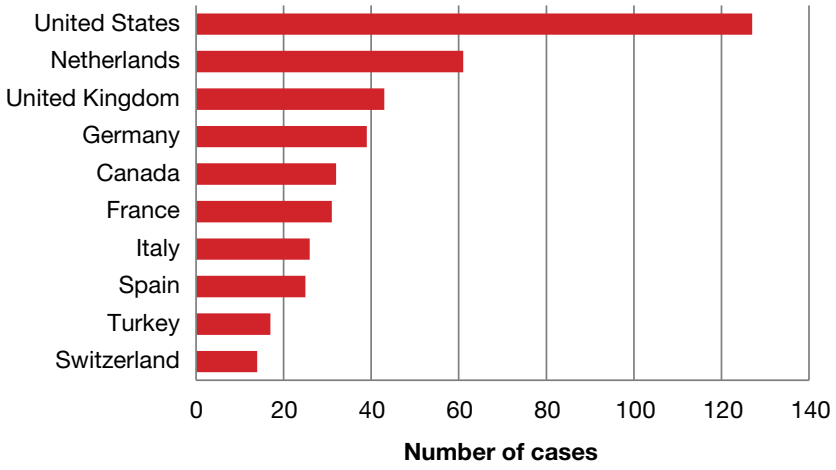
Figure 9. Home States by level of development (total as of end 2013)



Arbitrations have been initiated most frequently by claimants from the European Union (299 cases, or 53 percent or all known disputes) and the United States (127 cases, or 22 percent).[28] Among the EU Member States, claimants most frequently come from the Netherlands (61 cases), the United Kingdom (43), Germany (39), France (31), Italy (26) and Spain (25). Apart from countries in the European Union and the United States, only Canada, with 32 cases, counts as a home State with a significant number of investment claims (figure 10).

[28] A State is counted if the claimant, or one of the co-claimants, is a national (physical person or company) of the respective State. This means that where one case is brought by claimants of different nationalities, this case is counted for each nationality.

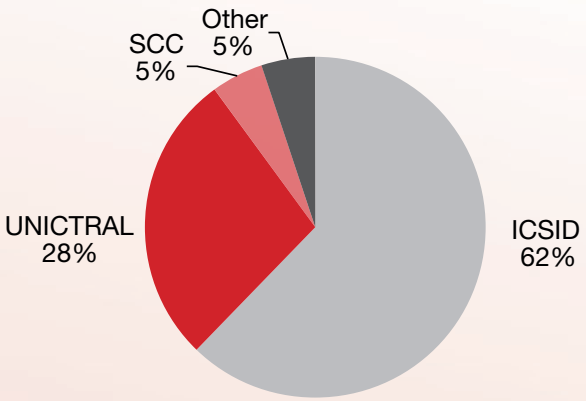
Figure 10. Most frequent home States (total as of end 2013)



Legal instruments. The three investment instruments most frequently used as a basis for ISDS claims have been NAFTA (51 cases), the Energy Charter Treaty (42) and the Argentina-United States BIT (17). At least 72 arbitrations have been brought pursuant to intra-EU BITs.

Arbitral forums. The majority of cases have been brought under the ICSID Convention and the ICSID Additional Facility Rules (353 cases) and the UNCITRAL Rules (158).[29] Other venues have been used only rarely, with 28 cases at the Stockholm Chamber of Commerce and six at the International Chamber of Commerce (see figure 11).

Figure 11. Arbitral forums/rules (total as of end 2013)



D. Outcomes in 2013

In 2013, ISDS tribunals rendered at least **37 decisions in investor-State disputes** (see annex 3), 23 of which are in the public domain (at the time of writing).[30] Of the 23 public decisions, fourteen principally addressed jurisdictional issues, with seven decisions upholding the tribunal's jurisdiction (at least in part) and seven decisions rejecting jurisdiction.[31] Eight decisions on the merits were rendered in 2013, with seven accepting – at least in part – the claims of the investors, and one dismissing all of the claims. Compared to previous years, the percentage of

[29] A number of cases under the UNCITRAL Rules are administered by the Permanent Court of Arbitration (PCA). By the end of 2013, the total number of investor-State cases administered by the PCA was 99, of which 50 were pending on 31 December 2013. Only 23 of all PCA-administered ISDS cases are public. *Source*: the Permanent Court of Arbitration International Bureau.

[30] There may have been other decisions in 2013 whose existence is not known due to the confidentiality of the dispute concerned.

[31] These exclude those decisions that upheld the tribunal's jurisdiction and considered at the same time the merits of the dispute.

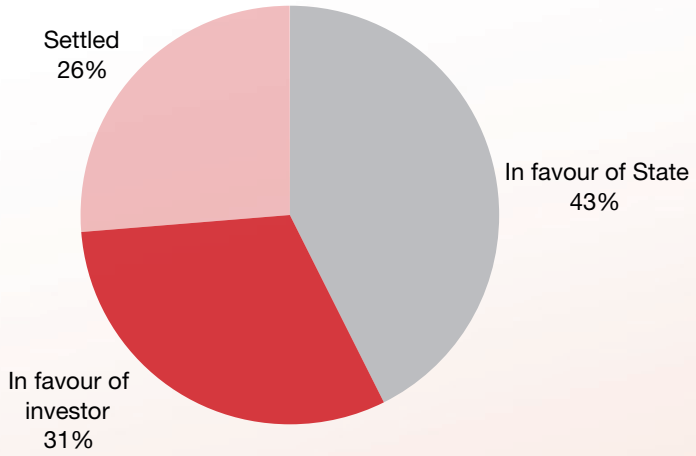
decisions rejecting jurisdiction in 2013 is higher, and the percentage of rulings on the merits in favour of the State is lower.

Of the **seven decisions finding States liable**, five found a violation of the fair and equitable treatment (FET) provision and two of the expropriation provision. At least five decisions rendered in 2013 awarded compensation to the investor, including an award of USD 935 million plus interest, the second highest known award in history.[32]

While three decisions on **applications for annulment** were issued in 2013 by ICSID *ad hoc* committees, only one, dismissing all claims for annulment, has been made public. In 2013, individual arbitrators issued **separate opinions** in seven of the 23 decisions that are in the public domain (in 2012 there had been six such opinions out of 32 public decisions).

2013 arbitral developments brought the **overall number of concluded cases** to 274.[33] Out of these, approximately 43 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 26 per cent of cases were settled (figure 12). In settled cases, the specific terms of settlement typically remain confidential.[34]

Figure 12. Results of concluded cases (total as of end 2013)



II. 2013 Decisions – An Overview[35]

A. Jurisdictional and admissibility issues

Consultation and negotiation requirement. Many IIAs impose on investors a requirement to consult/negotiate with the host State before bringing the claim to arbitration; however, they rarely spell out consequences of an investor's failure to meet this obligation. In *Tulip Real Estate v. Turkey*, the claimant argued that

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[32] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award, 22 March 2013. In one case claimants could not establish any damage thus no award of compensation was made (*Rompetrol v. Romania*), and in another case the quantification of damages was postponed to a subsequent phase of the arbitration proceedings (*ConocoPhillips v. Venezuela*).

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

[34] Settlements that become public knowledge allow for their discussion and analysis. A notable development occurred in 2014, when Argentina agreed to pay USD 5 billion (in Argentine sovereign bonds) to Repsol, in settlement of the company's ICSID claim (*Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38)).

[35] While the monitor aims to highlight key findings stemming from all of the (publicly available) decisions that investment treaty tribunals rendered in 2013 (as well as decisions issued in previous years but only made public during 2013), it is not a comprehensive review. Texts of the relevant arbitral awards can be found at www.italaw.com. For another useful review of recent arbitral decisions, see D. Vis-Dunbar and D. Rosert, "A Review of Recent Investment Arbitration Decisions", International Institute for Sustainable Development (IISD), 2013, available at http://www.iisd.org/pdf/2013/7th_annual_forum_final_report.pdf (accessed on 14 March 2014).

non-compliance with the consultation requirement does not create a jurisdictional hurdle to filing an ICSID claim and does not impact the admissibility of a claim. Noting the clear lack of a *jurisprudence constante* with regard to this type of treaty provision, the *Tulip* tribunal rejected this argument and found that the requirement to seek consultations and negotiations until one year has elapsed from the date of notification of the dispute "*is not to be watered down to a mere statement of aspiration*".[36] In the view of the tribunal, compliance with such a requirement "*is an essential element of Turkey's prospective consent*" to international arbitration and thus "*a pre-condition to the jurisdiction of this Tribunal*."[37]

Definition of "investment" for purposes of establishing the scope of application of (as well as the jurisdiction under) an investment treaty. Tribunals have continued to grapple with the need to decide whether the claimants' economic activities meet the attributes of an "investment" in order to determine whether they are covered by the IIA. The tribunal in *Apotex v. United States* dismissed the claim for lack of jurisdiction as it concluded that the claimant's activities with respect to the contemplated sales of its sertraline and pravastatin products in the United States were those of an exporter, not an investor.[38] In the view of the *Apotex* tribunal, Apotex's request for regulatory approval from the US Food and Drug Administration "*cannot change the nature of the underlying activity, or constitute an 'investment' in and of itself, within the meaning and scope of NAFTA Article 1139*."[39]

In another case, *Ambiente Ufficio v. Argentina*, the respondent argued that the investment at issue (Argentina's sovereign bond instruments) was not made "in the territory" of the host State as required by Article 1 of the Argentina-Italy BIT and that, hence, it was not covered by the treaty. However, the majority of the tribunal held that "*looking at the investment operation at stake as a whole and in terms of its economic realities, it is hard to imagine the investment's situs to be elsewhere than in Argentina.*"[40] The dissenting arbitrator in *Ambiente Ufficio* noted, on the contrary, that the "*territoriality requirement is indeed one of the most outstanding features of the Argentina-Italy BIT tak[en] as a whole […]. Being expressly and clearly manifested in the text of the BIT, the territoriality requirement as defined therein cannot be put aside in an interpretation of the common intention of Argentina and Italy on the issue of the 'protected investments' when they concluded the BIT*."[41] He furthermore noted that "*[t]he selling of the sovereign bonds issued by Argentina to the placing banks or underwriters in the international primary market and the buying in the Italian retail market by the Claimants of security entitlements in Argentina sovereign bonds [did not comply] with the territoriality requirement of Article 1(1) of the Argentina-Italy BIT. Sovereign bonds are intangible capital flows without physical implantation in a given host country's territory*."[42]

Definition of "investment" for purposes of establishing jurisdiction under the ICSID Convention. As is well known, Article 25 of the ICSID Convention uses the term "investment" without defining it, which has caused a prolonged controversy about the intended scope of this term. Decisions rendered in 2013 continue to

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[36] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Bifurcated Jurisdictional Issue [Art 41 ICSID], 5 March 2013, para. 72.

[37] *Ibid*.

[38] Following the view of the tribunal in *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America (UNCITRAL)*, Award, 12 January 2011.

[39] *Apotex Inc. v. The Government of the United States of America* (UNCITRAL), Award on Jurisdiction and Admissibility, 14 June 2013, paras. 244-245.

[40] *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, para. 508 ("*The Tribunal cannot join the Respondent's conclusion that the investment was not made in the Respondent's territory since the decisive elements, notably the fact that the funds involved were destined to contribute to Argentina's economic development and were actually made available to it for that purpose, qualify the investments pertinent to the present case as having been made in Argentina.*").

[41] *Ibid.*, Dissenting Opinion of Santiago Torres Bernárdez, 2 May 2013, para. 303.

[42] *Ibid.*, para. 316.

disagree on the meaning of "investment" in Article 25 and in particular on the exact relevance, if any, of the so-called *Salini* criteria.[43] The tribunal in *Philip Morris v. Uruguay* found that the notion of "investment" in Article 25 of the ICSID Convention "*covers a wide range of economic operations confirming the broad scope of its application, subject to the possibility for States to restrict the jurisdiction ratione materiae by limiting their consent either in their investment legislation or in the applicable treaty.*"[44] While it recognized the existence of outer limits of the notion of investment for purposes of establishing jurisdiction under the ICSID Convention (e.g. noting that "*a single commercial transaction*" does not qualify as an investment), the *Philip Morris* tribunal took the view that it is for the States' agreement (as reflected in the present case by the BIT) to define the scope of the "investment" that they accept to protect by their treaty.[45]

On the other hand, the tribunals in *Ambiente Ufficio v. Argentina* and *KT Asia v. Kazakhstan* differed from the *Philip Morris* decision as they did not focus primarily on the definition of investment found in the underlying treaty but, instead, framed their analysis by reference to the *Salini* criteria.

The majority of the tribunal in *Ambiente Ufficio* noted that the *Salini* test criteria do not constitute mandatory prerequisites for the jurisdiction of ICSID under Article 25 of the ICSID Convention. At the same time, the majority acknowledged that the criteria "*may still prove useful, provided that they are treated as guidelines and that they are applied in conjunction and in a flexible manner*"[46] and "*may help to identify, and exclude, extreme phenomena that must remain outside of even a broad reading of the term 'investment' in Art. 25 of the ICSID Convention.*"[47] Following the majority decision in *Abaclat v. Argentina*,[48] the majority in *Ambiente Ufficio* found that sovereign bonds and security entitlements could not be compared to single commercial transactions and it could see no reason to exclude the claim from ICSID "*if and to the extent that there is evidence that the States parties, i.e. Argentina and Italy, considered those to be investments to be protected*".[49]

One of the arbitrators in *Ambiente Ufficio* dissented with the majority, noting that a good faith international law interpretation of the term "investment" in Article 25 of the ICSID Convention would require the exclusion of portfolio investments and other financial negotiable products, traded with high velocity of circulation in capital markets and in geographically remote locations from the State in whose territory the investment is supposed to take place, between persons alien to any economic activity in the host State.[50]

The *KT Asia v. Kazakhstan* tribunal recognized that the claimant "*must show that it has made an 'investment' under the objective definition developed in the framework of the ICSID Convention in order to establish that the Tribunal has ratione materiae*

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[43] The criteria were formulated in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 31 July 2001. According to the Salini tribunal, investments infer: contributions [of capital or resources], a certain duration of performance of the contract, a participation in the risks of the transaction, as well as the contribution to the economic development of the host State.

[44] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal HermanosS.A. v. Oriental Republic of Uruguay)* (ICSID Case No. ARB/10/7), Decision on Jurisdiction, 2 July 2013, para. 200.

[45] *Ibid.*, para. 203.

[46] *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, para. 481.

[47] *Ibid*.

[48] *Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic)* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011.

[49] *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 471-472.

[50] *Ibid.*, Dissenting Opinion of Santiago Torres Bernárdez, 2 May 2013, paras. 262-263.

jurisdiction over the present dispute."[51] Citing earlier decisions,[52] the tribunal noted that, (1) commitment of resources, (2) duration and (3) risk form part of the objective definition of the term "investment".[53] Similar to the *Philip Morris* decision, however, the *KT Asia* tribunal rejected the relevance of the investment's contribution to the host State's economic development. The *KT Asia* tribunal noted that, "*while economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment.*"[54]

The requirement of "judicial finality" in cases alleging judicial misconduct. The tribunal in *Apotex v. United States* noted that both disputing parties had agreed (following the *Loewen* precedent) that any claim under the NAFTA based upon a judicial act is subject to a requirement that the claimant first exhaust all of the judicial remedies within the host State (i.e., judicial finality) unless such recourse is "*obviously futile*".[55] While the tribunal was sympathetic to Apotex's decision not to petition the US Supreme Court (unlikely to have secured the desired relief), it concluded that, at least with regard to one claim, the investor had not satisfied the judicial finality requirement. In the tribunal's view, "*under established principles, the question whether the failure to obtain judicial finality may be excused for 'obvious futility' turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief.*"[56]

***Ratione personae* jurisdiction under Article 25 of the ICSID Convention**. The tribunal in *Burimi v. Albania* found that Burimi SRL was an Italian legal entity and that whether it was under "foreign control" was irrelevant to the determination of its nationality.[57] The majority in *Ambiente v. Argentina* concluded that, for purposes of establishing jurisdiction *ratione personae* under Article 25 of the ICSID Convention, "*the burden of proof that the Claimants are Italian nationals falls on the Claimants themselves, while the burden to disprove the negative elements – i.e. of not being Argentine (or, for that matter, dual) nationals and of not having been domiciled in Argentina for more than two years – would fall on the Respondent's side.*"[58]

The requirement that litigation before domestic courts be pursued for a certain length of time as a precondition for international arbitration. A few decisions rendered in 2013 seem to have followed those past decisions that had considered non-compliance with such requirement to preclude the jurisdiction of the tribunal.[59]

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51 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, para. 168.

52 *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010; *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012; *Romak S.A. v. The Republic of Uzbekistan* (UNCITRAL, PCA Case No. AA280), Award, 26 November 2009.

53 *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013, paras. 165-170.

54 *Ibid.*, para. 172 (quoting *Saba Fakes v. Turkey*).

55 *Apotex Inc. v. The Government of the United States of America* (UNCITRAL), Award on Jurisdiction and Admissibility, 14 June 2013, para. 257.

56 *Ibid.*, para. 276.

57 *Burimi SRL and Eagle Games SH.A v. Republic of Albania* (ICSID Case No. ARB/11/18), Award, 29 May 2013, para. 131. This is consistent with the dominant line of cases such as *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, para. 240, and *AES Corporation v. The Argentine Republic* (ICSID Case No. ARB/02/17), Decision on Jurisdiction, 26 April 2005, paras. 75-80.

58 *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic) (*ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, para. 312.

59 See *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012, *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012, and *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, 19 December 2012 (concluding that an 18-month prior recourse to local courts is a jurisdictional requirement). However, see *Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic)* (ICSID Case No. ARB/07/), Decision on Jurisdiction and Admissibility, 4 August 2011, and *Hochtief AG v. The Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Jurisdiction, 24 October 2011, where the majority of the tribunals held that non-compliance with such a requirement did not undermine the jurisdiction of the tribunal.

For example, a majority of the tribunal in *Kilic v. Turkmenistan* found that recourse to local courts in Article VII.2 of the Turkey-Turkmenistan BIT to be a mandatory requirement. Therefore, it found that the offer to arbitrate therein was conditional upon the investor having brought the dispute before the respondent's courts without a final award within one year.[60] Having found that the claimant had not established that it would have been "*ineffective or futile*" for the claimant to have sought prior recourse to local courts,[61] the tribunal eventually found that it lacked jurisdiction over the matter.

Similarly, the tribunal in *Ambiente Ufficio v. Argentina* was "*inclined to endorse*" the position of the dissenting arbitrator in *Abaclat v. Argentina*, who had criticised the majority of the tribunal for not dismissing the claims due to the claimants' failure to resort to local court proceedings as required by the BIT.[62] The majority of the *Ambiente Ufficio* tribunal found that Article 8(3) of the Argentina-Italy BIT (setting out the local litigation requirement) should be interpreted to include a "futility exception" equal to that in the exhaustion of local remedies rule in the field of diplomatic protection.[63] The majority concluded that having recourse to the Argentine domestic courts would not have offered claimants a reasonable possibility to obtain effective redress and would have accordingly been futile.[64] Therefore, the tribunal found that the claimants had not actually violated the duty to have recourse to local courts under the underlying BIT.[65]

Criteria for determining whether a dispute litigated in domestic courts is the same as the dispute subject to international arbitration. The tribunal in *Dede v. Romania* found that the Romania-Turkey BIT subjects the investor's right to submit the dispute to arbitration to the express conditions of either exhaustion of local remedies or local litigation unfinished within a year.[66] For the purposes of determining whether such local litigation had taken place, the tribunal concluded that "*disputes brought before local courts [must] be of a nature that permits resolution to substantially the same extent as if brought before an international arbitral tribunal pursuant to an investment treaty.*"[67] Since the claimants never initiated any action before Romanian courts that would cover substantially the same dispute as the one brought before the international tribunal, the tribunal concluded that the claimants had not satisfied the jurisdictional requirement in the BIT.

Similarly, the tribunal in *Philip Morris v. Uruguay* found that the term "disputes" must be "*interpreted broadly as concerning the subject matter and facts at issue and not as limited to particular legal claims, including specifically BIT claims*"[68] for

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[60] The *Kilic* majority agreed with the decision in *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012 and the dissent in *Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic)* (ICSID Case No. ARB/07/), Decision on Jurisdiction and Admissibility, 4 August 2011. *Kilic v. Turkmenistan*, Award, 2 July 2013, paras. 6.3.2-6.3.5.

[61] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award, 2 July 2013, para. 8.1.21. See also, *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, 19 December 2012, where the tribunal found that the respondent had failed to provide local process that could be expected to reach a decision on the substance within the relevant (18-month) time-period.

[62] *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, para. 596.

[63] *Ibid.*, para. 607.

[64] The tribunal found that when claimants submitted the request for arbitration in 2008, "*they were confronted with a line of [Argentine] Supreme Court cases manifesting that the latter was not willing to let the judiciary interfere with the debt restructuring decisions of Congress regarding the emergency situation of the early 2000s.*" *Ibid.*, para. 619.

[65] *Ibid*, para. 620.

[66] *Ömer Dede and Serdar Elhüseyni v. Romania* (ICSID Case No. ARB/10/22), Award, 5 September 2013, para. 219.

[67] *Ibid.*, para. 253. The tribunal noted that "*[t]he 'triple identity' (same parties, same object and same cause of action) would not marry well with the purpose of Article 6(4), since both sides acknowledge that Claimants could not have cited BIT Article 4 before Romanian courts.*" (*Ibid.*, para. 249).

[68] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)* (ICSID Case No. ARB/10/7), Decision on Jurisdiction, 2 July 2013, para. 113.

purposes of satisfying the domestic litigation requirement in Article 10(2) of the Switzerland-Uruguay BIT. In other words, "*the dispute before domestic courts under Article 10(2) does not need to have the same legal basis or cause of action as the dispute brought in the subsequent arbitration, provided that both disputes involve substantially similar facts and relate to investments as this term is defined by the BIT*."[69] Interestingly, the tribunal also noted that the domestic litigation requirement could be satisfied "*by actions occurring after the date the arbitration was instituted.*"[70] The tribunal accordingly found that the claimant had satisfied the requirement under Article 10(2).

Legality of a claimant's investment. Investment treaties usually afford protection only to investments made in accordance with the host State's laws and regulations; hence, claims with respect to "illegal" investments fall outside of a tribunal's jurisdiction. In *Metal-Tech v. Uzbekistan*, the tribunal first rejected the respondent's contention that a legality requirement is implicit in the "objective definition" of investment under Article 25 of the ICSID Convention. Expressly disagreeing with the decision in *Phoenix Action v. Czech Republic*, the tribunal in *Metal-Tech* noted that compliance with the laws of the host State and respect of good faith are not elements of such objective definition of investment.[71]

Second, the *Metal-Tech* tribunal recognized that the contracting parties to a BIT may limit the protections of the treaty to investments made in accordance with the laws and regulations of the host State. The tribunal then interpreted the phrase "*implemented in accordance with the laws and regulations*" of the host State (as part of the definition of covered "investment") to require compliance with local laws only at the establishment phase. Having found that the claimant had paid government officials to support the claimant's investment in violation of the Uzbek anti-corruption legislation, the tribunal concluded that the claimant had breached the legality requirement in Article 1(1) of the Israel-Uzbekistan BIT and declined jurisdiction over the dispute.[72]

Corporate restructuring, abuse of treaty and denial of jurisdiction. Several decisions rendered in 2013 confirm the approach adopted by previous decisions that prohibit abuse of the right to international arbitration by investors. The tribunal in *Tidewater v. Venezuela*, for example, citing the decisions in *Mobil v. Venezuela* and in *Phoenix v. Czech Republic*, noted that restructuring investments only in order to gain jurisdiction under a BIT would constitute an abusive manipulation of the system of international investment protection.[73] The tribunal then examined: (i) whether the dispute existed at the time of the corporate restructuring; and (ii) whether the dispute was reasonably foreseeable at the time of the restructuring.[74] Having found that there was no existing nor foreseeable dispute at the time of the restructuring, the tribunal concluded that no abuse of the underlying treaty had been established.

The tribunal in *ConocoPhillips v. Venezuela* followed the same line of previous decisions dealing with corporate restructuring and abuse of treaty. The tribunal found that there was no evidence of abuse of process because, first, no claim had been made (and none was in prospect) at the time of the restructuring and, second,

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69 *Ibid*.

70 *Ibid.*, para. 144.

71 *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award, 4 October 2013, para. 127.

72 *Ibid.*, paras. 372-374. It should also be noted that, according to the tribunal, ordinarily, an MFN clause cannot be used to import a more favourable definition of investment contained in another BIT. In the tribunal's view, "*one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke the treaty protection […]*" (*Ibid.*, para. 145).

73 *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), Decision on Jurisdiction, 8 February 2013, para. 146.

74 *Ibid.*, para. 148.

ConocoPhillips' continuing expenditure on the projects showed that, even after the restructuring, it wished to continue to carry out the projects.[75]

In *ConocoPhillips v. Venezuela*, the respondent argued that the tribunal had no jurisdiction over the claims made by one of the claimants (ConocoPhillips Hamaca BV or CPH) because the relevant measures at issue had been taken before that particular claimant was inserted into the corporate chain relating to the relevant project (September 2006). While the tribunal agreed with the respondent with regard to a tax enacted in May 2006, the tribunal rejected the respondent's argument with regard to a legislative amendment that was enacted in August 2006. The tribunal reasoned that the amendment entered into force in January 2007, a few months after CPH had acquired its ownership interest.[76]

Denial of benefits. Denial-of-benefit clauses are inserted into IIAs to preclude "treaty shopping" and "nationality planning" by investors, but the emerging interpretation of these clauses prevents their effective use by host States. The tribunal in *Stati v. Kazakhstan* concluded that Article 17 of the ECT only applies if a State invoked that provision to deny benefits to an investor before a dispute arose. As the respondent did not exercise this right, the tribunal rejected the jurisdictional objection raised by the respondent.[77] Similarly, the tribunal in *Liman Caspian v. Kazakhstan* found that the right to deny benefits under Article 17(1) of the ECT cannot be exercised retroactively after the arbitration proceedings had already started. In the tribunal's view, "*[a]ccepting the option of a retroactive notification would not be compatible with the object and purpose of the ECT […] 'to promote long-term co-operation in the energy field'."*[78] While these two decisions represent a confirmation of earlier decisions such as *Plama v. Bulgaria and Veteran Petroleum v. Russia,*[79] they contradict the 2012 decision in *Pac Rim Cayman v. El Salvador*.[80]

Admissibility of multi-party proceedings. A legal lacuna of the ICSID Convention has given rise to different opinions on whether "class action"-type arbitrations are allowed under the Convention. The majority of the tribunal in *Ambiente Ufficio v. Argentina* followed the decision of the majority in *Abaclat v. Argentina* and found that there is nothing "*that would militate in favour of interpreting the 'silence' of the ICSID Convention as standing in the way of instituting multi-party proceedings*."[81] Accordingly, the majority concluded that the ICSID Convention, the Argentina-Italy BIT and other applicable rules in the dispute were not opposed to a plurality of claimants jointly submitting a claim to ICSID.[82] The dissenting arbitrator expressed his "*total disagreement*" with the conclusion of the majority on this point.[83]

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75 *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Jurisdiction and Merits, 3 September 2013, paras. 279-280. A third decision rendered in 2013 adopting a similar approach is *ST-AD GmbH v. The Republic of Bulgaria* (PCA Case No. 2011-06), Award on Jurisdiction, 18 July 2013.

76 *Ibid.*, paras. 287-289 ("*In principle […] a breach of obligation does not occur until the law in issue is actually applied in breach of that obligation and that cannot happen before the law in question is in force.*").

77 *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan* (SCC), Award, 19 December 2013, para. 745.

78 *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan (*ICSID Case No. ARB/07/14), Award, 22 June 2010, para. 225.

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

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

81 *Ambiente Ufficio S.p.A. and others v. Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, para. 146.

82 *Ibid*.

83 *Ibid.*, Dissenting Opinion of Santiago Torres Bernardez, para. 81.

B. Substantive Issues

The most-favoured-nation (MFN) clause as it applies to jurisdictional matters. Decisions rendered in 2013 continue to split on the issue of whether the MFN clause can be invoked by claimants to modify the dispute resolution provisions in the applicable investment treaty; the wording of the MFN clause has emerged as a key factor. A majority of the tribunal in *Garanti Koza v. Turkmenistan* agreed to apply the MFN clause to jurisdictional matters since the applicable Turkmenistan-United Kingdom BIT expressly extended the scope of the MFN clause to all BIT provisions, including those concerning dispute settlement. [84] The majority of the tribunal concluded that "*there is no reason why Turkmenistan's consent to ICSID Arbitration in its BIT with Switzerland may not be relied upon by a UK investor, if the provision for ICSID Arbitration or an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration provides treatment more favorable to the investor than the treatment provided by the base treaty.*"[85] The tribunal explained its decision noting that "*Turkmenistan: (a) has expressly consented in the basic Turkmenistan-UK BIT to submit investment disputes with UK investors to international arbitration, (b) has provided in the same BIT that UK investors and their investments will not be subjected to treatment less favorable than that accorded to investors of other States or their investments, (c) has expressly provided that the MFN treatment so accorded 'shall apply' to the dispute resolution provision of the BIT, and (d) has provided investors of third States, specifically Switzerland, with an unrestricted choice between ICSID Arbitration and UNCITRAL Arbitration*".[86]

The dissenting arbitrator disagreed with the majority, noting that in order to give effect to the MFN clause contained in the underlying treaty, the foreign investor "*must first be in a* dispute settlement relationship *with the host state*."[87] In the view of the dissenting arbitrator, the ICSID tribunal did not have jurisdiction over the dispute since the applicable BIT only provided for UNCITRAL arbitration.

On the other hand, the *Kilic v. Turkmenistan* tribunal found that the MFN clause did not encompass or apply to the dispute resolution provisions of the underlying treaty (Turkey-Turkmenistan BIT) and thus did not permit the claimant to rely on a more favourable provision in another of Turkmenistan's BITs (with Switzerland). In the particular dispute, the claimant's MFN argument was aimed at excusing itself from mandatory prior recourse to local courts as provided in the underlying treaty (between Turkey and Turkmenistan) but not in the third-party treaty (between Switzerland and Turkmenistan).[88] The *Kilic* tribunal noted that, in contrast to the MFN clauses at issue in the decisions that had adopted a different approach, the MFN clause in the applicable treaty was textually stricter and thus the legal reasoning set out in these earlier decisions was inapplicable to interpretation of the Turkey-Turkmenistan BIT.[89]

Denial of justice as a constitutive element of the fair and equitable treatment (FET) standard. The tribunal in *Franck Charles Arif v. Moldova* distinguished between a denial of justice claim based on customary law and one based on the FET clause of the underlying treaty. The tribunal dismissed the customary law claim becasue

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[84] *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, para. 41.

[85] *Ibid.*, para. 79 (emphasis in the original).

[86] *Ibid.*

[87] *Ibid.*, Dissenting Opinion of L. Boisson de Chazournes, para. 40 (emphasis in the original).

[88] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award, 2 July 2013, para. 7.9.1.

[89] *Ibid.*, para. 7.6.17. In *ST-AD GmbH v. The Republic of Bulgaria* (PCA Case No. 2011-06), Award on Jurisdiction, 18 July 2013, the tribunal rejected the claimant's argument that the MFN provision in the Bulgaria-Germany BIT could permit the claimant to circumvent the treaty's narrow arbitration clause (limiting arbitration for disputes relating to the question of compensation in case of expropriation only).

Mr. Arif was not a party to any national proceeding and thus could not claim that he had been denied justice in any such proceedings.[90] With regard to the FET claim, the tribunal recognized that, contrary to a free-standing claim for denial of justice under customary international law, FET "*also protects the foreign shareholder in a local company*." If such company is denied justice, "*the State will be held responsible towards the indirect investor for a breach of fair and equitable treatment*."[91] While it recognized that acts of the judiciary are subject to international law like the acts of any other branch of government,[92] the tribunal noted that "*international tribunals must refrain from playing the role of ultimate appellate courts*." It further noted that *"[t]he responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so."*[93] Having reviewed the court proceedings at issue, the *Arif* tribunal concluded that there was no procedural or substantive denial of justice, as the decisions in those proceedings did not evidence bad faith, lack impartiality or due process, nor did they adopt arguments "*so egregiously wrong that no competent and honest court would use them.*"[94]

The customary minimum standard of treatment (MST) of aliens. The MST is considered to be the "floor", below which treatment of aliens (including investors) must not fall; however, the exact contours of MST remain elusive. The tribunal in the CAFTA case *Teco v. Guatemala* noted that, while international tribunals should pay deference to a sovereign State's regulatory powers, such deference "*cannot amount to condoning behaviours that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process*."[95] Accordingly, in the view of the *Teco* tribunal, "*although the role of an international tribunal is not to second guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.*"[96]

The relationship between the treaty standard of FET and the MST. The tribunal in *Inmaris v. Ukraine* concluded that the FET clause in the Germany-Ukraine BIT is not limited to customary international law. With regard to several NAFTA decisions that have concluded otherwise, the tribunal noted that the three parties to the NAFTA issued a binding interpretation of the relevant provision in NAFTA that requires that it be interpreted in that fashion.[97] In the tribunal's view, since there is nothing in the BIT that would limit the FET clause to the customary standard, the tribunal concluded that "*[a]ny government act that is unfair or inequitable with respect to a covered investment breaches that obligation" and that "[a] government act could be unfair or inequitable if it is in breach of specific commitments, if it is undertaken*

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90 *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013, para. 435.

91 *Ibid.*, para. 438.

92 See similarly the tribunal in *Rompetrol v. Romania* that found no valid grounds for distinguishing between the actions of prosecutors (at issue in that case) and those of courts since international law makes no distinction between executive, legislative or judicial organs for the purpose of attributing State responsibility (*The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013, para. 164).

93 *Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013, paras. 441-442. A different approach was taken by the tribunal in *Rompetrol v. Romania*, which refused to read into the Netherlands-Romania BIT (and in particular its provision on FET) an implied term that would subject a claim for denial of justice to exhaustion of local remedies (Award, 6 May 2013, para. 160).

94 *Ibid.*, paras. 453 and 497.

95 *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013, paras. 490-492.

96 *Ibid.*, para. 493. Similarly, see *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013, para. 197.

97 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case No. ARB/08/8), Award, 1 March 2012, para. 264.

for political reasons or other improper motives, if the investor is not treated in an objective, even-handed, unbiased, and transparent way, or for other reasons."[98]

Legitimate expectations and the FET, MST standards. Arbitral tribunals have repeatedly named the protection of investors' legitimate expectations to be a key element of the FET standard; there have been differing approaches, however, as to what expectations can be deemed legitimate and in which circumstances such expectations may arise. In *Micula v. Romania*, the claimant maintained that Romania's repeal of certain investment incentives[99] breached the FET standard. The tribunal first noted that the FET standard does not give investors a right to regulatory stability *per se* and that they must expect that legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.[100] However, for the *Micula* tribunal, the crucial point was whether the State, through statements or conduct, contributed to the creation of a reasonable expectation (in that case, a representation of regulatory stability). In the tribunal's view, in order to determine whether an expectation is reasonable, it is irrelevant whether the State actually wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance. Eventually, a majority of the tribunal found that "*through an interplay of the purpose behind the [incentives], the legal norms, the PICs [permanent investor certificate], and Romania's conduct, Romania made a representation that created a legitimate expectation that the […] incentives would be available substantially in the same form as they were initially offered [i.e. for a period of ten years].*"[101]

The *Teco* tribunal, in line with some previous decisions (such as *Mobil & Murphy v. Canada*[102]) denied the relevance of the investor's legitimate expectations for purposes of determining a breach of the MST in Article 10.5 of CAFTA. In the tribunal's view, "*[w]hat matters is whether the State's conduct has objectively been arbitrary, not what the investor expected years before the facts. A willful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard, with no need to resort to the doctrine of legitimate expectations.*"[103] Having found that the regulator's repudiation of the two fundamental regulatory principles applying to the relevant administrative process[104] was "*arbitrary*" and in breach of "*elementary standards of due process in administrative matters*," the tribunal concluded that Guatemala had breached the obligation to accord FET under Article 10.5 of CAFTA.[105]

Definition of the expropriation of contractual rights. Similar to other types of investments, contractual rights are capable of being expropriated (often by termination of the relevant investment contract). The tribunal in *Vannessa Ventures*

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98 *Ibid.*, para. 265.

99 The Emergency Government Ordinance 24/1998 (EGO 24) was aimed at the development of certain disfavoured regions of Romania.

100 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award, 11 December 2013, para. 666.

101 *Ibid.*, para. 677. In addition, while the tribunal found that Romania's decision to revoke the incentives was reasonably tailored to the pursuit of a rational policy (specifically, EU accession) and there was an appropriate correlation between that objective and the measure adopted to achieve it (i.e., the repeal of the EGO 24 incentives), Romania acted unreasonably when it maintained as a whole the investors' obligations while at the same time eliminating virtually all of their benefits (paras. 825-826). The tribunal in *Stati & Ascom* v. Kazakhstan concluded that a string of measures by several governmental institutions constituted "*coordinated harassment*" in violation of the FET provision and "*in particular of claimants' legitimate expectations toward proper and fair government conduct*." *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan* (SCC), Award, 19 December 2013, para. 1087.

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

103 *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013, para. 621.

104 The two fundamental principles upon which the regulatory framework bases the tariff review process are as follows: first, save in certain limited cases provided by the law, the tariff would be based on the value added for distribution (VAD) study prepared by the distributor's consultant; and, second, any disagreement between the regulator and the distributor regarding such VAD study would be resolved by having regard to the pronouncements of a neutral Expert Commission.

105 *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013, para. 621.

v. Venezuela noted that "*in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.*"[106] Having found that the termination of the underlying contract (and the subsequent physical occupation of the investment) were nothing "*more than legitimate contractual responses to what the tribunal considers to be contractual breaches*," the tribunal rejected the investor's expropriation claim.[107]

The tribunal in *Inmaris v. Ukraine* had to determine whether the investor's contractual rights to use a ship had been expropriated following the host State's one-year travel ban on the ship. In its assessment, the tribunal focused on whether the deprivation was permanent rather than whether the travel ban was temporary. The tribunal found that the travel ban and the cancellation of an entire sailing season caused the claimants' business to suffer substantial harm to the extent that they could not reasonably have been expected to resume operations. The tribunal concluded that the travel ban amounted to an indirect expropriation in that it destroyed the value of the claimants' contractual rights, and that the decrease in value (due to the lasting damage to claimants' business) was, for all intents and purposes, permanent.[108]

The relevance of prompt compensation for determining lawfulness of expropriation. The tribunal in *ConocoPhillips v. Venezuela* noted that, while payment of compensation is not required at the precise moment of expropriation, it "*is commonly accepted that the Parties must engage in good faith negotiations to fix the compensation in terms of the standard set, in this case, in the BIT, if a payment satisfactory to the investor is not proposed at the outset.*"[109] Since the respondent had based its negotiation on the book value of the investment, a majority of the tribunal found that the respondent had breached its obligation to negotiate in good faith for compensation of its taking of the investor's assets on the basis of market value as required by Article 6(c) of the Netherlands-Venezuela BIT. Accordingly, the tribunal found the expropriation to be unlawful,[110] which will probably lead to an award of a higher amount of damages (see part C below).

The scope and meaning of "umbrella" clauses. "Umbrella" clauses (clauses that require a host State to respect any obligation assumed by it with regard to a specific investment) are controversial and have been subject to conflicting interpretations in the past. The decision in *Micula v. Romania* affirmed that the umbrella clause in the Romania-Sweden BIT covers obligations of any nature, regardless of their source (i.e., contractual and non-contractual obligations).[111] The tribunal then extensively examined whether there was indeed an obligation under Romanian law to maintain the same investment incentives for a period of ten years with respect to the claimants. The majority of the tribunal concluded that the claimants had not provided sufficient evidence and legal arguments on the content of Romanian law for the tribunal to find the existence of an obligation protected by the umbrella clause. The tribunal thus dismissed the claimants' umbrella clause claim.[112]

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[106] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Award, 16 January 2013, para. 209.
[107] *Ibid.*, para. 210.
[108] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case No. ARB/08/8), Award, 1 March 2012, paras. 300-301.
[109] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Jurisdiction and Merits, 3 September 2013, para. 362.
[110] *Ibid.*, para. 401.
[111] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award, 11 December 2013, para. 415. Article 2(4) provides that "[e]ach Contracting Party shall observe any obligation it has entered into with an investor of the other Contracting Party with regard to his or her investment."
[112] *Ibid.*, para. 459.

C. Compensation

At least five decisions rendered in 2013 awarded damages to the investor.[113] The highest amount was in *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others* in which the investor was awarded USD 935 million plus interest, which is the second largest[114] monetary award in the history of treaty-based ISDS. In *Stati v. Kazakhstan*, the claimant was awarded USD 497.68 million plus interest. In *Micula v. Romania* the claimant was awarded the equivalent of USD 115 million plus interest, while in *Teco v. Guatemala*, the claimant was awarded USD 21.1 million plus interest. In *Arif v. Moldova*, the claimant was awarded the equivalent of either USD 490,000 or USD 2.6 million plus interest depending whether the claimant was willing to accept restitution of the investment.

Establishment of loss. While the tribunal in *Rompetrol v. Romania* found a limited breach of the FET clause, it did not award any damages due to the claimant's failure to demonstrate any loss stemming from the wrongful conduct. The claimants used the "*event study method*"[115] to quantify their damages but the tribunal found the application of this method to be "*inherently questionable*".[116] For the tribunal, a valid technique for the quantification of economic damages would be "*one which […] allows a suitably objective comparison […] to be made between the status quo ante and the Claimant's situation at the time that suit is brought.*"[117] Since the event study method failed that test in the circumstances of the case, and no alternative method had been advanced, the tribunal concluded that the claimant had not met its burden of proof in establishing economic loss caused by the wrongful conduct of the host State.[118]

Lost profits. In a highly unusual development, the tribunal in *Al-Kharafi v. Libya* ordered the respondent State to pay USD 900 million in lost profits to the claimant who invested only USD 5 million in the business venture, a tourism development project. The tribunal dismissed Libya's arguments that the project was not a "*going concern*" and had no track record or performance. This approach goes against previous arbitral decisions, which have generally held that lost profits may be awarded only when the enterprise in question has a track record of profitable operations, so that future profits can be established with sufficient certainty. The decision of the *Al-Kharafi* tribunal may be at least partially explained by the fact that it applied Libyan law and UNIDROIT Principles of International Commercial Contracts, rather than public international law, to its determination of damages.[119]

Moral damages. While recent decisions recognize the possibility in principle to award such damages, tribunals continue to adopt a cautious stance in this regard. For example, the tribunal in *Inmaris v. Ukraine* rejected a claim for moral damages, noting that, while the respondent's actions were in violation of the BIT, they "*were not malicious or driven by motives beyond*" the perceived need to change key components of the underlying economic relationship with the investors. Having already awarded compensatory damages for economic harm, the tribunal did not find that "*any emotional or other harm claimants may have suffered is sufficiently serious as to merit an award of additional compensation for moral damages.*"[120] Similarly, the tribunal in *Rompetrol v. Romania* noted that as the claim for moral

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[113] While the tribunal in *ConocoPhillips v. Venezuela* found breach of the expropriation provision, the determination of the quantum was left for a subsequent phase of the arbitration.

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

[115] The "event study" method is a statistical method to assess the impact of an event on the value of a firm.

[116] *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013, para. 287.

[117] *Ibid.*, para. 288.

[118] *Ibid.*, paras. 288 and 299.

[119] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others,* Final Award, 22 March 2013, pp. 369-382.

[120] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine* (ICSID Case No. ARB/08/8), Award, 1 March 2012, para. 428.

damages "*is both notional and widely discretionary*", the tribunal should adopt "*a considerable degree of caution […] in facing the proposition that compensable 'moral' damages can be suffered by a corporate investor.*"[121]

However, the tribunal in *Al-Kharafi v. Libya* decided that the claimant was entitled to a compensation for the moral damages incurred as a result of the harm to its worldwide professional reputation (in the stock market as well as in the business and construction markets around the world). In that case, the respondent had abusively cancelled a project that it had previously approved for a period of 83 years, for which the investor had entered into contracts with international companies to execute. The tribunal awarded the sum of USD 30 million because of this.[122]

Date of valuation for unlawful expropriation. As noted above, the tribunal in *ConocoPhillips v. Venezuela* concluded that the expropriation of the investments was unlawful and thus held that the investment was to be valued as of the date of the award, not the date of expropriation.[123] The claimant requested the date of the award to be the valuation date because the three projects at issue in the arbitration had increased in value since the final act of confiscation by Venezuela in June 2007.

D. *Other issues: standard of proof,* amicus curiae *briefs, confidentiality and challenges to arbitrators*

The standard of proof. While the tribunal in *Rompetrol v. Romania* acknowledged that the "*balance of probabilities*" serves as the general standard of proof, it held that allegations of seriously wrongful conduct by State officials may require more persuasive evidence as opposed to pure probabilities or circumstantial evidence. However, the tribunal did not accept the respondent's argument that allegations of unlawful or malicious conduct, or bad faith, require a higher standard of proof.[124]

With regard to the issue of the standard of proof to sustain an allegation of corruption, the tribunal in *Metal-Tech v. Uzbekistan* noted that, because corruption is difficult to establish, it can be demonstrated through circumstantial evidence.[125]

***Amicus curiae* briefs**. The tribunal in *Apotex v. United States* rejected two unrelated applications to file written submissions as a non-disputing party because most of the relevant criteria (as identified by the NAFTA Free Trade Commission (FTC) in 2003)[126] had not been met. In particular, the tribunal found that neither non-disputing party could be of assistance to the tribunal or had a significant interest in the arbitration.[127]

Confidentiality. The tribunal in *Churchill Mining v. Indonesia* noted that "*the ICSID Convention and the Arbitration Rules contain no general rule imposing a duty of confidentiality on the parties and prohibiting them from disclosing their case in public, as was already stated 30 years ago in* Amco v. Indonesia*.*" However, the tribunal acknowledged that the parties are bound by a good faith duty not to exacerbate the dispute or affect the integrity of the arbitration proceedings and that under certain circumstances, public statements made by a party to ICSID proceedings could violate this duty of good faith.[128]

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[121] *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013, para. 289.
[122] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Award, 22 March 2013, page 369.
[123] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Jurisdiction and Merits, 3 September 2013, para. 401.
[124] *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013, paras. 182-183.
[125] *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award, 4 October 2013, para. 243.
[126] NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-Disputing Party Participation, 7 October 2003.
[127] *Apotex v. United States*, Procedural Order on the Participation of the Applicant, Mr Barry Appleton, as a non-disputing party, 4 March 2013, and *Apotex v. United States*, Procedural Order on the Participation of the Applicant, BNM, as a non-disputing party, 4 March 2013.
[128] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia (formerly Churchill Mining PLC v. Republic of Indonesia)* (ICSID Case No. ARB/12/14 and 12/40), Procedural Order No. 3 on Provisional Measures, 4 March 2013, paras. 46-47.

Challenges to arbitrators. An increasing number of challenges to arbitrators may indicate that disputing parties often perceive them as biased or predisposed. In *Burlington Resources v. Ecuador*, the Chairman of the ICSID Administrative Council laid out the relevant test under the ICSID Convention, as developed by past decisions. First, arbitrators must be both impartial and independent, where "*[i]mpartiality refers to the absence of bias or predisposition towards a party" and "[i]ndependence is characterized by the absence of external control*."[129] Second, the ICSID Convention does not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias. Third, the applicable legal standard is an objective standard based on a reasonable evaluation of the evidence by a third party. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[130] Finally, regarding the meaning of the word "*manifest*" in Article 57 of the Convention, the Chairman noted that "*a number of decisions have concluded that it means 'evident' or 'obvious,' and that it relates to the ease with which the alleged lack of the required qualities can be perceived.*"[131]

The Chairman of the ICSID Administrative Council also upheld the respondent's proposal to disqualify one of the arbitrators in *Blue Bank International v. Venezuela* because the arbitrator manifestly lacked impartiality. The Chairman noted that the arbitrator was a partner in a law firm which represented the claimant in a parallel proceeding against the respondent (*Longreef v. Venezuela*) and that the arbitrator's remuneration depended "*primarily*" on the results achieved by the firm.[132] The Chairman thus concluded that "*a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts in this case*."[133]

E. Annulment and judicial review

Annulment. The ICSID Convention provides limited grounds for annulment of arbitral awards. In *Malicorp v. Egypt*, the *ad hoc* annulment committee made findings concerning some of these grounds. With regard to "*a serious departure from a fundamental rule of procedure*", the *ad hoc* committee noted that the parties agreed that the fundamental principle of equality of arms (*principe du contradictoire*) constitutes one of the fundamental rules of procedure.[134] With regard to "*manifest excess of powers*" the *Malicorp* committee confirmed that a tribunal may be found to have exceeded its powers if it fails to apply the applicable law. In this respect, the *Malicorp* committee observed that while "*it is not within its mandate to review whether the Tribunal correctly applied Egyptian law [the applicable law in the Malicorp case] […] [t]he Committee must proceed to verify whether indeed the Tribunal applied Egyptian law. This is because it is possible that a tribunal would state that it is applying one law while in fact applying another*."[135] The *Malicorp* committee eventually rejected in its entirety Malicorp's application for annulment.[136]

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[129] *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 the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013, paras. 65-66.

[130] *Ibid.*, para. 67.

[131] *Ibid.*, para. 68.

[132] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November, 2013, paras. 66-67.

[133] *Ibid.*, paras. 68-69. The Chairman did not have to pronounce on the parallel request to disqualify the other party-appointed arbitrator, as the latter had already resigned from the tribunal.

[134] *Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on the Application for Annulment of Malicorp Limited, 3 July 2013, para. 29.

[135] *Ibid.*, para. 154.

[136] Two further decisions on annulment were rendered in 2013 but have not been made public. See *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on the Application for Annulment, 22 May 2013, and *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on the Application for Annulment, 16 July 2013.

Judicial Review. In contrast to ICSID Convention proceedings (which are de-localized, i.e. not subject to any domestic laws), non-ICSID arbitrations are governed by the laws of the place (seat) of arbitration, which usually allow for involvement of local courts. On 25 June 2013, the Caribbean Court of Justice (CCJ) reversed a 2012 injunction issued by the Belize Court of Appeal restraining British Caribbean Bank Limited (BCB) from continuing its arbitration under the Belize-UK BIT.[137] Similarly, on 1 November 2013, the Belize Court of Appeal reversed the injunctions issued by Awich CJ restraining Dunkeld International Investment Limited from continuing its arbitration under the Belize-UK BIT.[138] Both courts recognized that they retained the jurisdiction to restrain international arbitrations that were oppressive, vexatious, inequitable or would constitute an abuse of legal process; however, this had not been proven in either case.[139]

2013 saw the further development in *Achmea v. Slovak Republic (formerly Eureko v. Slovak Republic*), a case brought under the Czechoslovakia-Netherlands BIT (1991). Earlier, the respondent State had challenged in German courts the interim arbitral award (issued in 2010), where the tribunal upheld its jurisdiction over the dispute. Slovakia had argued that its membership in the EU deprived the arbitral tribunal of jurisdiction. In its 2012 decision, the Oberlandesgericht Frankfurt (Regional Court of Appeals) dismissed these arguments and refused to set aside the interim arbitral award.[140] The matter proceeded to the Bundesgerichtshof (Federal Court of Justice), which issued a procedural order on 19 September 2013. It did not take a substantive position, but rather held that the matter before it had become moot. It reasoned that Slovakia's application became inadmissible because in December 2012 the arbitral tribunal issued an award in favour of the claimant, granting 22 million euros in damages. The Federal Court of Justice stated that it could not decide on the challenge to the interim award since the final award had been rendered.[141]

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The growing number of ISDS cases and the broad range of policy issues they raise (UNCTAD, World Investment Report 2013) have turned ISDS into arguably the most controversial issue in international investment policy making. Over the past year, the public discourse about the pros and cons of ISDS has continued to gain momentum, and an increasing number of cases against developed countries has placed ISDS high-up on the list of issues for attention, also for developed country IIA policy makers.

For example, in response to the growing discontent with the arbitration system, the European Commission announced public consultations on the investment provisions of the future Transatlantic Trade and Investment Partnership (TTIP) to be concluded with the United States. Representatives of some key European countries have stated that they would not support including an ISDS mechanism in the TTIP or that it should be available only after domestic remedies in the host State have been exhausted.

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[137] *The British Caribbean Bank Limited v. The Attorney General* [2013] CCJ 4 (AJ), 25 June 2013; *British Caribbean Bank Limited v. The Attorney General of Belize* (Civil Appeal No. 6 of 2011), 3 August 2012.

[138] *Dunkeld International Investment Ltd. v. The Attorney General* (Civil Appeal No. 24 of 2011), 1 November 2013.

[139] *Ibid.*, paras. 140-146.

[140] *Achmea B.V. v. The Slovak Republic*, Decision of the Frankfurt Regional Court of Appeals (Germany), 10 May 2012, available at http://www.italaw.com/documents/26schh01110.pdf.

[141] *Achmea B.V. v. The Slovak Republic*, Preliminary Decision of the Federal Court of Justice (Germany), 19 September 2013, available at http://italaw.com/sites/default/files/case-documents/italaw1606.pdf.

In that context, questions arise about the rationale for including ISDS into IIAs – or other agreements – between developed countries with sophisticated regulatory and legal systems, and with generally open investment environments. Originally, the primary purpose of IIAs was the provision of legal protection to foreign investors, including through ISDS, hence addressing concerns that host countries' domestic legal systems may not be advanced enough to ensure due process, fair and non-discriminatory treatment and adequate compensation for expropriation.

While there is a possibility to address such issues in current and future negotiations, the situation is different in respect of the more than 2,300 IIAs in force today. There, changes can only be made by way of treaty amendment or renegotiation.

An important milestone in addressing ISDS-related concerns by means of increasing transparency of arbitral proceedings took place on 1 April 2014, when the new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules") came into effect. The Rules provide for a regime of disclosure in ISDS cases that acknowledges the public interest in such disputes, and give the public broad access to dispute-related documents. It must be noted, however, that in relation to treaties concluded before 1 April 2014, parties to a dispute, or parties to a treaty, must agree to the application of the Rules.

In sum, weighing the pros and cons of ISDS – and its variations – deserves careful attention. UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD)[142] and its "Roadmap for Five Paths of Reform"[143] can offer guidance. UNCTAD's forthcoming 2014 World Investment Forum (WIF),[144] with the IIA Conference scheduled for 16 October 2014, will offer an opportunity for multilateral consensus building in this regard.

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[142] See http://investmentpolicyhub.unctad.org/.

[143] UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of A Roadmap", IIA Issues Note, June 2013, No. 2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

[144] See http://unctad-worldinvestmentforum.org/.

Annex 1. Known treaty-based cases initiated in 2013[a]

No.	Case Title	Home Country	Legal Instrument
1	*Achmea v. Slovak Republic II* (UNCITRAL)	Netherlands	Netherlands-Slovakia BIT
2	*Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic*	Germany	Czech Republic-Germany BIT, Energy Charter Treaty
3	*Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain* (ICSID Case No. ARB/13/31)	Luxembourg, Netherlands	Energy Charter Treaty
4	*ASA International S.p.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/13/23)	Italy	Egypt-Italy BIT
5	*Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13)	United States	Kazakhstan-United States BIT
6	*Cementos La Union S.A. and Aridos Jativa S.L.U. v. Arab Republic of Egypt* (ICSID Case No. ARB/13/29)	Spain	Egypt-Spain BIT
7	*Cemusa - Corporación Europea de Mobiliario Urbano, S.A. and Corporación Americana de Equipamientos Urbanos, S.L. v. United Mexican States* (ICSID Case No. ARB(AF)/13/2)	Spain	Mexico-Spain BIT
8	*Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/13/2)	Switzerland	Costa Rica-Switzerland BIT
9	*ČEZ (Czech Republic) v. Albania* (UNCITRAL)	Czech Republic	Energy Charter Treaty
10	*Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain* (SCC)	Luxembourg, Netherlands	Energy Charter Treaty
11	*Consolidated Exploration Holdings Ltd. And others v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/13/1)	Kazakhstan	Kazakhstan-Kyrgyzstan BIT and Moscow Convention for the Protection of Investor Rights
12	*Courts (Indian Ocean) Limited and Courts Madagascar S.A.R.L. v. Republic of Madagascar* (ICSID Case No. ARB/13/34)	Mauritius	Madagascar-Mauritius BIT
13	*CSP Equity Investment Sarl v. Kingdom of Spain* (SCC)	Luxembourg	Energy Charter Treaty
14	*Deutsche Telekom v. India*	Germany	Germany-India BIT
15	*Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21)	France	France-Hungary BIT
16	*Eiser Infrastructure Limited and Energia Solar Luxembourg S.a r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36)	Luxembourg, United Kingdom	Energy Charter Treaty
17	*Eli Lilly and Company v. The Government of Canada*	United States	NAFTA
18	*Erbil Serter v. French Republic* (ICSID Case No. ARB/13/22)	Turkey	France-Turkey BIT
19	*Erhas and others v. Turkmenistan* (UNCITRAL)	Turkey	Turkey-Turkmenistan BIT
20	*EVN AG v. Republic of Bulgaria* (ICSID Case No. ARB/13/17)	Austria	Austria-Bulgaria BIT, Energy Charter Treaty
21	*Federal Elektrik Yatirim ve Ticaret A.Ş. and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/9)	Turkey	Turkey-Uzbekistan BIT
22	*Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38)	Kuwait	Jordan-Kuwait BIT
23	*Güneş Tekstil Konfeksiyon Sanayi ve Ticaret Limited Şirketi and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/19)	Turkey	Turkey-Uzbekistan BIT
24	*I.C.W. Europe Investments Limited v. The Czech Republic*	United Kingdom	
25	*Impresa Grassetto S.p.A., in liquidation v. Republic of Slovenia* (ICSID Case No. ARB/13/10)	Italy	Italy-Slovenia BIT
26	*Isolux Infrastructure Netherlands B.V. v. Spain* (SCC)	Netherlands	Energy Charter Treaty
27	*Joseph Houben v. Republic of Burundi* (ICSID Case No. ARB/13/7)	Belgium	Belgium/Luxembourg-Burundi BIT
28	*Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1)	Turkey	Pakistan-Turkey BIT

29	*Khaitan Holdings Mauritius v. India* (UNCITRAL)	Mauritius	India-Mauritius BIT
30	*Le Chèque Déjeuner and C.D Holding Internationale v. Hungary* (ICSID Case No. ARB/13/35)	France	France-Hungary BIT
31	*Lieven J. van Riet, Chantal C. van Riet and Christopher van Riet v. Republic of Croatia* (ICSID Case No. ARB/13/12)	Belgium	Belgium/Luxembourg-Croatia BIT
32	*Lone Pine Resources Inc. v. The Government of Canada* (UNCITRAL)	United States	NAFTA
33	*Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus* (ICSID Case No. ARB/13/27)	Greece	Cyprus-Greece BIT
34	*MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia* (ICSID Case No. ARB/13/32)	Hungary	Energy Charter Treaty
35	*Mr Jürgen Wirtgen, Mr Stefan Wirtgen, and JSW Solar (zwei) GmbH & Co.KG v. Czech Republic* (UNCITRAL)	Germany	Germany-Czech Republic BIT
36	*Mytilineos Holdings SA v. Serbia II* (UNCITRAL)	Greece	Greece-Serbia BIT
37	*Natland Investment Group N.V., Natland Group Limited, G.I.H.G. Limited, and Radiance Energy Holding S.A.R.L. v. The Czech Republic*	Cyprus, Luxembourg, Netherlands, United Kingdom	Czech Republic-Netherlands BIT
38	*Ossama Al Sharif v. The Republic of Egypt* (ICSID Case No. ARB/13/3)	Jordan	Egypt-Jordan BIT
39	*Ossama Al Sharif v. the Republic of Egypt* (ICSID Case No. ARB/13/4)	Jordan	Egypt-Jordan BIT
40	*Ossama Al Sharif v. the Republic of Egypt* (ICSID Case No. ARB/13/5)	Jordan	Egypt-Jordan BIT
41	*Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic*	Germany	
42	*Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8)	Cyprus, Slovakia	Cyprus-Greece BIT, Greece-Slovakia BIT
43	*RECOFI v. Vietnam* (UNCITRAL)	France	France-Vietnam BIT
44	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30)	Luxembourg, United Kingdom	Energy Charter Treaty
45	*South American Silver Corp v Bolivia* (UNCITRAL)	United Kingdom	Bolivia-UK BIT
46	*Spence International Investments, LLC, Bob F. Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E. Copher, Brette E. Berkowitz, Trevor B. Berkowitz, Aaron C. Berkowitz and Glen Gremillion v. The Government of the Republic of Costa Rica* (UNCITRAL)	United States	CAFTA
47	*Spentex Netherlands, B.V. v. Republic of Uzbekistan* (ICSID Case No. ARB/13/26)	Netherlands	Netherlands-Uzbekistan BIT
48	*Stans Energy v. Kyrgyz Republic*	Canada	Moscow Convention for the Protection of Investors' Rights
49	*Transglobal Green Energy LLC and Transglobal Green Panama, S.A. v. Republic of Panama* (ICSID Case No. ARB/13/28)	United States	Panama-United States BIT
50	*U.S. Steel Global Holdings I B.V. (The Netherlands) v. The Slovak Republic* (UNCITRAL)	Netherlands	Netherlands-Slovakia BIT
51	*Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Mr. Helmut Jungbluth v. Arab Republic of Egypt* (ICSID Case No. ARB/13/37)	Germany	Egypt-Germany BIT
52	*Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venzuela* (ICSID Case No. ARB/13/11)	Spain	Spain-Venezuela BIT
53	*Vladislav Kim and others v. Republic of Uzbekistan* (ICSID Case No. ARB/13/6)	Kazakhstan	Kazakhstan-Uzbekistan BIT
54	*Voltaic Network GmbH v. The Czech Republic*	Germany	
55	*WA Investments-Europa Nova Limited v. The Czech Republic* (UNCITRAL)	Cyprus	Energy Charter Treaty
56	*Windstream Energy LLC. V. Government of Canada* (UNCITRAL)	United States	NAFTA
57	*World Wide Minerals v. Republic of Kazakhstan* (II) (UNCITRAL)	Canada	Canada-USSR BIT

[a] Information about 2013 claims has been compiled on the basis of public sources, including specialized reporting services such as the *Investment Arbitration Reporter* and *Global Arbitration Review*.

Annex 2. Known investment treaty claims, by respondents

No.	Respondent State	Cases
1	Argentina	53
2	Venezuela, Bolivarian Republic of	36
3	Czech Republic	27
4	Egypt	23
5	Canada	22
6	Ecuador	22
7	Mexico	21
8	Poland	16
9	United States	15
10	India	14
11	Kazakhstan	14
12	Ukraine	14
13	Hungary	12
14	Bolivia, Plurinational State of	11
15	Slovakia	11
16	Romania	9
17	Russian Federation	9
18	Spain	9
19	Turkey	9
20	Costa Rica	8
21	Kyrgyzstan	8
22	Pakistan	8
23	Peru	8
24	Uzbekistan	8
25	Georgia	7
26	Turkmenistan	7
27	Algeria	6
28	Jordan	6
29	Albania	5
30	Bulgaria	5
31	Croatia	5
32	Indonesia	5
33	Lithuania	5
34	Moldova, Republic of	5
35	Congo, Democratic Republic of	4
36	Mongolia	4
37	Philippines	4
38	Viet Nam	4
39	Belize	3
40	Burundi	3
41	Chile	3
42	El Salvador	3
43	Estonia	3
44	Germany	3
45	Guatemala	3
46	Latvia	3
47	Lebanon	3
48	Macedonia, TFYR	3

49	Paraguay	3
50	Serbia	3
51	Slovenia	3
52	Sri Lanka	3
53	Zimbabwe	3
54	Armenia	2
55	Azerbaijan	2
56	Dominican Republic	2
57	France	2
58	Ghana	2
59	Lao People's Democratic Republic	2
60	Malaysia	2
61	Morocco	2
62	Panama	2
63	Tanzania, United Republic of	2
64	Tunisia	2
65	United Arab Emirates	2
66	United Kingdom	2
67	Unknown	2
68	Yemen	2
69	Australia	1
70	Bangladesh	1
71	Belgium	1
72	Bosnia and Herzegovina	1
73	Cambodia	1
74	China	1
75	Cyprus	1
76	Equatorial Guinea	1
77	Ethiopia	1
78	Gabon	1
79	Greece	1
80	Grenada	1
81	Guyana	1
82	Iran, Islamic Republic of	1
83	Korea, Republic of	1
84	Libya	1
85	Madagascar	1
86	Montenegro	1
87	Myanmar	1
88	Nicaragua	1
89	Nigeria	1
90	Oman	1
91	Saudi Arabia	1
92	Senegal	1
93	South Africa	1
94	South Sudan	1
95	Tajikistan	1
96	Thailand	1
97	Trinidad and Tobago	1
98	Uruguay	1
	Unknown	4

Annex 3. Decisions rendered in 2013

A. Decisions upholding jurisdiction (at least in part)

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary* (ICSID Case No. ARB/12/3), Decision on Respondent's Objection under Arbitration Rule 41(5), 16 January 2013	Hungary-United Kingdom BIT	United Kingdom	2012
2	*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), Decision on Jurisdiction, 8 February 2013	Barbados-Venezuela BIT	Barbados	2010
3	*Ambiente Ufficio S.p.A. and others v. Argentine Republic* *(formerly Giordano Alpi and others v. Argentine Republic)* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, and Dissenting Opinion of Santiago Torres Bernárdez, 2 May 2013	Argentina-Italy BIT	Italy	2008
4	*Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Bifurcated Jurisdictional Issue [Art 41 ICSID], 5 March, 2013	Netherlands-Turkey BIT	Netherlands	2011
5	*Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEMMagyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (ICSID Case No. ARB/12/2), Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), 11 March 2013	Hungary-Netherlands BIT and Hungary-Switzerland BIT	Netherlands, Switzerland	2012
6	*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal HermanosS.A. v. Oriental Republic of Uruguay* (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal HermanosS.A. v. Oriental Republic of Uruguay*), (ICSID Case No. ARB/10/7), Decision on Jurisdiction, 2 July 2013	Switzerland-Uruguay BIT	Switzerland	2010
7	*Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Decision on the Objection to Jurisdiction for lack of Consent, 3 July 2013 and Dissenting Opinion of Laurence Boisson de Chazournes, 3 July 2013	Turkey-Turkmenistan BIT	Turkey	2011

B. Decisions rejecting jurisdiction (in toto)

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Burimi SRL and Eagle Games SH.A v. Republic of Albania* (ICSID Case No. ARB/11/18), Award, 29 May 2013	Albania-Italy BIT	Italy	2011
2	*Apotex Inc. v. The Government of the United States of America* (UNCITRAL), Award on Jurisdiction and Admissibility, 14 June 2013	NAFTA	Canada	2008
3	*Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award, 2 July 2013 and Dissenting Opinion of Professor William W. Park, 20 May 2013	Turkey-Turkmenistan BIT	Turkey	2010
4	*ST-AD GmbH v. The Republic of Bulgaria* (PCA Case No. 2011-06), Award on Jurisdiction, 18 July 2013	Bulgaria-Germany BIT	Germany	2010
5	*Ömer Dede and Serdar Elhüseyni v. Romania* (ICSID Case No. ARB/10/22), Award, 5 September 2013	Romania-Turkey BIT	Turkey	2010
6	*Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award, 4 October 2013	Israel-Uzbekistan BIT	Israel	2010
7	*KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/09/8), Award, 17 October 2013	Kazakhstan-Netherlands BIT	Netherlands	2009

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

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award, 22 March 2013	The Unified Agreement for the Investment of Arab Capital in the Arab States	Kuwait	2011
2	*Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013	France-Moldova BIT	France	2011
3	*The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013	Netherlands-Romania BIT	Netherlands	2006
4	*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) , Decision on Jurisdiction and Merits, 3 September 2013 and Dissenting Opinion of G. Abi-Saab (text of the Opinion not publicly available)	Netherlands-Venezuela BIT	Netherlands	2007
5	*TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013	CAFTA	United States	2010
6	*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award, 11 December 2013 and Separate Opinion of G. Abi-Saab, 5 December 2013	Romania-Sweden BIT	Sweden	2005
7	*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan* (SCC), Award, 19 December 2013 and Dissenting Opinion of G. Abi-Saab (text of the Opinion not publicly available)	Energy Charter Treaty	British Virgin Islands (United Kingdom)	2010

D. Decision dismissing all of the investors' claims

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)04/6), Award, 16 January 2013 and Dissenting Opinion	Canada-Venezuela BIT	Canada	2004

E. Decisions awarding compensation

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award, 22 March 2013	The Unified Agreement for the Investment of Arab Capital in the Arab States	Kuwait	2011
2	*Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23), Award, 8 April 2013	France-Moldova BIT	France	2011
3	*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award, 11 December 2013 and Separate Opinion of G. Abi-Saab, 5 December 2013	Romania-Sweden BIT	Sweden	2005
4	*TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013	CAFTA	United States	2010
5	*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan* (SCC), Award, 19 December 2013 and Dissenting Opinion of G. Abi-Saab (text of the Opinion not publicly available)	Energy Charter Treaty	British Virgin Islands (United Kingdom)	2010

F. Decisions on the application for annulment

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on the Application for Annulment, 3 July 2013	Egypt-United Kingdom BIT	United Kingdom	2008
2	*Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on the Application for Annulment (not public), 22 May 2013	Energy Charter Treaty	Cyprus	2006
3	*Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on the Application for Annulment (not public), 16 July 2013	Ukraine-United States BIT	United States	1998

G. Decisions not publicly available

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/11/8), Decision on Jurisdiction, 27 February 2013	Kuwait-Pakistan BIT	Kuwait	2011
2	*Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/04/16), Decision on Jurisdiction and Liability, 10 April 2013	Argentina-United States BIT	United States	2004
3	*Abengoa, S.A. y COFIDES, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/09/2), Award, 18 April 2013	Mexico-Spain BIT	Spain	2009
4	*Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8), Decision on the Respondent's Preliminary Objections, 26 April 2013	Bolivia-United States BIT	United States	2010
5	*Luigiterzo Bosca v. Lithuania* (UNCITRAL), Award, 17 May 2013	Italy-Lithuania BIT	Italy	2010
6	*Convial Callao S.A. and CCI - Compañía de Concesiones de InfraestructuraS.A. v. Republic of Peru* (ICSID Case No. ARB/10/2), Award, 21 May 2013	Argentina-Peru BIT	Argentina	2010
7	*Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Annulment, 22 May 2013	Energy Charter Treaty	Cyprus	2006
8	*Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), Decision pursuant to ICSID Arbitration Rule 41(5), 2 July 2013	Energy Charter Treaty	Sweden	2012
9	*Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Annulment , 16 July 2013	Ukraine-United States BIT	United States	1998
10	*Rafat Ali Rizvi v. Republic of Indonesia* (ICSID Case No. ARB/11/13), Award, 16 July 2013 and Separate Concurring Opinion of M Sornarajah (text of the Opinion not publicly available)	Indonesia -United Kingdom BIT	United Kingdom	2011
11	*Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1), Award, 26 September 2013	Netherlands-Venezuela BIT	Netherlands	2011
12	*AES Corporation and Tau Power B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/10/16), Award, 1 November 2013	Kazakhstan-United States BIT and Energy Charter Treaty	United States	2010
13	*Total S.A. v. The Argentine Republic* (ICSID Case No. ARB/04/01), Award, 27 November 2013	Argentina-France BIT	France	2004
14	*Ilya Levitis v. The Kyrgyz Republic* (UNCITRAL), Cost Award, 19 December 2013	Kyrgyzstan-United States BIT	United States	2012

H. Decisions on the Proposal for Disqualification of a Member of the Tribunal

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant's Proposal to Disqualify Mr Gabriel Bottini from the Tribunal, 27 February 2013	France-Venezuela BIT	France	2012
2	*Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5), Decision on the Proposal to Disqualify Francisco Orrego Vicuna, 20 June 2013	Canada-Venezuela BIT	Canada	2012
3	*CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India* (UNCITRAL), Disqualification of Arbitrator Francisco Orrego Vicuna (text of the Decision not publicly available), 30 September 2013	India-Mauritius BIT	Mauritius	2012
4	*Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB 12/20), Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal,12 November 2013	Barbados-Venezuela BIT	Barbados	2012
5	*Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Francisco Orrego Vicuna and Claus von Wobeser, 13 December 2013	Argentina-Spain BIT	Spain	2012
6	*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 the Proposal for Disqualification of Professor Francisco Orrego Vicuna, 13 December 2013	Ecuador-United States BIT	United States	2008

I. Domestic Court Decisions

	Case title	Legal instrument	Investor's home country	Year case was initiated
1	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Ontario Supreme Court Decision on Enforcement of Ecuadorian Judgment, 1 May 2013	Ecuador-United States BIT	United States	2009
2	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Order of the US District Court in the Republic of Ecuador v Stratus Consulting Inc., 29 May 2013	Ecuador-United States BIT	United States	2009
3	*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Supreme Court of Argentina Decision on the Enforcement of the Ecuadorian Judgment, 4 June 2013	Ecuador-United States BIT	United States	2009
4	*Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 34877), DC Court's Rejection of Ecuador's Challenge to the Final Award, 6 June 2013	Ecuador-United States BIT	United States	2006
5	*The British Caribbean Bank Limited v. The Government of Belize* (UNCITRAL), Judgement of the Caribbean Court of Justice, 25 June 2013	Belize-United Kingdom BIT	United Kingdom	2010
6	*RosInvestCo UK Ltd. v. The Russian Federation* (SCC Case No. V079/2005), Judgement of the Svea Court of Appeal (Svea Hovratt), 5 September 2013	Russian Federation-United Kingdom BIT	United Kingdom	2005
7	*Achmea B.V. v. The Slovak Republic* (formerly *Eureko B.V. v. The Slovak Republic*) (UNCITRAL, PCA Case No. 2008- 13), Preliminary Decision of the German Federal Court of Justice, 19 September 2013	Netherlands-Slovak Republic BIT	Netherlands	2009
8	*Dunkeld International Investment Ltd. v. The Government of Belize* (UNCITRAL), Judgement of the Belize Court of Appeal, 1 November 2013	Belize-United Kingdom BIT	Turks & Caicos (United Kingdom)	2009

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