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LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT*

I. Recent Trends

In 2011, the number of known treaty-based investor-State dispute settlement (ISDS) cases filed under international investment agreements (IIAs) grew by at least 46, bringing the total number of known treaty-based cases to 450 by the end of 2011 (figure 1).[1] This constitutes the highest number of known treaty-based disputes ever filed in one year. Since most arbitration forums do not maintain a public registry of claims, the total number of actual treaty-based cases is likely to be higher.

Of the 46 new disputes (see annex 1), 34 were filed with the International Centre for Settlement of Investment Dispute (ICSID) or the ICSID Additional Facility,[2] and six under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). For six of the new cases, the applicable arbitration rules/venues are unknown.

Highlights

- At least 46 new cases were initiated in 2011, constituting the highest number of known treaty-based disputes ever filed in one year.
- The total number of known treaty-based cases reached 450 in 2011 and the total number of countries that have responded to one or more investment treaty arbitration increased to 89.
- Of the 26 arbitral decisions rendered in 2011, eight decisions dealt exclusively with jurisdictional matters, 11 were awards on the merits, and one dealt with an application for annulment. Six decisions are known to have been issued but their text is not publicly available.
- Of the eight publicly available decisions on jurisdiction, three were in favour of the investor and five in favour of the State. Of the 11 publicly available decisions on merits and/or damages, seven were in favour of the investor and four in favour of the State.
- The majority of investment cases continues to accrue under ICSID (or under the ICSID Additional Facility) (in total now 279 cases) and UNCITRAL (126).
- In one of the 2011 rulings, the majority of a tribunal decided that arbitral tribunals established under the ICSID Convention can hear mass claims.
- 2011 also saw the initiation of cases involving important public policy aspects, notably against Australia's tobacco control legislation and against Germany's nuclear phase-out.

* This This IIA Issues Note is based on a draft prepared by Federico Ortino, King's College London. Contact: Elisabeth Tuerk, e-mail: iia@unctad.org. A number of experts provided comments on section II "2011 Decisions – Key Issues", including Nathalie Bernasconi, Rudolf Dolzer, Alvaro Galindo, Robert Howse, Ursula Kriebaum, Markus Krajewski, Facundo Perez, August Reinisch and Stephan Schill. Wolfgang Alschner, Anna-Lisa Brahms, Hamed El Kady, Sergey Ripinsky and Claudia Salgado assisted in the finalization of the document.

[1] This number does not include cases that are exclusively based on investment contracts (State contracts) or national investment laws and cases where a party has so far only signaled its intention to submit a claim to arbitration, but has not yet commenced the arbitration (notice of intent). Due to new information becoming available for 2010 and earlier years, the number of total known IIA-based ISDS cases at end 2010 was revised upwards to 404 instead of 390, as reported in the UNCTAD's 2011 IIA Issue Note No. 1. UNCTAD's database on investor-State dispute settlement cases (available at http://unctad.org/iia-dbcases/) is continuously updated.

[2] *Source*: ICSID Secretariat.

Advance unedited version

This follows a past trend, with the majority of cases accruing under ICSID (or under the ICSID Additional Facility) (in total now 279 cases) and UNCITRAL (126).[3] Other venues are used only marginally, with 21 cases at the Stockholm Chamber of Commerce (SCC), and seven with the International Chamber of Commerce (ICC). The Cairo Regional Centre for International Commercial Arbitration and the London Court of International Arbitration received one case each.[4] In the remaining cases, the applicable arbitration rules/venues are unknown.

In 38 of the 46 new cases, respondents are developing or transition economies and in the remaining eight cases they are developed countries. In 2011, Venezuela responded to ten new cases; followed by Egypt and Ecuador with four new cases each; Peru (3) and Poland, Philippines and Turkmenistan (2).

35 of the 46 new cases were filed by investors from developed countries. Out of these 35 cases, 28 were filed against developing countries or economies in transition. Nine out of the 46 new cases were filed by investors from developing countries or economies in transition, with only one of them being filed against a developed country. For two cases the investor's home country remains unknown.

2011 also saw the initiation of cases involving important public policy aspects. Philip Morris, for example, brought a case against Australia challenging the country's tobacco policies, put in place with a view to safeguarding public health and implementing obligations under the World Health Organization Framework Convention on Tobacco Control (FCTC).[5] Another example is Vattenfall, a Swedish investor controlling two nuclear power plants in Germany, who filed a case against Germany regarding the country's nuclear phase-out.[6]

In total, over the past years at least 89 governments have responded to one or more investment treaty arbitration: 55 developing countries, 18 developed countries and 16 countries with economies in transition (see annex 2). The largest number of claims were filed against Argentina (51 cases), Venezuela (25), Ecuador (23), Mexico (19), and the Czech Republic (18).

In 2011, tribunals rendered at least 26 decisions in investor-State disputes (see annex 3), 20 of which (at the time of writing) are in the public domain.[7] Of the 20 public decisions, eight dealt exclusively with jurisdictional matters (three asserting the tribunal's jurisdiction and five denying it), 11 were awards on the merits[8] (seven of which were awarded in favour of the investor), and one dealt with annulment (dismissing both parties' applications for annulment). At least, eight other decisions on discontinuance of proceedings and costs were also rendered in 2011. In addition, tribunals adopted awards embodying the parties' settlement agreement. Two 2011 examples are *Vattenfall AB, et al v. Germany* and *EVN AG v. Macedonia.*[9]

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[3] A number of cases under UNCITRAL rules are being administered by the Permanent Court of Arbitration (PCA). By the end of 2011, the total number of ISDS cases administered by the PCA was 65, of which 32 are pending. Only 14 of all PCA-administered ISDS cases are public. *Source*: the Permanent Court of Arbitration International Bureau.

[4] In addition to one dispute governed by its own rules, the London Court of International Arbitration has also administered three UNCITRAL disputes.

[5] This follows a similar case Philip Morris launched in 2010 against Uruguay. The cases were brought under the Switzerland-Uruguay and the Australia-Hong Kong BITs respectively. *Philip Morris v. Australia* (UNCITRAL) and *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay (*ICSID Case No. ARB/10/7).

[6] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk BrunsbüttelGmbH und Co. oHG, Kernkraftwerk Krümmel GmbH und Co. oHG v. Federal Republic of Germany.* Similar to an earlier case, see footnote 9, the case was brought under the Energy Charter Treaty.

[7] As of the end of March 2012, six decisions known to have been rendered in 2011 were not publicly available. These are: *ABCI Investments N.V. v. Tunisia* (ICSID Case No. ARB/04/12), Decision on Jurisdiction, February 2011; *Remington Worldwide Limited v. Ukraine* (SCC), Award, 28 April 2011; *Cesare Galdabini SpA v. Russian Federation* (UNCITRAL), Award, May 2011; TS Investment Corp. v. Armenia (LCIA), Award, August 2011; *East Cement for Investment Company v. Poland*, (ICC), Partial Award, 26 August 2011 and *Mercuria Energy Group Ltd. v. Poland,* (SCC), Final Award, December 2011.

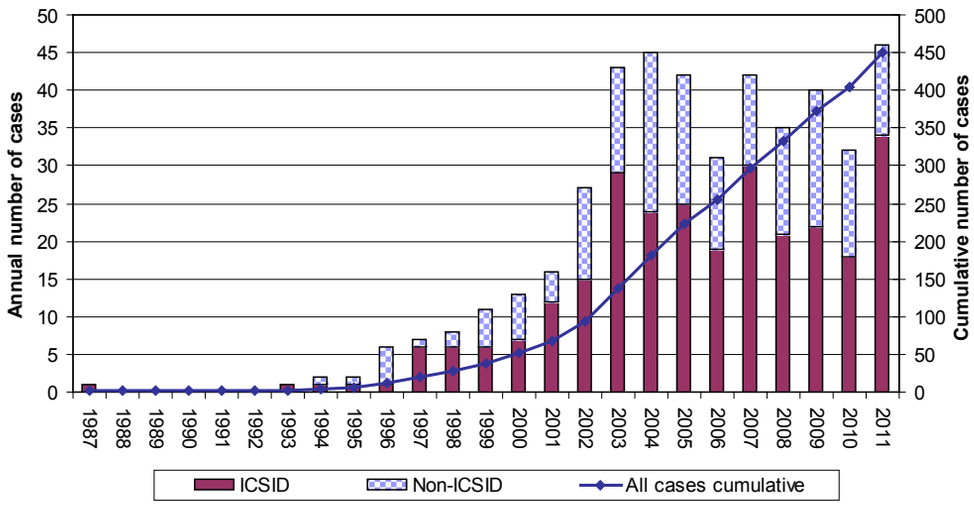
[8] Awards on the merits may also include findings on jurisdiction and on damages.

[9] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. The Federal Republic of Germany,* (ICSID Case No. ARB/09/6), Award, 11 March 2011 and *EVN AG v. The former Yugoslav Republic of Macedonia (*ICSID Case No. ARB/09/10), Award, 2 September 2011.

2011 arbitral developments brought the overall number of concluded cases to 220. Out of these, approximately 40 % were decided in favour of the State and approximately 30% in favour of the investor. Approximately 30% of the cases were settled.

Figure 1. Known investor-State treaty based disputes, 1987-2011

(Cumulative and newly instituted cases)



Source: UNCTAD.

II. 2011 Decisions – Key Issues[10]

A. Jurisdictional and Admissibility Issues

On the definition of "investment" for purposes of establishing the scope of application of (as well as the jurisdiction under) an investment treaty, decisions in 2011 continued to adopt different approaches. The tribunal in *Alps Finance and Trade v. Slovak Republic* found that the underlying transaction (an acquisition of certain "receivables" from a private company) could not be deemed a protected investment both under the applicable bilateral treaty and customary international law. Following the earlier decision in *Romak v. Uzbekistan*,[11] the *Alps Finance* tribunal, operating under the UNCITRAL rules, held that notwithstanding the treaty's apparent all-inclusive definition of covered investments ("every kind of assets"), when the asset arises from a contract, the contract itself should qualify as an investment. For that purpose the contract must satisfy certain minimum requirements, such as (i) duration, (ii) contribution and (iii) risk.[12] Interestingly, the tribunal in *Alps Finance* concluded that this is also the outcome under customary international law.[13]

The tribunal in *White Industries v. India* (also operating under UNCITRAL rules) adopted a different approach. First, *"having regard to the definition of 'investment' in the BIT, which clearly include[s] White's rights under the Contract, and the decisions of other tribunals that rights aris[ing] from contracts may amount to investments, the Tribunal concludes that the fact that White's rights under the Contract may be in personam rather than in rem does not exclude the Contract from qualifying as an investment."*[14]

[10] While the monitor aims to highlight key findings stemming from the decisions investment tribunals rendered in 2011, it is not a comprehensive review.

[11] *Romak S.A. v . The Republic of Uzbekistan* (UNCITRAL), Award, 26 November 2009.

[12] *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, para. 231.

[13] Ibid., para. 241: "*A more than abundant number of cases have contributed to elucidate the notion of investment under the ICSID Convention and, more in general, international customary law. It is now common ground that the necessary conditions or characteristics to be satisfied for attributing the quality of 'investment' to a contractual relationship include: (a) a capital contribution […], (b) a significant duration […] and (c) a sharing of operational risks […].*" Furthermore, the tribunal stated in para. 245: *"The constant jurisprudential trend has led the most prominent doctrine to exclude in categorical terms that a mere one-off sale transaction might qualify as an investment. The Tribunal cannot ignore the general consensus formed around the above doctrine."*

[14] *White Industries Australia Limited v. India,* UNCITRAL, Final Award, 30 November 2011, para. 7.4.7.

Second, the tribunal excluded the applicability of the so-called *Salini* test (and implicitly the minimum requirements identified in *Romak and Alps Finance*) in the case of an arbitration not subject to the ICSID Convention.[15]

Furthermore, the tribunal in *Abaclat et al. v. Argentina* had to decide whether the securities entitlements (in Argentinean bonds) acquired by claimants in secondary securities markets outside Argentina were investments "made in the territory of" Argentina for purposes of the definition of investment in the Argentina-Italy bilateral investment treaty (BIT).[16] A majority of the tribunal found that the securities entitlements at issue satisfied the territorial link. Having noted that *"[w]ith regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred"*,[17] the tribunal found that *"the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina's economic development."*[18]

In a dissenting opinion, one arbitrator disagreed with the majority decision of the *Abaclat* tribunal on the existence of the required territorial link. He opined that *"the financial securities instruments that constitute the alleged investment, i.e. the security entitlements in Argentinean bonds, have been sold in international financial markets, outside Argentina, with choice of law and forum selection clauses subjecting them to laws and fora foreign to Argentina. In fact, they were intentionally situated outside Argentina and out of reach of its laws and tribunals. There is no way then to say (and no legal basis for saying) that they are legally located in Argentina."*[19] Days after issuing his dissenting opinion, that member of the tribunal resigned from the *Abaclat* tribunal.[20]

On the definition of "investment" for purposes of establishing jurisdiction under Article 25 of the ICSID Convention, the decision in Abaclat et al v. Argentina provides an indication of the controversy surrounding this issue. In particular, a majority of the tribunal rejected to employ the so-called *Salini* criteria: (i) a contribution, (ii) of a certain duration, (iii) of a nature to generate profits or revenues, (iv) showing a particular risk, and (v) of a nature to contribute to the economic development of the host State. The majority noted as follows: *"Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the tribunal does not see any merit in following and copying the Salini criteria. The Salini criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which [neither] the Convention itself nor the Contracting Parties to a specific BIT intended to create."*[21]

The majority in *Abacla*t adopted an approach different from the one taken in *Salini,* which consisted in *"verifying that Claimants made contributions, which led to the creation of the value that Argentina and Italy intended to protect under the BIT."*[22] The majority eventually found that the claimants' purchase of security entitlements in Argentinean bonds constitutes a contribution which qualifies as investment under Article 25 of the ICSID Convention.[23] In a dissenting opinion, an arbitrator disagreed, stating that a contribution to the host State's economic development forms part of the "hard core" of the ICSID Article 25 investment definition.[24]

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[15] Ibid., paras. 7.4.8 and 7.4.9.

[16] The definition of investment in the Argentina-Italy BIT refers to *"any contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party in the territory of the other."* (Article 1).

[17] *Giovanna a Beccara and Others v. Argentine Republic*, (also known as *Abaclat et al v. Argentina*), ICSID Case No. ARB/07/5, Decision on Jurisdiction, 4 August 2011, para. 374.

[18] Ibid., para. 378.

[19] *Abaclat et al v. Argentina,* Dissenting Opinion, George Abi-Saab, 28 October 2011, para. 78.

[20] «Dissenter resigns after voicing policy concerns», *Global Arbitration Review*, 15 November 2011, available at: http://www.globalarbitrationreview.com/news/article/29957/.

[21] *Abaclat et al v. Argentina*, Decision on Jurisdiction, 4 August 2011, para. 364.

[22] Ibid., para. 365.

[23] Ibid., paras. 366-67.

[24] *Abaclat et al v. Argentina,* Dissenting Opinion, paras. 47-51.

The tribunal in *GEA v. Ukraine* highlighted the controversy about the relevant definition of "investment" for purposes of Article 25 of the ICSID Convention, noting the contrast between an "objective" meaning (as advanced in *Romak v. Uzbekistan*) and a "subjective" definition (as noted in *Biwater v. Tanzania*).[25] The *GEA* tribunal avoided taking sides by noting that whatever test was applied, each lead to the same conclusions[26] and concluded, inter alia, that a previous ICC Award could not be deemed a protected investment as *"the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself."*[27]

Stressing the importance of a "contribution" for purposes of establishing jurisdiction under Article 25 of the ICSID Convention, the tribunal in *Malicorp v. Egypt* noted that a contractual promise to make contributions in the future is in principle capable of satisfying such requirement, even if those contributions had not yet been made.[28]

On the definition of "investor" for purposes of establishing the scope of application of (as well as the jurisdiction under) an investment treaty, the tribunal in *Alps Finance v. Slovak Republic* was confronted with three separate conditions pursuant to the relevant clause in the Slovak Republic-Switzerland BIT: that the claimant (a) is constituted under the laws of Switzerland, (b) has its "seat" in Switzerland and (c) performs "real economic activities" in Switzerland. The tribunal concluded that the second and third conditions had not been proven. With regard to the second condition, the tribunal equated the seat of a company to *"an effective center of administration of the business operations"*. It also emphasized the kind of evidence required to prove the existence of such centre in a specific country, like the place of the company's board of directors or shareholders meetings; the number of employees working at the seat; an address with phone and fax numbers; certain general expenses and overhead costs incurred for the maintenance of the physical location of the seat.[29] With regard to the third condition, the tribunal noted that the claimant had not been able to present a complete set of tax returns, or establish the number and type of its clients, type of its operations, kind of contracts it entered into, quantity and type of personnel, nature and composition of its managing bodies.[30]

On the treaty requirement that the claimant pursued litigation before domestic courts (for at least 18 months) as a precondition for international arbitration, the tribunal in *Impregilo v. Argentina* followed the 2008 decision in *Wintershall v. Argentina* and concluded that the underlying treaty between Argentina and Italy contained a mandatory jurisdictional requirement that had to be fulfilled for an ICSID tribunal to assert jurisdiction.[31] However, as further discussed below, a majority of the *Impregilo* tribunal went on to assert its jurisdiction bypassing the 18-month recourse to local courts requirement through the most-favoured-nation (MFN) clause in the base treaty.

This contrasts with the approach taken by the majority of the tribunal in *Abaclat et al v. Argentina* which applied the same provision in the Argentina-Italy BIT. Having characterized the 18-month recourse to local courts requirement as merely relating to the circumstances under which consent to ICSID jurisdiction and arbitration is to be given full effect and be implemented (i.e., an admissibility issue) rather than a condition of such consent (i.e., a jurisdictional question),[32] the majority concluded that *"[b]ased on the circumstances of the present case and in particular the Emergency Law*

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[25] *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, paras. 141-142.
[26] *GEA v. Ukraine*, para. 143.
[27] Ibid., para. 162.
[28] *Malicorp Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 113.
[29] *Alps Finance and Trade AG v. Slovak Republic,* Award, 5 March 2011, para. 217.
[30] Ibid., para. 219.
[31] *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 94. The tribunal in *Wintershal*l had stated that a very similar clause in the Argentina-Germany BIT contained *"a time-bound prior-recourse-to-local-courts clause, which mandates (not merely permits) litigation by the investor (for a definite period) in the domestic forum." Wintershall Aktiengesellschaft v. Argentina,* ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 35. For similar decisions see also *Hochtief AG v. Argentina,* ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, paras. 53-55; and the Judgement of the US Court of Appeals in the District of Columbia, 17 January 2012, which vacated a 2007 arbitral award in *BG Group v. Argentina,* on the basis that the arbitral tribunal had not complied with the 18-month local-courts requirement in the underlying investment treaty.
[32] *Abaclat et al v. Argentina*, Decision on Jurisdiction, 4 August 2011, para. 500.

and other relevant laws and decrees, Argentina's interest in pursuing the 18 months litigation requirement does not justify depriving Claimants of their right to resort to arbitration for the sole reason that they decided not to previously submit their dispute to the Argentinean courts."[33]

On the requirement to waive domestic proceedings, the tribunal in *Commerce Group v. El Salvador* interpreted the relevant requirement in Article 10.18(2)(b) of Central America Free Trade Agreement (CAFTA) to include an obligation on the claimant to file a formal written waiver and then materially ensure that no other legal proceedings are initiated or continued.[34] As the tribunal found that the claimant had not complied with the waiver requirement, it also concluded that it had no jurisdiction over the CAFTA claims.[35]

On the admissibility of mass claims under the ICSID Convention, a majority of the tribunal in *Abaclat* concluded that the mass aspect of claimants' claims does not constitute an impediment to their admissibility. It noted *inter alia* that *"(i) The silence of the ICSID framework regarding collective proceedings is to be interpreted as a 'gap' and not as a 'qualified silence'; (ii) The Tribunal has, in principle, the power under Article 44 ICSID Convention to fill this gap to the extent permitted under Article 44 ICSID Convention and Rule 19 of the ICSID Arbitration Rules; and (iii) The procedure necessary to deal with the collective aspect of the present proceedings concern the method of the Tribunal's examination, as well as the manner of representation of claimants. However, it does not affect the object of such examination."*[36]

On the availability of counterclaims, the tribunal in *Spyridon Roussalis v. Romania* recognized that under the ICSID Convention counterclaims arising directly out of the subject-matter of the dispute may be determined by an ICSID tribunal provided that they are within the scope of the consent of the parties according to Article 46 of the ICSID Convention. A majority of the tribunal, however, declined jurisdiction to hear the counterclaims brought by Romania arising out of the failure of the claimant to make the USD 1.4 million investment on which claimant based his investment claim. The majority interpreted the consent clause in the underlying treaty (*"disputes … concerning an obligation of the latter"*) to limit jurisdiction to claims brought by investors about obligations of the host State.[37]

B. Substantive Issues

On the most-favoured-nation (MFN) clause as it applies to jurisdictional matters, two decisions rendered in 2011 continue to show a high level of controversy (particularly as both decisions were taken by a majority vote). A majority decision in *Hochtief v. Argentina* allowed the investor, on the basis of the MFN clause in the base treaty (Argentina-Germany BIT), to bypass the requirement in that treaty to pursue litigation in the domestic courts for at least 18 months before turning to international arbitration. The tribunal found that the MFN clause applied to dispute settlement as the latter is an *"activity in connection with an investment"*. Considering the boundaries of the MFN clause, it decided that the MFN clause may not operate to create wholly new rights where none otherwise existed under the Argentina-Germany BIT.[38] Applying this analysis to the claims before it, the tribunal concluded that reliance on the third-party treaty (Argentina-Chile BIT) via the MFN clause *"would not give Hochtief a right to reach a position that it could not reach under the Argentina-Germany BIT: it would*

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[33] Ibid., para. 590. Cf Dissenting Opinion, Abi-Saab, paras. 22-33.

[34] *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, para. 84.

[35] Ibid., para. 116.

[36] *Abaclat et al v. Argentina,* Decision on Jurisdiction, 4 August 2011, para. 551.

37 *Spyridon Roussalis v. Romania,* ICSID Case No. ARB/06/1, Award, 7 December 2011, para. 869 (for the dissent see Declaration by Michael Reisman, 28 November 2011). See also *Paushok et al v. Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, where the tribunal declined to exercise jurisdiction over any of the counterclaims advanced by the respondent as they lacked *"a close connection"* with the primary claim from which they arose. Ibid., para. 693.

[38] *Hochtief v. Argentina,* Decision on Jurisdiction, 24 October 2011, paras. 72 and 81.

enable it only to reach the same position as it could reach, by its own unilateral choice and actions, under the Argentina-Germany BIT, but to do so more quickly and more cheaply, without first pursuing litigation in the courts of Argentina for 18 months."[39]

In Impregilo v. Argentina, a majority of the tribunal employed the MFN clause to bypass a time-bound prior-recourse-to-local-courts clause in the Argentina-Italy BIT. The tribunal noted inter alia that the MFN clause in the base treaty expressly extended the scope of the clause to *"all other matters regulated by this Agreement"* and that in this situation previous arbitral decisions have almost unanimously found that the MFN clause covers the dispute settlement rules.[40] The tribunal also emphasized the importance of avoiding inconsistent decisions: *"the Arbitral Tribunal finds it unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators. The best way to avoid such a result is to make the determination on the basis of case law whenever a clear case law can be discerned."*[41]

In a strong dissent, the minority arbitrator in the *Impregilo* tribunal, reviewing (and often criticizing) many of the previous decisions rendered by investment tribunals on the applicability of the MFN clause to jurisdictional matters, noted that *"[u]nless specifically stated to the contrary, the qualifying conditions put by the State in order to accept to be sued directly on the international level by foreign investors cannot be displaced by an MFN clause, and a conditional right to ICSID cannot magically be transformed into an unconditional right by the grace of the MFN clause."*[42]

It is worth noting that the tribunal in *HICEE v. Slovak Republic* rejected the investor's claim to employ the MFN clause in order to expand the notion of covered investment in the base treaty. The tribunal stated that *"the clear purpose of [the MFN clause] is to broaden the scope of the substantive protection granted to the eligible investments of eligible investors; it cannot legitimately be used to broaden the definition of the investors or the investments themselves."*[43]

On the fair and equitable treatment (FET) clause, decisions rendered in 2011 highlight the potential unpredictability of the standard as tribunals continued to emphasize its flexible nature and coverage of a number of elements.[44] Citing the *Rumeli* award,[45] the tribunal in *Paushok v. Mongolia* noted that the FET standard includes the following elements: transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor's reasonable and legitimate expectations.[46]

Further, some decisions rendered in 2011 highlight that absent a "stability agreement" or a "promise by the host State", the protection of investors' legitimate expectations cannot mean that the State will never be able to modify the legal framework applicable at the time of their first investment. The *Paushok* tribunal noted, for example, that *"investors cannot legitimately expect that the taxation environment which they face at the time of their first investment will not be substantially altered with the passage of time and the evolution of events. The proper way for an investor to protect itself in such circumstances is to ensure that it will benefit from a stability agreement covering taxation and other matters."*[47] In *Impregilo v. Argentina,* the tribunal stated that *"[t]he legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be*

[39] Ibid., para. 85.
[40] *Impregilo S.p.A v. Argentina,* Award, 21 June 2011, paras. 103 and 108.
[41] Ibid., para. 108. For a similar reference to an apparent requirement on arbitration tribunals to follow a *jurisprudence constante* see *Alps Finance and Trade AG v. Slovak Republic*, Award, 5 March 2011, para. 245.
[42] *Impregilo S.p.A v. Argentina*, Concurring and Dissenting Opinion, Brigitte Stern, para. 99.
[43] *HICEE BV v. Slovak Republic,* UNCITRAL, Partial Award, 23 May 2011, para. 149. It is unclear whether the tribunal's reference to *"substantive protection"* implicitly excludes the applicability of the MFN clause to jurisdictional matters. It should be noted that the MFN clause was contained in Article 3 of the Netherlands-Slovak Republic BIT, which includes other key investment protection guarantees (like FET and FPS).
[44] See for example, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paras. 316-18.
[45] *Rumeli Telekom A.S. and Telsim Mobil v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008.
[46] *Paushok et al v. Mongolia,* Award on Jurisdiction and Liability, 28 April 2011, para. 253.
[47] Ibid., para. 370.

protected from unreasonable modifications of that legal framework."[48]

While the *Paushok* tribunal eventually found no breach of the FET clause, the tribunal in *Impregilo* concluded that Argentina breached its duty to afford fair and equitable treatment to the Impregilo's subsidiary, Aguas del Gran Buenos Aires (AGBA), by failing to restore a reasonable equilibrium in the concession. The tribunal stated as follows: *"Since the disturbance of the equilibrium between rights and obligations in the concession was essentially due to measures taken by the Argentine legislator, it must have been incumbent on Argentina to act to effectively restore an equilibrium on a new or modified basis. Although Argentina has attributed the failure of the negotiations to what it regarded as AGBA's unreasonable demands, it does not appear that Argentina took any measures to create for AGBA a reasonable basis for pursuing its tasks as concessionaire which had been negatively affected by the emergency legislation, including the New Regulatory Framework."*[49]

The tribunal in *El Paso v. Argentina* found that none of the individual measures (taken by Argentina from December 2001 onward following a financial crisis) constituted a breach of the FET clause. However, the tribunal concluded that the cumulative effect of those measures constituted a breach of the FET clause as it was *"a total alteration of the entire legal setup for foreign investments"* in violation of *"a special commitment of Argentina that such a total alteration would not take place."*[50] Referring to the concept of *"creeping expropriation",* the tribunal likened the situation under review to *"a creeping violation of the FET standard",* which it described as *"a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result."*[51]

On the requirement to provide effective means of asserting claims and enforcing rights with respect to investments, the tribunal in *White Industries v India* adopted the approach followed by the tribunal in *Chevron-Texaco v Ecuador*[52] emphasising the following: (i) the "effective means" standard is *lex specialis* and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law, (ii) the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case, (iii) indefinite or undue delay in the host State's courts dealing with an investor's claim may amount to a breach of the "effective means" standard, (iv) court congestion and backlogs are relevant factors to consider, but do not constitute a complete defence, (v) the issue of whether or not "effective means" have been provided by the host State is to be measured against an objective, international standard, (vi) local remedies do not need to be exhausted.[53] The *White Industries* tribunal eventually found that India had at least in part breached the "effective means" standard due to the undue delay in dealing with the investor's claim.[54]

On the definition of indirect expropriation, recent tribunals continued to emphasize the relevance of a multitude of elements. Decisions rendered in 2011 rely principally on the adverse effect on the investment, the proportionality of the host State's measure, the loss of control of the investment, and/or the investor's reasonable expectations.

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[48] *Impregilo S.p.A v. Argentina*, Award, 21 June 2011, para. 291. A similar position was adopted in *Total S.A. v. Argentina,* ICSID Case No. ARB/04/01, Decision on Liability, 21 December 2010, para. 117: *"In the absence of some 'promise' by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a 'guarantee' of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilisation clauses on which the investor is therefore entitled to rely as a matter of law."*

[49] *Impregilo S.p.A v. Argentina*, Award, 21 June 2011, para. 330.

[50] *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 517.

[51] Ibid., para. 518.

[52] *Chevron & Texaco v Ecuador*, Partial Award on the Merits, 30 March 2010, paras 241-248.

[53] *White Industries v India*, Award, 30 November 2011, para. 11.3.2. The 'effective remedies' standard (in the India-Kuwait BIT) operated on the basis of the MFN clause in the underlying treaty (between Australia and India).

[54] *White Industries*, para. 11.4.19.

The tribunal in *Spyridon Roussalis v. Romania*, for example, relied principally on the adverse effects of the measure on the investment, applying the "substantial deprivation" test. The tribunal noted that *"in order to determine whether an indirect expropriation has taken place, the determination of the effect of the measure is the key question. Acts that create impediments to business do not by themselves constitute expropriation. In order to qualify as indirect expropriation, the measure must constitute a deprivation of the economic use and enjoyment, as if the rights related thereto, such as the income or benefits, had ceased to exist."*[55] The *Spyridon Roussalis* tribunal also added a reference to a previous decision requiring *"a major adverse impact on the economic value of the investment, as substantially to deprive the investor of the economic value, use or enjoyment of its investment."*[56]

In addition to examining the negative economic impact of the disputed measure on the investment, some tribunals have also looked at the reasonableness and proportionality of the measure. Having found that the claimant had failed to establish a substantial deprivation of the value of the investment, the tribunal in *Total v. Argentina* also found that Argentina's pesification was *"a bona fide regulatory measure of general application, which was reasonable in light of Argentina's economic and monetary emergency and proportionate to the aim of facing such an emergency"*[57] and thus did not amount to a measure equivalent to expropriation.

In *El Paso v. Argentina*, the tribunal stated that a necessary condition for indirect expropriation is *"the neutralisation of the use of the investment"*. In particular, in order to determine whether an interference is sufficiently restrictive to amount to an "indirect" expropriation, the tribunal noted that the loss of control, rather than the mere loss of value, is the crucial element. The *El Paso* tribunal stated that *"[i]t is generally accepted that the decisive element in an indirect expropriation is the 'loss of control' of a foreign investment, in the absence of any physical taking […]"*[58] and that *"a mere loss in value of the investment, even if important, is not an indirect expropriation."*[59]

Furthermore, the tribunal in *Grand River Enterprises v. United States*, in its determination of whether the disputed measure constituted a regulatory expropriation, took into consideration the investor's reasonable expectations. The claimant had argued that, as a member of indigenous peoples or so-called First Nations in North America – a protected and sovereign group of peoples – he could reasonably expect that his activities would be wholly immune from United States state regulation. The tribunal rejected the claimant's argument, *inter alia*, because of the unsettled nature of the legal issue of whether United States state regulation applied to the investor and his activities. The United States state regulation at issue was the 1998 Master Settlement Agreement (MSA) reached between major United States tobacco companies and United States states on tobacco marketing and tobacco-related public health spending.[60] The tribunal stated as follows: *"As to U.S. domestic law, given its unsettled nature in relevant respects, it is implausible to find that Mr. Montour could have reasonably expected, and reasonably relied on such an expectation as a prudent investor, that states would refrain from applying the MSA measures to him as they have done. As demonstrated by Professor Goldberg's expert report, U.S. states had at least a colorable argument under domestic law for valid application of the MSA measures to his activities."*[61]

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[55] *Spyridon Roussalis, v. Romania,* Award, 7 December 2011, para. 328.

[56] Ibid., para. 328 citing both *Tecmed v. Mexico,* ICSID Case No. ARB (AF)/00/2 Award, 29 May 2003 and *Telenor v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006. See also *Grand River Enterprises v. United States,* UNCITRAL, Award, 12 January 2011, para. 154: "*The language of Article 1110 NAFTA and the reasoning of numerous tribunals show that an expropriation must involve the deprivation of all, or a very great measure, of a claimant's property interests."*

[57] *Total S.A. v. Argentina*, Decision on Liability, 21 December 2010, paras. 196-97. See also *El Paso v. Argentina,* Award, 31 October 2011, para. 241.

[58] *El Paso v. Argentina,* Award, 31 October 2011, para. 245.

[59] Ibid., para. 249.

[60] For more detailed information, see http://oag.ca.gov/tobacco/msa.

[61] *Grand River Enterprises v. United States*, Award, 12 January 2011, para. 142.

On the issue of expropriation by virtue of a contractual breach, two recent tribunals adopted a similar approach based on examining whether the alleged breach of contract was justified. The tribunal in *Malicorp v. Egypt* rejected the investor's claim of expropriation as it found that *"the reasons on which the Respondent relied in order to bring the Contract to an end appear serious and adequate; the termination, justified in fact and in law, could not be interpreted as an expropriatory measure."*[62] Similarly in *Impregilo v. Argentina,* the tribunal rejected the claimant's contention that the termination of the concession contract with AGBA, an Argentine subsidiary of Impregilo, by the host State could be regarded as an act of direct or indirect expropriation noting that *"the Province, with some justification, considered that AGBA had grossly failed in fulfilling its contractual obligation and terminated the Concession Contract on this basis."*[63]

On the possibility of expropriating an arbitral award, the tribunal in *GEA Group v. Ukraine* accepted the principle enunciated in *Saipem v. Bangladesh* that a decision denying recognition of an arbitral award may be considered tantamount to an expropriation if such a decision is rendered on grossly illegitimate grounds. However, the *GEA Group* tribunal rejected the investor's claim as the investor had not demonstrated that *"the actions taken by the Ukrainian courts were 'egregious' in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA's ability to recover on the ICC Award."*[64]

On the scope of the umbrella clauses, the *El Paso v. Argentina* tribunal rejected the investor's claim based on Article II(2)(c) of the Argentina-United States BIT, *inter alia,* because El Paso had not directly entered into an investment agreement (since the Concession Agreement had been signed by the Argentina-based subsidiary of El Paso).[65]

On the full protection and security (FPS) standard, the tribunal in *El Paso v. Argentina* noted that the standard *"is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party."*[66] In the view of the tribunal, such standard imposes an obligation of vigilance and care, which comprises *"a duty of prevention and a duty of repression."* Noting that all impugned measures that allegedly violated the FPS standard were directly attributable to Argentina and not to any third party, the tribunal concluded that these measures cannot be examined from the angle of full protection and security.[67]

On the state of necessity defence under customary international law, at issue in several of the arbitrations involving Argentina's 2001 financial crisis, the tribunal in *Impregilo v. Argentina* noted that the customary international law standard, as codified in Article 25 of the International Law Commission's Articles on State Responsibility, is by definition *"stringent and difficult to satisfy."*[68] The tribunal eventually rejected Argentina's plea based on the finding that Argentina had contributed to the situation of necessity by its own economic policies that *"rendered the economy of the country vulnerable to exogenous shocks and pressures, and impacted adversely the sustainability of its economic model"*. An example which the tribunal gave of such contribution was *"Argentina's long-term failure to exercise fiscal discipline."*[69]

On the state of necessity defence under an investment treaty, the tribunal in *El Paso v. Argentina* rejected the respondent's defence of necessity found in Article XI

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[62] *Malicorp Limited v. Egypt,* Award, 7 February 2011, para. 143.

[63] *Impregilo S.p.A v. Argentina*, Award, 21 June 2011, para. 283.

[64] *GEA Group v. Ukraine,* Award, 31 March 2011, para. 236. For a similar approach and conclusion see also *White Industries v India,* Final Award, 30 November 2011, para. 12.3.4-12.3.6.

[65] *El Paso v. Argentina*, Award, 31 October 2011, paras. 531-538. The *El Paso* tribunal cited extensively in support of its findings the decision of the ad-hoc annulment committee in *CMS v. Argentina* that had in turn annulled the findings of the earlier tribunal award interpreting the umbrella clause in the same treaty.

[66] Ibid., para. 522.

[67] Ibid., paras. 523-24.

[68] *Impregilo S.p.A v. Argentina,* Award, 21 June 2011, para. 344.

[69] Ibid., para. 358. The tribunal was thus able to avoid a finding regarding whether Argentina's measures were the "only means" available to address the crisis. The tribunal recognized that while this question had been the subject of numerous studies by renowned experts, it still awaited conclusive answer. (Ibid., para. 353.)

of the *Argentina-United States* BIT. The tribunal ruled that the state of necessity under Article XI cannot be invoked by a party having itself created such necessity or having substantially contributed to it. On the basis of this approach, a majority of the tribunal eventually concluded that *"Argentina's failure to control several internal factors, in particular the fiscal deficit debt accumulation and labour market rigidity, substantially contributed to the crisis. The progressive worsening of internal factors diminished Argentina's ability to respond adequately to external shocks, unlike what happened in other South American countries."*[70] The minority arbitrator disagreed with the far-reaching conclusion by the majority, noting that it was not based on an in-depth understanding of the intricacies of economic development. In her view, it should not lightly be assumed that a State is responsible for an economic collapse in a liberal market economy, where the invisible hand of the market is more powerful than the hand of the State.[71]

C. Remedies and Compensation

On damages, at least six decisions rendered in 2011 awarded them to the investor. The highest amount featured in *Chevron v. Ecuador* where the investor was awarded $ 77.74 million plus pre- and post-award compound interest.[72] In two arbitrations against Argentina, both arising from the emergency legislation in the context of the 2001 financial crisis, the claimants were awarded $ 43.03 million plus compound interest (*El Paso v. Argentina*[73]) and $ 21.29 million plus compound interest (*Impregilo v. Argentina*[74]). Smaller awards were granted in *Joseph Lemire v. Ukraine* ($ 8.71 million plus interest),[75] *White Industries v. India* (approx. $ 5 million plus interest)[76] and *Tza Yap Shum v. Peru* ($ 786,306).[77]

On the availability of moral damages, in *Lemire v. Ukraine*, the tribunal confirmed that *"moral damages may be awarded, but only under exceptional circumstances."* On the basis of a review of relevant case law, the tribunal concluded that such exceptional circumstances were present when (i) the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; (ii) the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and (iii) both cause and effect are grave or substantial.[78] The tribunal concluded that such exceptional circumstances were not present in the case before it.

On valuation, the various tribunals that had to determine the amount of compensation to be awarded to the claimants, employed a variety of methods. The discounted-cash-flow (DCF) method was employed in *El Paso v. Argentina* and *Joseph Lemire v. Ukraine*. Interestingly, the *Lemire* tribunal, given the number of assumptions surrounding the DCF model, felt the need to test the results reached via the DCF method against other parameters, including the "amounts invested", "risk environment" and "comparable transactions".[79]

In *Impregilo v. Argentina,* the tribunal refused to calculate damages on the basis of customary economic parameters such as cost- or asset-based method or an income-based method because it found that the responsibility for the failure of the concession

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[70] *El Paso v. Argentina,* Award, 31 October 2011, para. 656.
[71] Ibid., para. 667. The minority arbitrator, however, decided not to include a separate dissenting opinion *"as the divergence on the application of Article XI does not have far-reaching consequences on the material aspects of the final disposal of the case."* (Ibid., para. 670.)
[72] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador,* UNCITRAL, PCA Case No. 34877, Final Award, 31 August 2011.
[73] *El Paso v. Argentina*, Award, 31 October 2011.
[74] *Impregilo S.p.A. v. Argentina*, Award, 21 June 2011.
[75] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011.
[76] *White Industries Australia Limited v India*, Final Award, 30 November 2011.
[77] *Tza Yap Shum v. Peru,* ICSID Case No. ARB/07/6, Award, 7 July 2011.
[78] *Joseph Charles Lemire v. Ukraine,* Award, 28 March 2011, para. 333.
[79] Ibid., paras. 298-309.

was shared by both the foreign investor and the Argentine province. Instead, the tribunal decided to determine the damages to be paid by Argentina on the basis of a reasonable estimate of the loss that may have been caused to Impregilo.[80]

In *Tza Yap Shum v. Peru,* the tribunal rejected the DCF method advanced by the claimant as the investment had not shown a track record sufficient to qualify as a going concern (the investment had only been in operation for two years). Instead, the tribunal considered it more appropriate to establish the value of the investment in dispute on the basis of the "adjusted book value" method.

D. Provisional Measures, Dissenting Opinions and Length of Arbitration Proceedings

On provisional measures, the tribunal in *Chevron v Ecuador* (II) ordered the Respondent to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case.[81] The tribunal also decided that the claimants *"shall be legally responsible, jointly and severally, to the Respondent for any costs or losses which the Respondent may suffer in performing its obligations under this Second Interim Award, as may be decided by the tribunal within these arbitration proceedings (to the exclusion of any other jurisdiction)"*.[82]

The proportion of **separate or dissenting opinions** submitted in 2011 is similar to that seen in the last few years. Of the 20 public decisions rendered in 2011 by an arbitral tribunal or ad hoc committee (on jurisdiction, on the merits or on annulment), six were rendered by a majority of the arbitral tribunal with one (and in one case two) member(s) of the tribunal submitting a separate opinion.[83] Similarly to the presiding arbitrator in *Tokios Tokeles v Ukraine* following his well known dissenting opinion,[84] the (party-appointed) dissenting arbitrator in *Abaclat v Argentina* decided to resign from the tribunal shortly after issuing his dissenting opinion.

On the length of arbitration proceedings, a few decisions rendered in 2011 evidence the difference in the amount of time needed to reach a final decision. For example, looking only at the six public decisions rendered in 2011 involving the award of damages in favour of the investor,[85] the arbitration proceedings in *El Paso v Argentina* took over eight years,[86] while the arbitration proceedings in *White Industries v India* took sixteen months.[87] The other four decisions (involving the award of damages) show that the arbitration proceedings in those four arbitrations took approximately four years (i.e., between 46 and 54 months*).*[88]

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[80] *Impregilo S.p.A v. Argentina*, Award, 21 June 2011, para. 378.

[81] *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador,* UNCITRAL, *(Chevron v. Ecuador* II), Order for Interim Measures, 9 February 2011, p. 3.

[82] Ibid., p. 4.

[83] Dissenting opinions were issued in *HICEE v. Slovak Republic, Abaclat et al v. Argentina, Hochtief v. Argentina, Impregilo S.p.A v. Argentina* (two concurring and dissenting opinions), *Joseph Lemire v. Ukraine, Spyridon Roussalis v Romania.* Note, moreover, that in *El Paso v Argentina, o*ne arbitrator disagreed with parts of the reasoning and conclusion of the majority with regard to the state of necessity defence found in the bilateral investment treaty. However, the arbitrator decided not to include a separate dissenting opinion *"as the divergence on the application of Article XI does not have far-reaching consequences on the material aspects of the final disposal of the case." El Paso v. Argentina,* Award, 31 October 2011, paras. 666-670.

[84] *Tokios Tokelés v. Ukraine,* ICSID Case No. ARB/02/18, Dissenting opinion, 29 April 2004.

[85] Note that there is an additional decision on the merits in the public domain *(Sergei Paushok et al v. Mongolia* (UNCITRAL) Award on Jurisdiction and Liability, 28 April 2011). It is however, not relevant in this context as the tribunal established liability but postponed the determination of damages.

[86] 12 June 2003 (ICSID Registration); 6 February 2004 (Tribunal constituted); 8 April 2005 (hearing on jurisdiction); 27 April 2006 (Decision on Jurisdiction); June 2007 (hearing on the merits); June 2009 (appointment of independent valuation expert); 31 October 2011 (Award).

[87] 27 July 2010 (notice of arbitration); 9 November 2010 (Tribunal constituted); September 2011 (hearing); 30 November 2011 (Decision on Jurisdiction, Liability and Damages).

[88] (1) *Impregilo v Argentina*: 25 July 2007 (ICSID Registration); 27 May 2008 (Tribunal constituted); May 2009 (hearing on jurisdiction); March 2010 (hearing on the merits); 21 June 2011 (Award). (2) *Lemire v Ukraine:* 8 December 2006 (ICSID Registration); 14 June 2007 (Tribunal constituted); December 2008 (hearing); 14 Jan 2010 (Decision on Jurisdiction and Liability); 28 March 2011 (Decision on Damages). (3) *Tza Yap Shum v Peru*: 12 February 2007 (ICSID Registration); 1 October 2007 (Tribunal constituted); October 2008 (hearing on jurisdiction); 19 June 2009 (Decision on Jurisdiction); June 2010

E. Annulment and Judicial Review

On annulment, the ad hoc committee in *Continental v Argentina*, the only ICSID annulment decision rendered in 2011 in an investor-State dispute, dismissed the applications for annulment of the investor and the host State in their entirety. It also emphasized two aspects of the annulment process. First, while it noted the limited function of an annulment committee (assessing the legitimacy of the award rather than its correctness), the ad hoc committee noted that it is *"to be expected that the ad hoc committee will have regard to relevant previous ICSID awards and decisions, including other annulment decisions, as well as to other relevant persuasive authorities."* In the view of the committee, the emergence in the longer term of a jurisprudence constante in relation to annulment proceedings *"may be a desirable goal."*[89]

Second, the *Continental v Argentina* ad hoc committee emphasized the autonomous nature of the various grounds for annulment. It thus noted that if the party wishes to contend that a single aspect of an award constitutes simultaneously more than one ground for annulment under Article 52(1) of the ICSID Convention, that party must identify separately how the very different considerations involved in each of these enquiries are nevertheless provoked by the same aspect of an impugned award.[90]

On decisions of domestic courts reviewing arbitral awards, noteworthy is the Judgement of the Ontario Court of Appeal on the application to set aside the award rendered by a NAFTA tribunal in *Cargill v Mexico.* While the Court of Appeal ultimately rejected the appeal brought by Mexico, it clarified the issue of the standard of review to be employed by domestic courts in Canada. While the parties disagreed on the appropriate standard of review (Mexico arguing for "correctness" and Cargill for "deference" or "reasonableness"), the Court of Appeal concluded that when at issue is whether the tribunal acted within its jurisdiction, *"the standard of review of the award the court is to apply is correctness, in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made."*[91] The Court of Appeal, however, emphasized that such a standard does not give the courts a broad scope for intervention in the decisions of international arbitral tribunals; in fact, in the Court of Appeal's view, *"courts are expected to intervene only in rare circumstances where there is a true question of jurisdiction."*[92]

A United States federal District Court granted the investor's cross-motion for recognition and enforcement of an arbitral award rendered in *BG Group v Argentina*.[93] The District Court reviewed the award principally on whether the award contravened public policy or in other words was *"repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."*[94] According to the District Court, Argentina failed to establish that the arbitral tribunal's *"interpretations of the investment treaty contravened any well-settled law or case precedent, let alone that its rulings were contrary to a principle so inextricably woven into the fabric of American jurisprudence to warrant this Court's intervention."*[95]

(hearing on the merits); 7 July 2011 (Award). (4) *Chevron & Texaco v Ecuador:* 2006 (notice of arbitration); 1 December 2008 (Interim Award on Jurisdiction); 30 March 2010 (Partial Awards on the Merits); 31 August 2011 (Final Award).

[89] *Continental v Argentina,* ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 84.

[90] *Continental Casualty Company v Argentina,* Decision on Annulment, para. 85, quoting *Duke Energy v. Peru*, ICSID Case No ARB/03/28, Decision on the application for annulment, 1 March 2011, paras. 91-92.

[91] Judgment of the Ontario Court of Appeal on application to set aside award, *Mexico v Cargill,* 4 October 2011, para. 42. The Court referred to two previous NAFTA review decisions under Article 34 of the Model Law adopting the same standard: *United Mexican States v. Metalclad Corp. (*2001), 89 B.C.L.R. (3d) 359 (S.C.), and *Canada (Attorney General) v. S.D. Myers, Inc*. (2004), 3 F.C.R. 368.

[92] *Mexico v Cargill,* para. 44.

[93] *Argentina v. BG Group,* Memorandum Opinion, 21 January 2011.

[94] Ibid. p. 27.

[95] Ibid. It should be noted that the District Court decisions on Argentina's motion (2010) and investor's cross-motion (2011) have been reversed on 17 January 2012 by the US Court of Appeal for the DC Circuit.

III. Concluding Remarks

Developments in 2011 brought home two important messages about ISDS. First, the record number of newly initiated arbitrations is an indication that the ISDS system stays in demand. Foreign investors continue using IIAs as a basis for initiating international arbitrations against host States in pursuit of their interests. (With at least 46 new cases, the system reached a record high in 2011). As these known cases are only the ones in the public domain, representing possibly only the tip of the iceberg, the real number of cases is likely to be higher.[96]

Second, with a number of high-profile arbitrations involving key public policies in the area of tobacco control, nuclear phase-out or sovereign debt restructuring, the ISDS regime reaches far beyond its original intention. Third, as demonstrated by the review of 2011 awards, arbitral tribunals continue to disagree on core IIA definitions and standards, thus further undermining the system's predictability. Taken together, these trends risk a broad back-lash against international investment regulation.

Policy makers around the globe are now tasked to bring the system back to its original role of promoting good governance and fostering the rule of law. Initial responses by some countries include denouncing the ICSID Convention[97] and declaring that they will abstain from including ISDS into future IIAs,[98] accompanied by intensified policy debates on the issue all around the globe.

This adds a renewed emphasis on using alternative methods for settling investment disputes (ADR)[99] and the implementation of dispute prevention policies (DPPs)[100] as well as efforts to make tribunals' interpretations more coherent and predictable.[101]

International policy action also needs to play a role in this regard. By offering countries a forum to share experiences and best practices, multilateral consensus-building can help devise ways forward in addressing one of the most urgent challenges in international investment policy making.

[96] This is supported by Ecuador's recent release of information on the IIA claims it faces. Importantly, the government's list includes a number of previously unknown cases, see http://www.pge.gob.ec/es/reglamentos-internos/doc_download/368-hoja-de-casos-14-de-feb-2012.html.

[97] Venezuela recently followed Bolivia and Ecuador in denouncing the ICSID convention. S. Ripinsky, "Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve", I*nvestment Treaty News*, Vol.2 (forthcoming). For an analysis on Bolivia and Ecuador, see UNCTAD (2010) *Denunciation of the ICSID Convention and BITs: impact on investor-State claims,* available at: http://archive.unctad.org/en/docs/webdiaeia20106_en.pdf.

[98] For example Australia, see Gillard Government Trade Policy Statement: http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf.

[99] See UNCTAD (2010) *Investor–State Disputes: Prevention and Alternatives to Arbitration,* available at: http://archive.unctad.org/en/docs/diaeia200911_en.pdf ; UNCTAD (2011) *Investor-State Disputes: Prevention and Alternatives to Arbitration II*, available at: http://archive.unctad.org/en/docs/webdiaeia20108_en.pdf

[100] See UNCTAD (2011) *Best Practices in Investment for Development, Case Studies in FDI, How to Prevent and Manage Investor-State Disputes: Lessons from Peru*, available at: http://archive.unctad.org/en/docs/webdiaepcb2011d9_en.pdf

[101] See UNCTAD (2011) *Interpretation of IIAs: What States Can Do,* available at: http://archive.unctad.org/en/docs/webdiaeia2011d10_en.pdf

Annexes[102]

Annex 1. New known treaty-based cases initiated in 2011

	Case Title	Home Country
1	*Accession Eastern Europe Capital AB and Mezzanine Management Sweden AB v. Republic of Bulgaria* (ICSID Case No. ARB/11/3)	Sweden
2	*Adel A Hamadi Al Tamimi v. Sultanate of Oman* (ICSID Case No. ARB/11/33)	United States
3	*Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/11/8)	Kuwait
4	*Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines* (ICSID Case No. ARB/11/27)	Belgium
5	*Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt* (ICSID Case No. ARB/11/6)	Kuwait
6	*Burimi SRL and Eagle Games SH.A v. Republic of Albania* (ICSID Case No. ARB	Italy
7	*Club Hotel Loutraki S.A. and Casinos Austria International Holding GMBH v. Republic of Serbia* (ICSID Case No. ARB/11/4)	Greece
8	*Copper Mesa v. Ecuador* (UNCITRAL arbitration rules, administered by the PCA 2012-2)	Canada
9	*Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2)	Canada
	Detroit International Bridge Company v. Canada (UNCITRAL)	United States
11	*Dialasie SAS v. Vietnam* (UNCITRAL arbitration rules, administered by the PCA)	France
12	*DP World Callao S.R.L., P&O Dover (Holding) Limited, and The Peninsular and Oriental Steam Navigation Company v. Republic of Peru* (ICSID Case No. ARB/11/21)	United Kingdom
13	*Ekran Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15)	Malaysia
14	*EuroGas GmbH. v. Slovakia* (UNCITRAL)	United States
15	*Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/11/12)	Germany
16	*Gambrinus, Corp. v. Bolviarian Republic of Venezuela* (ICSID Case No. ARB/11/31)	Unkown
17	*Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20)	Turkey
18	*Highbury International AVV and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/1)	Netherlands
19	*Hortensia Margarita Shortt v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/30)	Unkown
20	*Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt* (ICSID Case No. ARB/11/16)	United Arab Emirates
21	*Indorama International Finance Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/11/32)	United Kingdom
22	*Kahn Resources Inc, Khan Resources B.V., Cauc Holding Company Ltd v. the Government of Mongolia and Monatom Co., Ltd* (UNCITRAL)	Netherlands
23	*Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19)	Luxembourg
24	*Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/5)	Netherlands

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

	Case Title	Home Country
25	*Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (ICSID Case No. ARB/11/24)	Greece
26	*Merck v. Ecuador* (UNCITRAL arbitration rules, administered by the PCA AA 442)	United States
27	*Mobile TeleSystems OJSC v. Turkmenistan* (ICSID Case No. ARB(AF)/11/4)	Russian Federation
28	*Mr. Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23)	France
29	*Murphy Exploration and Production Company International v. Ecuador (Murphy v Ecuador III)* (UNCITRAL arbitration rules, administered by the PCA AA 434)	United States
30	*National Gas S.A.E. v. Arab Republic of Egypt* (ICSID Case No. ARB/11/7)	United Arab Emirates
31	*Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1)	Canada
32	*OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25)	Netherlands
33	*Oxus Gold v. Uzbekistan* (UNCITRAL)	United Kingdom
34	*Philip Morris v. Australia* (UNCITRAL)	Hong Kong
35	*Rafat Ali Rizvi v. Republic of Indonesia* (ICSID Case No. ARB/11/13)	United Kingdom
36	*Renco Group, Inc v. Peru* (UNCITRAL)	United States
37	*Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17)	France
38	*Laboratoires Servier v. Poland* (UNCITRAL)	France
39	*Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26)	Portugal and Luxembourg
40	*The Williams Companies, International Holdings B.V., WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (Pigap II) Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/10)	Netherlands
41	*Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28)	Netherlands
42	*Türkiye Petrolleri Anonim Ortaklıgı v. Republic of Kazakhstan* (ICSID Case No. ARB/11/2)	Turkey
43	*Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk BrunsbüttelGmbH und Co. oHG, Kernkraftwerk Krümmel GmbH und Co. oHG v. Federal Republic of Germany*	Sweden
44	*Vigotop Limited v. Republic of Hungary* (ICSID Case No. ARB/11/22)	Cyprus
45	*Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland* (ICSID Case No. ARB(AF)/11/3)	United States
46	*Zamora Gold v. Ecuador* (UNCITRAL)	Canada

Source: UNCTAD.

Annex 2. Known investment treaty claims, by respondents

	Country	Cases
1	Argentina	51
2	Venezuela	25
3	Ecuador	23
4	Mexico	19
5	Czech Republic	18
6	Canada	17
7	Egypt	14
8	Poland	14
9	Ukraine	14
10	United States	14
11	Kazakhstan	11
12	India	10
13	Bolivia	9
14	Russian Federation	9
15	Slovakia	9
16	Turkey	9
17	Romania	8
18	Georgia	7
19	Hungary	7
20	Moldova, Republic of	7
21	Peru	7
22	Jordan	5
23	Turkmenistan	5
24	Albania	4
25	Congo, Democratic Republic of	4
26	Costa Rica	4
27	Mongolia	4
28	Pakistan	4
29	Philippines	4
30	Algeria	3
31	Belize	3
32	Chile	3
33	El Salvador	3
34	Estonia	3
35	Germany	3
36	Guatemala	3
37	Kyrgyzstan	3
38	Lebanon	3
39	Lithuania	3
40	Paraguay	3
41	Sri Lanka	3
42	Uzbekistan	3
43	VietNam	3
44	Zimbabwe	3
45	Armenia	2
46	Azerbaijan	2
47	Bangladesh	2
48	Bulgaria	2
49	Burundi	2
50	Croatia	2

	Country	Cases
51	Dominican Republic	2
52	Ghana	2
53	Indonesia	2
54	Latvia	2
55	Macedonia, TFYR	2
56	Malaysia	2
57	Morocco	2
58	Slovenia	2
59	Tanzania, United Republic of	2
60	United Arab Emirates	2
61	Yemen	2
62	Australia	1
63	Bosnia and Herzegovina	1
64	Cambodia	1
65	China	1
66	Ethiopia	1
67	France and United Kingdom	1
68	Gabon	1
69	Grenada	1
70	Guyana	1
71	Iran, Islamic Republic of	1
72	Myanmar	1
73	Nicaragua	1
74	Nigeria	1
75	Oman	1
76	Panama	1
77	Portugal	1
78	Saudi Arabia	1
79	Senegal	1
80	Serbia	1
81	Serbia-Montenegro	1
82	South Africa	1
83	Spain	1
84	Tajikistan	1
85	Thailand	1
86	Trinidad and Tobago	1
87	Tunisia	1
88	United Kingdom	1
89	Uruguay	1
90	Unknown	7
	Total	450

Source: UNCTAD.

Annex 3. Decisions rendered in 2011

A. Decisions upholding jurisdiction

	Case Title	Legal instrument	Investor's home country	Year case was initiated
1	*Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6), Decision on Jurisdiction, 30 June 2011	Ecuador-France BIT	France	2008
2	*Abaclat et al v. Argentine Republic* (also known as *Giovanna A. Beccara and others v. Argentine Republic)* (ICSID Case No. ARB/07/5), Decision on Jurisdiction, 4 August 2011 and Dissenting Opinion, 28 October 2011	Argentina-Italy BIT	Italy	2007
3	*Hochtief Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Jurisdiction, 24 October 2011 and Separate and Dissenting Opinion, 24 October 2011	Argentina-Germany BIT	Germany	2007

B. Decisions rejecting jurisdiction

	Case Title	Legal instrument	Investor's home country	Year case was initiated
1	*Alps Finance and Trade AG v. Slovak Republic* (UNCITRAL), Award, 5 March 2011	Slovak Republic-Switzerland BIT	Switzerland	2008
2	*Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Award, 14 March 2011	CAFTA-DR	United States of America	2009
3	*Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Final Award, 2 September 2011	ECT	Cyprus	2006
4	*Vito G. Gallo v. Canada,* (UNCITRAL), Award, 15 September 2011	NAFTA	United States	2007
5	*HICEE v. Slovak Republic* (UNCITRAL), Partial Award, 23 May 2011 and Dissenting Opinion	Netherlands-Slovak Republic BIT	Netherlands	2008

C. Decisions finding State's liability for IIA breaches[103]

	Case Title	Legal instrument	Investor's home country	Year case was initiated
1	*Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB(AF)/98/1), Award, 28 March 2011 and Dissenting Opinion, 1 March 2011	Ukraine-United States BIT	United States of America	1998
2	*Sergei Paushok et al v. Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011	Mongolia-Russia BIT	Russian Federation	2008
3	*Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award, 21 June 2011 and two Concurring and Dissenting Opinions	Argentina-Italy BIT	Italy	2007
4	*Tza Yap Shum v. Republic of Peru* (Case No. ARB/07/6), Award, 7 July 2011	China-Peru BIT	China	2007
5	*Chevron Corporation and Texaco Petroleum Corporation v. Ecuador* (PCA Case No. 34877), Final Award, 31 August 2011	Ecuador-United States BIT	United States of America	2006
6	*El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011	Argentina-United States BIT	United States	2003
7	*White Industries Australia Limited v. India* (UNCITRAL), Final Award, 30 November 2011	Australia-India BIT	Australia	2010

[103] These decisions may also include findings on jurisdiction and on damages.

D. Decisions dismissing the investors' claims

	Case Title	Legal instrument	Investor's home country	Year case was initiated
1	*Grand River Enterprises Six Nations, Ltd., et. al. v. United States* (UNCITRAL), Award, 12 January 2011	NAFTA	Canada	2004
2	*Malicorp Limited v. Egypt* (ICSID Case No. ARB/08/18), Award, 7 February 2011	Egypt-United Kingdom BIT	United Kingdom	2008
3	*GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16), Award, 31 March 2011	Germany-Ukraine BIT	Germany	2008
4	*Spyridon Roussalis v. Romania* (ICSID Case No. ARB/06/1), Award, 7 December 2011 and Declaration, 28 November 2011	Greece-Romania BIT	Greece	2006

E. Decisions on the application for annulment

	Case Title	Legal instrument	Investor's home country	Year case was initiated
1	*Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment, 16 September 2011	Argentina-United States BIT	United States of America	2003

F. Decisions not publicly available

	Case Title	Legal instrument	Investor's home country	Year case was initiated
1	*ABCI Investments N.V. v. Republic of Tunisia,* (ICSID Case No. ARB/04/12), Decision on Objections to Jurisdiction, 18 February 2011	Netherlands-Tunisia BIT	Netherlands Antilles	2004
2	*Remington Worldwide Limited v. Ukraine,* (SCC), Award, 28 April 2011	ECT	Gibraltar (United Kingdom)	2008
3	*Cesare Galdabini SpA v. Russian Federation,*(UNCITRAL), Award, May 2011	Italy-Russian Federation BIT	Italy	2009
4	*TS Investment Corp. v. Republic of Armenia,* (LCIA), Award, August 2011	Armenia-United States BIT	United States of America	2007
5	*East Cement for Investment Company v. Republic of Poland,*(ICC), Partial Award, 26 August 2011	Jordan-Poland BIT	Jordan	2009
6	*Mercuria Energy Group Limited v. Republic of Poland,* (SCC), Final Award, December 2011	ECT	Cyprus	2008

Source: UNCTAD.

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