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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.

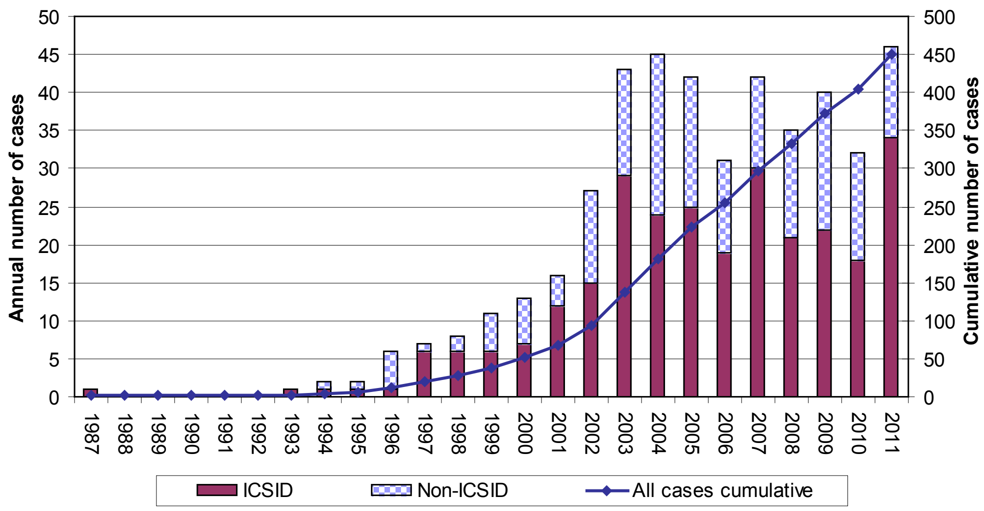
[7] As of the end of March 2012, six decisions known to have been rendered in 2011 were not publicly available. These are: *ABCI Investments N.V. v. Tunisia* (ICSID Case No. ARB/04/12), Decision on Jurisdiction, February 2011; *Remington Worldwide Limited v. Ukraine* (SCC), Award, 28 April 2011; *Cesare 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]

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[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]

[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 *Wintershall* 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*

[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*

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[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.