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Recent Developments in International Investment Disputes:

Investment treaty cases from September 2010 to October 2011

Nathalie Bernasconi-Osterwalder and Vyoma Jha

October 2011

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Published by the International Institute for Sustainable Development.

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Written by Nathalie Bernasconi-Osterwalder and Vyoma Jha

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Acronyms

AGBA	Aguas del Gran Buenos Aires
BIT	Bilateral Investment Treaty
CEMVEN	CEMEX Venezuela
ECT	Energy Charter Treaty
GEA	GEA Group Aktiengesellschaft
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
JAA	joint-activity agreements
MFN	most-favoured nation
PPA	Power Purchase Agreement
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law

1.0 Introduction

This note highlights relevant developments in international investment disputes from September 2010 to October 2011. In essence, it attempts to outline some of the wider policy implications of the arbitral awards in this time period.

While this note does not detail every international investment dispute or issue addressed in decisions issued in this time period, it provides an account of the following substantive issues that arose in some of the various awards on jurisdiction and liability: definitions of "investment" and "investor"; most-favoured nation treatment; expropriation; fair and equitable treatment; and dispute resolution under foreign investment laws.

In total, we analyze 17 awards: 14 decisions by International Centre for the Settlement of Investment Disputes (ICSID) tribunals, two by United Nations Commission on International Trade Law (UNCITRAL) tribunals and one by a Stockholm Chamber of Commerce (SCC) tribunal. While most of the disputes arose from bilateral investment treaties (BITs), two cases arose under the Energy Charter Treaty (ECT) (*AES v. Hungary* and *Libananco v. Turkey*).

There were six decisions just on jurisdiction; of these, jurisdiction was rejected in three cases and upheld in the other three. Interestingly, in one of those decisions, while the tribunal accepted jurisdiction to hear the contract claims of the claimant, it deferred the question of whether it had competence over the treaty claims to a later stage (*Perenco v. Ecuador*).

Of the remaining 11 decisions, the award was in favour of the state in five cases and in favour of the investor in other six. Of the six decisions on liability in favour of the investor, the tribunal awarded damages to the investor in all but one case, where it deferred the question of damages to a separate quantum phase of the proceedings (*Total v. Argentina*).

What follows is a closer look at the various substantive issues that arose in the international investment disputes in the period September 2010 to October 2011.

2.0 Definition of "Investment"

The definition of "investment" is a perennially contentious issue, and one that continued to prove controversial over the last year. In a particularly notable decision, for example, a tribunal granted jurisdiction to tens of thousands of holders of Argentinian bonds, having deemed that sovereign debt instruments constituted a protected investment under the Italy-Argentina Bilateral Investment Treaty (BIT) and the ICSID Convention (*Abaclat v. Argentina*). However, the dissent of Professor Georges Abi-Saab (not yet public), as well as the ensuing debate among academics and practitioners, indicates that some believe that the majority tribunal took an overly broad view of the term "investment," one that goes beyond what states intended.

Several other decisions over the last year considered whether, and in which situations, contracts can qualify as investments. One case, for instance, concerned a contract that had been terminated by the Egyptian government, on the grounds that the investor had not performed its obligations (*Malicorp v. Egypt*). The tribunal, however, found that the commitments in the contract were enough to qualify as an investment—even if they were largely unfulfilled. Another tribunal looked at a purchase contract signed by the Ukrainian government and concluded that it was merely a commercial contract, and did not constitute an investment (*Global Trading v. Ukraine*). Another tribunal found that an agreement under which the investor was to provide oil to another company for conversion constituted an investment. Yet, in the same decision, the tribunal concluded that an arbitral award from a different arbitration could not be considered an investment (*GEA v. Ukraine*). Finally, several decisions confirmed the approach taken in earlier cases that indirect investments also qualify as protected investment under investment treaties.

The debate over the definition of "investment" has an added layer of complexity in cases decided under the ICSID Convention. The challenge in these cases arises from the fact that a dispute must be related to an "investment" in the eyes of the ICSID Convention and the relevant investment treaty; yet, the ICSID Convention is famously silent on the matter of defining the term "investment." Tribunals have taken widely divergent approaches to solving this dilemma. For example, one tribunal was of the view that the ICSID Convention and BIT criteria set forth two different, yet essentially "complementary," tests (*Malicorp v. Egypt*). Another tribunal found that it is "appropriate to interpret the BIT as reflecting the state's understanding that the activity constitutes an 'investment' within the meaning of the ICSID Convention" (*Alpha Projektholding v. Ukraine*).

Tribunals' interpretations of the term "investment" in these cases were based fundamentally on the language used in the governing treaties. That language, however, tends to be broad. Case developments confirm that the notion of "investment" continues to leave much room to arbitrators to adopt very different interpretative approaches. The cases also confirm that tribunals are unwilling to impose limits on the definition of the term that are not expressly stated in the treaty. Direction could be provided by states through clearer drafting or, in the case of existing treaties, through amendments or joint or unilateral interpretations.

2.1 Abaclat and others v. Argentine Republic (2011)

In the August 2011 decision of *Abaclat and others v. Argentine Republic*, the majority of an ICSID tribunal, comprising of Pierre Tercier and Jan van den Berg, concluded that it had jurisdiction under the Italy-Argentina BIT to hear the mass claims brought by nearly 60,000 Italian nationals against Argentina. Meanwhile, the dissent of Professor Abi-Saab has not been made public yet.

The claimants, who held "security entitlements" in various Argentinian sovereign bonds, alleged that Argentina's default and its sovereign debt restructuring were in breach of Argentina's obligations under the BIT. The "security entitlements" were the alleged "investments" harmed as a result of those breaches.

The Italy-Argentina BIT defined an "investment" to be "any conferment or asset invested or reinvested" by an investor of the home country in the territory of the host country in compliance with the host country's laws and regulations. It then provided an illustrative list of assets that were covered.

Argentina contended that the "security entitlements" were not investments because they were not "made within the territory of Argentina." Argentina argued that, among the defects relating to that requirement, the security entitlements did not cause any transfer of money into Argentina, and were located outside of Argentina.

In its decision, the majority took note of the broad view of "investments" given in the treaty, and determined that the bonds at issue were "obligations" or "securities" explicitly covered by the agreement. It further determined that the security entitlements in the bonds were also "securities" listed as a form of covered "investment."

With respect to Argentina's argument regarding the location of the investment, the tribunal determined that the security entitlements and the bonds were part of the same economic instrument, and that that instrument was designed to generate funds ultimately made available to Argentina to "finance its economic development." As such, the majority concluded, the bonds and security entitlements constituted an "investment" in Argentina.

The majority also noted that the large number of claimants did not constitute an impediment to their admissibility. In their view, "the silence of the ICSID framework regarding collective proceedings is to be interpreted as a 'gap' and not as a 'qualified silence.'"

2.2 Malicorp Limited v. Arab Republic of Egypt (2011)

In the 2011 decision in *Malicorp Limited v. Arab Republic of Egypt*, an ICSID tribunal had to determine whether it was a dispute about a protected investment or a purely contractual action. Malicorp, the claimant, had signed a concession contract in 2000 to build and operate an international airport. However, Malicorp had taken almost none of the legal, financial and technical steps required to launch the project, nor had it incorporated the local company that was meant to become the concessionaire. As a consequence, the government terminated the concession contract in 2001. Malicorp alleged that its investment had been expropriated. The tribunal was faced with the question of whether the contract alone was sufficient to qualify as an investment under the ICSID Convention (which does not define the term "investment") and the BIT (which defined "investment" as "every kind of asset" with an illustrative list of examples including "claims," "performance under a contract" and "business concessions conferred by law or under contract").

The tribunal concluded that this *did* constitute an investment. It had little difficulty determining that the contract was an "asset" under the BIT, viewing that it fell within a number of the examples of "assets" the treaty listed, such as a "claim," "performance under a contract" and a "business concession."

The tribunal stated that even though Malicorp had not performed many of the requirements in connection with the contract, it was still bound by the contract and under an obligation to make major contributions in the future. An investment, according to the tribunal, "entails the promise to make contributions in the future for the performance of which that party is henceforth contractually bound." Thus, the tribunal accepted that the dispute arose out of an investment.

2.3 GEA Group Aktiengesellschaft v. Ukraine (2011)

A three-member ICSID tribunal in the case of *GEA Group Aktiengesellschaft v. Ukraine*, also dealt with the question of defining "investment." The dispute arose out of an agreement between a German firm, New Klöckner (which was ultimately acquired by the claimant GEA Group Aktiengesellschaft [GEA]) and a Ukrainian chemical company, Oriana, wherein New Klöckner was to provide fuel to Oriana for conversion. Once the conversion agreement began to deteriorate, however, 125,000 tons of fuel went missing. The parties subsequently entered into a settlement and repayment agreement for the missing fuel, which stipulated that disputes would be settled at the International Chamber of Commerce (ICC). A dispute was eventually lodged with the ICC, which found Oriana liable for some US$30 million. However, efforts to enforce the award failed when Ukrainian courts determined that the repayment agreement had been improperly authorized. Ultimately, in 2008, GEA filed a request against Ukraine with ICSID under the German-Ukraine BIT, claiming that Ukraine failed to honor its "repeated promises" to ensure that GEA was paid for its products.

The claimant argued that its investment consisted of the original agreement to convert fuel, the subsequent settlement and repayment agreement, as well the ICC award. The governing BIT contained the rather common broad definition of an "investment" as "any kind" of asset, and listed several examples in a non-exclusive list.

The tribunal added, however, that there was at least some support for the notion that the term "investment" has a separate inherent and objective meaning that "cannot be ignored" when evaluating the meaning of the term under a BIT (irrespective of whether the dispute is an UNCITRAL, ICSID, or other arbitration). That separate meaning was that an "investment" must entail a contribution that extends over a certain time and that involves some risk. The tribunal explained that, even if an asset fell within the enumerated items under a BIT's list of "investments," it would only be an "investment" covered by the treaty if it had those characteristics required by the "inherent definition."

The ICSID tribunal concluded that GEA had a protected investment only in the form of a conversion agreement. That agreement, it determined, fell within at least one of the types of assets specifically referenced in the treaty, and also satisfied the "objective" or "inherent" definition of an "investment." In contrast, the settlement agreement was "merely an inventory of undelivered goods and recorded the difference as a debt" and the repayment agreement "merely established a means for repayment." The tribunal also rejected the argument that the ICC award should be viewed as an investment. It noted that the "award itself involves no contribution to, or relevant economic activity."

2.4 CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (2010)

In the Jurisdictional Decision of *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, an ICSID tribunal ruled that it had jurisdiction under the Netherlands-Venezuela BIT to hear a claim by Dutch investors for alleged treaty violations of their "indirect" investments.

The first claimant, CEMEX Caracas Investments B.V., and its wholly owned subsidiary, CEMEX Caracas II Investments B.V., were both incorporated in the Netherlands. CEMEX Caracas II owned 100 per cent of the shares in a Cayman Islands company, Vencement Investments, which in turn owned 75.7 per cent of the shares in CEMEX Venezuela (CemVen), a cement company incorporated and operating in Venezuela. The claimants, thus, complained that their indirectly owned cement company, CemVen, was expropriated, without compensation.

Citing a similar BIT interpretation in the case of *Siemens v. Argentina* (2007) dealing with indirect ownership, the tribunal affirmed that the BIT in this case covered indirect investments and entitled the claimants to assert their claims for alleged treaty violations.

2.5 Global Trading Resource Corp. and Globex International, Inc. v. Ukraine (2010)

In another ICSID case, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, a pair of American companies alleged that Ukraine failed to pay for and take delivery of the poultry shipped pursuant to the poultry sales and purchase contracts negotiated by the claimants with senior Ukrainian officials.

The tribunal, however, concluded that it did not have jurisdiction to hear the claim on the grounds that the sale and purchase contracts entered into by the claimants were pure commercial transactions that cannot be considered as "investments" pursuant to the ICSID Convention. It held that, although not explicitly defined in the ICSID Convention, there is an "objective" definition of investment under the ICSID framework. The tribunal noted that "the fact that the trade in these particular goods was seen to further the policy priorities of the purchasing state does not bring about a qualitative change in the economic benefit that all legitimate trade brings in its train. Nor can an undertaking by officials of the State to honour the contractual commitments to be concluded transform a sale and purchase agreement into an investment" (para. 56). Thus, the tribunal decided that the claims brought by Global Trading Resource Corp. and Globex International, Inc. were manifestly without any legal merit.

In reaching its conclusion, the tribunal avoided a full analysis of the companies' claim that their commercial transaction qualified as an investment under the US-Ukraine BIT. Among other things, the tribunal looked at the provision of the BIT that defined investments as "rights conferred by law or by contract." It found this provision could be understood broadly to include any rights or that it might refer only to rights that are capable of constituting investments in themselves. Instead of assessing this provision independently, the tribunal went on to identify if the claimants' "rights" qualified as investments as such under the ICSID Convention. Since it concluded this was not the case, it did not further analyze the potential meaning of the BIT provision.

2.6 Alpha Projektholding GmbH v. Ukraine (2010)

An ICSID tribunal in the case of *Alpha Projektholding GmbH v. Ukraine* ruled on a dispute that arose out of a failed hotel reconstruction deal entered into by Alpha with a Ukrainian state-owned enterprise in Kiev, Hotel Dnipro.

Here, again, the governing BIT used a broad, asset-based definition of an "investment," and an illustrative, rather than exhaustive, list of the types of assets covered. It also, however, specified that the investment had to be invested in connection with "economic activity" and in accordance with the host state's laws and regulations.

The tribunal found that the investor did have a "claim to money" within the meaning of the BIT's definition of "investment," as it had a claim to share in the profits or revenues from the hotel renovation project. It also determined that the investor's rights under various contracts were economic rights covered under the broad definition of "investments," even if they weren't specifically included in the illustrative list of covered assets. It rejected, however, the investor's contention that the "know how" allegedly contributed to the project by one participant was an investment as it did not "in itself result in creation of economic or legal rights" (para. 306).

The tribunal then went on to determine whether Alpha had made an "ICSID investment." In order to determine whether there was an "investment" under ICSID jurisprudence, the tribunal began by looking into the *Salini v. Morocco* (2001) test, which, among other criteria, considers that an ICSID investment must make a contribution to the host state's economic development.[1] It went on to express doubts about that particular criterion, arguing that it allows tribunals to engage in a post hoc evaluation of the investor's business, economic, financial or policy assessments that prompted the investment.

The arbitrators were of the opinion that in most cases when an investment is found to exist under the BIT, it also meets the definition of "investment" under the ICSID Convention.

> *When the State party to a BIT agrees to protect certain kinds of economic activity, and when the BIT provides that disputes between investors and States relating to such activity may be resolved through ICSID arbitration, it is appropriate to interpret the BIT as reflecting the State's understanding that the activity constitutes an "investment" within the meaning of the ICSID Convention as well. [...] A tribunal would have to have very strong reasons to hold that the States' mutually agreed definition of investment should be set aside. (para. 315)*

Though the tribunal decided that Alpha had made an "ICSID investment" by implication of the definition of "investment" under the BIT, it still applied the *Salini* test, given that the parties had spent considerable time arguing whether the claimant's investment met the *Salini* criteria. The tribunal saw nothing in the *Salini* criteria that would create any concern that the BIT definition covers transactions that would not be deemed investments for the purposes of the ICSID Convention. It concluded that Alpha satisfied the four *Salini* criteria for defining investment—sufficient duration, assumption of risk, financial contribution or commitment, and contribution to Ukraine's development.

2.7 Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (2011)

The case of *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* saw Ecuador object to the ICSID tribunal's jurisdiction under the France-Ecuador BIT on the grounds that Perenco was a company incorporated in the Bahamas and not controlled by French nationals.

Perenco's claim was that a chain of corporate ownership led Perenco's ultimate parent company to being controlled by the late Hubert Perrodo, a French national. It argued that the shares of Perenco International Limited belong to the heirs of the late Mr. Perrodo and therefore are "indirectly" controlled by French nationals.

However, the question of the nationality of Perenco was deferred to a later stage of the merits stage of the proceedings. The tribunal was of the view that since it was the *investment* rather than a French *investor* that had brought the claim, Perenco must adduce evidence of how it is controlled by four non-parties to the arbitration who are nationals of France. It will be interesting to see how the tribunal decides the treaty-based jurisdiction in this case.

[1] Under the *Salini* test, the tribunal would ascertain whether the following elements were present: 1) a contribution of money or other assets of economic value, 2) a certain duration, 3) an element of risk and 4) a contribution to the host state's development.

3.0 Definition of "Investor"

3.1 Libananco Holdings Co. Limited v. Republic of Turkey (2011)

In *Libananco Holdings Co. Limited v. Republic of Turkey*, Libananco brought an approximately US$10.1 billion claim against Turkey for alleged breaches of the ECT and submitted the dispute before an ICSID tribunal. The tribunal, however, declined jurisdiction over the matter on grounds that the claimant company was not an "investor" under the ECT.

The dispute revolved around the alleged expropriation of the electricity businesses, CEAS and Kepez, which belonged to the members of the Uzan family. The Uzans are a wealthy Turkish family that has been enmeshed in multiple legal disputes around the world, a number related to fraud allegations against them. Libananco, a company registered in Cyprus, claimed that the ownership of shares in the two companies had transferred to it prior to the alleged expropriation through three main acts of *teslim*, that is to say, the legal transfer of possession under Turkish law. The tribunal, however, was of the view that there was insufficient evidence to prove *teslim* in relation to the share certificates Libananco had allegedly acquired. The tribunal also rejected Libananco's claim that it was only required to provide prima facie evidence of ownership of the share certificate at the jurisdictional stage. Thus, the tribunal concluded that Libananco was not an "investor" under ECT, owing to its failure to prove that it owned CEAS and Kepez at the time of their alleged expropriation.

Interestingly, the European Court of Human Rights recently dismissed claims brought by 47 minority shareholders in CEAS and Kepez, who alleged violations of the European Convention on Human Rights on account of Turkey's actions in terminating the concession and share delisting. The tribunal noted that Turkey had complied with the domestic law while delisting the shares and that the shareholders had domestic recourse to challenge the actions of Turkey. Therefore, the tribunal dismissed the claims as "ill-founded" and "inadmissible."

3.2 Alps Finance and Trade AG v. Slovak Republic (2011)

An UNCITRAL tribunal in the case of *Alps Finance and Trade AG v. Slovak Republic* declined jurisdiction over a claim against Slovakia after determining that the claimant was not an "investor" as intended by the Switzerland-Slovakia BIT.

Alps Finance had entered into an agreement with a private Slovak company to purchase credit owed by a bankrupt debtor. When efforts to enforce the credits were blocked by a Slovakian regional court, Alps Finance brought a claim against Slovakia, alleging that it had failed to protect its "investment."

However, the tribunal declined jurisdiction on the grounds that the claimant was not a protected investor. The tribunal was of the view that the claimant was "far from meeting the standard imposed under the BIT," which requires a Swiss claimant to have its "seat" and show "real economic activity" in Switzerland.

The claimant argued that it was a Swiss investor, on the basis of its incorporation in Switzerland and a tax declaration. But the tribunal concluded that the claimant failed to provide evidence of a "seat" in Switzerland, such as telephone, office rental and staff. Moreover, it noted that the claimant failed to demonstrate that it was involved in any "real economic activity" in Switzerland.

Having declined jurisdiction on the grounds that the claimant was not an "investor," the tribunal also went on to decide that the claimant's business did not qualify as an "investment." The tribunal concluded that the contract in question was a one-off sale-purchase agreement and failed to meet the criteria attributed to an "investment."

It should be noted that most investment treaties include a definition of "investor" that is much broader than the definition included in the Switzerland-Slovak Republic BIT, which primarily relies on the principle of incorporation. Those broader definitions allow for the setting up of shell companies that can rely on BIT protections without actually having "real economic activity and seat" in the home country. The claim of a shell company can therefore sometimes take the host country by surprise, because it never considered that investor as being an investor from the state where it simply set up a mailbox. More narrowly drafted clauses allow home states to protect those companies that are actually contributing to its own economic development.

4.0 Most-Favoured Nation Treatment

A series of decisions over the past year addressed the purpose and scope of the most-favoured nation (MFN) clause in BITs; in particular, whether MFN status allows investors to import more favourable provisions from BITs that have been concluded by the host state. This debate is not new. Since the *Maffezini* case in 2000 (which was the first to conclude that even procedural rights could be imported from other BITs through the MFN provision), a series of cases addressed this issue with respect to both substantive as well as procedural rights. Over the past decade, tribunals have come to contradicting conclusions on the same legal issues, and these opposing opinions have continued over the past year.

The cases continue to fuel the debate over the appropriate scope of the MFN clause, and the possibility for investors to pick and choose the best provisions from a variety of BITs. Several states are now responding to this development by introducing clauses that either carve out treatment provided under existing treaties or make it clear that procedural rights in other treaties are not covered by the MFN clause.

4.1 Impregilo S.p.A. v. Argentine Republic (2011)

In the *Impregilo S.p.A. v. Argentine Republic* arbitration, the majority of an ICSID tribunal, comprising of Judge Hans Danelius and Judge Charles N. Brower, held that the claimant, an Italian investor, was entitled to rely on the MFN clause of the Italy-Argentina BIT to import dispute-settlement rules from the Argentina-US BIT.

Article 3(1) of the Argentina-Italy BIT provides that "each Contracting Party shall, within its own territory, accord to investments made by investors of the Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favourable than that accorded to its own investors from third-party countries."

In the majority's opinion, the term "treatment" was wide enough to encompass matters relating to dispute settlement. Furthermore, the tribunal attached special weight to the language of the MFN clause, which extends its scope to "all other matters." It was of the view that where the MFN clause refers to "all matters" or "any matter" regulated in the BIT, it can be considered to encompass dispute settlement provisions as well.

As in *Maffezini* and several subsequent cases, the *Impregilo* case concerned a provision requiring investors to submit their dispute to domestic courts for 18 months before filing international arbitration proceedings. As in several (though not all) previous cases, the majority allowed the claimant to avoid this requirement, ruling that the Italian investors would instead be subject to the much shorter waiting period in the US-Argentina BIT.

Notably, however, a strong dissent came from Argentina's nominee to the tribunal, Professor Brigitte Stern. In her view, unless the MFN clause specifically provides that it extends its scope to dispute settlement provisions, these clauses should not be interpreted to allow investors to import more favourable dispute settlement provisions from other BITs.

She strongly criticized the majority opinion for allowing the investor to have the "best of both treaties." In particular, under the US-Argentina BIT, Impregilo would also have been required to choose between pursuing either domestic proceedings or international arbitration due to that treaty's so-called "fork in the road" provision. However, the majority's decision allowed Impregilo to enjoy the reduced waiting period of the US-Argentina BIT without being restricted by the "fork in the road" provision. Thus, Impregilo enjoyed the "best of both treaties" with a reduced waiting period as per the US-Argentina BIT and the option of pursuing simultaneous domestic and international claims as permitted under the Italy-Argentina BIT.

Thus, according to Professor Stern, Impregilo was granted an "inexistent favourable treatment" that put it in a better position than an investor under either the Italy-Argentina BIT or US-Argentina BIT alone. Professor Stern noted that the fact that investors are not importing the jurisdictional clause as a whole, but rather only those aspects of a jurisdictional clause that appear more favourable, can lead to the serious problem of a "pick and choose" policy in the implementation of the MFN clause.

4.2 *RosInvestCo v. Russian Federation (2010)*

Also notable for its treatment of the applicability of the MFN clause to dispute settlement provisions was the award rendered by an SCC tribunal in *RosInvestCo v. Russian Federation*. Like the *Impregilo* case, this dispute also dealt with the degree to which the MFN provision allows investors to "cherry-pick" favourable clauses from BITs, while disregarding the context of that BIT, especially those provisions that might narrow or put limits on investors' rights relating to dispute settlement.

In the *RosInvestCo* case, the tribunal was of the opinion that the governing US-Soviet BIT did not grant it the authority to determine whether there had been an expropriation. Nevertheless, in 2007 the tribunal in the case found it had jurisdiction, because the MFN provision in the UK-Soviet BIT allowed RosInvestCo to import the broader dispute settlement provision of the Demark-Russia BIT.

In the September 2010 award on the merits (which only became public several months later), the tribunal considered whether it would also have to take into account limitations of the Denmark-Russia BIT's dispute settlement provisions, in particular, the carve-out for disputes related to taxation—an issue that was relevant for the *RosInvestCo* case. Russia had argued that even though the Denmark-Russia BIT contained broader investor-state dispute resolution provisions, those provisions were limited by an exception in Article 11(3) that carved out "taxation" from the scope of the agreement. Thus, according to Russia, since RosInvestCo's claims were based on Russian taxation, the tribunal could not have jurisdiction over the dispute. However, the tribunal rejected that argument. By allowing a U.K. investor to enjoy the more favourable dispute resolution provisions of the Denmark-Russia BIT that was divested from that agreement's taxation or other exceptions, the tribunal arguably granted the U.K. investor more favourable treatment than a Danish investor covered by the Denmark-Russia BIT.

This case therefore relates to similar issues as in *Impregilo*, allowing investors to rely on non-existing super-treaties by picking and choosing the favourable provisions and ignoring the less favourable ones contained in the treaties concluded by the host state.

4.3 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia (2011)*

Finally, in the case of *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, an UNCITRAL tribunal allowed the investor to use the Russia-Mongolia BIT's MFN clause to import the unrestricted fair and equitable treatment standards of protection from the US-Mongolia and Denmark-Mongolia BITs.

5.0 Expropriation

While investors routinely invoke expropriation claims in investment treaty arbitration, only one known case over the past 12 months saw the claimant succeed in its expropriation claim. An ICSID tribunal found that, by stopping payments to the investor in order to undertake renovation as agreed upon in a hotel renovation deal, the respondent deprived the investment of economic value, which thus amounted to expropriation (*Alpha v. Ukraine*). The investor also succeeded in its claim of fair and equitable treatment in this case.

Investors typically invoke a violation of fair and equitable treatment along with the expropriation claim. It is not rare that a claimant prevails with respect to the fair and equitable treatment claim and loses with respect to expropriation. For example, in both *Impregilo v. Argentina* and *Total v. Argentina* we see that the investor failed on the question of expropriation, but succeeded in its claim of fair and equitable treatment.

5.1 Impregilo S.p.A. v. Argentine Republic (2011)

In the case of *Impregilo S.p.A. v. Argentine Republic, Impregilo* was the largest shareholder in Aguas del Gran Buenos Aires (AGBA), a consortium that was operating a 30-year concession to provide water and sewerage services in the Province of Buenos Aires.

Following a series of governmental measures, the provincial governor terminated the concession in 2006, blaming AGBA for violating several contractual obligations under the concession. Impregilo then claimed that it had suffered expropriation of its investment.

A majority of the tribunal, comprised of Judge Danelius and Professor Stern, dismissed Impregilo's claim of expropriation. According to them, the termination of the concession was carried out in accordance with the contract and thus was "an act performed by the public authorities in their capacity as a party to the Contract." They were of the view that concession was terminated only after the authorities had considered that AGBA failed in fulfilling its contractual obligations and therefore, it could not be regarded as an act of direct or indirect expropriation.

The majority also dismissed Impregilo's claim that since the State had a "political" desire to put water and sewerage services under public ownership, the termination should be deemed as expropriation. They were of the opinion that even if Argentina may have had a political objective, that did not mean the termination should necessarily be considered an act of expropriation.

Judge Brower, however, disagreed with the majority's reasoning of the expropriation claim. He argued that the key legal question was the cumulative impact of the state's actions on the value of the investment. He concluded that there had been an expropriation owing to the province's politically motivated actions that caused the total devaluation of the investment. He added that an intention to expropriate is also relevant if it helps in establishing a finding of expropriation.

The tribunal unanimously concluded, however, that Argentina was liable for breach of the fair and equitable treatment obligation under the Italy-Argentina BIT, which we will discuss subsequently.

5.2 Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia (2011)

In the case of *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, an UNCITRAL tribunal rejected the claimants' allegations of expropriation. The claimants alleged that Mongolia's 68 per cent tax levied on gold sales at prices over US$500 an ounce amounted to expropriation. The tribunal held that the windfall tax imposed a heavy burden on the claimant's investment, but the losses recorded by the claimants did not qualify as "destruction" of the investment. The tribunal, thus, rejected the claim for expropriation, noting that the claimants retained ownership and continued to manage their investment. The tribunal also rejected the investors' claims that Mongolia was in breach of the fair and equitable treatment obligation under the BIT.

5.3 Malicorp Limited v. Arab Republic of Egypt (2011)

In the 2011 case of *Malicorp Limited v. Arab Republic of Egypt*, an ICSID tribunal considered the question of whether expropriation could flow from domestically valid contract termination. Malicorp, the claimants, alleged that the concession contract granted to it in 2000 to build and operate an international airport had been terminated illegally, thus amounting to an expropriation of their investment. The tribunal, however, rejected the claim for expropriation through its finding that the termination of the concession contract was legal under domestic law. In the tribunal's view, since there were grounds of mistake and non-performance of the contract made out against Malicorp, Egypt had valid reasons in domestic law to terminate the contract.

5.4 Total S.A. v. The Argentine Republic (2010)

An ICSID tribunal in *Total S.A. v. The Argentine Republic* dismissed Total's claim of indirect expropriation of its investment. Total had made a number of investments in Argentina in the gas transportation, hydrocarbons exploration and production, and power generation industries. Total's claim before the tribunal was that a series of measures enacted by Argentina during and after its 2001–2002 financial crisis was in breach of its obligations under the US-Argentina BIT, as it had the effect of expropriating its investment. However, the tribunal concluded that Total "is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment." As we will discuss subsequently, the tribunal nevertheless found certain actions of Argentina to be in breach of the fair and equitable standard obligation under the US-Argentina BIT.

5.5 AES Summit Generation Limited and AES-Tiza Erömü Kft. v. Republic of Hungary (2010)

The case of *AES Summit Generation Limited and AES-Tiza Erömü Kft. v. Republic of Hungary* centred on a Power Purchase Agreement (PPA) with AES, a British energy company, which established a pricing formula to be applied once Hungary ceased to administer energy generation prices under a privatization scheme. However, Hungary restored the administrative pricing regime and enacted price decrees in 2006 and 2007 following a public outcry against the allegedly high profits of public utility companies. AES suffered significant losses of revenue as a result of the return of administered prices. AES brought a claim of expropriation against the Hungarian government, but was unsuccessful, as the tribunal was of the view that the price decrees did not deprive AES of its ownership or control over its investment. The tribunal held that not every state regulation with negative effects on a foreign investor amounts to expropriation. The British company also failed in its claims of unfair and inequitable treatment towards its investment by Hungary.

5.6 Nations Energy Inc., et al. v. Republic of Panama (2010)

In the ICSID case of *Nations Energy Inc., et al. v. Republic of Panama*, the claimants alleged indirect expropriation under the US-Panama BIT, in relation to Panama's refusal to allow the claimants to transfer tax credits to a third party. However, the claim of expropriation was rejected by the tribunal, which ruled that a "hypothetical right" to transfer tax credits was not a "true attribute" of property ownership that justifies an expropriation claim. The investors had also failed in their claims of breach of the fair and equitable treatment standard by Panama.

5.7 Alpha Projektholding GmbH v. Ukraine (2010)

The ICSID tribunal in *Alpha Projektholding GmbH v. Ukraine* held that there had been an expropriation of Alpha Projektholding's investment in a dispute over a hotel renovation deal.

Alpha, which had concluded several joint-activity agreements (JAAs) with Ukrainian state-owned enterprise Hotel Dnipro, was supposed to receive monthly payments from Dnipro in order to pay the company that would undertake the renovation. Given its deteriorating financial condition, Dnipro stopped payments to Alpha in 2004. Alpha then initiated ICSID arbitration against Ukraine under the Austria-Ukraine BIT claiming a breach of several treaty obligations.

On the point of expropriation, the tribunal considered that neither Ukraine nor Dnipro indicated an intention to resume payments after they were terminated in 2004 or to pay Alpha its share in the JAAs. In light of the evidence, the tribunal concluded that Ukraine expropriated Alpha's rights under the agreements, by substantially and permanently depriving the investment of economic value. Ukraine was also found to be in breach of the fair and equitable treatment obligation under the BIT.

5.8 RosInvestCo UK Ltd. v. The Russian Federation (2010)

In the 2010 case of *RosInvestCo UK Ltd. v. The Russian Federation*, an SCC tribunal found that the Russian Federation had unlawfully expropriated RosInvestCo's property. RosInvestCo claimed that Russia's tax assessments, penalties, and enforcement actions expropriated its property in violation of the governing UK-Soviet BIT.

On the merits, Russia defended the claim on the grounds that the measures were not expropriatory because they were legitimate exercises of its police and taxation powers. Russia further asserted that the government's actions had not caused the investor any substantial or permanent losses, nor interfered with any legitimate expectations.

In response, RosInvestCo attempted to frame its claims so as to remove the tax assessments from the crux of the dispute. It argued that the tax assessments were pretexts for the expropriation and did not themselves expropriate RosInvestCo's property. According to the claimant, its property was expropriated through the auctions held to collect the tax assessments.

The tribunal explained that, when assessing liability, it would not consider whether there was "an expropriation by way of taxation," but instead whether the "cumulative combination" of the taxation measures and the consequential auctions expropriated RosInvestCo's property. Ultimately, the tribunal decided that the "totality of the circumstances" led to the conclusion that RosInvestCo's property was unlawfully expropriated by Russia.

6.0 Fair and Equitable Treatment

The investment disputes over the past year indicate a trend of broad interpretations being given to the fair and equitable treatment standard in BITs. One tribunal cited a long list of principles that flow from the fair and equitable treatment obligation: "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" (*Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*).

Several cases involved claims relating to contracts between the government and the investor. No clear trend can be identified in this respect: while some arbitrators appear to distinguish between sovereign acts and acts of a contractual nature, others appear to take a more blurred approach (see majority opinion and dissent in *Impregilo v. Argentina*). In one case, for instance, the tribunal maintained that, in the absence of a "stabilization clause" in the contract that limits the state's sovereign right to enact legislation, the investor cannot have any legitimate expectations that the pricing system would not change at all (*AES v. Hungary*). In another case, the tribunal, without a precise articulation from the investor as to what legitimate expectation was undermined, noted that the investor had a legitimate expectation that the respondent would perform its contractual obligations. Thus, it held that the respondent was in breach of the fair and equitable treatment standard under the BIT for non-performance (*Alpha v. Ukraine*).

Finally, one tribunal took a particularly broad interpretation of the fair and equitable treatment standard by applying it to the tender process (*Lemire v. Ukraine*).

6.1 Impregilo S.p.A. v. Argentine Republic (2011)

In *Impregilo S.p.A. v. Argentine Republic*, an ICSID tribunal held actions by Argentina towards Impregilo's investment to be in breach of the fair and equitable treatment standards under the Italy-Argentina BIT.[2]

Impregilo was the largest shareholder in AGBA, a consortium that was operating a 30-year concession to provide water and sewerage services in the Province of Buenos Aires. The concession was struggling to meet its service and expansion goals, when certain actions of the authorities in the province aggravated its problems. Argentina's financial crisis also had the effect of exacerbating the concession's financial woes.

The basis of Impregilo's complaint was Argentina's failure to update the database of AGBA's users, its failure to build three sewage treatment plants in the concession area, its modification of the Regulatory Framework, its lack of support to obtain funding and the termination of the Concession Contract.

The majority, comprised of Judge Danelius and Professor Stern, was of the opinion that the above actions of the provincial authorities were of a contractual nature and not a sovereign act of the state that would make Argentina liable for breaches of the BIT.

Judge Brower, however, dissented from the majority and was of the opinion that the Argentine actions were politically motivated rather than being merely of a contractual nature. Thus, according to him, Argentina breached its treaty obligation of providing fair and equitable treatment.

[2] According to Article 2, para. 2 of the Italy-Argentina BIT, investments shall at all times be accorded fair and equitable treatment. It is added that neither State shall impair by arbitrary or discriminatory measures the management, maintenance, enjoyment, transformation, cessation or disposal of investments made in its territory by the other state's investors.

The three arbitrators, however, unanimously agreed that Argentina's response to the financial crisis of the previous decade, particularly its failure to restore a reasonable equilibrium in the concession, constituted a breach of its duty to afford fair and equitable treatment to Impregilo's investment. They agreed that Argentina's emergency response to the financial crisis continued long after the crisis had subsided. Thus, the tribunal held Argentina to be in breach of its obligations to provide fair and equitable treatment and disallowed it from arguing the defense of "necessity."

Interestingly, with respect to Impregilo's allegations that Argentina failed to provide full protection and security to its investments, the tribunal was of the view that where there has been a failure to give an investment fair and equitable treatment it is not necessary to examine whether there has also been a failure to ensure full protection and security.

6.2 Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia (2011)

In the case of *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia*, an UNCITRAL tribunal rejected the investor's claims that Mongolia's windfall taxes levied on gold sales breached its obligation to provide fair and equitable treatment under the terms of the Russia-Mongolia BIT.

The tribunal was of the view that the windfall tax was within the government's sovereign powers to enact fiscal legislation and did not constitute a breach of the BIT in spite of being "excessive." It stated that, "many will argue that this is not wise economic policy but this does not mean it would constitute a breach of a BIT, particularly in the area of taxation, in respect of which States jealously guard their sovereign powers."

Another aspect of the case dealt with the claimant trying to delay payment of the windfall tax through an agreement with Mongolia's central bank, MongolBank. The claimant then charged the bank with exporting and selling the gold prematurely in breach of their agreement. After determining that the state could be held accountable for the actions of the bank, the tribunal concluded that the claimant had been "prematurely and without any right" deprived of its ownership of the gold deposited with MongolBank, in breach of the BIT's fair and equitable treatment provision.

Additionally, the tribunal went on to opine that it was wrong to restrict the definition of fair and equitable treatment to protection of legitimate expectation and non-discrimination. It cited a longer list of principles that flowed from this treaty obligation, including: "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."

6.3 Total S.A. v. The Argentine Republic (2010)

An ICSID tribunal in the case of *Total S.A. v. The Argentine Republic* also discussed the issue of fair and equitable treatment. Total, which had made a number of investments in Argentina in the gas transportation, hydrocarbons exploration and production and power generation industries, alleged that a series of measures enacted by Argentina during and after its 2001–2002 financial crisis was in breach of its obligations under the US-Argentina BIT.

The tribunal ultimately found certain actions of Argentina to be in breach of the fair and equitable treatment obligation under the BIT, but differed on which actions in particular did so.

The majority, comprised of Professor Giorgio Sacerdoti and Dr. Luis Herrera Marcano, concluded that the measures taken by Argentina at the peak of the financial crisis were "in good faith in a situation of recognized economic emergency of an exceptional, even catastrophic, nature" (para. 163). They were of the view that, in the absence of a stabilization clause, any changes made to general legislation was a "legitimate exercise of the host State's governmental powers." Thus, the majority did not find Argentina's actions in breach of the fair and equitable treatment obligations under the BIT.

Interestingly, this opinion of the majority was a major departure from an earlier ruling for *CMS v. Argentina* (2005), where Argentina was held to be in breach of the fair and equitable treatment standard under the US-Argentina BIT for the measures it took during the 2001–2002 financial crisis.

Henri Alvarez, the claimant's nominee, maintained that Argentina's actions, even during the financial crisis, were in breach of the fair and equitable treatment standard under the BIT.

The tribunal, however, unanimously concluded that the measures taken by Argentina after the peak of the financial crisis, such as Argentina's continued freezing of tariffs in the gas sector, were in breach of the fair and equitable treatment obligation. The tribunal noted that the persistent lack of any tariff readjustment by Argentina constitutes a breach of the fair and equitable treatment standard, since it is contrary to the very principles in Argentina's law that provides for renegotiations to re-establish the equilibrium of the tariffs.

6.4 AES Summit Generation Limited and AES-Tiza Erömü Kft. v. Republic of Hungary (2010)

In *AES Summit Generation Limited and AES-Tiza Erömü Kft. v. Republic of Hungary*, AES initiated ICSID arbitration under the ECT, alleging that Hungary breached its obligation to provide it fair and equitable treatment.

The company maintained that the PPA with Hungary created legitimate expectations that the administered pricing system would not be reintroduced. However, in the tribunal's view, AES could have no legitimate expectations since the PPA did not contain any "stabilization clause" that would limit Hungary's sovereign right to enact legislation. Thus, Hungary's actions to restore the administrative pricing regime and enacted price decrees were held to be a valid, reasonable and proportionate exercise of regulatory power and not in breach of the ECT.

The tribunal added that the full protection and security standard does not rise to the level of protecting the investor against regulation by the state based on rational public policy grounds.

6.5 Joseph Charles Lemire v. Ukraine (2011)

An ICSID tribunal in the case of *Joseph Charles Lemire v. Ukraine* concluded that Ukraine violated the fair and equitable treatment obligation in the governing US-Ukraine BIT.[3] Mr. Lemire, an American national, had invested in the radio broadcasting business in Ukraine after the government opened that sector to private participation. While his company had obtained some radio frequencies for that business, Mr. Lemire alleged that from 1999 through 2008, the government improperly and repeatedly denied his bids for additional frequencies, awarded broadcasting licenses to other companies and thereby thwarted his plans of developing several nationwide radio networks.

[3] The Preamble states, "Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."

Ukraine argued that the state entity responsible for the tender processes justifiably awarded the frequencies to other applicants, as Mr. Lemire's company lacked the necessary resources and capabilities to prevail in its applications. However, in its January 2010 decision on jurisdiction and liability, the majority of the tribunal concluded that the tender process was irregular, arbitrary and discriminatory, and amounted to a breach of the fair and equitable treatment obligation. In the award issued in March 2011, the tribunal tackled the issue of damages that had been left outstanding after the 2010 decision and also revisited issues of jurisdiction and liability in response to the dissenting opinion to the award filed by Dr. Jürgen Voss.

The dissenting opinion criticized the majority's application of the fair and equitable treatment standard as being overly broad and having harmful consequences for host states, particularly as applied to review tender processes. Dr. Voss was of the opinion that the majority's interpretation of the fair and equitable treatment standard was a dangerous expansion of the boundaries of investment treaty protection, obliging states to pay damages to foreigners who bid unsuccessfully in public tenders. The majority, however, retorted that it had not applied the standard in the overly broad manner suggested by Dr. Voss. It went on to clarify its stand that the fair and equitable treatment obligation should provide for compensation in cases where state authorities act in "blatant disregard" of applicable tender rules.

6.6 *Nations Energy Inc., et al. v. Republic of Panama (2010)*

In the November 2010 case of *Nations Energy Inc., et al. v. Republic of Panama*, an ICSID tribunal rejected all claims by Nations Energy Inc., Jaime Jurado, and Electric Machinery Enterprises, Inc., a consortium of U.S. investors in a Panamanian power plant. Under the US-Panama BIT, the claimants cited unfair and inequitable treatment in relation to the refusal to allow the transfer of tax credits to third parties.

The tribunal, however, rejected the claim of unfair and inequitable treatment and noted that the BIT permits claims over "matters of taxation" in just a few narrow circumstances, such as alleged expropriation.[4] Tax policies, the tribunal determined, fell outside the parameters of a fair and equitable treatment claim.

In a dissenting opinion, Dr. José María Chillón Medina considered the BIT's provision on fair and equitable treatment as a requirement for a specific standard of fairness, even in areas involving taxation. He argued that a large purpose of a treaty—to protect investments—could otherwise easily be rendered meaningless.

6.7 *Alpha Projektholding GmbH v. Ukraine (2010)*

In *Alpha Projektholding GmbH v. Ukraine,* Alpha concluded several JAAs with Hotel Dnipro, a Ukrainian state-owned enterprise in Kiev, for the reconstruction of the hotel building. Under the agreements, Alpha would take a bank loan to pay Pakova—the company that would undertake the renovation—and would receive minimum monthly payments from Dnipro.[5]

[4] Article XI US-Panama BIT:

1. With respect to its tax policies, each party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other party.
2. Nevertheless, this Treaty shall apply to matters of taxation only with respect to the following:
   (a) expropriation, pursuant to Article 4;
   (b) transfers, pursuant to Article 6; or
   (c) the observance and enforcement of terms of an investment agreement or authorization, as referred to in Article 7 (1)(a) or (b).

[5] Article 2 of the Austria-Ukraine BIT states, in pertinent part, that "each Contracting Party shall in its territory promote, as far as possible, investments of investors of the other Contracting Party, admit such investments in accordance with its legislation and in each case accord such investments fair and equitable treatment."

However, with Dnipro's deteriorating finances and its management shifting to State Administration of Affairs, Alpha stopped receiving payments under any of the JAAs. After consultations between the Austrian and Ukrainian governments broke down, Alpha initiated ICSID arbitration against Ukraine under the Austria-Ukraine BIT. It claimed that the cessation of payments and other acts by Dnipro and the Ukrainian government amounted to breaches of several BIT provisions, including fair and equitable treatment.

The tribunal found that Ukraine had ordered Dnipro to stop payments to Alpha and was responsible for Dnipro's continued failure to fulfill its contractual obligations. Although the tribunal agreed with the Ukraine that Alpha did not precisely articulate what legitimate expectations were undermined by Ukraine, it found that Alpha had a legitimate expectation that Ukraine would not interfere with the JAAs. Thus, according to the tribunal, Ukraine and the State Administration of Affairs frustrated this expectation by effectively negating the JAAs, in turn breaching the fair and equitable treatment standard under the BIT.

7.0 Dispute Resolution Under Foreign Investment Laws

Tribunals in two recent cases against Venezuela faced the question of whether they had jurisdiction to hear claims of investors pursuant to Venezuela's Investment Promotion and Protection Law. In both cases, tribunals rejected jurisdiction given the ambiguous wording of the dispute settlement clause in the law. Several countries have investment codes that contain clauses on arbitration, sometimes providing foreign investors with the possibility of initiating international arbitration proceedings against the government.

7.1 CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (2010)

In the Jurisdictional Decision of *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, the tribunal refused jurisdiction over the matter under Article 22 of Venezuela's Investment Promotion and Protection Law as pointed out by the claimants.

Article 22 of Venezuela's Investment Promotion and Protection Law reads:

> *Any disputes arising between an international investor whose country of origin has a treaty or agreement for promotion and protection of investments in force with Venezuela, or any disputes to which the provisions of the Articles of Association of the Multilateral Investment Guarantee Agency (MIGA) or the Convention on the Settlement of Investment Disputes between States and the Nationals of other States (ICSID) are applicable, shall be submitted to international arbitration under the terms provided for in the respective treaty or agreement, should it so provide, without prejudice to the possibility of using the systems of litigation provided for in the Venezuelan laws in force, when applicable.*

CEMEX claimed that, in addition, to the Netherlands-Venezuela BIT, an ICSID tribunal also had jurisdiction to hear the case under the Venezuelan statute. They argued that Article 22 of the Investment Promotion and Protection Law provided advance consent to international arbitration with foreign investors. Venezuela, however, contested jurisdiction on both grounds.

The tribunal concluded that Venezuela's Investment Promotion and Protection Law does not contain consent to ICSID jurisdiction. It was of the view that if the drafters of the statute wanted to give advance consent to ICSID jurisdiction, they would have done it more explicitly.

7.2 Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela (2011)

In the recent case of *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, another ICSID tribunal refused jurisdiction in a claim brought by Brandes pursuant to the 1999 Venezuelan Investment Promotion and Protection Law. Brandes, an American investment adviser, claimed compensation for an investment in a telecom company that was allegedly expropriated by Venezuela. Following the approach taken in the cases of *Mobil v. Venezuela* (2010) and *CEMEX v. Venezuela* (2010), the tribunal in this case also declined jurisdiction pursuant to Article 22 of Venezuela's Investment Promotion and Protection Law stating that it did not contain consent of Venezuela to ICSID jurisdiction.

8.0 References[6]

Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5 (2011). The tribunal comprised of Professor Pierre Tercier (President), Prof. Georges Abi-Saab (Respondent's nominee) and Prof. Albert Jan van den Berg (Claimant's nominee).

AES Summit Generation Limited and AES-Tiza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22 (2010). The tribunal comprised of Mr. Claus von Wobeser (President), J. William Rowley QC (Claimant's nominee) and Prof. Brigitte Stern (Respondent's nominee).

Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16 (2010). The tribunal comprised of Hon. Davis R. Robinson (Chairman), Dr. Yoram Turbowicz (Claimant's nominee) and Dr. Stanimir A. Alexandrov (Respondent's nominee).

Alps Finance and Trade AG v. Slovak Republic, UNCITRAL (2011). The tribunal comprised of Antonio Crivellaro (Chair), Hans Stuber (Claimant's nominee) and Bohuslav Klein (Respondent's nominee).

Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3 (2011). The tribunal comprised of Rodrigo Oreamuno (President), Prof. Karl-Heinz Böckstiegel (Claimant's nominee) and Prof. Brigitte Stern (Respondents' nominee).

CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15 (2010). The tribunal comprised of Judge Gilbert Guillaume (President), Prof. Georges Abi-Saab (Respondents's nominee) and Robert B. von Mehren (Claimant's nominee).

CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8 (2005).

Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (2000).

GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16 (2011). The tribunal comprised of Albert Jan van den Berg (President), Toby Landau (Claimant's nominee) and Prof. Brigitte Stern (Respondent's nominee).

Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11 (2010). The tribunal comprised of Sir Frank Berman (President), Prof. Emmanuel Gaillard (Claimant's nominee) and J. Christopher Thomas (Respondent's nominee).

Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 (2011). The tribunal comprised of Judge Hans Danelius (President), Judge Charles N. Brower (Claimant's nominee) and Prof. Brigitte Stern (Respondent's nominee).

Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18 (2011). The tribunal comprised of Professor Juan Fernández-Armesto (President), Jan Paulsson (Claimant's nominee) and Dr. Jürgen Voss (Respondent's nominee).

Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8 (2011). The tribunal comprised of Michael Hwang (President), Henri Alvarez (Claimant's nominee) and Sir Frank Berman (Respondent's nominee).

[6] Case summaries and updates can also be found at: Investment Treaty News (IISD) (www.iisd.org/itn) and International Arbitration Reporter: (www.iareporter.com).

Malicorp Limited v. Arab Republic of Egypt, ICSID Case No. ARB/08/18 (2011). The tribunal comprised of Prof. Pierre Tercier (President), Prof. Luiz Olavo Baptista (Claimant's nominee) and Pierre-Yves Tschanz (Respondent's nominee).

Mobil v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 (2010).

Nations Energy Inc., et al. v. Republic of Panama, ICSID Case No. ARB/06/19 (2010). The tribunal comprised of Alexis Mourre (President), Dr. José María Chillón Medina (Claimant's nominee) and Dr. Claus von Wobeser (Respondent's nominee).

Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/08/6 (2011). The tribunal comprised of Judge Peter Tomka (President), Neil Kaplan (Claimant's nominee) and J. Christopher Thomas (Respondent's nominee).

RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005 (2010). The tribunal comprised of Prod. Dr. Karl-Heinz Bockstiegel (President), Hon. Lord Steyn and Sir Franklin Berman.

Salini Costruttori SpA v. Morocco, ICSID Case No. ARB/00/4 (2001).

Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Mongolia, UNCITRAL (2011). The tribunal comprised of Hon. Marc Lalonde (President), Dr. Horacio A. Grigera Naón (Claimant's nominee) and Prof. Brigitte Stern (Respondent's nominee).

Siemens A.G. v. The Argentine Republic, ICSID CASE No. ARB/02/8 (2007).

Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01(2010). The tribunal comprised of Prof. Giorgio Sacerdoti (President), Henri C. Alvarez (Claimant's nominee) and Dr. Luis Herrera Marcano (Respondent's nominee).

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Published by the International Institute for Sustainable Development.

International Institute for Sustainable Development
Head Office
161 Portage Avenue East, 6th Floor, Winnipeg, Manitoba, Canada R3B 0Y4
Tel: +1 (204) 958-7700 | Fax: +1 (204) 958-7710 | Web site: www.iisd.org

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