

# **Bilateral Investment Treaties: The Essentials**

# **Bilateral Investment Treaties (BITs): The Essentials**

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## **Summary.**

1. The purpose of this paper is to provide an overview of a rapidly growing area of litigation concerning Investor Protection – Bi-lateral Investment Treaty Disputes.
2. Many readers will already be familiar with BITs. Sections 1-3 (pp 3-20) provide background to Bi-Lateral Investment Treaties and their key features.
3. Section 4 (pp 21-29) refers to recent statistics from the International Centre for Settlement of Investment Disputes (ICSID), as well as leading cases dealing with the scope for preliminary measures in Investment Treaty cases, what constitutes an “Investor” and “investment”, and the consequences when a claim is brought on a fraudulent basis.
4. Annex A (pp 30-36) is an example of a BIT entered into between China and Uganda on 27 May 2004.
5. Annex B (pp 37-46) is a schedule of some recent BIT arbitration decisions which impact upon key concepts within BITs.
6. Annex C (pp 47-56) is a list of some leading ICSID investment dispute cases in the Oil and Gas sector.

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## **Summary of contents.**

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### **1. Background**

7. BIT disputes are a rapidly expanding and high profile area of international litigation. The UNCTAD Report (2008) shows that there were 7 known BIT cases in total as at 1996. By 2012, the number was 514. More than 70 states have faced BIT claims, Argentina having faced the most (the aftermath of its currency crisis)<sup>2</sup>.
8. However, although rapidly expanding in numbers, Investment Treaty disputes still comprise less than 10% of the total number of international arbitrations. Publicly available information indicates that there are approximately 125 Investment Treaty cases pending before International Tribunals (there will be more disputes in existence because a further number are being considered before ad hoc tribunals and/or remain clothed with confidentiality).
9. Nevertheless, given the potential utility of BITs for Foreign Investors and the scope for claims against States, it is vital to be aware of the key features of Investment Treaties – whether from the perspective of advising on the negotiation of an inward investment agreement (and hence considering issues such as strategic use of jurisdictions which have Investment Treaty arrangements with the host state), or when considering a potential claim against a State.

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<sup>2</sup> See the UNCTAD Report (May, 2013) “Recent Developments in Investor-State Dispute Settlement”

## Research tools

### Good web sites:

- UNCTAD - plenty of research data on trends in BIT negotiations/disputes and a very good database of Bi-lateral Investment Treaties (“BITs”) ([www.unctad.org](http://www.unctad.org))
- ICSID - case list, procedural orders, decisions on jurisdiction/merits and BIT list (of around 1100 BITs) ([www.icsid.org](http://www.icsid.org))
- ECT - case list, information relating to Energy Charter Treaty 1994 ([www.encharter.org](http://www.encharter.org))

## 2. Key Issues

### I. What is a BIT?

10. These are Treaty arrangements used to provide foreign investors with a “level playing field” and access to an international arbitral tribunal in the event that the host State uses its sovereign power with detrimental effect to the foreign investor.
11. The first BIT was entered into in 1959 (in the wake of the Cold-War and nationalisations which exposed the lack of effective protection for foreign investors)<sup>3</sup>. By the end of 2008, there were almost 3,000 BITs<sup>4</sup>. Most are bi-lateral, some are linked to multilateral treaty based systems such as the ICSID Convention (1965), and the Energy Charter Treaty (1994).

### II. The contents of a typical BIT

12. Most BITs follow a similar approach vis-à-vis contents.
- a. **Preamble** – limited legal effect (provides context for interpretation)
  - b. **Definitions** – main ones being **Investor/Investment** - (increasing tendency in new BITs for States to require commercial presence/substantial business activities for nationality qualification qua investor<sup>5</sup>)

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<sup>3</sup> The pre-cursors for BITs were Treaties of “Friendship, Commerce and Navigation” – the first one having been signed in 1788 between the US and France containing provisions regulating treatment of foreign investment.

<sup>4</sup>For a list all BITS signed and/or in force see the database: <https://icsid.worldbank.org/ICSID/FrontServlet> there it indicates that the top four signatory States to BITS are: 1. Germany, 2. Switzerland, 3. The Netherlands, and 4. France. For statistics related to disputes initiated and heard, see the UNCTAD Report (2013)

<sup>5</sup> See, for example, the 1998 BIT between Chile and Turkey (Article 1) which requires the corporate entity to have its “headquarters together with effective economic activities” in its “home State”.

Scope of Protection – core provisions:

- c. **Fair and equitable treatment** (including denial of justice)
- d. **Expropriation**

“Procedural (or substantive) bonuses”

- e. **Most-Favoured Nation Provisions (“MFN”)**
- f. **“Umbrella clauses”**

Procedure (General)

- g. **Other Incorporated Procedures**

13. These provisions (and their meaning/effect) are the subject of much debate.

14. **MFN provisions** (depending on which ICSID decision you read, permit an investor to “cut and paste” more favourable provisions in any other BIT which the Host State has entered into<sup>6</sup>).

15. **Umbrella clauses** (again depending on which ICSID case you read and the exact wording of the provision, “elevate” a contractual obligation to the realm of Treaty obligation<sup>7</sup>).

16. **Jurisdictional provisions.**

- a. Settlement of disputes between the Host State and an investor
- b. Entry into force of the BIT
- c. Duration of the BIT

17. As BITs are treaties, the obligations undertaken by States are governed by Public International Law. There was very little development by way of International Law jurisprudence on key concepts such as the meaning of

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<sup>6</sup> In the case of *Maffezini v. Spain (ICSID) (25/1/00)*, the Argentine Investor in Spain was allowed to use a more beneficial time requirement in the arbitration process found in the Chile-Spain BIT on the basis that (subject to public policy considerations of the parties to the negotiations of the respective BITs), this reflected the rationale of MFN provisions. However, since then, various cases (see especially the recent case of *ICS v. Argentina (Award on Jurisdiction) PCA Case No. 2010-09 (10<sup>th</sup> February, 2012)*) have evidenced a more restrictive approach, focussing on the intention of the parties to the BITs to evaluate the effect of the MFN provision.

<sup>7</sup> *SGS v. Pakistan (6/8/03) ICSID* Tribunal said the BIT clause in question did not do this, whereas the ICDIS Tribunal in *SGS v. Phillipines (29/1/04)* said it did vis the BIT clause it considered (differently worded). The emerging consensus is that a clause requiring the State to “honour all of its obligations/commitments” does in fact “elevate” a contract breach to the realm of a BIT obligation for the State IF it, (as opposed to a sub-state entity), has entered into the contract in question – see the cases of *Salini v. Jordan (ICSID) (Jurisdiction) [12/11/04]* (at paragraphs 120 to 130), and *LG&E v. Argentina [3/10/06]* (ICSID – Liability) (at paragraphs 164 to 175).

expropriation for decades, due to ideological differences as to the role of investors.

18. Hence, anyone coming to this area will find that most of the “learning” is recent (within the past 10 years) and essentially comes from decisions of International Arbitral Tribunals such as the ICSID Tribunal.
19. ICSID and ECT decisions are publicly available and, (in addition to the very recent admission of “amicus” briefs – see the Procedural Order in the case of *Suez v. Argentina [ICSID]* (12/2/07)), there is a move to make pleadings in these cases publicly available also. Two reasons may explain the stark contrast (vis-à-vis the apparent openness of the process) with most international arbitrations which are controlled by strict confidentiality requirements:
  - There is a perceived strong public interest in the “investor community” and citizens of a “Host State” being informed as to the existence and nature of investor disputes
  - There is a very real problem with regards to the lack of any system of precedent vis-à-vis arbitral decisions in this area (see the observations of the ICSID Tribunal in the case of *AES Corp v. Argentina* [13/7/05] at paras. 30-32 thereof). Conflicting decisions are common (often reflecting the quality of the arbitrators and/or the desire of the tribunal to “push” a certain argument)
20. Many States that were hitherto blissfully ignorant as to the significance of BITs have been taken by surprise as to their meaning and effect. Indeed, there have been an increasing number of threats by States to seek re-negotiation of BITs and/or their termination.
21. On 2<sup>nd</sup> May 2007, the World Bank received a written notice of denunciation of the ICSID Convention from the Republic of Bolivia. In accordance with Article 71 of the ICSID Convention, the denunciation takes effect six months after the receipt of Bolivia’s notice (on 3<sup>rd</sup> November 2007). Thereafter, Ecuador acted in a similar manner on 4<sup>th</sup> December 2007 and Venezuela on 25 January 2012, and other Developing States have stated an intention to withdraw from the ICSID Convention.

### III. How to spot a BIT claim.

22. **Is there a claim involving a State entity where it might be argued that an investment has been detrimentally affected by the use of State authority?**

#### 3. BIT Claim Checklist

23. Assuming you have located an applicable BIT, when advising on a BIT matter, always ask the following questions to evaluate whether the BIT provisions are engaged, and the nature/extent of any potential claim thereunder:

- a. **When did the BIT enter into force?**
- b. **Was the alleged BIT breach by the State after its entry into force or is it a continuing breach?**

#### **Preliminary Questions of Jurisdiction:**

24. In *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012, it was stated, whilst considering the terms of the Guatemala-Spain BIT, that:
- such treaties do not give “*general consent to submit any kind of dispute or difference related to investments [...], but only those related to violations of substantive provisions of the treaty itself.*”, (para. 306.); and
  - an international tribunal will only have jurisdiction if the claimant establishes “*that the facts it alleged, if proven, could constitute a violation of the Treaty.*” (paras. 323-373.)
25. In *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Third Interim Award on Jurisdiction and Admissibility, 27 February 2012 (*Chevron v. Ecuador II*), it was stated:
- for the purposes of considering a respondent’s jurisdictional objections – it was necessary for the tribunal to decide whether or not, if the facts alleged by the claimants are assumed to be true, the challenged conduct would be capable of constituting breaches of the BIT.
  - The assumption of truth could be reversed if such factual pleadings were “*incredible, frivolous, vexatious or otherwise advanced by the Claimant in bad faith.*” (para. 4.6.)
- It was not required that a chance of success greater than 51% should be made out, just that the case was “*decently arguable*” or possessed of “*a reasonable possibility as pleaded*”. (para. 4.8.)

26. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012 stated that “*international case law has consistently determined that jurisdiction is generally to be assessed as of the date the case is filed*”. (para. 255.)

**c. Is there an Investor?**

27. Very broad definition – so long as a national of a BIT State party (natural or legal entity) can claim to have made an investment in the Host State party to the same BIT, the fact that a locally incorporated entity is used to conduct business is no bar to a BIT based claim.

28. For a time, the majority decision in *Waguih Siag v. Egypt* [11/04/07] seemed to threaten significant restrictions. The Claimant was an Egyptian national at all material times when the investment was made, and then allegedly lost his Egyptian nationality, acquired Lebanese nationality and also Italian nationality – he claimed under an Italy/Egypt BIT.

29. The majority held that the ICSID nationality requirement (Article 25 ICSID Convention) was satisfied and that the Claimant had lost Egyptian nationality, despite the fact that his acquisition of Lebanese/Italy nationality appeared to be a device. The minority view was that Egyptian nationality had not been lost and was the real and effective nationality (which meant that as a national of the Host State the Claimant’s claim was barred).

30. Subsequent cases have somewhat allayed these fears. Most recently, in *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, it was held that the dividing line in determining whether a change of nationality can become an abuse of process occurs “*when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy [...].The answer in each case will, however, depend upon its particular facts and circumstances...*”(para 2.99)

31. In the present case the tribunal found that since the basis of the claim (El Salvador’s *de facto* ban on mining in 2008) occurred *after* Pac Rim Cayman’s change of nationality in 2007, the dispute could not have been foreseen by the claimant. (para 2.109)

32. In *Standard Chartered Bank v. The United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award, 2 November 2012, it was further held that:

- to get “*benefit from Article 8(1)’s arbitration provision, a claimant must demonstrate*
  - *that the investment was made at the claimant’s direction,*
  - *that the claimant funded the investment or*

- *that the claimant controlled the investment in an active and direct manner.*” (para 230.)
  - an indirect chain of ownership linking the British claimant to debt owed by a Tanzanian borrower did not satisfy the requirement in the Treaty’s arbitration provision. The tribunal reasoned that, despite the fact that the claimant owned a substantial equity interest in a Hong Kong company, which in turn held Tanzanian debt acquired from Malaysian financial institutions, it could not be said that those loans were the claimant’s investments (paras. 196-197)
33. Also remember that the ICSID Convention contains its own (undefined) requirement of Investor/Investment (Article 25 ICSID Convention) which can sometimes act as a second hurdle vis local corporate entities where the issue of effective “investor” control is raised – see the ICSID case of *Suez v. Argentina* [16/5/06] (at paragraphs 38 to 40 thereof).
34. The fact that the “foreign” investor (company) is 99% owned by nationals of the Host State, and that there is no evidence to show “inflow of capital” might appear to disqualify a party from claiming to be an “investor” – not so - (see the case of *Tokios v. Ukraine* [29/4/04] and the dissenting opinion of Professor Prosper Weil who argued that the “real investor” in this case was a Ukraine national and not a Lithuanian company, and that “*investments made in a State by its own citizens with domestic capital through the channel of a foreign entity*” did not fall within the object and purpose of BIT protection).
35. See now the more recent decision in *Alps Finance v. Slovakia* [5/03/2011] in which it was held that if an BIT imposes a requirement of having a seat and real economic activity in the host state, this requirement has the purpose of excluding “mailbox” or “paper” companies from its protection.

#### **d. Is there an Investment?**

##### **i. Generally**

36. “Every kind of asset” – again a very broad concept.
37. In the case of *Bayindir v. Pakistan [ICSID]* (14/11/05) (Jurisdiction decision), the Pakistani Government’s eminent legal team provided a good opportunity for the Tribunal to rule on a very expansive challenge to knock out the claim on jurisdictional grounds.
38. The claim against Pakistan had been brought by a Turkish contractor whose agreement to build a motorway in Pakistan had been affected (allegedly) by, inter alia, the imposition of additional taxes, favouritism to local contractors and corruption.
39. The ICSID Tribunal rejected all of Pakistan’s contentions. On the issue of the nature of an investment, the Tribunal stated (at paragraph 116) that it could

not be “*seriously disputed that Bayindir’s contribution in terms of know how, equipment and personnel clearly has an economic value and falls within the meaning of “every kind of asset”.*

40. The case of *Caratube International Oil Company LLP v. The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012 held:

- that “investment” understood by the tribunal as “an economic arrangement requiring a contribution to make profit, and thus involving some degree of risk”. (para. 455.)
- the tribunal found “no plausible economic motive” to explain the US national’s investment in CIOC, no evidence of a contribution of any kind (the US national’s personal guarantees for a loan received by the company from a Lebanese bank were not considered as constituting a sufficient contribution in this case) or any risk undertaken by the US national, and no capital flow between the US national and CIOC (para. 455.)

#### ii. Under Article 25 of the ICSID Convention

41. In *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012. It was held:

- Criteria of investment: “[w]hile there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of a contribution, a certain duration, and an element of risk are necessary elements of an investment.”
- Moreover, economic development of the host State, whilst desirable, was “not necessarily an element of an investment.” (para. 5.43.)

42. The case of *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012 held that:

- regularity of profit and return should not be used as additional benchmarks.
- “the existence of an investment must be assessed at its inception and not with hindsight.”(para. 295.)
- a contribution can take any form and it is not limited to financial terms but also includes know-how, equipment, personnel and services (para 297)
- short-term projects are not deprived of “investment” status solely by virtue of their limited duration. Duration is to be analysed
  - in light of all the circumstances and
  - of the investor’s overall commitment (paras 303-304)

43. In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012, it was held:

- the following are not part of the normal definition of investment:
  - contribution to the development of the host State

- conformity with the laws of the host State and
  - respect of good faith are not. (para. 219.)
  - distinction made “*between the objects of an investment, ‘such as shares or concessions [...] and the action of investing’*”
  - “[w]hile shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets”. (para 233)
44. This reasoning agreed with the decision in *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012:
- ICSID claims were “*at least in principle separable from their underlying investments*” and
  - thus the claimant’s ICSID claims “*were [not] necessarily and automatically transferred along with the shares by operation of law.*” (para. 145)
  - Instead, any qualifying investor who suffered damages as a result of the governmental measure, at the time those measures were taken, should retain standing to bring a claim, provided they did not otherwise relinquish their right to that claim.

**e. Has there been an absence of Fair and Equitable Treatment?**

1. What does this mean in practice?
2. How do you recognise unfair and inequitable treatment when you see it?

**i. The meaning of fair and equitable treatment**

45. No “standard” definition.
46. Generally requires States “to maintain stable and predictable investment environments consistent with reasonable investor expectations”.
47. However, there is substantial room for exercise of discretion by the arbitral tribunal in each particular case.
48. See for example:

***CME v. The Czech Republic* [13/9/01]  
*Ronald S. Lauder v. The Czech Republic* [3/9/01]**

Essentially the same facts (nominally different parties and different BITs) (alleged interference with TV broadcast licence), yet:

- **CME:** The Tribunal found that there had been a breach of the requirement for fair and equitable treatment, “by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest”.

- **Lauder:** The Tribunal found that there had been no breach of the requirement for fair and equitable treatment.

49. ***CMS Gas v. Republic of Argentina [2005]***

- Claim by an US investor following the massive currency devaluation and “pesification” by Argentina in the late 1990s.
- Held that Argentina had breached the requirement for fair and equitable treatment, by breaching the legitimate expectations of the investor.

**ii. Recent movement towards clarifying the standard**

50. Several recent divergent, but not necessarily incompatible, attempts:

51. In ***Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia (ICSID Case No. ARB/09/16)***, Award, 6 July 2012, held:

It is unnecessary to engage in an extensive discussion of the FET standard. Approved the view that the: “*standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors.*” (para. 273.)

- Failure to engage investor in timely basis
- Engage forthrightly with it (para. 289)
- Subject it to additional admin proceedings outside contractual litigation (para. 296.)

52. In ***Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No. ARB/06/11)***, Award, 5 October 2012 the tribunal noted that “*the obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality.*” (para. 404.)

53. In ***Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay (ICSID Case No. ARB/07/9)***, Further Decision on Objections to Jurisdiction, 9 October 2012, held that in order to succeed in a claim alleging violation of the FET clause, the claimant must show that “*the conduct of Paraguay reflects an act of ‘puissance publique’, that is to say ‘activity beyond that of an ordinary contracting party’.*” (para. 211.)

54. In ***Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine (ICSID Case No. ARB/08/11)***, Award, 25 October, 2012 it was held that in order to establish a breach of the FET standard, the action or omission by the State needs to violate “*a certain threshold of propriety*” and among the relevant factors to be considered the tribunal referred to the host State’s specific representations to the investor, lack of due process or transparency,

harassment, coercion, abuse of power, bad faith, arbitrariness, discrimination or inconsistency. (para 212-217)

55. Also helpful are the considerations found in *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, which:

- noted a trend towards treating the content of autonomous FET clauses as “*not materially different from the content of the minimum standard of treatment in customary international law, as recognised by numerous arbitral tribunals and commentators.*” (paras.418-419.)
- distilled the standard:
  - protection of legitimate and reasonable expectations which have been relied upon by the investor to make the investment;
  - good faith conduct, although bad faith on the part of the State is not required for its violation;
  - conduct that is transparent, consistent and not discriminatory, that is, not based on unjustifiable distinctions or arbitrary;
  - conduct that does not offend judicial propriety, that complies with due process and the right to be heard. (para 420)

### iii. The relevance/irrelevance to the ‘standard’ of legitimate expectation

56. *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November, 2012 stated:

- that while “*specific assurances may reinforce investor’s expectations, such assurance is not always indispensable*” (para 7.78);
- that it was “*well-established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest*”;
- and that, therefore, “*the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably*”. (Para 7.77)

57. Likewise, in *Ulysseas, Inc. v. The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012 it was stated that in the absence of specific promises or representations made by the State to the investor, the latter cannot have a legitimate expectation that there will be no changes in the host State’s legal and economic framework (para 217.)

58. Similarly, in *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon* (ICSID Case No. ARB/07/12), Award, 7 June 2012 it was stated that in the absence of a stabilisation clause or similar commitment, changes in the regulatory framework would be considered as breaches of the duty to grant FET “*only in case of a drastic or discriminatory change in the essential features of the transaction.*” (para. 244.)

59. Finally, in *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award, 17 August 2012 the Tribunal reviewed the conduct of the host State on the basis of the concept of denial of justice in the current state of customary international law – suggesting that customary international law is the relevant standard for such (para. 427.)

**f. Has there been expropriation of the investment?**

60. Various treaty based restrictions on expropriation (Art. 1110 NAFTA, Art. 13 Energy Charter Treaty, BITs, S.712(g) American Restatement 3rd of the Foreign Relations Law)

61. General rule: Investment shall not be expropriated or nationalised or subjected to measures having the effect equivalent to expropriation or nationalisation except:

- for a public purpose
- in a non-discriminatory manner
- in accordance with due process
- against prompt, adequate and effective compensation

62. What sort of state conduct constitutes an Expropriation?

- **Key Test:** Whether action of a state deprives investor of the whole or significant part of investment (substantial deprivation test)
- However, deprivation is not the determinative factor for expropriation
- Bona fide acts of state: such as general taxation, regulation for public health and other exercise of state police powers if not discriminatory do not constitute expropriation
- Key Question: When does conduct of state cross the line that separates valid regulatory activity from expropriation?

63. Note:

- The form and intent of government measure will always be important but not always decisive
- There is no need to show obvious benefit to the Host State
  - Outright expropriation is relatively easy to recognise – State takes over a business or nationalises an entire industry (fairly uncommon)
  - What amounts to expropriation is largely fact driven
  - “creeping”/”regulatory” expropriation is more likely to be seen where the investor’s ability to conduct business is effectively undermined by regulations/State acts or omissions.

**i. Direct Expropriation**

64. *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012 held that a governmental measure would constitute (direct) expropriation if:

- the measure deprived the investor of his investment;
- the deprivation was permanent; and
- the deprivation found now justification under the police powers doctrine. (para 506)

## ii. Indirect/Regulatory Expropriation

65. Again in *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012:

- Majority of the tribunal affirmed past decisions that measure must have resulted in substantial deprivation. (para. 396.)
- explained that a loss of management or control over the investment was not a necessary element of substantial deprivation: “*what appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. The loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return.*” (para 397)
- further noted that the criterion of loss of the economic use or viability of the investment applied to “*the investment as a whole*”. – a windfall profit tax could not be tantamount to expropriation. “[*b*]y definition, such a tax would appear not to have an impact upon the investment as a whole, but only on a portion of the profits. On the assumption that its effects are in line with its name, a windfall profits tax is unlikely to result in the expropriation of an investment”. (para 404)

66. *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 held:

- to prove indirect expropriation, claimant must prove that its investment lost all significant economic value following early termination etc. (para. 6.53)
- Furthermore, “*both in applying the wording of Article 13(1) ECT and under international law, the test for expropriation is applied to the relevant investment as a whole, even if different parts may separately qualify as investments for jurisdictional purposes.*” (para 6.58)

67. *Renta 4 S.V.S.A., et al v. The Russian Federation* (SCC No. 24/2007), Award, 20 July 2012 emphasised that indirect expropriation must be deduced from a pattern of conduct, observing its conception, implementation, and effects, even if the intention to expropriate is disavowed at every step. (para. 45) – affirmed in *Rompetrol*.

***Further Selected Cases on Indirect Expropriation:***

**68. *Azinian v. Mexico* (ICSID Case No. (AF)ARB/97/2)**

Facts: Concession granted for waste management. Misrepresentation by US company as to experience. Evidence of lack of capacity to perform concession. State government terminated contract.

Decision: Termination of contract upheld by Mexican courts based on relevant standards for annulling concessions under Mexican law. No evidence that the finding by the Mexican Courts was so insubstantial, bereft of basis in law so as to be arbitrary or malicious (and thus constitute a denial of justice).

**69. *Metalclad v. Mexico* (ICSID Case No. (AF)ARB/97/1)**

Facts: Investor obtained necessary federal permit to operate landfill. Local municipality subsequently denied construction permit forcing facility to close. Later, the State Governor issued an ecological decree (ostensibly for the preservation of cactus in the area) which had the effect of barring operation of facility.

Decision: Measure tantamount to Expropriation:

- (a) By tolerating and acquiescing in actions of municipal authorities which prevented operation of landfill despite approval of federal authorities; and
- (b) Passing of ecological decree.

NB: Judicial Review in Supreme Court of Canada held expropriation as a result of decree was not patently unreasonable.

**70. *CME v. Czech Republic* (2001) UNCITRAL**

Facts: Lauder (US investor) invested in CME (Dutch Co), which in turn invested in Czech Co which was to hold broadcasting licence and operate television station. Public outcry at foreign ownership of television broadcast after award of licence. New business agreement agreed as a result of involvement of Czech Media Council whereby ČNTS (a joint venture) was set up to hold broadcasting license.

Decision: Indirect expropriation on 2 grounds:

- (a) Media Council's deprived ČNTS of exclusive use of broadcasting licence; and
- (b) Media Council forced changes in relationship between ČNTS and joint-venture partner benefiting the local JV partner.

NB: Lauder Tribunal (US/Czech BIT case) on same facts held no expropriation.

**71. *Pope & Talbot v. Canada* (2000) UNCITRAL**

Facts: Canada imposed a lumber export control regime.

Decision: Test: Is the interference sufficiently restrictive to support a conclusion that property was taken? The Investor was able to continue to export and to earn profit from those exports; remained

in control of the investment including day-to-day operations. Therefore, no substantial deprivation of right.

**72. *S.D. Myers v. Canada (2000) UNCITRAL***

Facts: Canadian government closed border to transportation of PCB hazardous waste to detriment of S.D. Myers whose Canadian operation engaged in sale of such waste to USA based entities.

Decision: Canada not acted for legitimate environmental purpose and was motivated by a protectionist desire to favour Canadian firms engaged in waste remediation. Creeping expropriation defined as “a lasting removal of ability of owner to make use of its economic rights”.

Temporary closure of border to PCB transport not expropriation (but held a breach of minimum standard of treatment).

**73. *CMS Gas Transmission v. Argentina (ICSID Case No. ARB/01/8)***

Facts: License to a gas transportation company provided tariff to be calculated in USD, converted into pesos and indexed to US PPI. In 1999 Argentina temporarily suspended PPI adjustment, subsequently suspended permanently (not for exports). In 2000 a court injunction suspended license pending challenge to legality of PPI adjustment. In 2001 Emergency Law set exchange rate 1 peso to 1 dollar.

Decision: No indirect expropriation as per the substantial deprivation test. Applying Pope & Talbot and Metalclad, tribunal held that investor in control of investment, day-to-day management of business, and was able to export.

Note: Argentina commenced ICSID annulment proceedings, and was granted a stay of execution of the Award in the interim.

**g. Are there Most-Favoured Nation Provisions (“MFN”)/Implications?**

74. There is evidence of divergent approaches to the interpretation and application of these provisions in the recent decisions. Thus, in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic (ICSID Case No. ARB/09/1)*, Decision on Jurisdiction, 21 December 2012:

- Majority held that claimant could rely on the MFN clause found in the Argentina-Spain BIT to make use of the (more favourable) dispute resolution provisions contained in Article 13 of the Argentina-Australia BIT.
- The tribunal noted that the broad “*all matters*” language of the MFN clause was unambiguously inclusive. (para. 186)

75. In contrast, in *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL, PCA Case No. 2010-9)*, Award on Jurisdiction, 10 February 2012, the Tribunal found that the MFN

clause in Article 3 of the Argentina-UK BIT did not apply in such a way as to permit the claimant to avail itself of the dispute resolution provisions of the Argentina- Lithuania BIT. (para. 280.):

The tribunal noted:

- “a State’s consent to arbitration shall not be presumed in the face of ambiguity [and] where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.” (para. 280.)
- the term “*treatment*”, in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary, while the settlement of disputes remained an entirely distinct issue, covered by a separate and specific treaty provision. (para. 296.)
- reference to “*treatment in its territory*” in the MFN clause clearly imposed a territorial limitation, which consequently excluded international arbitration proceedings from the scope of the MFN clause. (para. 296.)

76. Similarly, in *Daimler Financial Services AG v. Argentine Republic (ICSID Case No. ARB/05/1)*, Award, 22 August 2012, The majority determined that the language of the Argentina-Germany BIT’s MFN clause was territorially limited, that “*treatment*” was intended by the parties to refer only to treatment of the investment, and that the BIT did not extend MFN treatment to “*all matters*” subject to the BIT (paras. 224, 230-231, 236.)

#### **h. Are there “Umbrella Clauses”/Implications?**

77. Again, in the application of these clauses there appears to be a lack of lack of consensus. Thus, in *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay (ICSID Case No. ARB/07/29)*, Award, 10 February 2012, it was held

- that there was nothing in Article 11 of the Paraguay-Switzerland BIT that stated or implied that a government would only fail to observe its commitments if it abuses its sovereign authority (para. 91); and consequently
- that if the respondent failed to observe any of its contractual commitments, it breached Article 11 and no further examination of whether respondent’s actions are properly characterized as “*sovereign*” or “*commercial*” in nature was necessary. (para. 95.)

78. On the other hand, in *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine (ICSID Case No. ARB/08/11)*, Award, 25 October 2012, it was held that:

- The term “Party” in Article II(3)(c) of the Ukraine-US BIT108 referred to any situation where the Party was acting *qua* State, meaning
- that where the conduct of entities could be attributed to the host State, such entities should be considered to be “the Party” for the purposes of Article II(3)(c). (paras. 243 and 246.)

**i. Are there explicitly incorporated procedural requirements?**

79. *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (UNCITRAL, PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012:

- Tribunal noted that the trend in public international law (as evidenced for example in the recent decision of the ICJ in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (International Court of Justice), Decision on Preliminary Objections, 1 April 2011, paras.133-135 ) has clearly favoured the strict application of procedural prerequisites. (para. 250)
- The tribunal also held that the 18-month recourse-to-local-courts requirement constitutes a condition to the respondent State's consent to arbitration. (paras. 258-262.)
- Moreover, the tribunal decided that it could not ignore the 18-month recourse-to-local-courts requirement on the basis that the litigation would be futile or inefficient – stressed that it could not “*create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract.*” (paras. 267-269)
- Consequently, the tribunal found that it lacked jurisdiction due to the claimant's failure to comply with the mandatory 18-month recourse-to-local courts requirement set forth in Article 8 of the Argentina-UK BIT. Similar reasoning adopted in *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award, 22 August 2012

80. However, on an identical provisions in Article X(1) of the Argentina-Spain BIT it was held in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID CaseNo. ARB/09/1), Decision on Jurisdiction, 21 December 2012

- that as long as the local proceedings dealt with the same subject-matter as the one brought to international arbitration, the treaty requirement is met. (para. 112)
- Equally, the tribunal noted that the underlying BIT permits either party (including the respondent State) to initiate the domestic litigation for the recourse-to-local-courts requirement to be fulfilled. (paras 133-135)

**j. Is there sufficient evidence to make out a prima facie case of a breach of the BIT?**

81. See the (somewhat scathing) criticism of the Claimant's pleading in the ICSID Tribunal's decision in the case of *Telenor v. Hungary* (13/9/06), where the Claimant had failed to establish (at the threshold level of jurisdiction) a prima facie case of expropriation in relation to provision of telecommunication services.

**k. Is there evidence of a "knock out" point such as the payment of a bribe?**

82. See the decision of the ICSID Tribunal in the case of *World Duty Free v. Kenya* (4/10/06), where the Claimant (alleging, inter alia, that its investment in construction of duty free complexes in Kenya had been expropriated) deployed evidence to the effect that senior Kenyan officials had been bribed in 1989 by its personnel, to obtain the contract pursuant to which its investment had been made.

83. Perhaps unsurprisingly, (because it is extremely rare for a party to advance facts relating to payment of a bribe - unless it is seeking to avoid contractual responsibilities/legal claims), the Tribunal dismissed the claim.

**l. What is the claim worth - what are "just and equitable" damages?**

84. See the recent decision of the ICSID Tribunal in the case of *PSEG v. Turkey* (19/1/07) (at pages 72 to 87) for the approach to fair market value and loss of profits.

#### **4. Recent Developments.**

- **ICSID's caseload statistics for 2012**
- **Preliminary Measures**
- **"Investment"**
- **Abuse of process**
- **Illegality**

#### **I. ICSID Caseload Statistics.**

85. New cases per annum:

**2008/21**  
**2009/25**  
**2010/26**  
**2011/38**  
**2012/50**

86. The story so far:

63% of ICSID cases are based on BITs for jurisdiction

30% of cases concern South American State Parties and 23% concern Eastern Europe/Central Asia State Parties

25% of cases are in the Oil, Gas and Mining sector. 12% in the Electrical power and energy sector

62% of cases lead to an award. 38% of proceedings are discontinued

76% of cases lead to an award on the merits. 23% of awards decline ICSID jurisdiction

68% of arbitrators in ICSID cases are from North America and Western Europe

The top 3 nationalities for ICSID arbitrator appointments are US-160/French-128/British-123



## II. Preliminary Measures.

### *Some cases:*

- Phoenix Action Ltd v. Czech Republic [6/4/2007] (ICSID Case No. ARB/06/05) (“Phoenix”)
- City Oriente v. Ecuador [13/5/2008] (ICSID Case No. ARB/06/21) (“City Oriente”)
- Perenco v. Ecuador [8/5/2009] (ICSID Case No. ARB/08/06) (“Perenco”)
- Quiborax v. Bolivia [26/2/2010] (ICSID Case No. ARB/06/02) (“Quiborax”)
- Burlington v. Ecuador [29/6/2009] (ICSID Case No. ARB/08/05)
- Chevron v. Ecuador [14/5/2010] (PCA Case No. 2009-23)
- Tethyan Copper Compnay v. Pakistan [13/12/2012] (ICSID Case No. ARB/12/1)

### 1. ***Phoenix Action Ltd v. Czech Republic [6/4/2007] (ICSID Case No. ARB/06/05)*** (“Phoenix”)

87. The Claimant was an Israeli Company entirely owned by one individual. The Claimant became sole shareholder of two Czech companies in December 2002. The Czech authorities commenced a criminal investigation against the individual (tax evasion and fraud). There were civil proceedings in the Czech Courts against the Czech companies relating to disputes over property (which disputes existed before the Claimant bought the shares in those companies).

88. Complaints had been filed before Czech Courts and the ECHR by the Czech companies, claiming, inter-alia a violation of Article 6 ECHR. The Courts had been asked to grant interim measures by way of release of assets which had been frozen (possible proceeds of crime), but had declined to do so. All in all, a complex context for an ICSID Tribunal to consider preliminary measures.

89. By letter dated 25<sup>th</sup> January 2007, the Claimant sought provisional measures invoking ICSID Rule 39, and sought transfer of frozen funds to a bank account in favour of the one of the Czech companies. The request for provisional measures was subsequently expanded to include notifications relating to disputed property, and an order seeking examination of Czech Government archives on the (unsubstantiated) grounds that one of the parties in the civil litigation against the Czech companies was “acting on behalf and with the help of the Czech Government”.

90. The Tribunal referred back to the decision in ***Holiday Inn v. Morocco (ICSID 1972)*** to re-iterate that jurisdiction exists to rule on requests for provisional measures pending jurisdictional objections.

91. In considering the source of power for provisional measures, the Tribunal identified Article 47 of the ICSID Convention as elaborated upon in ICSID Arbitration Rule 39. The Tribunal observed that provisional measures should only be granted in situations of “*absolute necessity and urgency, in order to*

*protect rights that could, absent these measures, be definitely lost*” (para 32). ICJ case law identified the test as being actions “*capable of causing or of threatening irreparable prejudice to the rights invoked*” (**Greece v. Turkey 1976**/page 15)

92. As for “rights” – they must “exist at the time of the request and not be hypothetical or to be created in the future” (**Maffezini v. Spain (28/10/1999)** (Procedural Order No.2).
  93. The Tribunal declined to order that the Czech authorities should enter a note on the file that certain plots of land should not be sold – because this presupposed that there was an ownership right in existence- the very matter subject to dispute before the Czech Courts. The Tribunal noted that Interim Measure are meant to preserve the “*status quo*” and not improve a parties position.
  94. Likewise the claim for release of frozen funds. As for access to Government archives, the request was a “fishing expedition” (para 43). Hence all requests for interim measures were rejected – in a decision published almost 4 months after the request was first made.
- 2. City Oriente v. Ecuador [13/5/2008] (ICSID Case No. ARB/06/21) (“City Oriente”)**
95. On 19<sup>th</sup> November 2007, the Arbitral Tribunal had ordered very wide ranging provisional measures which called upon the Ecuadorian authorities, inter-alia, to refrain from instituting or prosecuting any proceedings or actions of whatsoever nature against the Claimant and its employees arising out of a Contract and/or the effects of the application of a Law seeking amendments in the Hydrocarbons sector.
  96. City Oriente contended that additional monies were being demanded pursuant to the Law which were unjustified vis the Contract, and violated Investor protection rights. On 17<sup>th</sup> October 2007, a criminal case was initiated in Ecuador against the Claimant’s executives – embezzlement – the failure to pay the monies that had been sought. This led to the provisional measures request- granted less than 4 weeks later.
  97. The Claimant contended that there had been a violation of the provisional measures. The Respondent (which had not entered an appearance earlier) applied on 1<sup>st</sup> February 2008 for the measures to be set aside.
  98. The Tribunal observed that there was no requirement for “irreparable harm” – Rule 39 imposed an “urgency” requirement. The Tribunal stated that the “*harm spared to [the Claimant] by such measures must be significant and [must] exceed greatly the damage caused to the party affected thereby*” (para 72) – this looks somewhat like the English Law **American Cyanimid [1975] AC 396 (HL)** “balance of convenience” test for interim-injunctive relief.

99. The Tribunal emphasised that it was not seeking to usurp the sovereign powers of Ecuador, but that the absence of the provisional measures carried a high risk that the Contract would be terminated by the State, in addition to which monies would be demanded from the Claimant which might not be payable or capable of payment- jeopardizing the Claimant's economic feasibility. An eventual award in the ICSID proceedings in favour of the Claimant would not be able to address this adequately. In contrast, the Tribunal considered that if the final award was in favour of the Respondent, it would be compensated for delayed payment by way of interest.
100. The Tribunal stressed that it was not seeking to prejudge the merits, simply seeking to maintain the status quo pending determination of the Claimant's claim.

**3. *Perenco v. Ecuador* [8/5/2009] (ICSID Case No. ARB/08/06) ("Perenco")**

101. This ICSID Tribunal was presided over by the late Lord Bingham, in one of the very few arbitration matters he dealt with before his untimely death. There is little doubt (in the author's mind) that the presence of Lord Bingham on the Tribunal led to an order for provisional measures with a significant difference – payment of sums into an escrow account by the Claimant by way of security, in the event that the Claimant did not succeed on the jurisdictional or merits issues.
102. A request for arbitration had been filed on 30<sup>th</sup> April 2008. The dispute concerned Participation Contracts for Exploration and Exploitation of Hydrocarbons, conferring an entitlement to engage in oil exploration and production activities.
103. In April 2006, a new Law was enacted in Ecuador, which the Claimant contended provided for additional payment to the Ecuador authorities in a manner not reflected in the Contracts. The Claimant made the payments sought under protest until April 2008, at which point negotiations for a compromise broke down. In February 2009, enforcement notices were issued against the Claimant for non-payment totaling around USD\$ 330 million. On 3<sup>rd</sup> March 2009, the seizure of property belonging to the Claimant was ordered.
104. In the request for arbitration, the Claimant had sought provisional measures including restraint of the Respondent from collecting the monies purportedly due pursuant to the new Law. During the first ICSID hearing on 7<sup>th</sup> February 2009 (9 months after the request was filed), Claimant's Counsel stated that he did not intend to pursue the provisional measures request at that juncture.
105. However, by letter dated 18<sup>th</sup> February 2009, the request for provisional measures was formally revived.

106. The Tribunal proceeded on the basis that it had to be satisfied that a *prima facie* basis for jurisdiction existed (para. 39). In the face of what it considered to be the threat or likelihood of imminent seizure of the Claimant's assets in the sum of around US\$ 330 million, the Tribunal granted the measures sought.
107. The Respondent retorted that the Tribunal merely had the power to make recommendations and not orders – unsurprisingly, the Tribunal rejected this contention. By way of analogy, the ICJ has a power to “indicate” provisional measures which have consistently held to be obligatory in character pursuant to Article 41 of the ICJ's Statute (paras. 68 to 70 - see the discussion thereafter with reference to other International Tribunals, as well as the first ICSID provisional measures decision – *Maffezini (1999)*).
108. Another case concerning similar circumstances is *Burlington v. Ecuador [29/6/2009] (ICSID Case No. ARB/08/05)*- Request for Arbitration dated 21<sup>st</sup> April 2008/Provisional Measures sought on 20<sup>th</sup> February 2009/order made on 29<sup>th</sup> June 2009. However, in this case it was also held that an order for provisional remedies only created procedural rights during the currency of the arbitration and that it could not be assimilated to a court's decision to annul a final award (para. 481.)

#### 4. *Quiborax v. Bolivia [26/2/2010] (ICSID Case No. ARB/06/02)* (“Quiborax”)

109. The Tribunal ordered provisional measures by a decision dated 26<sup>th</sup> February 2010, in response to a request dated 14<sup>th</sup> September 2009.
110. The dispute arose from the revocation by Presidential Decree dated 23<sup>rd</sup> June 2004 of eleven mining concessions held by the Claimants in Bolivia. The Claimant contended that the State had engaged in confiscation/expropriation. After the revocation, lengthy negotiations took place which had apparently led to an orally agreed compromise.
111. However, in late 2008, Bolivia initiated criminal proceedings against various persons connected to the Claimant (on the basis that forged corporate documents were being used to support the Claimant's ownership of shares in the original concession holder), leading the Claimant to submit that Bolivia had repudiated the oral settlement agreement.
112. Bolivian authorities seized documents and questioned various individuals, leading to formal charges being laid against 5 individuals on 16<sup>th</sup> March 2009. One of the individuals “confessed” to using forged documents to assert entitlements which underpinned the ICSID claim. He was sentenced in August 2009, and immediately pardoned.
113. The Claimant contended that the criminal proceedings were intended to frustrate the ICSID claim, and in essence asserted that the ICSID claim was being presented upon a false basis. The Claimant argued that the provisional

measures were necessary to preserve the status quo, as well as the right of the procedural integrity of the ICSID proceedings.

114. The Tribunal considered that Bolivia had initiated a corporate audit which had targeted the Claimant because it had initiated the ICSID arbitration (para. 121). Indeed, the Bolivian authorities asserted that the alleged irregularities had only come to light because of the ICSID arbitration.

115. The Tribunal noted that the Claimant no longer had business operations or a presence in Bolivia. The only co-Claimant who had been implicated in criminal proceedings had not yet been charged and live outside Bolivia.

116. Whilst the existence of the criminal proceedings by themselves was of itself objectionable, the fact that potential witnesses might be unwilling to come forward was significant, given that the ICSID proceedings had been characterized in Bolivia as based upon criminal conduct. As a result, the criminal proceedings were considered by the Tribunal to pose a threat to the integrity of the ICSID proceedings.

117. Accordingly, the Tribunal granted provisional measures requiring Bolivia to suspend criminal proceedings directly related to the arbitration.

118. For a further illustration of the potential scope for provisional measures see the PCA Tribunal's decision in the case of ***Chevron v. Ecuador*** [14/5/2010] (PCA Case No. 2009-23)(The Notice of Arbitration was served on 23<sup>rd</sup> September 2009 and a request for interim measures made (by email) on 1<sup>st</sup> April 2010. A hearing took place on 10<sup>th</sup> and 11<sup>th</sup> May 2010, leading to the order for Provisional Measures stated to be effective until the next procedural hearing in November 2010.

119. The order included provision “not to exert .. pressure on the Court addressing pending litigation in Ecuador”.. and for the Respondent to *“facilitate.. not discourage, by every appropriate means, the Claimant’s engagement of legal experts, advisers .. from the Ecuadorian legal profession for the purpose of these arbitration proceedings (at the Claimants’ own expense).”*

**5. *Tethyan Copper Compnay v. Pakistan* [13/12/2012] (ICSID Case No. ARB/12/1)**

120. Most recent case which, in line with past practice, affirmed that provisional measures can be ordered by a tribunal where the situation is urgent and the measures in questions are necessary to preserve the right being asserted from irreparable harm.

### III. Abuse of Process.

*Europe Cement Investment v. Turkey* (13/8/2009) [ICSID Case No. ARB (AF)/07/02] (“Europe Cement”)

*Cementownia v. Turkey* (17/9/2009) [ICSID Case No. ARB (AF)/06/02] (“Cementownia”)

121. Both cases concerned claims relating to alleged ownership of shares in companies in Turkey which were engaged in electricity transmission. It was alleged that Turkish legislation in February 2001 had the effect of preventing the Turkish companies from continuing business, as a new State owned entity was established for such purposes.
122. The issue for consideration in the above cases was whether the Claimant’s had established that they were “investors” in the Turkish companies – did they own shares?
123. In both cases there appears to have been a somewhat troublesome procedural process, with Claimant’s Counsel coming off the record and numerous procedural orders having been made, for, inter-alia, production of originals of share certificate, but not complied with by the Claimants.
124. As to the central question, both Tribunals held that proof of ownership of shares in the Turkish companies had not been established, and thus the Claimant’s were not investors – no jurisdiction.
125. However, the Tribunals went further and concluded that the Claimants had used forged documents to try to advance fraudulent claims (para. 159 Cementownia// Europe Cement Tribunal adopted slightly gentler terminology with the same meaning at para 175).
126. The Tribunals both considered whether an award of “moral damages” could be made against the Claimants – and decided against. In the case of *Desert Line v. Yemen* (6/2/2008)[ICSID Case No. ARB/05/07] the Tribunal had awarded the Claimant an amount of USD\$1 million for “*in particular the physical duress exerted on the Claimant’s executives*”. Both Tribunals concluded that such an award was only to be made in exceptional circumstances where the harm could be shown.
127. The Tribunals therefore declined to award any “moral damages” to Turkey, instead awarding all costs claimed (USD\$ 4 million and USD\$ 5 million respectively) – even though neither Claimant appeared to have any assets (Cementownia had advanced a USD\$ 6.4 billion dollar claim- on the basis of having purchased shares in the Turkish companies for around USD\$ 50,000. Moreover, Cementownia had sold off all its assets and gone out of business by the time the Tribunal made the costs Award- Para 158/fifth bullet point).

#### **IV. Illegality**

***SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4),  
Decision on Jurisdiction and Liability**

128. The applicable Argentina-France BIT did not contain an explicit requirement that investments be made in accordance with the legislation of the host State. The tribunal held, however, that the principle of legality and good faith exists regardless of whether the treaty expresses it in explicit terms. In the tribunal's view, this principle would preclude investors who engage in "*serious violation of the legal order*" of the host State from benefitting from treaty protection. (para. 308.)
129. Previously, questions of illegality had been considered as only in terms of their explicit incorporation into the relevant BIT.

## **5. Concluding Observations.**

130. Once you have read a few BIT cases (unwieldy as they are) and represented clients in them, a familiar pattern emerges: filing of a claim, delay in appointing the Tribunal, a procedural order which is inevitably violated. Thereafter, a hearing on jurisdiction which mostly results in the Tribunal finding jurisdiction. After 4 years or so, if and when a Merits award is produced, the claim is very often dismissed or an award is made for a sum significantly less than sought<sup>8</sup>.
131. Nevertheless, there are very real signs (in recent decisions) that Arbitral Tribunals are now recognising the need to produce expeditious, clear, coherent and consistent decisions. This is a very important and welcome development.

**Khawar Qureshi QC**  
**June 2013**

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<sup>8</sup> Yukos BIT related claims total USD\$ 33billion (ongoing). Metaclad's claim of USD\$ 43 million yielded a USD\$ 17 million award. S.D. Myer's claim of USD\$ 80 million yielded a USD\$ 6 million award. In the *Telenor* case (13/9/06) , the Tribunal appears to have been heavily influenced by the fact that the Claimant was unable to show any real damage or loss to support its claim of expropriation – even at the jurisdiction stage.

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**ANNEX A: EXAMPLE BIT BETWEEN CHINA AND UGANDA**

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**AGREEMENT BETWEEN THE GOVERNMENT OF THE PEOPLE'S  
REPUBLIC OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF  
UGANDA ON THE RECIPROCAL PROMOTION AND PROTECTION OF  
INVESTMENTS**

The Government of the People's Republic of China and the Government of the Republic of Uganda hereinafter referred to as the Contracting Parties, Desiring to strengthen their economic cooperation by creating favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognising that the encouragement and reciprocal protection of such investments will be conducive to the stimulation of business initiative and will increase prosperity of both Contracting States; Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two Contracting States in the interest of their economic development, Have agreed as follows:

**Article 1****Definitions For the purpose of this Agreement:**

1. The term "investment" means every kind of property, such as goods, rights and interests of whatever nature, and in particular though not exclusively, includes:
  - (a) tangible, intangible, movable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights;
  - (b) shares, debentures, stock and any other kind of participation in companies;
  - (c) claims to money or to any other performance having an economic value associated with an investment;
  - (d) intellectual and industrial property rights such as copyrights, patents, trademarks, industrial models and mockups, technical processes, know-how, trade names and goodwill, and any other similar rights;
  - (e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources, Any change in the form in which properties are invested does not affect their character as investments provided that such change is in accordance with the laws and regulations of the Contracting Party in whose territory the investment has been made.
  
2. The term "investor" means
  - (a) natural persons who have nationality of either Contracting Party in accordance with the laws of that Contracting Party;
  - (b) legal entities, including company, association, partnership and other organization, incorporated or constituted under the laws and regulations of either Contracting Party and have their headquarters in that Contracting Party.

3. The term "return" means the amounts yielded from investments, including profits, dividends, interests, capital gains, royalties, fees and other legitimate income.

4. For the purposes of this Agreement, the term "territory" means respectively: -for the People's Republic of China, the territory of the People's Republic of China, including the territorial sea and air space above it, as well as any area beyond its territorial sea within which the People's Republic of China has sovereign rights of exploration for and exploitation of resources of the seabed and its sub-soil and superjacent water resources in accordance with Chinese Law and international law; -for Uganda, the Republic of Uganda.

## **Article 2**

### **Promotion and protection of investments**

1. Each Contracting Party shall encourage and promote investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

2. The investments made by investors of one contracting party shall enjoy full and complete protection and safety in the territory of the other Contracting Party.

3. Without prejudice to its laws and regulations, neither Contracting Party shall take any discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.

4. Subject to its laws and regulations, one Contracting Party shall provide assistance in and facilities for obtaining visas and working permit to nationals of the other Contracting Party engaging in activities associated with investments made in the territory of that Contracting Party.

## **Article 3**

### **Treatment of Investment**

1. Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party.

2. Without prejudice to its laws and regulations, each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favorable than that accorded to the investments and associated activities by its own investors.

3. Neither Contracting Party shall subject investments and activities associated with such investments by the investors of the other Contracting Party to treatment less favorable than that accorded to the investments and associated activities by the investors of any third State.

4. This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third State by virtue of its participation or association in a free

trade zone, customs union, common market or any other form of regional economic organization.

5. The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the Double Taxation Treaty between the two Contracting Parties and the domestic laws of each Contracting Party.

#### **Article 4 Expropriation**

1. Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of investors of the other Contracting Party of their investments in territory, except for the public interest, without discrimination and against compensation.

2. Any measures of dispossession which might be taken shall give rise to prompt compensation, the amount of which shall be equivalent to the real value of the investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, whichever is earlier.

3. The said compensation shall be set not later than the date of dispossession. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.

#### **Article 5 Indemnification**

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation and other settlements, which is no less favorable than that granted to its own nationals or companies or to those of the most favored nation.

#### **Article 6 Subrogation**

If one Contracting Party or its designated agency makes a payment to its investors under a guarantee or a contract of insurance against non-commercial risks it has accorded in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize:

(a) the assignment, whether under the law or pursuant to a legal transaction in the former Contracting Party, of any rights or claims by the investors to the former Contracting Party or to its designated agency, as well as,

(b) that the former Contracting Party or to its designated agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of that investor and assume the

obligations related to the investment to the same extent as the investor.

## **Article 7**

### **Transfers**

1. Each Contracting Party shall guarantee to the investors of the other Contracting Party the transfer of their investments and returns held in its territory, including:

- (a) profits, dividends, interests and other legitimate income;
- (b) proceeds obtained from the total or partial sale or liquidation of investments;
- (c) payments pursuant to a loan agreement in connection with investments;
- (d) royalties in relation to the matters in Paragraph 1 (d) of Article 1;
- (e) payments of technical assistance or technical service fee, management fee;
- (f) payments in connection with contracting projects;
- (g) earnings of nationals of the other Contracting Party who work in connection with an investment in its territory.

2. Nothing in Paragraph 1 of this Article shall affect the free transfer of compensation paid under Article 4 and 5 of this Agreement.

3. The transfer mentioned above shall be made in a freely convertible currency and at the prevailing market rate of exchange applicable within the Contracting Party accepting the investments and on the date of transfer.

4. In case of a serious balance of payments difficulties and external financial difficulties or the threat thereof, each contracting party may temporarily restrict transfers, provided that this restriction: i) shall be promptly notified to the other party; ii) shall be consistent with the articles of agreement with the International Monetary Fund; iii) shall be within an agreed period; iv) would be imposed in an equitable, non-discriminatory and in good faith basis.

5. A Contracting Party may require that, prior to the transfer of payments, formalities arising from the relevant laws and regulations are fulfilled by the investors, provided that those shall not be used to frustrate the purpose of paragraph 1 of this article.

## **Article 8**

### **Settlement of disputes between an investor and a Contracting Party**

1. Any legal dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

2. If the dispute cannot be settled through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted by the choice of the investor:

- (a) to the competent court of the Contracting Party that is a party to the dispute;
- (b) to International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States,

done at Washington on March 18, 1965, provided that the Contracting Party involved in the dispute may require the investor concerned to go through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to the ICSID. Once the investor has submitted the dispute to the competent court of the Contracting Party concerned or to the ICSID, the choice of one of the two procedures shall be final.

3. The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws the provisions of this Agreement as well as the universally accepted principles of international law.

4. The arbitration award shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award. Each party to the dispute shall bear the costs of its appointed arbitrator and of its representation in arbitral proceedings. The relevant costs of the Chairman and tribunal shall be borne in equal parts by the parties to the dispute. The tribunal may in its award direct that a higher proportion of the costs be borne by one of the parties to the dispute.

## **Article 9**

### **Settlement of disputes between Contracting Parties**

1. Any dispute relating to the interpretation or application of this Agreement shall be settled as far as possible through diplomatic channels within three months.

2. In case of failure of a settlement through diplomatic channels within three months, the dispute may be submitted to an ad hoc joint committee consisting of the representatives of the two Parties or to ad hoc arbitration.

3. The Contracting Parties may set up such joint committee comprising relevant experts to resolve the dispute. The procedures of the joint committee shall be decided by both parties to the dispute.

4. If the joint committee cannot settle the dispute within six months, the party to the dispute is entitled to submit the dispute to an ad hoc arbitration tribunal. The arbitration tribunal shall be set up as follows for each individual case: Each Contracting Party shall appoint one arbitrator within a period of two months from the date on which one Contracting Party has informed the other Party of its intention to submit the dispute to arbitration. Those two arbitrators shall, within further two months, together select a national of a third State having diplomatic relations with both Contracting Parties as Chairman of the arbitral tribunal. If these time limits have not been complied with either Contracting Party shall request the President of the International Court of Justice to make the necessary appointment(s). If the President of the International Court of Justice is a national of either Contracting Party or of a State with which one of the Contracting Parties has no diplomatic relations or if, for any other reason, he cannot exercise this function, the Vice-President of the International Court of Justice shall be requested to make the appointment(s).

5. The court thus constituted shall determine its own rules of procedure. Its decisions shall be taken by a majority of the votes; they shall be final and binding on the Contracting Parties.

6. Each Contracting Party shall bear the costs resulting from the appointment of its arbitrator. The expenses in connection with the appointment of the third arbitrator and the administrative costs of the court shall be borne equally by the Contracting Parties.

## **Article 10**

### **Other obligations**

If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the Agreement, such position shall not be affected by this Agreement.

## **Article 11**

### **Special Agreements**

1. Investments made pursuant to a specific agreement concluded between one Contracting Party and investors of the other Party shall be covered by the provisions of this Agreement and by those of the specific agreement.

2. Each Contracting Party undertakes to ensure at all times that the commitments it has entered into vis-à-vis investors of the other Contracting Party shall be observed.

## **Article 12**

### **Application**

This Agreement shall apply to investment, which are made prior to or after its entry into force by investors of one either Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party concerned in the territory of the latter, but shall not apply to the dispute that arose before the entry into force of this Agreement.

## **Article 13**

### **Governing law**

All investments shall, subject to this Agreement, be governed by law in force in the territory of the Contracting Party in which such investments are made.

## **Article 14**

### **Consultations**

1. The representatives of the Contracting Parties shall hold meetings from time to time for the purpose of: (a) reviewing the implementation of this Agreement; (b) exchanging legal information and investment opportunities; (c) resolving disputes arising out of investments;

- (d) forwarding proposals on promotion of investment;
- (e) studying other issues in connection with investment.

2. Where either Contracting Party requests consultation on any matter of Paragraph 1 of this Article, the other Contracting Party shall give prompt response and the consultation be held alternatively in Beijing and Kampala.

## **Article 15**

### **Amendments**

The terms of this Agreement may be amended by mutual agreement of both Contracting Parties and such amendments shall be effected by exchange of notes between them through diplomatic channels.

## **Article 16**

### **Entry into force and duration**

1. This Agreement shall enter into force on the first day of the following month after the date on which both Contracting Parties have notified each other in writing that their respective internal legal procedures necessary therefore have been fulfilled and remain in force for a period of ten years.
2. This Agreement shall continue to be in force unless if either Contracting Party has fails to given a written notice to the other Contracting Party to terminate this Agreement one year before the expiration of the initial ten year period specified in Paragraph 1 of this Article or at any time thereafter.
3. With respect to investments made prior to the date of termination of this Agreement, the provisions of Article 1 to 15 shall continue to be effective for a further period of ten years from such date of termination.

*In Witness Whereof the undersigned, duly authorized thereto by respective Governments, have signed this Agreement.*

*Done in duplicate in Beijing on May 27, 2004, in the Chinese and English languages, both texts being equally authentic.*

*For the Government of the People's Republic of China*

*For the Government of the Republic of Uganda*

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**ANNEX B: SOME RECENT BIT ARBITRATION DECISIONS WHICH IMPACT  
UPON KEY CONCEPTS WITHIN BITS**

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The cases below cover the following topics, and are current as at May 2013.

1. Definition of Investor;
2. Definition of Investment;
3. Fair and Equitable Treatment;
4. Expropriation;
5. Umbrella clauses;
6. MFN clauses;
7. Denial of justice; and
8. Quantification.

<b>1. INVESTOR</b>		
<b>Name</b>	<b>Date</b>	<b>Result</b>
<i>Alps Finance and Trade AG v Slovak Republic</i> <b>UNCITRAL</b>	Award: March 5, 2011	Tribunal declined jurisdiction on the grounds that the claimant was not an “investor”, and the claimant’s business was not an “investment
<i>Libananco Holdings Co. Limited v. Republic of Turkey</i> <b>(ICSID Case No. ARB/06/8)</b>	Award: September 02, 2011; Decision on Applicant's Request for a Continued Stay of Enforcement of the Award - May 07, 2012	The tribunal declined jurisdiction on the grounds that the claimant was not an “investor” under the ECT, due to its failure to show that it owned the businesses at issue at the time of the alleged expropriation.
<i>Pac Rim Cayman LLC v. The Republic of El Salvador</i> <b>(ICSID Case No. ARB/09/12)</b>	Decision on the Respondent’s Jurisdictional Objections: 1 June 2012	Discusses change of nationality, and whether and when it becomes an abuse of process.
<i>Swisslion DOO Skopje v. Macedonia, former Yugoslav Republic of</i> <b>(ICSID Case No. ARB/09/16)</b>	Award: 6 July, 2012	Proceedings against the Claimant did not breach the BIT but measures “on the margins” of the proceedings did
<i>Standard Chartered Bank v. The United</i>	Award: 2 November 2012.	Investment must have been made at claimant’s direction, funded by him and actively controlled

<b>Republic of Tanzania (ICSID Case No. ARB/10/12)</b>		by him for him to be regards as an investor.
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<b>2. INVESTMENT</b>		
<b>Name</b>	<b>Date</b>	<b>Result</b>
<b>Alpha Projektholding GmbH v. Ukraine (ICSID Case No. ARB/07/16)</b>	Award – November 8, 2010	Tribunal found that it did have jurisdiction (after discussing BIT and ICSID Convention definitions of jurisdiction),
<b>Cemex v. Venezuela</b>	Decision: 30 December 2010	The tribunal affirmed that the BIT in this case covered indirect investments and entitled the claimants to assert their claims for alleged treaty violations.
<b>Malicorp v Egypt (ICSID Case No. ARB/08/18)</b>	Decision: 7 February 2011	Jurisdiction accepted
<b>GEA v Ukraine (ICSID Case No. ARB/08/16)</b>	Award: 31 March 2011	Tribunal found that it did have jurisdiction to hear the claims
<b>HICEE v. Slovak Republic PCA 2009-11</b>	Partial Award: 23 May 2011	The tribunal found under the BIT, there was no protection for investments made by a locally incorporated entity in other locally incorporated entities.
<b>White Industries Australia Ltd v India UNCITRAL</b>	Award: November 30, 2011	Tribunal did have jurisdiction over the dispute – the arbitration award at issue arose from a long-term contract between the parties, and was protected as a “continuation or transformation of the original investment”.
<b>Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador (UNCITRAL, PCA Case No. 2009-23),</b>	Third interim award on jurisdiction and admissibility: 27 February 2012	The tribunal rejected jurisdictional challenges by Ecuador, and in particular, held that the settlement agreement and concession agreement must be viewed as a single arrangement.
<b>Railroad Development Corporation v. Republic of Guatemala (ICSID Case No.</b>	Second decision; May 18, 2010; award, June 29, 2012	Did have jurisdiction.

<b>ARB/07/23)</b>		
<i>Caratube International Oil Company LLP v. The Republic of Kazakhstan</i> (ICSID Case No. ARB/08/12),	Award, 5 June 2012	Investment requires a contribution to be made and that it involves some degree of risk.
<i>Daimler Financial Services AG v. Argentine Republic</i> (ICSID Case No. ARB/05/1)	Award, 22 August 2012	Claims in principle separable from underlying investment. Any qualifying investor who suffered damages can claim.
<i>Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia</i> (ICSID Case No. ARB/06/2),	Decision on Jurisdiction, 27 September 2012	Distinction between object of investment and action of investing.
<i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i> (ICSID Case No. ARB/09/2)	Award, 31 October 2012	Regularity of profit and return not necessarily a definitional bench-mark.
<i>Electrabel S.A. v. Republic of Hungary</i> (ICSID Case No. ARB/07/19)	Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012	Definitional criteria – a contribution; a certain duration; and an element of risk.

### 3. FAIR AND EQUITABLE TREATMENT

<b>Name</b>	<b>Date</b>	<b>Result</b>
<i>AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary</i> (ICSID Case No. ARB/07/22)	Award: 23 September 2010	Claimant failed in its claims of fair and equitable treatment,

<b><i>RSM Production Corporation and others v. Grenada</i></b> (ICSID Case No ARB/10/6)	Award: 10 December 2010	The tribunal dismissed the investor's claims as 'manifestly without legal merit' pursuant to ICSID Arbitration Rule 41(5), on the grounds that the legal and factual bases on which the investor's claims depended had already been fully litigated in a prior contractual arbitration
<b><i>Murphy Exploration and Production Company International v. Republic of Ecuador</i></b> (ICSID Case No ARB/08/4)	Award: 15 December 2010	Failure to comply with necessary procedural requirements prior to hearing of the claim,
<b><i>GEA v Ukraine</i></b> (ICSID Case No ARB/08/16)	Award: 31 March 2011	No breach
<b><i>Paushok v Mongolia</i></b>	Award: 28 April 2011	There had been no breach of the obligation for fair and equitable treatment, and no expropriation.
<b><i>El Paso v Argentina</i></b> (ICSID Case No ARB/03/15)	Award: 31 October 2011	The tribunal found that none of the individual measures constituted a breach of the FET clause; but 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.
<b><i>Spyridon Roussalis v. Romania</i></b> (ICSID Case No. ARB/06/1)	Award: 7 December 2011	No case of breach of the obligation of fair and equitable treatment was made out. The majority found that the tribunal did not have jurisdiction over the respondent's counterclaim, on the basis that the consent clause in the underlying treaty limited jurisdiction to claims brought by investors about obligations of the host State
<b><i>[Censored] v Netherlands</i></b>	Award: 23 April 2012	No breach
<b><i>Toto Costruzioni Generali S.p.A. v. Republic of Lebanon</i></b> (ICSID Case No ARB/07/12)	Award: 7 June 2012	The tribunal had jurisdiction over the claimant's claims, but Lebanon had not breached its obligations to be fair and equitable. The tribunal had no jurisdiction over the respondent's claims.
<b><i>Edf v Argentina</i></b> (ICSID Case No ARB/03/23)	Award: 11 June 2012	There had been a breach of the fair and equitable treatment obligation.

<b><i>Swisslion DOO Skopje v. Macedonia, former Yugoslav Republic of</i></b> <b>(ICSID Case No. ARB/09/16)</b>	Award: 6 July, 2012	Proceedings against the Claimant did not breach the BIT but measures “on the margins” of the proceedings did
<b><i>Ulysseas Inc. v Ecuador</i></b>	12 June 2012	The tribunal held that the respondent had not breached any of its obligations under the BIT in relation to the claimant’s investment, and dismissed all of the claimant’s claims.
<b><i>Iberdrola Energía S.A. v. Republic of Guatemala</i></b> <b>(ICSID Case No. ARB/09/5)</b>	Award, 17 August 2012	
<b><i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador</i></b> <b>(ICSID Case No ARB/06/11)</b>	Award: 5 October 2012	The Tribunal found that Ecuador had acted in breach of the Ecuador/US BIT by failing to accord fair and equitable treatment to Occidental’s investment, a breach that was tantamount to expropriation. Ecuador had passed a decree terminating a contract with Occidental in breach of both Ecuadorian and customary international law.  Standard of proportionality.
<b><i>Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay</i></b> <b>(ICSID Case No. ARB/07/9),</b>	Further Decision on Objections to Jurisdiction, 9 October 2012	Requirement for a “puissance publique” – activity beyond that of a normal contracting party.
<b><i>Bosh International, Inc and B&amp;P Ltd Foreign Investments Enterprise v. Ukraine</i></b> <b>(ICSID Case No. ARB/08/11)</b>	Award, 25 October, 2012	State needs to violate a “certain threshold of propriety”.

<b><i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i></b> (ICSID Case No. ARB/09/2)	Award: 31 October 2012	Not materially different from the standard of treatment in customary international law.
<b><i>Electrabel S.A. v. Republic of Hungary</i></b> (ICSID Case No. ARB/07/19),	Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012	State entitled to maintain a degree of regulatory flexibility to respond to changing circumstances in the public interest.
<b><i>Franck Charles Arif v. Moldova</i></b> (ICSID Case No ARB/11/23)	Award: 8 April 2013	The Tribunal found that Moldova breached the fair and equitable treatment standard of the BIT in relation to Mr. Arif’s investment in the Airport. Moldova was therefore ordered to restitute Claimant’s investment in the Airport store, or, if restitution is not provided within 60 days or if Moldova’s proposal for restitution is refused by Mr. Arif, who has a discretionary power to reject it, Moldova will have to pay Mr. Arif damages in the amount of 35,136,294 MDL, plus interest at a rate of EURIBOR.
<b><i>Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine</i></b> (ICSID Case No ARB/08/8)	Award: 1 May 2013	The Tribunal found in favour of the Claimants on all matters. Ukraine had breached its obligations of fair and equitable treatment under Article 2(1) of the BIT
<b><i>Rompetrol v Romania</i></b> (ICSID Case No ARB/06/3)	Award: 6 May 2013	The Tribunal dismissed all the claims apart from a claim for breach of the “fair and equitable treatment” requirement laid down in Article 3(1) of the BIT. Tribunal determined that a breach pursuant to the “cumulative effect” of individual acts of a less severe kind had taken place. The Claimant had not met the onus of proving that it had suffered economic loss or damage as a result of this breach, however, and so its claim for damages, including

<b>4. EXPROPRIATION</b>		
<b>Name</b>	<b>Date</b>	<b>Result</b>
<b><i>AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary</i></b> (ICSID Case No ARB/07/22)	Award: 23 September 2010	No expropriation.

<b><i>RSM Production Corporation and others v. Grenada (ICSID Case No ARB/10/6)</i></b>	Award: 10 December 2010	No expropriation.
<b><i>Murphy Exploration and Production Company International v. Republic of Ecuador (ICSID Case No ARB/08/4)</i></b>	Award: 15 December 2010	No expropriation.
<b><i>Malicorp v Egypt (ICSID Case No. ARB/08/18)</i></b>	7 February 2011	The tribunal rejected the investor's claim of expropriation as the respondent was justified in terminating the contract, and this action could not be interpreted as an expropriatory measure.
<b><i>GEA v Ukraine (ICSID Case No. ARB/08/16)</i></b>	Award: 31 March 2011	No expropriation.
<b><i>Paushok v Mongolia</i></b>	Award: 28 April 2011	No expropriation.
<b><i>Spyridon Roussalis v. Romania (ICSID Case No. ARB/06/1)</i></b>	Award: 7 December 2011	To amount to expropriation a measure must constitute a deprivation of economic use and enjoyment, as if the related rights had ceased to exist.
<b><i>Railroad Development Corporation v. Republic of Guatemala (ICSID Case No. ARB/07/23)</i></b>	Second decision; May 18, 2010; award, June 29, 2012	No expropriation.
<b><i>Edf v Argentina (ICSID Case No ARB/03/23)</i></b>	Award: 11 June 2012	The tribunal rejected the claimant's claims for indirect expropriation
<b><i>Ulysseas Inc. v Ecuador</i></b>	12 June 2012	Opinion discusses discriminatory & arbitrary treatment, and "temporary" and indirect expropriation.
<b><i>Swisslion DOO Skopje v. Macedonia, former Yugoslav Republic of (ICSID Case No. ARB/09/16)</i></b>	Award: 6 July, 2012	No expropriation.
<b><i>Renta 4 S.V.S.A., et al v. The Russian Federation (SCC No. 24/2007)</i></b>	Award, 20 July 2012	Expropriation may be amount from a series of actions which taken individually may not amount to such.
<b><i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (ICSID Case No ARB/06/11)</i></b>	Award: 5 October 2012	No expropriation.

<b><i>Electrabel S.A. v. Republic of Hungary</i></b> (ICSID Case No. ARB/07/19)	Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012	In order to prove indirect expropriation the claimant was required to prove that its investment had lost all significant economic value following the early termination of a power purchase agreement.
<b><i>Burlington Resources Inc. v. Republic of Ecuador</i></b> (ICSID Case No. ARB/08/5)	Decision on Liability: 14 December 2012	The Tribunal ruled that Ecuador unlawfully expropriated the company's significant oil investments. The Tribunal also found that Burlington's investment included the contractual right to be indemnified for the effects of Law 42, which, if enforced would materially have depleted its contractual position.
<b><i>Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine</i></b> (ICSID Case No ARB/08/8)	Award: 1 May 2013	It had breached its obligations under Article 4(2) the BIT by expropriating the Claimant's investment without payment of compensation.

<b>5. MOST-FAVOURED NATION CLAUSES</b>		
<b>Name</b>	<b>Date</b>	<b>Result</b>
<b><i>AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary</i></b> (ICSID Case No ARB/07/22)	Award: 23 September 2010	The Tribunal found that Hungary did not breach its ECT obligation to provide Most Favoured trading status to AES.
<b><i>Impregilo SpA v Argentina Republic</i></b> (ICSID Case No ARB/07/17)	Award: June 21, 2011	The Tribunal held that the MFN clause in the Argentina-UK BIT did extend to the dispute resolution provisions and therefore did not exempt ICS from complying with the litigation prerequisite. (Contrast with ICS and Hochtief)
<b><i>Hochtief v Argentina</i></b> (ICSID Case No ARB/07/31)	Award: 24 October 2011	The Tribunal held that the MFN clause in the Argentina-UK BIT did extend to the dispute resolution provisions and therefore did not exempt ICS from complying with the litigation prerequisite. (Contrast with Impreglio and ICS)
<b><i>White Industries Australia Ltd v India</i></b> <b>UNCITRAL</b>	Award: November 30, 2011	Tribunal did have jurisdiction over the dispute – the arbitration award at issue arose from a long-term contract between the parties, and was protected as a “continuation or transformation of the original investment”. The MFN clause allowed Claimant to incorporate provision from the India/Kuwait BIT, and India was in breach of the obligation to provide “effective means” of resolving the claim.
<b><i>ICS Inspection and</i></b>	Award on	Found that MFN clause of the Argentina-UK BIT

<b><i>Control Services Limited (United Kingdom) v. The Republic of Argentina (UNCITRAL, PCA Case No. 2010-9)</i></b>	Jurisdiction, 10 February 2012	did not apply in a way which would allow the claimant to make use of the dispute resolution provision in the Argentina-Lithuania BIT.
<b><i>Daimler Financial Services AG v. Argentine Republic (ICSID Case No. ARB/05/1)</i></b>	Award, 22 August 2012	The majority of the tribunal declined jurisdiction on the basis that the investor had failed to first submit the dispute to the Argentine courts for 18 months, as required by the Argentina-Germany BIT. The majority of the tribunal also held that the MFN clause did not extend to dispute resolution provisions, and therefore it did not enable investors to take advantage of arbitration clauses from Argentina's other bilateral investment treaties
<b><i>Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic (ICSID Case No. ARB/09/1)</i></b>	Decision on Jurisdiction, 21 December 2012	The Tribunal held that the claimants had satisfied the pre-conditions to arbitration contained in the Spain-Argentina BIT. The majority also held that, if those pre-conditions were not satisfied, the claimants could rely on the MFN clause in the BIT, to benefit from the dispute settlement provisions in the Australia-Argentina BIT, which did not contain those pre-conditions.

<b>6. UMBRELLA CLAUSES</b>		
<b>Name</b>	<b>Date</b>	<b>Result</b>
<b><i>Murphy Exploration and Production Company International v. Republic of Ecuador (ICSID Case No ARB/08/4)</i></b>	Award: 15 December 2010	As previously detailed
<b><i>Societe Generale de Surveillance SA v Paraguay (ICSID Case No ARB/07/29)</i></b>	Award: 10 February 2012	The tribunal found that the respondent was in breach of the umbrella clause.
<b><i>Bosh International, Inc and B&amp;P Ltd Foreign Investments Enterprise v. Ukraine (ICSID Case No. ARB/08/11)</i></b>	Award on Jurisdiction and Liability: 25 October 2012	Found that for the respondent university's claim to be attributable to the Ukraine for the purposes of the relevant BIT and its umbrella clause, it would have to be empowered by law to exercise elements of government authority, and that its conduct would have to be related to the exercise of that authority. In this case second limb not made out.

### 7. DENIAL OF JUSTICE

Name	Date	Result
<i>White Industries Australia Ltd v India UNCITRAL</i>	Award: November 30, 2011	The Tribunal found that Claimant did not show that there was a denial of justice or expropriation.
<i>[Censored] v Netherlands</i>	Award: 23 April 2012	As Above

### 8. QUANTIFICATION

Name	Date	Result
<i>Lemire v Ukraine (ICSID Case No ARB/06/18)</i>	Award: 28 March 2011	Discusses quantification of damages for breach of the obligation for fair and equitable treatment, and the availability of moral damages.
<i>Edf v Argentina (ICSID Case No ARB/03/23)</i>	Award: 11 June 2012	Reasserted the duty of claimants to take reasonable steps to mitigate damage.
<i>Railroad Development Corporation v. Republic of Guatemala (ICSID Case No. ARB/07/23)</i>	Second decision; May 18, 2010; award, June 29, 2012	First time that dispute resolution under CAFTA had been used.
<i>Quasar de Valores SICAV S.A., and Others v. The Russian Federation, (SCC No. 24/2007)</i>	Award: 20 July 2012	The tribunal found that the claimant's interest were expropriated and discussed the value of compensation to be given.

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**ANNEX C: SOME LEADING ICSID INVESTMENT DISPUTE  
CASES IN THE OIL AND GAS SECTOR**

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<b>Case Name</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>
<i>City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (ICSID Case No. ARB/06/21)</i>	Date registered: 19.12.2006 Const. of tribunal: 04.10.2007 Discontinuance issued: 12.09.2008	Hydrocarbon concession: Oil field development	Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal on September 12, 2008 pursuant to ICSID Arbitration Rule 43(1))
<i>Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (ICSID Case No. ARB/08/6)</i>	Date registered: June 04, 2008 Const. of tribunal: November 21, 2008 Reconst. of tribunal: January 13, 2010, May 06, 2010 Decision on Jurisdiction: June 30, 2011	Hydrocarbon concession: Oil field development	Pending.
<i>Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25</i>	Date registered: 24.09.2007 Const. of tribunal: 24.01.2008 Settlement: 08.04.2009	Oil rights	Consent award enforcing settlement, separate costs, withdrawal of claim, discontinuance
<i>RSM Production Corporation v. Grenada (ICSID Case No. ARB/05/14)</i>	Date registered: 05.08.2005 Const. of tribunal: 07.12.2005 Award issued: 13.03.2009 Annulment procedure registered: 10.07.2009	Oil exploration contract	Award for Grenada awarded.

<b>Wintershall Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/04/14)</b>	Date registered: 15.07.2004 Const. of tribunal: 07.09.2005 Award issued: 08.12.2008	Gas and oil production	Award
<b>SAIPEM v Bangladesh (ICSID Case No. ARB/05/7)</b>	Date registered: April 25, 2005 Tribunal constituted: August 22, 2005 Award rendered on: June 30, 2009	Contract to build gas pipeline	Decision: Recommends that state does not encash warranty bond
<b>Plama Consortium Limited v. Republic of Bulgaria, (ICSID Case No. ARB/03/24)</b>	Date registered: August 19, 2003 Tribunal constituted: February 10, 2004 Award rendered on August 27, 2008	Oil  <i>(ICSID Case No. ARB/03/24)</i>	Award: Claim rejected
<b>Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16</b>	Date registered: December 06, 2002, Tribunal constituted: May 05, 2003 Award rendered on September 28, 2007	Gas supply and distribution enterprise	State did not give fair and equitable treatment, compensation: 128m\$, plus interest, individual costs
	Date registered: January 30, 2008 Tribunal constituted: September 15, 2008 Decision on Annulment: June 29, 2010	Annulment	Award annulled
<b>Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan (ICSID Case No. ARB/06/15)</b>	Date registered: August 30, 2006 Constituted: January 18, 2007 Reconstituted: March 01, 2008 Award rendered on: September 8, 2009	Oil and gas distribution	Case dismissed
<b>Ioannis Kardassopoulos (Greece) v. Georgia, ICSID Case No. ARB/05/18</b>	Date registered: 03.10.2005 Award: 3 March 2010	Oil and gas distribution enterprise, \$350 million	Award

<b><i>Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh, (ICSID Case No. ARB/06/10)</i></b>	Date registered: June 30, 2006 Tribunal constituted: February 15, 2007 Award rendered on: May 17, 2010	Exploration, development and production of natural gas	Award
<b><i>Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan ICSID Case No. ARB/07/14</i></b>	Date registered: July 16, 2007 Tribunal constituted: January 24, 2008 Award rendered on June 22, 2010	Exploration and extraction of hydrocarbons	Award
<b><i>Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration and Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla") (ICSID Case No. ARB/10/18)</i></b>	Date Registered: July 28, 2010 Tribunal constituted: 20 December 2010	Gas purchase and sale agreement	Pending
<b><i>Opic Karimum Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/14</i></b>	Date Registered: June 16, 2010 Tribunal constituted: 5 January 2011	Oil exploration and production	Pending
<b><i>Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, Bangladesh Petroleum Exploration &amp; Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/11</i></b>	Date Registered: May 27, 2010 Tribunal constituted: 20 December 2010	Petroleum development contract	Pending
<b><i>Universal Compression International Holdings, S.L.U. v. Bolivarian</i></b>	Date Registered: April 12, 2010 Tribunal constituted:	Oil and gas enterprise	Pending

<b><i>Republic of Venezuela (ICSID Case No. ARB/10/9)</i></b>	3 November 2010		
<b><i>Pan American Energy LLC v. Plurinational State of Bolivia, ICSID Case No. ARB/10/8</i></b>	Date Registered: April 12, 2010 Tribunal constituted: 24 August 2012	Exploration and exploitation of hydrocarbons	Pending
<b><i>RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6</i></b>	Date Registered: March 16, 2010 Tribunal constituted: 5 August 2010 Award: 10 December 2010	Oil exploration contract	Award
<b><i>Itera International Energy LLC and Itera Group NV v. Georgia, ICSID Case No. ARB/09/22</i></b>	Date Registered: December 29, 2009 Discontinued: 19 November 2010	Gas distribution enterprise	Discontinued
<b><i>Mærsk Olie, Algeriet A/S v. People's Democratic Republic of Algeria, ICSID Case No. ARB/09/14</i></b>	Date Registered: July 29, 2009 Tribunal Constituted: March 10, 2010	Exploration and production of liquid hydrocarbons	Pending (parties filed request for discontinuance on 30 May 2012)
<b><i>GEA Group Aktiengesellschaft v. Ukraine (ICSID Case No. ARB/08/16)</i></b>	Date Registered: November 21, 2008 Tribunal Constituted: March 20, 2009 Award: 31 March 2011	Petrochemical industry	Award
<b><i>Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12</i></b>	Date Registered: August 26, 2008 Tribunal Constituted: February 23, 2009 Award: 5 June 2012	Oil exploration and production contract	Award
<b><i>Repsol YPF Ecuador, S.A. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador) (ICSID Case No. ARB/08/10)</i></b>	Date Registered: August 08, 2008 Tribunal Constituted: February 06, 2009	Oil exploration contract	Pending Procedural Order No. 1 available in Spanish

<b><i>Itera International Energy LLC and Itera Group NV v. Georgia, ICSID Case No. ARB/08/7</i></b>	Date Registered: June 05, 2008 Tribunal Constituted: December 11, 2008	Gas distribution enterprise	Pending (pursuant to the parties' agreement, the proceeding is suspended on March 11, 2010)
<b><i>Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (ICSID Case No. ARB/08/6)</i></b>	Date Registered: June 04, 2008 Tribunal Constituted: November 21, 2008 Tribunal Reconstituted: January 13, 2010 May 06, 2010 Decision on Jurisdiction: 30 June 2011	Hydrocarbon concession	Pending
<b><i>Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5</i></b>	Date Registered: June 02, 2008 Tribunal Constituted: November 18, 2008 Decision on jurisdiction: June 2, 2010	Hydrocarbon concession	Pending
<b><i>Murphy Exploration and Production Company International v. Republic of Ecuador (ICSID Case No. ARB/08/4)</i></b>	Date Registered: April 15, 2008 Tribunal Constituted: October 20, 2008 Award: 15 December 2010	Hydrocarbon concession	Award
<b><i>Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4</i></b>	Date Registered: December 19, 2007 Tribunal Constituted: March 09, 2009 Decision on Liability: 22 May 2012	Petroleum development projects	Decision on Liability
<b><i>ConocoPhillips</i></b>	Date Registered:	Oil and gas	Pending

<b><i>Company and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30</i></b>	December 13, 2007 Tribunal Constituted: July 23, 2008 Tribunal Reconstituted: February 01, 2010	enterprise	
<b><i>Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27</i></b>	Date Registered: October 10, 2007 Tribunal Constituted: August 08, 2008 Decision on jurisdiction: June 10, 2010	Oil and gas enterprise	Pending
<b><i>Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria, ICSID Case No. ARB/07/18</i></b>	Date Registered: July 26, 2007 Tribunal Constituted: January 21, 2009 Order of discontinuance: 1 August 2011	Hydrocarbon concession	Discontinued
<b><i>Ron Fuchs v. Georgia (ICSID Case No. ARB/07/15)</i></b>	Date Registered: July 16, 2007 Tribunal Constituted: September 14, 2007 Tribunal Reconstituted: January 16, 2008	Oil and gas distribution enterprise	Award rendered on March 3, 2010
	Date Registered: July 16, 2010 Tribunal Constituted: 11 August 2010	Annulment Proceedings	Pending
<b><i>RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2</i></b>	Date Registered: January 18, 2007 Tribunal Constituted: May 20, 2008 Award: 11 July 2011	Petroleum exploration contract	Award
	Date Registered: 21 November 2011 Tribunal Constituted: 20 December 2011 Tribunal	Annulment Proceedings	Pending

	Reconstituted: 3 March 2012		
<b><i>Nations Energy, Inc. and others v. Republic of Panama, ICSID Case No. ARB/06/19</i></b>	Date Registered: December 11, 2006 Tribunal Constituted: November 28, 2007 Award: 24 November 2010	Electricity power generation project	Award
	Date Registered: 1 April 2011	Annulment Proceedings	Pending
<b><i>Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11)</i></b>	Date Registered: July 13, 2006 Tribunal Constituted: February 06, 2007	Hydrocarbon concession	Pending
<b><i>The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3)</i></b>	Date Registered: February 14, 2006 Tribunal Constituted: December 20, 2006	Oil refinery	Pending
<b><i>Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (ICSID Case No. ARB/04/16)</i></b>	Date Registered: August 05, 2004 Tribunal Constituted: August 14, 2008	Gas production concessions	Pending
<b><i>Total S.A. v. Argentine Republic (ICSID Case No. ARB/04/1)</i></b>	Date Registered: January 22, 2004 Tribunal Constituted: August 24, 2004 Decision on Liability: 27 December 2010	Gas production and distribution/p ower generation project	Decision on Liability
<b><i>El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15</i></b>	Date Registered: June 12, 2003 Tribunal Constituted: February 06, 2004 Award: 31 October 2011	Hydrocarbon and electricity concessions	Award
<b><i>Gas Natural SDG, S.A. v. Argentine Republic (ICSID Case No.</i></b>	Date Registered: May 29, 2003 Tribunal	Gas supply and distribution	Pending

<i>ARB/03/10)</i>	Constituted: November 10, 2003	enterprise	
<i>Camuzzi International S.A. v. Argentine Republic (ICSID Case No. ARB/03/2)</i>	Date Registered: February 27, 2003 Tribunal Constituted: May 05, 2003	Gas supply and distribution enterprise	Pending (the suspension of the proceeding is further extended, pursuant to the parties' agreement on June 13, 2012)
<i>LG&amp;E Energy Corp., LG&amp;E Capital Corp. and LG&amp;E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1)</i>	Date Registered: January 31, 2002 Tribunal Constituted: November 13, 2002 Award rendered: July 25, 2007	Gas distribution enterprise	Award rendered on July 25, 2007
	Date Registered: September 24, 2007	Supplementary Decision	Decision on the Request for Supplementary Decision issued on July 8, 2008
	Date Registered: September 19, 2008	Annulment Proceeding	Pending (pursuant to the parties' agreement, the proceeding is further suspended on 30 July 2012)
<i>Sudapet Company Limited v. Republic of South Sudan (ICSID Case No. ARB/12/26)</i>	Date Registered: August 29, 2012	Exploration and production of hydrocarbons	Pending
<i>Republic of Equatorial Guinea v. CMS Energy Corporation and others (ICSID Case No. CONC(AF)/12/2)</i>	Date Filed: June 29, 2012 Commission Constituted: July 06, 2012	Oil and gas enterprise	Pending
<i>Ampal-American Israel Corporation and others v. Arab Republic of Egypt (ICSID Case No. ARB/12/11)</i>	Date Registered: May 23, 2012	Natural gas export	Pending (Tribunal not yet constituted)
<i>Hess Equatorial Guinea, Inc. y Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea (ICSID Case No. CONC(AF)/12/1)</i>	Date Filed: May 15, 2012	Hydrocarbon concession	Pending (Commission not yet constituted)

<b><i>RSM Production Corporation v. Saint Lucia (ICSID Case No. ARB/12/10)</i></b>	Date Registered: April 23, 2012	Hydrocarbon s exploration agreement	Pending (Tribunal not yet constituted)
<b><i>Slovak Gas Holding BV, GDF International SAS and E.ON Ruhrgas International GmbH v. Slovak Republic (ICSID Case No. ARB/12/7)</i></b>	Date Registered: April 05, 2012	Natural Gas Services	Pending
<b><i>RSM Production Corporation v. Republic of Cameroon (ICSID Case No. CONC/11/1)</i></b>	Date Registered: September 19, 2011 Commission Constituted: February 17, 2012	Hydrocarbon s exploration and exploitation concession agreement	Pending
<b><i>Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania (ICSID Case No. ARB/11/24)</i></b>	Date Registered: September 12, 2011 Tribunal Constituted: March 01, 2012	Oil storage and distribution project	Pending
<b><i>The Williams Companies, International Holdings B.V., WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (Pigap II) Limited v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/10)</i></b>	Date Registered: April 20, 2011	Gas compression and injection enterprises	Pending (Tribunal not yet constituted)
<b><i>National Gas S.A.E. v. Arab Republic of Egypt (ICSID Case No. ARB/11/7)</i></b>	Date Registered: March 22, 2011 Tribunal Constituted: December 15, 2011	Gas pipelines construction and operation agreement	Pending
<b><i>Türkiye Petrolleri Anonim Ortaklığı v. Republic of Kazakhstan (ICSID Case No. ARB/11/2)</i></b>	Date Registered: January 14, 2011 Tribunal Constituted: September 27, 2011	Oil exploration and production joint venture	Pending
<b><i>Cervin Investissements S.A. and Rhone Investissements v. Republic of Costa Rica (ICSID Case No.</i></b>	Date Registered: March 11, 2013	Gas distribution enterprise	Pending

<b><i>ARB/13/2)</i></b>			
<b><i>Repsol, S.A. and Repsol Butano, S.A.v. Argentine Republic (ICSID Case No. ARB/12/38)</i></b>	Date Registered: December 18, 2012	Oil Production enterprise	Pending
<b><i>Tullow Uganda Operations PTY LTD v. Republic of Uganda (ICSID Case No. ARB/12/30)</i></b>	Date Registered: October 31, 2012	Petroleum exploration, development and production agreement	Pending
<b><i>Lundin Tunisia B. V. v. Republic of Tunisia (ICSID Case No. ARB/12/30)</i></b>	Date Registered: September 11, 2012	Oil exploration and exploitation operation	Pending
<b><i>Pluspetrol Perú Corporation and others v. Perupetro S.A. (ICSID Case No. ARB/12/28)</i></b>	Date Registered: August 29, 2012	Hydrocarbon concession	Pending