The Global Community

Yearbook of International Law and Jurisprudence

2013

Volume II

Oceana®
NEW YORK

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

INTRODUCTORY NOTE

From Reshaping the Salini Criteria to Solidifying the Elements of Fair and Equitable Treatment—ICSID Arbitration in 2012

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Abstract

Among the jurisdictional hurdles for claimants in ICSID cases, the scope of the notion of an "investment" in the sense of Article 25 ICSID Convention remained one of the most problematic issues in 2012, although tribunals have again downplayed the need for the most controversial aspect, the "contribution to the development of the host state". Equally, nationality shopping after a dispute had arisen was a risky business for aggrieved claimants. ICSID tribunals have further clarified the prerequisites for filing *amicus curiae* briefs as well as for the disqualification of challenged arbitrators. They remain split, however, on the reach of an MFN clause as well as on the interpretation of umbrella clauses. From the point of substantive investment law, awards in 2012 have helped consolidate the law on indirect expropriation, fair and equitable treatment, and other standards. The year saw a further case involving EU law issues, which foreshadowed future cases.

Keywords: notion of investment; nationality; third-party submissions; arbitrator challenges; indirect expropriation; fair and equitable treatment; most-favoured nation treatment; umbrella clauses; annulment of awards; impact of EU law.

As in the past, this introductory note provides an overview of selected important ICSID decisions and awards rendered during the reporting year 2012.[1] Excerpts from some of them are partly reproduced in the Legal Maxims section of this *Yearbook*.[2] In 2012, ICSID remained the preferred option for investment dispute

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1 In 2012, ICSID registered 40 new arbitration cases, 2 new ICSID Additional Facility conciliation cases and 8 arbitration cases under the Additional Facility bringing the total number of cases instituted before the Centre to 419. 23 awards and 8 decisions on jurisdiction were rendered in 2012, 166 cases were pending. ICSID stopped publishing NEWS FROM ICSID in 2011 which contained an annual overview of the number of awards and decisions rendered. The new publication THE ICSID CASELOAD—STATISTICS (Issue 2013-1), available at <http://icsid.worldbank.org/ICSID/FrontServlet>, no longer contains all this information in absolute terms but mostly comprises percentage graphics. No responsibility is taken for the correctness of the above figures. *See* UNCTAD, *IIA Issues Note*, No. 1 (May 2013).

2 *See* Jane Hofbauer, *Legal Maxims: Summaries and Extracts from Selected Case Law: ICSID*, in this *Yearbook* at 941.

settlement with the highest number of newly registered claims.[3] This note will focus on developments in ICSID case law that may help finding consolidated interpretations of investment-relevant notions, but it will also address the problem of inconsistencies in the jurisprudence.

I. Jurisdictional Issues

The scope of the jurisdictional requirement of an "investment" under the ICSID Convention[4] has remained a central bone of contention in 2012.

A. The Potential Demise of the "Contribution" Element in Ascertaining Whether an "Investment" under Article 25 of the ICSID Convention Has Been Made

The interpretation of the notion of "investment" pursuant to Article 25 of the ICSID Convention as a jurisdictional requirement has become a classical question for ICSID tribunals.[5] In the last few years, the emerging consensus on using the so-called *Salini* criteria of duration, substantial commitment, regularity of profit and returns, risk and contribution to the host state's development[6] came increasingly under fire from tribunals showing irritation concerning the "subjective" notion of a contribution to the development of the host state. This can be seen as a backlash to the expansive "jurisdictional" interpretation of the *Salini* test according to which all the above-mentioned criteria had to be fulfilled in order to qualify as an investment, as used by the annulment committee in *Mitchell* v. *Congo*[7] and by the ICSID sole arbitrator in *Malaysian Historical Salvors* v. *Malaysia*.[8]

3 According to information in the public domain, 6 non-ICSID cases were initiated in 2012. *See* <http://www.italaw.com/>.

4 Article 25(1) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1965, 575 UNTS 159; 4 International Legal Materials 532 (1965), provides: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

5 *See only* August Reinisch, *From the Perennial Issue of the Notion of Investment Pursuant to Article 25 ICSID Convention and Narrow Dispute Settlement Provisions to Further Clarifications of Substantive Standards of Protection—ICSID Arbitration in 2009*, 10 Global Community YILJ 839 (2010); *Id.*, *From Rediscovered Waiting Periods to Ever More Activist Annulment Committees—ICSID Arbitration in 2010*, 11 Global Community YILJ 933–956 (2012).

6 In the aftermath of *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52, investment tribunals have focused on: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host state's development. *See* Christoph H. Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, The ICSID Convention: A Commentary 128 *et seq*. (2nd ed., 2009).

7 *Patrick Mitchell* v. *Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Nov. 1, 2006).

8 *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007; *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009. John P. Given, *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia: An End to the Liberal Definition of Investment in ICSID Arbitrations*, 31 Loyola of Los Angeles International and Comparative Law Review 467–500 (2009); Joseph M. Boddicker, *Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in*

Already, in 2011, the Argentinian bondholder case of *Abaclat* v. *Argentina*[9] resulted in a sweeping rejection of the *Salini* test which it considered "contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote."[10] Instead, the *Abaclat* tribunal suggested an alternative minimalist test which only required "that Claimants made contributions, which led to the creation of the value that Argentina and Italy intended to protect under the BIT. Thus, the only requirement regarding the contribution is that it be apt to create the value that is protected under the BIT."[11]

Three 2012 cases seem to return to a more nuanced assessment of the "investment" requirement under Article 25 of the ICSID Convention.

In *Electrabel* v. *Hungary*,[12] an ICSID tribunal held that

> [. . .] there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.[13]

It further followed the 2010 decision of the ICSID tribunal in *Saba Fakes* v. *Turkey*[14] that the "economic development of the host State is one of the objectives of the ICSID Convention and a desirable consequence of the investment, but it is not necessarily an element of an investment. The expectation of profit and return which is sometimes viewed as a separate component of an investment must rather be considered as included in the element of risk, since every investment runs the risk of reaping no profit at all."[15]

Finally, the *Electrabel* tribunal added that "subject to the wording of the provision in the treaty for dispute resolution, the legality of the investment and the investor's good faith may be relevant as elements of the definition of an investment or as a bar to the exercise of jurisdiction or to investment protection on the merits."[16] This finding is reminiscent of the award in *Phoenix* v. *Czech Republic*,[17] in which one of the *Electrabel* arbitrators sat as president. In *Phoenix*, the tribunal declined to exercise jurisdiction over a claim brought by an Israeli investor against the Czech Republic because it found that the acquisition of two Czech companies was not a *bona fide* investment. Contrary to the lenient "investment" notion expressed in

ICSID Arbitration, 25 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1031–1071 (2010); Govert Coppens, *Treaty Definitions of "Investment" and the Role of Economic Development: A Critical Analysis of the "Malaysian Historical Salvors" Cases*, in FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 174–191 (Vivienne Bath & Luke Nottage eds., 2011).

9 *Abaclat and Others* v. *Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.

10 *Id.*, para. 364.

11 *Id.*, para. 365.

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

13 *Id.*, para. 5.43.

14 *Saba Fakes* v. *Turkey*, ICSID Case No. ARB/07/20, Award of 14 July 2010, paras. 101–102.

15 *Electrabel* v. *Hungary*, para. 5.43.

16 *Id.*

17 *Phoenix Action, Ltd.* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

Electrabel, the *Phoenix* tribunal considered that six elements, including the hitherto separate issues of "investing in accordance with the laws of the host State and *bona fide*" had to be taken into account when determining whether an investment was made for purposes of Article 25.[18] The tribunals in *Electrabel* and *Phoenix* share, however, their scepticism towards the possibility of ascertaining whether an investment has contributed to the development of host states.[19]

The concentration of only three elements, crucial for the existence of an "investment" in the sense of Article 25 of the ICSID Convention, was also evident in *Quiborax* v. *Bolivia*[20] in which another ICSID tribunal agreed with the parties

> [...] that a contribution of money or assets (that is, a commitment of resources), risk and duration are all three part of the ordinary definition of investment.[21]

The *Quiborax* tribunal also contributed to the demise of the requirement of a contribution to the development of the host state by expressly

> [...] appreciat[ing] that the element of contribution to the development of the host State is generally regarded as part of the well-known four-prong *Salini* test. Yet, such contribution may well be the consequence of a successful investment; it does not appear as a requirement. If the investment fails, it may end up having made no contribution to the host State development. This does not mean that it is not an investment. For this reason and others, tribunals have excluded this element from the definition of investment. [...].[22]

Thirdly, the tribunal in *Deutsche Bank* v. *Sri Lanka*[23] considered that only the three criteria of contribution of assets, duration, and risk were relevant for defining an investment. It laconically summarized that

> [t]he development of ICSID case law suggests that only three of the above criteria, namely contribution, risk and duration should be used as the benchmarks of investment, without a separate criterion of contribution to the economic development of the host State and without reference to a regularity of profit and return. It should also be recalled that the existence of an investment must be assessed at its inception and not with hindsight.[24]

With regard to the discarded element of a contribution to the host state development, the *Deutsche Bank* tribunal further stated that

> [...] the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal. It is generally considered that this criterion

18 *Id*., para. 114 ("1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*.").

19 *Id*., para. 85 ("It is the Tribunal's view that the contribution of an international investment to the *development* of the host State is impossible to ascertain—the more so as there are highly diverging views on what constitutes 'development'. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed.").

20 *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.

21 *Id*., para. 219.

22 *Id*., para. 220.

23 *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012.

24 *Id*., para. 295 (footnote omitted).

> is unworkable owing to its subjective nature. Indeed, whether or not a commitment of capital or resources ultimately proves to have contributed to the economic development of the host State can often be a matter of appreciation and can generate a wide spectrum of reasonable opinions. Moreover, some transactions may undoubtedly be qualified as investments, even though they do not result in a significant contribution to economic development in a post hoc evaluation of the claimant's activities. This is for example the case of mergers and acquisitions or of failed construction projects.[25]

The tribunal had to assess whether a hedging agreement entered into by the claimant bank and the respondent state aiming at reducing Sri Lanka's exposure to volatile oil prices constituted an investment under Article 25 ICSID Convention. In holding affirmatively, the tribunal found that the agreement involved a substantial commitment of resources by Deutsche Bank, was envisaged for a sufficiently extensive period of 12 months[26] and that it implied a substantial risk for the investor to be required to make high financial payments.

B. The Jurisdictional Need to Make a *Prima Facie* Case

It is generally accepted by investment tribunals, as it is by other international courts and tribunals, that, on the jurisdictional stage, claimants only have to make a so-called *prima facie* case, demonstrating that if the facts can be proven the alleged conduct may constitute a violation of the applicable investment treaty.[27] This jurisdictional requirement usually does not pose any specific problems to claimants.

However, in the 2012 *Iberdrola* case,[28] it was fatal to a number of the investor's claims. The tribunal restated the *prima facie* test in the following words. It held that

> [...] an international tribunal does not have competence by the mere fact that one of the parties to the process asserts that international law has been violated. In a case like the one filed by the Claimant in this arbitration, the Tribunal would have jurisdiction only if the Claimant had established that the facts it alleged, if proven, could constitute a violation of the Treaty.[29]

The tribunal held that it lacked jurisdiction to decide over the insufficiently substantiated claims alleging expropriation,[30] fair and equitable treatment as well as other treaty standards because the investor had merely submitted arguments demonstrating disputes under Guatemalan law.[31] Apparently the tribunal had

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25 *Id.*, para. 306 (footnotes omitted).

26 The tribunal stressed that is was the intended duration period that was decisive and that the fact that the hedging agreement was in fact terminated after roughly four months was irrelevant. *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 304.

27 Audley Sheppard, *The Jurisdictional Threshold of a* Prima-facie *Case*, in The Oxford Handbook of International Investment Law (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008), at 932–961; Schreuer, Malintoppi, Reinisch & Sinclair, *supra* note 6, at 540, paras. 86 *et seq.*

28 *Iberdrola Energía S.A.* v. *Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012.

29 *Id.*, para. 350.

30 *Id.*, para. 323 ("Beyond qualifying the behavior as aberrant or as breaches of the Treaty, the Claimant at no time presents clear and concrete reasoning about which are the actions or conduct which, under international law and not only under local law, could constitute acts of expropriation.").

31 *Id.*, para. 350 *et seq.*

expressly, but unsuccessfully required specific submissions from claimant as to the alleged BIT violations. The investor's failure to specify its claims in this regard was fatal.[32]

C. Nationality Shopping

Since the 2004 *Tokios Tokelés* case,[33] the fulfilment of nationality requirements under Article 25 ICSID Convention have been very controversial at times. One more and more often invoked jurisdictional objection of respondent states relates to allegedly abusive corporate nationality structuring, frequently dubbed "nationality shopping". However, it is also clear since the 2005 *Aguas del Tunari* case[34] that an investor's purposive choice of nationality for dispute settlement reasons is not necessarily impermissible.[35]

The 2012 ICSID tribunal in *Pac Rim* v. *El Salvador*[36] was faced with the jurisdictional challenge that the investor had abusively changed its corporate nationality in order to benefit from the Central America Free Trade Agreement (CAFTA) provisions. Indeed, the investor had changed its corporate nationality form a Cayman Islands entity to a US incorporated company in 2007. The United States is and Cayman Islands is not a party to CAFTA. The tribunal was apparently favourably disposed towards such an abuse of process claim in principle. However, it stressed that in order to constitute abuse one would have to carefully analyse when the change in nationality had taken place. In fact, the *Pac Rim* tribunal endorsed the distinction relied upon by previous ICSID tribunals between pre-existing and future disputes. Following *Phoenix* v. *Czech Republic*[37] and *Mobil* v. *Venezuela*,[38] it basically held that

> [...] in order to determine whether the Claimant's change of nationality was or was not an abuse of process, the Tribunal must first ascertain whether the relevant measure(s) or practice [...] took place before or after the change in nationality [...].[39]

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32 *Id*., para. 358 ("The discussion of international law that occurred during this process was purely theoretical, concerning the applicability to this case of the decisions in some awards that the Claimant cited, as well on as the content of the protection standards. However, ultimately, in the briefs of the Claimant there is no connection between the facts alleged and the standards invoked, nor a realization of the act or acts of authority that, in the light of international law, could have been considered violations of its rights under the Treaty.").

33 *Tokios Tokelés* v. *Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

34 *Aguas del Tunari S.A.* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

35 *Aguas del Tunari S.A.* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, para. 330 ("It is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.").

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

37 *Phoenix Action, Ltd.* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 94–95.

38 *Mobil Corporation and others* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, paras. 204–205.

39 *Pac Rim Cayman LLC* v. *Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.52.

As regards the specific time element when a dispute must have arisen in order not to trigger abusive corporate nationality shopping the *Pac Rim* tribunal held that

> [...] the dividing-line 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. In the Tribunal's view, before that dividing-line is reached, there will be ordinarily no abuse of process; but after that dividing-line is passed, there ordinarily will be. The answer in each case will, however, depend upon its particular facts and circumstances, as in this case. As already indicated above, the Tribunal is here more concerned with substance than semantics; and it recognises that, as a matter of practical reality, this dividing-line will rarely be a thin red line, but will include a significant grey area.[40]

Since Pac Rim had changed its corporate nationality in 2007 before the contested measures (adversely affecting its mining operations) were adopted or could have been foreseen the tribunal rejected the abuse of process claim.

II. Procedural Issues

The year 2012 also witnessed a number of interesting procedural issues in ICSID cases. With its commercial arbitration pedigree, investment arbitration has come under increased scrutiny and critical appraisal, in particular by NGOs and some governments over the last years. Especially, a lack of transparency and an absence of third-party input on broader societal values often at stake in investment cases have been lamented. The specific nature of investment arbitration as a form of quasi-judicial review of host state measures often dealing with questions of public interest[41] is considered to require a more transparent and inclusive procedure than that usually applied in commercial arbitration with its prevailing confidentiality.

As regards the latter issue, both individual investment tribunals as well as arbitration institutions have reacted by gradually opening up their procedures to the public. Already in 2000, the NAFTA tribunals in *S.D. Myers* and *Metalclad* held that no "general principle of confidentiality" existed in investment arbitration.[42] In 2001, this view was confirmed by the NAFTA Free Trade Commission which held in its interpretation of NAFTA provisions that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration [...]."[43]

With regard to ICSID an important step was the amendment of its ICSID Arbitration Rules in 2006 which provided for, inter alia, the publication of excerpts from all ICSID cases and inserted new standards and criteria for the submission

40 *Id.*, para. 2.66.

41 Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 European Journal of International Law 121–150 (2006); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale Journal of International Law 283–346 (2010); Andreas Kulick, Global Public Interest in International Investment Law (2012).

42 *See S.D. Myers Inc.* v. *Canada*, Procedural Order No. 16, 13 May 2000, para. 8; *Metalclad Corporation* v. *Mexico*, Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 13.

43 Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, para. 1.

of *amicus curiae* briefs.[44] Another one was the 2006 ruling of the tribunal in *Biwater (Gauff)* v. *Tanzania*,[45] which recognized "an overall trend in [investment arbitration] towards transparency"[46] and continued to fashion a specifically tailored solution for the problem of making documents publicly available, depending upon the types of documents involved and the procedural stage during which disclosure is sought.[47] Its recommendations provided an influential blueprint for future investment disputes.[48]

The possibility to allow *amicus curiae* briefs is an important avenue of "opening up" investment arbitration to the public. This procedural device, common in US domestic litigation, has found increasing acceptance in WTO dispute settlement[49] and is now entering investment arbitration. The 2006 amendment of the ICSID Arbitration Rules now specifically provides for such a possibility while earlier ICSID tribunals were uncertain of the permissibility of *amicus* briefs.[50]

A. *Amicus Curiae* Briefs

The 2006 amendment to the ICSID rules of procedure has inserted a new Rule 37(2) which expressly provides for the filing of *amicus curiae* briefs. It provides:

> (2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "nondisputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining

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44 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006, available at <http://www.worldbank.org/icsid/basic doc/CRR_English-final.pdf>. *See also* Schreuer, Malintoppi, Reinisch, Sinclair, *supra* note 6, at 684; Antonio R. Parra, *The New Amendments to the ICSID Regulations and Rules and Additional Facility Rules*, 3 The Law and Practice of International Courts and Tribunals 181 (2004); Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21 ICSID Review—Foreign Investment Law Journal 427 (2006).

45 *Biwater (Gauff) Tanzania Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006.

46 *Id*., para. 122.

47 *Id*., para. 163.

48 *See also* Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration—The* Biwater Gauff *Compromise*, 6 The Law and Practice of International Courts and Tribunals 97 (2007).

49 Petros C. Mavroidis, Amicus Curiae *Briefs Before the WTO: Much Ado About Nothing*, in European Integration and International Co-Ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann (Armin von Bogdandy, Yves Mény & Petros C. Mavroidis eds., 2002), at 317–330; James Durling & David Hardin, Amicus curiae *participation in WTO dispute settlement: reflections on the past decade*, in Key Issues in WTO Dispute Settlement—The First Ten Years (Rufus Yerxa & Bruce Wilson eds., 2005), at 221–231.

50 *See Aguas del Tunari S.A.* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, para. 15 *et seq*. (denying a request for *amicus curiae* status because of the consensual nature of investment arbitration) with *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to Transparency and *Amicus Curiae* Petition, 17 March 2006, para. 17 *et seq*. (permitting a request for *amicus curiae* status depending "on three basic criteria: a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case, and c) the procedure by which the *amicus* submission is made and considered.").

> whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Investment tribunals are gradually grappling with this concept of non-disputing party (NDP) submissions.

The 2012 procedural order in *von Pezold and Others* v. *Zimbabwe*[51] adopted a particularly high threshold for NGOs to be permitted to submit *amicus* briefs. The case potentially raises human rights as well as issues concerning rights of indigenous peoples. Two different groups of NGOs, a Berlin-based human rights group and a Zimbabwean group of indigenous communities, had petitioned the ICSID tribunal to file *amicus* briefs which were rejected on a narrow reading of the Rule 37(2) requirements.

In the tribunal's view, it was "implicit in Rule 37(2)(a), which requires that the NDP bring a perspective, particular knowledge or insight that is different from that of the Parties" that an *amicus curiae* should also be independent of the parties.[52] In particular with regard to the Zimbabwean group the tribunal had strong doubts about its independence. Though this apparent lack of independence or neutrality of the petitioners was a sufficient ground to deny the application,[53] the tribunal continued to consider the other criteria of Rule 37(2).

Of particular interest was the next ground for denying *amicus* status which related to the place of human rights in investment arbitration. Petitioners claimed that the land disputes may have both human rights and indigenous peoples' rights implications potentially justifying the Zimbabwean measures in issue. The tribunal put emphasis on the fact that neither party had specifically invoked such rights to conclude that the proposed *amicus* briefs would not assist them "in the determination of a factual or legal issue related to the proceeding" pursuant to Rule 37(2)(a).[54]

51 *Bernhard von Pezold and Others* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012.

52 *Id*., para. 49.

53 *See*, however, the ruling in *Pac Rim Cayman LLC* v. *Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.26 *et seq*., in which another ICSID tribunal granted *amicus* status to an NGO that had vigorously campaigned against the underlying investment project.

54 *Bernhard von Pezold and Others* v. *Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012, para. 57 ("The Petitioners do not propose to make submissions that would assist them 'in the determination of a factual or legal issue related to the proceeding', as is required by Rule 37(2)(a). The Petitioners, in effect, seek to make a submission on legal and factual issues that are unrelated to the matters before the Arbitral Tribunals. The Arbitral

Although the applicable law provisions of the BIT contained a reference to "such rules of general international law as may be applicable", the tribunal opined that such a clause "does not incorporate the universe of international law into the BITs or into disputes arising under the BITs."[55] A similar reasoning was adopted by the tribunal to conclude that the proposed amicus briefs would not "address a matter within the scope of the dispute" in the sense of Rule 37(2)(b). According to the *von Pezold* tribunal the petitioners

> [...] propose[d] to make a submission on the putative rights of the indigenous communities as "indigenous peoples" under international human rights law, a matter outside of the scope of the dispute, as it is presently constituted.[56]

It would have been interesting to see how the tribunal had reacted in case the parties had made specific pleas and put forward human rights arguments, e.g., in defence of some measures. The narrow reading of the requirements for *amicus curiae* briefs by the *von Pezold* tribunal is likely to raise concerns among the NGO community that issues that the parties may deliberately choose to omit from their pleadings will not be addressed at all.

B. Arbitrator Disqualification

Another procedural issue that relates to the actual and perceived integrity of the arbitral process concerns the independence and impartiality of arbitrators in ICSID proceedings. As in investment arbitrations governed by other procedural rules, arbitrator challenges have become a widespread practice over the last few years under the ICSID rules.[57]

Interestingly, the ICSID standards are quite different from those of other arbitration rules. While it is usually the yardstick of an arbitrator's "independence and impartiality",[58] the ICSID Convention lays down the qualities required by prospective arbitrators in rather general terms:

Tribunals agree in this regard with the Claimants that the reference to 'such rules of general international law as may be applicable' in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs. Moreover, neither Party has put the identity and/or treatment of indigenous peoples, or the indigenous communities in particular, under international law, including international human rights law on indigenous peoples, in issue in these proceedings.").

55 *Id*.

56 *Id*., para. 60.

57 *See* on arbitrator independence and challenges Audley Sheppard, *Arbitrator Independence in ICSID Arbitration*, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Christina Binder, Ursula Kriebaum, August Reinisch & Stephan Wittich eds., 2009), at 131–156; Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, 21 Arbitration International (2005), at 241–246; August Reinisch & Christina Knahr, *Conflict of Interest in International Investment Arbitration*, in Conflict of Interest in Governance—An Interdisciplinary Outlook on the Global, Public, Corporate and Financial Sphere (Anne Peters, Lukas Handschin & Daniel Hoegger eds., 2012), at 103–124.

58 Article 6(7) UNCITRAL Arbitration Rules 2010, available at <http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2010Arbitration_rules.html> ("The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."); General Standard 1 IBA Guidelines on Conflicts of Interest in International Arbitration, available at <http://www.int-

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.[59]

While referring to independence in the form of "independent judgment", this language appears to lack the twin requirement of impartiality. However, as noted by a number of ICSID tribunals there is a discrepancy between the English/French and the Spanish text[60] which has led tribunals to speak of a broad overlap between ICSID and other standards[61] and to actually require the usual two elements also in ICSID cases. This approach was affirmed in the 2012 decision not to disqualify a member of the *Conoco* v. *Venezuela* tribunal.[62] It found that

> ICSID decisions call attention to a slight difference between the English and French texts and the Spanish text of Article 14(1). The former use the expression "may be relied upon to exercise independent judgment"/"offre toute garantie d'indépendence dans l'exercice de leurs fonctions" while the latter refers to a person who "inspirar plena confianza en su imparcialidad de juicio" (emphasis added). (The three language texts of Arbitration Rule 6 also include slight differences.) Since all three texts are declared to be equally authentic, and because of their close relationship in principle and in practice, we apply the two standards of independence and impartiality in making our decision.[63]

The challenge of Mr. Fortier arose from the fact that his disclosure that the law firm he was affiliated with merged with another firm that had acted against the respondent was allegedly belated and led to doubts about his independence. Based on previous decisions,[64] the *Conoco* tribunal held that

> [. . .] independence concerns the lack of relations with a party that might influence the arbitrator while impartiality involves not favouring one party or the other.[65]

Pursuant to ICSID practice, a lack of independence could be the case where an arbitrator either has a close relationship to one of the parties or has a personal

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bar.org/images/downloads/guidelines%20text.pdf> ("Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.").

59 Article 14(1) ICSID Convention.

60 *Id.*: ("[. . .] inspirar plena confianza en su imparcialidad de juicio.").

61 *Suez et al.* v. *Argentina*, para. 27; *Compañía de Aguas del Aconquija S. A. & Vivendi Universal* v. *Argentina*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, para. 14.

62 *ConocoPhillips Company et al.* v. *The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Ives Fortier, Q.C., Arbitrator, 27 February 2012.

63 *Id.*, para. 54.

64 *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A.* v. *Argentina*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.* v. *Argentina*, ICSID Case No. ARB/03/19 and *AWG Group Limited* v. *Argentina*, UNCITRAL Arbitration, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008, para. 28 ("[. . .] independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of bias or predisposition toward one of the parties.").

65 *ConocoPhillips Company et al.* v. *The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Ives Fortier, Q.C., Arbitrator, 27 February 2012, para. 54.

interest in the outcome of the case. A relationship with a party affecting the eligibility as arbitrator may be of a personal, family or business nature.[66]

In the *Conoco* case, however, the challenged arbitrator had informed ICSID about the proposed merger shortly after he had learned about it himself and resigned from his firm before the merger became effective. His co-arbitrators, who according to the ICSID rules had to decide on the challenge,[67] found that the situation did not give rise to grounds disqualifying him. In this respect the tribunal stressed "that the term 'manifest' in Article 57 means 'obvious' or 'evident' and highly probable, not just possible, and that it imposes a relatively heavy burden on the party proposing disqualification."[68]

C. The Use of MFN Clauses to Avoid Waiting Periods

The *Maffezini*[69] debate continues to plague investment tribunals and also in 2012 there was no solution of a harmonized approach in sight. To the contrary, ICSID (and non-ICSID) panels remain split on whether most-favoured nation (MFN) clauses, regularly included in BITs and other investment instruments, are limited to substantive treatment or whether they can be invoked to import "procedural" benefits under other International Investment Agreements (IIAs).

The 2012 ICSID decision on jurisdiction in *Teinver* v. *Argentina* nicely summarized the existing case law with reference to an UNCTAD study:[70]

> UNCTAD identifies the following cases as fitting within the "admissibility" category: *Maffezini*, *Siemens*, *Gas Natural*, *National Grid*, *Suez InterAguas*, *AWG Group* and *Wintershall*. To these cases, the Tribunal would add *Impregilo*, *Hochtief*, *Abaclat*, *ICS*, and *Daimler*. In each of these cases, the claimant was required under the respective terms of its BIT's dispute settlement provisions to seek a remedy before a local court of the host State for a period of time before bringing arbitration. Each of the claimants in these cases sought to use its BIT's MFN clause in order to "borrow" a dispute settlement provision from another treaty that did not contain a local court requirement as a precondition of arbitration. With the exceptions of *Wintershall*, *ICS* and *Daimler* the claimants' arguments were successful.

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66 This includes a permanent attorney/client relationship, any other permanent or recurrent business relationship, employment by a party, including civil service in a state that is a party, substantial participation or shareholding in a company that is a party and any form of relationship in which the arbitrator stands to profit directly or indirectly from the financial gain of a party. *See* Schreuer, Malintoppi, Reinisch & Sinclair, *supra* note 6, at 513.

67 Article 58 ICSID Convention ("The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. [. . .]").

68 *ConocoPhillips Company et al.* v. *The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify, para. 56.

69 *Emilio Agustín Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000; Stephanie L. Parker, *A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties*, 2 The Arbitration Brief 30–63 (2012); Francisco Orrego Vicuña, *Reports of [Maffezini's] Demise Have Been Greatly Exaggerated*, 3 Journal of International Dispute Settlement 299–327 (2012); Martins Paparinskis, *MFN Clauses and International Dispute Settlement: Moving Beyond Maffezini and Plama*, 26 ICSID Review: Foreign Investment Law Journal 14–58 (2011).

70 UNCTAD, *Most Favoured-Nation Treatment*, UNCTAD Series on International Investment Agreements II, UNCTAD/DIAE/IA/2010/1, January 24, 2011.

> UNCTAD identifies the following cases as fitting within the "scope of jurisdiction" category: *Salini*, *Plama*, *Telenor*, *Berschader*, and *Tza Yap Shum*. In these cases, the claimants sought to use the MFN clause to expand the scope of jurisdiction under their applicable BIT. In *Salini*, the claimant attempted to use the MFN clause to bring in contract claims before an ICSID tribunal. In *Plama*, the claimant attempted to use the MFN clause to broaden the scope of jurisdiction beyond that of its applicable BIT, which only provided jurisdiction to resolve issues of compensation in the case of an expropriation. Similarly, in *Telenor* and *Berschader*, the claimants attempted to use the MFN clause to broaden jurisdiction beyond their BITs, which only provided jurisdiction over expropriation claims. In each of these cases, the claimant's attempts to rely on the MFN clause were rejected by the tribunals. UNCTAD identified only one case within this category, *RosInvestCo*, that departed from this trend.[71]

The *Teinver* tribunal clearly endorsed the *Maffezini* approach by qualifying the waiting periods in the Argentina-Spain BIT 1991 as mere admissibility requirements which could be avoided through reliance on the BIT's MFN clause since the "broad 'all matters' language of the Article IV(2) MFN clause [was] unambiguously inclusive."[72]

The tribunal stressed that

> [...] Claimants have not requested that the Tribunal apply the MFN clause in order to replace the Treaty's provisions on the arbitral forum or rules. Nor have Claimants requested that the Tribunal apply the MFN clause in order to broaden the scope of legal issues that may be adjudicated through arbitration. Instead, they have argued that the procedural requirements of Article X, namely the negotiation and local court requirements, may be bypassed in favor of the more procedurally limited dispute settlement provisions of the Australia-Argentina BIT.[73]

While the *Teinver* tribunal, based on *Maffezini*, qualified the requirement to litigate in domestic courts prior to initiating investment arbitration as a mere waiting period, the ICSID tribunal in *Daimler* v. *Argentina* rejected that view.[74] It specifically

71 *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, paras. 170, 171 (footnotes omitted).

72 *Id*., para. 186.

73 *Id*., para. 182.

74 *Daimler Financial Services AG* v. *The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, 22 August 2012, para. 189 ("What is in dispute is not a mere waiting period but a requirement that the dispute be submitted to the domestic Argentine courts for potential judicial resolution for a period of at least 18 months").

endorsed the *Wintershall* approach[75] and held that "[a]ll BIT-based dispute resolution provisions [. . .] are by their very nature jurisdictional."[76]

On this basis the *Daimler* tribunal concluded:

> Since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere "procedural" or "admissibility-related" matter.[77]

This finding *de facto* predetermined the MFN debate since the tribunal was clearly unwilling to permit an investor to circumvent a jurisdictional pre-condition to arbitration.

The *Daimler* tribunal then continued its analysis of the MFN clause ultimately rejecting the notion that it could be extended to dispute settlement. First, the *Daimler* tribunal emphasized that the applicable MFN clause was qualified by the words "in the territory" which implied that only dispute settlement before national courts could be covered, not, however, international investment arbitration.[78] Second, the *Daimler* tribunal found that the MFN clause's failure to refer to "all matters" subject to the Treaty suggested that international dispute settlement was not included.[79] Third, the tribunal was of the opinion that the specific exceptions concerning tax and regional economic preferences related to treatment in the territory of a host state and thus could not imply that the parties intended to include dispute settlement.[80] Fourth, the tribunal did not find that the third-party treaty's dispute resolution provisions (which contained a fork-in-the-road provision) were more favourable than those of the basic treaty.[81] Further, the *Daimler* tribunal concluded that since the basic treaty's dispute settlement mechanism was not "objectively less favourable" than that of the third-party treaty invoked, it would have been incorrect to "characterize the Claimant's position as more compatible with the Treaty's objects and purposes then the Respondent's position."[82] Finally, the tribunal reviewed state practice following the *Maffezini* decision,[83]

75 The Daimler tribunal at *Daimler Financial Services AG* v. *The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, 22 August 2012, para. 193, found that the applicable BIT "describes its dispute resolution process in mandatory and necessarily sequential language" and that it sets forth "the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties' consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts." This finding is followed by approvingly citing the *Wintershall* tribunal which stated: "That an investor could choose at will to omit the second step [the 18-month domestic courts requirement] is simply not provided for nor even envisaged by the Argentina-Germany BIT—because (Argentina's) the Host State's 'consent' (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts." *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 160.

76 *Daimler Financial Services AG* v. *The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, 22 August 2012, para. 193.

77 *Id*., para. 194.

78 *Id*., para. 225.

79 *Id*., paras. 234–236.

80 *Id*., paras. 237–239.

81 *Id*., paras. 240–250.

82 *Id*., para. 260.

83 *Id*., paras. 261–278.

including some statements of treaty parties rejecting the *Maffezini* approach, and concluded that they "converge in signaling that the specified MFN clauses do not, and were never intended to, reach the international dispute resolution provisions of the respectively mentioned investment agreements."[84]

III. Substantive Issues

The 2012 jurisprudence of ICSID tribunals sheds light on all major substantive standards of investment protection. Some highlights will be addressed by the following non-exhaustive selection.

A. The Notion of Indirect Expropriation

Investment tribunals have struggled for long to determine what exactly amounts to indirect expropriation.[85]

The tribunal in *Burlington* v. *Ecuador*[86] was faced, inter alia, with the question whether windfall profit taxes of 50 percent and 99 percent imposed by the host state on the lucrative oil business amounted to indirect expropriation. After holding that taxation may in exceptional cases amount to confiscatory taxation which would thus be expropriatory, the *Burlington* tribunal found that neither tax

> [. . .] substantially deprived Burlington of the value of its investment. While Law 42 at 99% diminished Burlington's profits considerably, Burlington's allegations that its investment was rendered worthless and unviable have not been substantiated. Rather, the evidence shows that, notwithstanding the enactment of Law 42 at 99%, the investment preserved its capacity to generate a commercial return. Finally, although the evidence shows that Ecuador passed Law 42 without intending to comply with the tax absorption clauses, there can be no expropriation in the absence of substantial deprivation.[87]

The same tribunal did find, however, that another host state measure amounted to expropriation. The host state had initially only temporarily physically occupied part of the investor's installations. In this context the *Burlington* tribunal found that

> Ecuador's takeover of the Blocks became a permanent measure on 30 August 2009. As of this date, Ecuador deprived Burlington of the effective use and control of Blocks 7 and 21 on a permanent basis, and thus expropriated its investment.[88]

84 *Id.*, para. 276.

85 *See* L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 19 ICSID Review—FILJ 293 (2004); Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20(1) ICSID Review—FILJ (2005); Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 The Journal of World Investment and Trade (2007) 717; August Reinisch, *Expropriation*, in Muchlinski, Ortino & Schreuer, *supra* note 27, at 407; Katia Yannaca-Small, *Indirect Expropriation and the Right to Regulate: How to Draw the Line?*, in Arbitration Under International Investment Agreements: A Guide to the Key Issues (Katia Yannaca-Small ed., 2010), at 445.

86 *Burlington Resources Inc.* v. *Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012.

87 *Id.*, para. 456.

88 *Id.*, para. 535.

Also the *Electrabel* tribunal[89] relied on the substantial deprivation test in order to qualify state measures as amounting to indirect expropriation. Relying on a wealth of previous investment cases as well as scholarly writings, the tribunal was of the opinion

> [...] that the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment.[90]

In the specific case, the tribunal found that the termination of specific long-term power purchase agreements[91] by Hungary did not constitute such a radical deprivation of the investor's rights.

B. Fair and Equitable Treatment

Fair and equitable treatment is increasingly becoming the dominant standard in investment arbitration. Its violation is clearly easier to prove than that of expropriation—which is sometimes captured in the expression "expropriation light"—making fair and equitable treatment claims the most frequently raised claims in investment cases. Nevertheless, there is also a clearly discernible trend in investment decisions away from the broad obligations imposed on host states in decisions like *MTD*[92] or *Tecmed*.[93] Rather, tribunals appear to follow a more restricted approach leaving more regulatory freedom to host states.

One of these cases is the 2012 decision in *Electrabel* v. *Hungary*,[94] one of a group of investment cases brought by various power generators against Hungary following the latter's termination and alteration of various power purchasing stipulations in the aftermath of its accession to the European Union. Among others, the claimant had argued that the termination of its power purchasing agreement (PPA) by Hungary constituted a violation of fair and equitable treatment (FET) as contained in

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

90 *Id.*, para. 6.62.

91 *See* text *infra* at note 94.

92 *MTD Equity* v. *Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113 ("[FET] should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement—'to promote', 'to create', 'to stimulate'—rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.").

93 *Técnicas Medioambientales Tecmed, S.A.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003), para. 154 (fair and equitable treatment standard protects "basic expectations" of investors "that the host State acts in a consistent manner, free from ambiguity and totally transparent.").

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

the Energy Charter Treaty (ECT).[95] Based on its earlier findings on applicable law,[96] the tribunal held that Hungary was under an EU law obligation to terminate the PPA pursuant to a Commission decision and that even if that had not been the case

> Hungary was not unreasonable, still less acting irrationally or arbitrarily, in adopting and maintaining that same interpretation [of a duty to terminate]; and that, accordingly, that conduct, by itself, could not amount, in the Tribunal's view, to any breach by Hungary of the ECT's FET standard.[97]

In an interesting *obiter dictum* the *Electrabel* tribunal held that "if and to the extent that the European Commission's Final Decision required Hungary, under EU law, prematurely to terminate Dunamenti's PPA, that act by the Commission cannot give rise to liability for Hungary under the ECT's FET standard."[98] Rather, the tribunal suggested such a decision might lead to a liability on the part of the European Union.

But the *Electrabel* tribunal's reasoning on fair and equitable treatment itself is more detailed with regard to price reductions introduced by Hungary concerning the investors' PPAs before their actual termination. According to the tribunal, "[f]air and equitable treatment is connected in the ECT to the encouragement to provide stable, equitable, favorable and transparent conditions for investors."[99] Referring to previous ICSID decisions like *Bayindir* v. *Pakistan*[100] and *Siag and Vecchi* v. *Egypt*,[101] the *Electrabel* tribunal was of the opinion that

> [...] the obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment.[102]

And that "the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations."[103]

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95 Article 10(1) ECT ("Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment").

96 *See infra* text at note 142.

97 *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 6.91.

98 *Id.*, para. 6.76.

99 *Id.*, para. 7.73.

100 *Bayindir* v. *Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 178.

101 *Waguih Elie George Siag and Clorinda Vecchi* v. *The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 150.

102 *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 7.74.

103 *Id.*, para. 7.75.

In spite of this particular emphasis on legitimate expectations, the tribunal very pointedly insisted that such expectations had to be balanced with the host state's right to regulate:

> While the investor is promised protection against unfair changes, it is 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. Consequently, 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, taking into account the circumstances of the investment.[104]

Since the "[f]airness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of the investment and of the conduct of the host State,"[105] the tribunal laid particular emphasis on the fact that the changes to the long-term PPAs were foreseeable under Hungary's long-term EU accession perspective and that investors could not simply rely on their agreements. In this respect the tribunal's finding on applicable law was relevant according to which "[f]oreign investors in EU Member States, including Hungary, cannot have acquired any legitimate expectations that the ECT would necessarily shield their investments from the effects of EU law as regards anti-competitive conduct."[106] Thus, it concluded that it was not "unreasonable for a State to try to ensure the adaptation of long term contracts to new conditions prevailing in a liberalised economy operating under EU law."[107]

The importance to secure sufficient regulatory space of host states to be balanced against the legitimate expectations of investors was also expressed in *Toto* v. *Lebanon*.[108] The tribunal stressed "that fair and equitable treatment does not, in the circumstances prevailing in Lebanon at the time, entail a guarantee to the investor that tax laws and customs duties would not be changed."[109] According to the *Toto* tribunal

> [i]n the absence of a stabilisation clause or similar commitment, which were not granted in the present case, changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction.[110]

In the case at hand, the tribunal found that the complained of changes in the tax and customs framework did not amount to such drastic and discriminatory changes. Interestingly, the *Toto* tribunal expressly took into account the specific situation of the host country. It found that the "post-civil war situation in Lebanon, with substantial economic challenges and colossal reconstruction efforts, did not justify legal expectations that custom duties would remain unchanged."[111] This

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104 *Id.*, para. 7.77.

105 *Id.*, para. 7.78.

106 *Id.*, para. 4.141.

107 *Id.*, para. 7.141.

108 *Toto Costruzioni Generali S.p.A.* v. *Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012.

109 *Id.*, para. 242.

110 *Id.*, para. 244.

111 *Id.*, para. 245.

relative yardstick expresses a similar thought forcefully proposed by the 2009 ICSID award in *Pantechniki* v. *Albania*[112] which had found that a state's level of development and stability was a relevant circumstance in determining whether it had acted with due diligence, albeit in the context of providing full protection and security.[113]

Also in a number of other 2012 cases, ICSID tribunals dealt with alleged breaches of the fair and equitable treatment standard and addressed specific aspects of it.

In *Swisslion* v. *Macedonia*,[114] the tribunal, without entering into any deeper discussion of the notion of fair and equitable treatment, focused on the due process requirement inherent in it. It was of the opinion that fair and equitable treatment "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."[115] It was this basic guarantee of fair treatment that was absent in the way the host state treated the investor. In the eyes of the tribunal, it was not so much the judicial proceedings before Macedonian courts in a dispute between the Swiss investors and the host state, but the events leading to the litigation and its follow-up as well as administrative proceedings instituted against Swisslion that had a harassing effect.

The ICSID tribunal in *Deutsche Bank* v. *Sri Lanka*[116] came to a finding of a breach of fair and equitable treatment which involved a more thorough analysis of the required standard of treatment. The tribunal particularly relied on the criteria established by the *Waste Management* case[117] when it identified the following components of fair and equitable treatment:

- 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.[118]

Using these criteria the tribunal established that Sri Lanka had breached fair and equitable treatment through the way its supreme court conducted judicial

112 *Pantechniki S.A. Contractors & Engineers* v. *Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

113 *Id.*, para. 82.

114 *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012.

115 *Id.*, para. 273.

116 *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012.

117 *Waste Management, Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

118 *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 420.

proceedings and through investigations by its central bank that were initiated for improper motives, carried out in way lacking transparency and due process and ultimately *ultra vires*.[119]

Also in *Bosh* v. *Ukraine*,[120] an ICSID tribunal relied on previously established criteria to determine breaches of fair and equitable treatment. The tribunal expressly endorsed the elements identified in the *Lemire* case,[121] referring to the following

> relevant factors, including "whether the State made specific representations to the investor"; "whether due process has been denied to the investor"; "whether there is an absence of transparency in the legal procedure or in the actions of the State"; "whether there has been harassment, coercion, abuse of power or other bad faith conduct by the host State"; and "whether any of the actions of the State can be labelled as arbitrary, discriminatory or inconsistent."[122]

On this basis the tribunal concluded that audit proceedings concerning the investor were properly conducted pursuant to Ukrainian law and that there was no indication of impropriety.

C. Umbrella Clauses

The claimant in *SGS* v. *Paraguay*[123] was no newcomer to the issue of litigating the meaning of umbrella clauses. The Swiss customs inspection firm had already previously tried to sue Pakistan and the Philippines for unpaid bills under the theory that such contractual breaches amounted to breaches of the applicable BITs via their umbrella clauses. Those proceedings were not very successful though the tribunals disagreed sharply on the true meaning of an umbrella clause.

In *SGS* v. *Pakistan*,[124] the arbitrators rejected the view that "breaches of a contract [...] concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international law. Having regard to the distinction in principle between breaches of contract and breaches of treaty, contractual claims could only be brought under Article 11 'under exceptional circumstances'."[125] In *SGS* v. *Philippines*, the tribunal adhered to the traditional view that an umbrella clause "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an

119 *Id.*, paras. 474–491.

120 *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise* v. *Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012.

121 *Joseph Charles Lemire* v. *Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, para. 284.

122 *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise* v. *Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012, para. 212.

123 *SGS Société Générale de Surveillance S.A.* v. *The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 12 February 2012.

124 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.

125 *SGS* v. *Pakistan*, para. 172.

issue of international law."[126] Nevertheless, the tribunal held that before adjudicating SGS's investment claim, the contractual claim in domestic courts had to be awaited. This latter view was also adopted by the ICSID tribunal in *Bureau Veritas* v. *Paraguay*[127] and, most recently, in *Bosh* v. *Ukraine*.[128]

In 2012, SGS was more successful. An ICSID tribunal awarded more than US$50 million for unpaid bills (plus interest) under services contracts with Paraguay. The tribunal's decision focused on the umbrella clause of the Paraguay-Switzerland BIT which provided as follows:

> Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.[129]

In an attempt to apply a literal interpretation of this treaty provision, the tribunal rejected Paraguay's argument that only a "sovereign" interference with its contractual obligations would lead to an infringement of the umbrella clause.[130] According to the tribunal

> [a]rticle 11 requires the "observance" of commitments. Also as a matter of the ordinary meaning of the term, a failure to meet one's obligations under a contract is clearly a failure to "observe" one's commitments. There is nothing in Article 11 that states or implies that a government will only fail to observe its commitments if it abuses its sovereign authority. Hence, again applying standard principles of treaty interpretation, a breach of contract by Paraguay with respect to an investment of a Swiss investor is a breach of Article 11.[131]

The *SGS* v. *Paraguay* tribunal equally rejected Paraguay's argument that before deciding the claim it should await the outcome of the local courts which were exclusively competent pursuant to the contracts choice-of-forum clause. This argument which found acceptance in *SGS* v. *Philippines* and in *Bureau Veritas* v. *Paraguay* was rejected because the tribunal held that the contractual duty to make payments

126 *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 128.

127 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V.* v. *Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009.

128 *Bosh International, Inc. and B&P Ltd Foreign Investments Enterprise* v. *Ukraine*, ICSID Case No. ARB/08/11, Award, 25 October 2012.

129 Article 11 Paraguay-Switzerland BIT.

130 According to Paraguay such an argument was supported by *Impregilo S.p.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260, and *Siemens A.G.* v. *Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 253. However, as the *SGS* v. *Paraguay* tribunal noted, *Impregilo* was decided in the context of fair and equitable treatment violations, and it expressly differed from *Siemens*; *SGS Société Générale de Surveillance S.A.* v. *The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 12 February 2012, paras. 92, 93. But *see also* the statement in *Sempra Energy International* v. *The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 310 ("The decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.").

131 *SGS* v. *Paraguay*, para. 91.

and the forum selection clause were "discrete, separate commitments as between the parties"[132] which could be violated separately and not only as a "package."

Further, in the tribunal's view,

> [i]n addition to agreeing to the forum selection clause in the Contract, it separately agreed to arbitration in accordance with the BIT. By doing so, Respondent offered to Swiss investors an alternative forum for dispute settlement. The BIT arbitration mechanism formed part of the applicable legal framework and became, in effect, an irrevocable part of the bargain.[133]

This interpretation of an umbrella clause is remarkable since it appears to be the broadest and most investor-friendly given to date. It will be interesting to see whether ICSID cases will follow this path.

IV. The Impact of EU Law on Investment Arbitration

With the entry-into-force of the Lisbon Treaty in late 2009,[134] the European Union has acquired competences, including treaty-making powers, in the field of foreign direct investment.[135] Although in the short and medium term the European Union has authorized its member states to continue to maintain and even to conclude new BITs with third countries, this new investment power will eventually lead to the replacement of such BITs by EU IIAs, probably often concluded in broader economic cooperation or partnership agreements or Free Trade Agreements (FTAs).[136]

Another EU problem that has already arrived at investment arbitration is the impact of EU law on existing BITs between EU Member States, so-called intra-EU-BITs, and on arbitration proceedings based on such BITs.[137] In a number of

132 *Id.*, para. 105.

133 *Id.*, para. 107.

134 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, Official Journal (OJ) C 306/01 of 17 December 2007.

135 *See* Article 207(1) Consolidated version of The Treaty on the Functioning of the European Union, OJ C 115/47 of 9 May 2008 ("The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.").

136 *See* Marc Bungenberg, *Going Global? The EU Common Commercial Policy after Lisbon*, in European Yearbook of International Economic Law (Christoph Hermann & Jörg Philipp Terhechte eds., 2010), 123–151; Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. Int'l Economic Law 51–84 (2012); Angelos Dimopoulos, EU Foreign Investment Law (2011); Frank Hoffmeister & Günes Ünüvar, *From BITS and Pieces towards European Investment Agreements*, in EU and Investment Agreements. Open Questions and Remaining Challenges (Marc Bungenberg, August Reinisch & Christian Tietje, eds., 2013), at 57–86.

137 *See* Marc Burgstaller, *The Future of Bilateral Investment Treaties of EU Member States*, in Internationaler Investitionsschutz und Europarecht (Marc Bungenberg, Joern Griebel & Steffen Hindelang eds., 2010), at 113–138; Steffen Hindelang, *Member State BITs—There's Still (Some) Life in the Old Dog Yet*, in Yearbook Int'l Investment Law & Policy 2010/2011 (Karl Sauvant ed., 2011), at 217; August Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action—The Decisions on Jurisdiction in the* Eastern Sugar *and* Eureko *Investment Arbitrations*,

investment cases, the EU Commission has taken a hard-line approach, suggesting that with the accession of states to the European Union their intra-EU-BITs have become incompatible with EU law and would have to be terminated. Some respondent states have even reinforced that thought and argued that their intra-EU-BITs have become automatically invalid as a result of EU accession. This latter argument was rejected by a number of investment tribunals, mostly holding that pursuant to the rules of the Vienna Convention on the Law of Treaties on successive treaty obligations there was not sufficient identity between the subject-matters of such BITs and the EU treaties nor a total incompatibility.[138]

In 2012, an ICSID case, *Electrabel* v. *Hungary*,[139] addressed a number of EU law issues. While it only briefly followed previous cases rejecting the incompatibility argument,[140] the tribunal dealt at length with the question whether EU law should be viewed as domestic or international law—an issue already decided upon by the ICSID tribunal in *AES* v. *Hungary*[141] which had held that EU law should be regarded like national law as a "fact".[142] The *Electrabel* tribunal, however, regarded EU law as a *sui generis* body of rules, displaying both features of international and domestic law. This was important considering the applicable law clause of the ECT which referred in addition to the treaty's own rules to "applicable rules and principles of international law."[143] In this regard, the tribunal concluded

> [. . .] that EU law (not limited to EU Treaties) forms part of the rules and principles of international law applicable to the Parties' dispute under Article 26(6) ECT. Moreover EU law, as part of the Respondent's national law, is also to be taken into account as a fact relevant to the Parties' dispute.[144]

The tribunal further held that the ECT and EU law should be interpreted in a harmonious way since both aimed at liberalizing energy markets. With a view to the

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39(2) Legal Issues of Economic Integration 157–177 (2012); Christer Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 Journal of International Arbitration 455–468 (2007); Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58 International and Comparative Law Quarterly 297–320 (2009).

138 *Eastern Sugar BV* v. *Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007; *Eureko BV* v. *The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

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

140 *Id.*, para. 4.175 ("EU law is not incompatible with the provision for investor-state arbitration contained in Part V of the ECT, including international arbitration under the ICSID Convention. The two legal orders can be applied together as regards the parties' arbitration agreement and this arbitration, because only the ECT deals with investor-state arbitration; and nothing in EU law can be interpreted as precluding investor-state arbitration under the ECT and the ICSID Convention.").

141 *AES Summit Generation Limited AES-Tisza Erömü Kft* v. *The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010.

142 *Id.*, para. 7.6.12 ("In summary, the Tribunal determines that the Respondent's acts/measures are to be assessed under the ECT as the applicable law but that the EC law is to be considered and taken into account as a relevant fact").

143 Article 26(4) ECT ("A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.").

144 *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.195.

core question in issue, whether the abrogation of long-term PPAs as a result of EU liberalisation measures was contrary to ECT guarantees the tribunal concluded "that the objectives of the ECT and EU law were and remained similar as regards anti-competitive conduct, including unlawful State aid."[145]

A further major issue addressed in *Electrabel* v. *Hungary* was the question whether EU law deprived the ICSID tribunal of its jurisdiction over the ECT dispute because of the exclusive effect of some provisions concerning the EU courts.

The EU Commission had submitted that in this "intra-EU dispute" the ICSID tribunal "should not assume jurisdiction over claims concerning a subject-matter falling within the competence of the European Union and triggering the latter's responsibility if contrary to the ECT."[146] Since the dispute was triggered by an EU decision, calling for the end of the PPA as state aid incompatible with EU law, it should have been brought against the European Union and before EU courts only.[147] The tribunal, however, rejected that argument finding that the investor's claim was directed against Hungary's termination of the PPA.[148] In this regard the tribunal was explicit that Hungary would not be liable if it acted according to a legally binding EU obligation.[149] Ultimately, the tribunal found that the termination of the PPA neither constituted an indirect expropriation nor amounted to a violation of fair and equitable treatment.[150]

V. Annulment Committees on Procedural Issues

Like the previous year,[151] 2012 did not produce many annulment decisions. The only annulment decision of interest here occurred in *Victor Pey Casado* v. *Chile*,[152] in which an *ad hoc* committee partially annulled an ICSID award for the rarely invoked ground of a serious departure from a fundamental rule of procedure

145 *Id*., para. 4.141.

146 *Id*., para. 5.10.

147 *Id*., para. 5.10, citing the European Commission's submission *in extenso* which states at para. 67: "In sum, the European Commission is of the view that the Tribunal lacks jurisdiction over the termination claim because the latter fails under the competence of the Community, but was brought by an EU investor. The proper avenue for the EU investor is to seek protection for this claim before Community courts, and this is indeed what most of the operators, including as it appears Dunamenti, have done."

148 *Id*., para. 5.34 ("As confirmed by the Claimant to the Tribunal's satisfaction on several occasions, the Claimant is not here impugning the validity of the European Commission's Final Decision of 4 June 2008 under EU law or the ECT; nor is the Claimant attacking any act of the Commission (or other EU institution), whether by alleging any liability against the European Union (including the Commission) or by seeking to attribute liability to the Respondent for any act of the European Union.").

149 *Id*., para. 6.73.

150 *See supra* text at notes 86 and 90.

151 *See* August Reinisch, *From the Admission of the First Mass-Claims Case before ICSID to a Creeping Violation of the FET Standard—ICSID Arbitration in 2011*, in 12 Global Community YILJ 2012, 883–904.

152 *Victor Pey Casado and President Allende Foundation* v. *Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012.

pursuant to Article 52(1)(d) of the ICSID Convention.[153] The committee found that the parties had not had sufficient opportunity to submit arguments concerning the issue of damages in case of a breach of the fair and equitable treatment standard and that this deficiency amounted to a serious departure from a fundamental rule of procedure. In outlining the required standard of review when assessing whether such a ground for annulment had actually occurred the *Victor Pey Casado* committee subscribed to a strict standard of scrutiny. It started with the undisputed premise that fundamental rules "include the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias."[154] It then addressed in detail the determinant elements of the "seriousness" of a departure from fundamental procedural rules that would justify annulment. The *ad hoc* committee recognized that while some previous committees had stressed the importance of the rule violated,[155] others focused on an outcome-determinative test.[156]

As regards the latter impact-focused test, the committee found that the annulment applicant was

> [. . .] not required to show that the result would have been different, that it would have won the case, if the rule had been respected. The Committee notes in fact that, in *Wena*, the committee stated that the applicant must demonstrate "the impact that the issue may have had on the award." The Committee agrees that this is precisely how the seriousness of the departure must be analyzed.[157]

In other words, it sided with the respondent state's argument that it had to scrutiny "whether, if the rule had been observed, there is a distinct possibility (a 'chance') that it may have made a difference on a critical issue."[158]

The *Victor Pey Casado* committee clarified another important procedural issue concerning annulments of ICSID awards when it held that "it has no discretion not to annul an award if a serious departure from a fundamental rule is established."[159]

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153 Article 52(1) ICSID Convention ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.").

154 *Victor Pey Casado and President Allende Foundation* v. *Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment, 18 December 2012, para. 73.

155 *Id*., para. 76 ('Some committees have looked at the importance of the right involved. If the right is fundamental or substantial, its deprivation could jeopardize the legitimacy or integrity of the arbitral process. Therefore, in the view of those committees, the violation of such right deserves a remedy. As described by commentators and certain committees, "the departure must be more than minimal" or "must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."' [footnotes omitted]).

156 *Id*., para. 76 ('Other committees have opined that the fundamental rule must relate to an outcome-determinative issue. In the *Wena* case, the committee held that "the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed."' [footnotes omitted]).

157 *Id*., para. 78.

158 *Id*., para. 77.

159 *Id*., para. 80.

On this basis, the *ad hoc* committee found that Chile had been deprived of the right to present its arguments on the standard applicable to the calculation of damages for its breach of the fair and equitable treatment provision of the BIT and it considered that this departure from the right to be heard was serious as the issue on which Chile was denied an opportunity to be heard was "substantial and outcome-determinative."[160]

VI. Conclusions

The jurisprudence of ICSID tribunals and *ad hoc* committees in 2012 again offered a wealth of issues.

Apparently, the controversial "contribution to host state development" element is less and less accepted by ICSID tribunals as a separate jurisdictional requirement in order to determine whether an investment in the sense of Article 25 ICSID Convention was made. Similarly, the distinction between improper nationality shopping and legitimate nationality planning under the Convention's rules relating to the nationality of claimants is becoming more clearly determined in ICSID jurisprudence. Next to familiar issues, like the reach of MFN clauses, less developed areas such as the preconditions for the filing of *amicus curiae* briefs or arbitrator disqualifications have been addressed.

In the field of substance investment protection, ICSID tribunals are increasingly specifying the law on expropriation and fair and equitable treatment, whereas the effect of umbrella clauses still remains a controversial topic.

In 2012, also ICSID tribunals had to rule on the legal minefield of EU and investment law. Their findings will contribute to an emerging jurisprudence in this regard and it will be interesting how national courts as well as the Court of the European Union will react to that.

160 *Id.*, para. 269.