

# International Centre for Settlement of Investment Disputes (ICSID) Case Law Review

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## Abstract

The ICSID case law review aims at discussing all decisions published by ICSID arbitral tribunals during a given period of time. This review covers the last semester 2011 and the first trimester 2012 with the analysis of one order, nine decisions and four awards.

## Keywords

provisional measures; parallel criminal procedures; jurisdiction based on investment law; jurisdiction and admissibility; class action; sovereign debt and investment; mandatory submission to national courts; annulment; State's counterclaims; conflict of interests

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The firms in which the authors practice, or have practiced, may have intervened as counsel in certain of the reviewed cases. The views and opinions expressed in this article are those of the authors and do not necessarily represent the views of, and should not be attributed to the law firm to which they belong.

All decisions analyzed in this review can be accessed on one of the following websites: ICSID <http://icsid.worldbank.org>, Investment Claims <http://www.investmentclaims.com> or Investment Treaty Arbitration <http://www.italaw.com>.

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## I. Introduction

This second issue of the ICSID Case Law Review analyzes all ICSID awards, decisions and orders published during the second semester of 2011 and the first trimester of 2012 (as well as two decisions of 2008 and 2009 that were not publicly available until now).

In terms of the ICSID caseload, the second semester of 2011 follows the trend set by the first semester in making 2011 the most prolific year in terms of case registration in the history of ICSID. On 31 December 2011, 38 cases had been registered, as compared to 26 cases for the whole year in 2010 and a total of 25 in 2009. The record number of 37 cases registered in 2007 has thus been broken and 2012 does not appear to be any different as 8 cases were registered during the first trimester.

Amongst these 38 cases, four were registered under the ICSID's Additional Facility Rules and one under the Conciliation Rules. The basis of consent to arbitration was a bilateral investment treaty (BIT) in 76% of the cases, a contract in 10% of the cases, a national law in 10% of the cases, the Energy Charter Treaty in 2% of the cases and the OMAN-US FTA in one remaining case. In certain instances, the arbitration is based on more than one instrument. As of 31 December 2011, ICSID's Secretariat had registered a total of 369 cases under both the ICSID Convention and the Additional Facility Rules.

On 24 January 2012, Venezuela gave official written notice of its denunciation of the Convention. In accordance with Article 71 of the Convention, the denunciation took effect six months after the receipt of the notice, i.e., on 25 July 2012. Taking into account Venezuela's withdrawal, 157 States had signed the Convention and 147 States had ratified it as of 31 March 2012.

The present issue of the ICSID Case Law Review covers 1 order, 9 decisions and 4 awards. One award and one decision on a request for disqualification were rendered in Spanish and will be commented on in a forthcoming issue.<sup>1</sup>

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<sup>1</sup> The award is in the case *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) and the decision is in *Nations Energy, Inc. and others v. Republic of Panama* (ICSID Case No. ARB/06/19). Also, the award rendered on 2 September 2011 in the case of *EVN AG v. Former Yugoslav Republic of Macedonia* (ICSID Case No. ARB/09/10) will not be commented on in this issue as it merely describes the process leading to a settlement and the issuance of an award on agreed terms.

## II. Decision on the Requests for Correction, Supplementary Decision and Interpretation of 10 July 2008, *Archer Daniels Midland Company and Tate & Lyle Ingredients America, Inc. v. The United Mexican States*<sup>2</sup>

*Composition of the Arbitral Tribunal: Mr. Bernardo Cremades, President; Messrs. Arthur W. Rovine and Eduardo Siqueiros,*<sup>3</sup> *Arbitrators.*

*Additional Facility Rules – Correction – Interpretation – Supplementary Decision – Articles 55 and 57 of the Additional Facility Rules*

This decision on the Requests for Correction, Supplementary Decision and Interpretation dates back to 2008 but was only published in the second semester of 2011, hence the present commentary.

This decision is of limited interest for international investment law as it heavily relies on factual issues relating to the drafting of the Award rendered on 21 November 2007.<sup>4</sup> We will not go into the factual background of the case, other than what is necessary for the understanding of the present decision.

The Respondent first made a request for a correction of the Award, which was then followed by the Claimants' request for a Supplementary Decision. Being an arbitration under the Additional Facility Rules, Articles 55 to 57 were applicable to these procedures.

The Respondent's request for correction concerned the designation of the correct party in the dispositive section, namely:

that payment under the Award should be made to ALMEX and not to ADM and TLIA, as the Claimants submitted the dispute to arbitration not only on their own behalf (under Article 1116 of the NAFTA) but on behalf of ALMEX (pursuant to Article 1117 of the NAFTA). The Respondent contends that the amounts awarded were calculated on the basis of the damages ALMEX suffered during the imposition of the Tax, and not damages suffered by ADM and TLIA.<sup>5</sup>

<sup>2</sup> ICSID Case No. ARB/03/20 [*Archer – Correction*].

<sup>3</sup> Common agreement of the Parties on the composition of the Arbitral Tribunal on 14 June 2005.

<sup>4</sup> Commented on in J. Fouret & D. Khayat, "Centre international pour le règlement des différends relatifs aux investissements" (2008) 21.2 RQDI 291, at 298 *et seq.*

<sup>5</sup> *Archer – Correction*, para. 18.

The Respondent based its argument on Article 1135(2)(b) of NAFTA, which indicates:

Article 1135: Final Award

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:
  - (a) monetary damages and any applicable interest;
  - (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

2. **Subject to paragraph 1, where a claim is made under Article 1117(1):**
  - (a) an award of restitution of property shall provide that restitution be made to the enterprise;
  - (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and**
  - (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.
3. A Tribunal may not order a Party to pay punitive damages. (Emphasis added)

For the Respondent, there was no doubt that it was the enterprise, ALMEX, which should be the beneficiary of the amounts to be paid under the Award.

The Tribunal does not hesitate in confirming that a clerical error was evidently made, as the damages were calculated according to Article 1117 and, thus, it is automatically the enterprise that should be the beneficiary of these amounts. It therefore modified the dispositive section of the Award accordingly.<sup>6</sup>

Concerning the Claimants' request for a Supplementary Decision, the grounds for this were threefold: (i) failure to state reasons in the damage calculation, particularly with regard to the weight of evidence presented by

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<sup>6</sup> *Archer – Correction*, paras. 22–24.

the parties, and the level of response to all the questions raised; (ii) supplementary explanation on the refusal to grant loss of profits; and (iii) supplementary explanation on the refusal to grant compound interest.

As affirmed by previous Tribunals,

the purpose of recourse to a supplementary decision, as set out in Article 49(2) of the ICSID Convention, is to provide a remedy to questions that the Tribunal has omitted to decide in the award.

[...]

The Supplementation process is not a mechanism by which parties can continue proceedings on the merits or seek a remedy that calls into question the validity of the Tribunal's Decision.<sup>7</sup>

This is indeed both the very purpose of the articles of the Washington Convention and Additional Facility Rules as well as at the same time being the risk inherent in these types of procedure. However, tribunals, in the past and rightfully, have been very strict against any manipulation of this procedure by the requesting party.<sup>8</sup>

The Arbitral Tribunal in the present case does not depart from this trend as the Claimants' requests were evidently those of a disgruntled party.

First, regarding the weight of evidence and loss of profits, the Arbitral Tribunal starts by indicating that "*Claimants' submission does not precisely identify the questions that the Tribunal has omitted to decide*",<sup>9</sup> which does not appear promising for the Claimants' request. Analyzing their discretionary power, in terms of the explanations and calculations of a Tribunal regarding damages and lost profits, the arbitrators come to the conclusion that the absence of precisely defined questions from the Claimants was fatal to their request.<sup>10</sup>

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<sup>7)</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on the Request for a Supplementary Decision of 8 July 2008, paras. 13 and 16.

<sup>8)</sup> See our comments on the above-mentioned case, *LG&E*, in J. Fouret & D. Khayat, "Centre international pour le règlement des différends relatifs aux investissements" (2008) 21.2 RQDI 291, at 345–346.

<sup>9)</sup> *Archer – Correction*, para. 32.

<sup>10)</sup> *Archer – Correction*, paras. 33–49.

Second, regarding the allocation of compound interest, the Tribunal's response is blunt and seems to express its exasperation towards the Claimants' attitude and misuse of the Additional Facility Rules:

The Claimants are not satisfied with the Tribunal's decision, or at least the explanation of its decision, to award simple rather than compound interest. However, as explained, it is not a proper use of Article 57 to seek additional reasons for a question that was decided in the Award. Indeed, considered in its totality the Claimants' submission on this question lacks all merit. Its premise is to ignore the express wording of Article 57 and to read Article 57 to require reasons, then to analyse the Tribunal's reasons to identify a doubt, then to present this doubt either as a question not decided or a decision not reasoned. At best, the methodology demonstrates the scale of the Claimants' misapprehension of the Article 57 power.<sup>11</sup>

There is not much to add to this quote, which also reflects the firmness that the authors of the present review believe to be necessary in order not to distort the arbitral process by using, and abusing, every avenue possible in a given arbitration mechanism.

### **III. Decision regarding Claimant's Application for Provisional Measures, *Caratube International Oil Company LLP v. Republic of Kazakhstan***<sup>12</sup>

*Composition of the Arbitral Tribunal: Prof. Dr. Karl-Heinz Böckstiegel, President; Dr. Gavan Griffith QC and Dr. Kamal Hossain, Arbitrators.*<sup>13</sup>

*Application for provisional measures – maintaining the status quo – parallel criminal proceedings – return of documents seized – stay of criminal proceedings – duty to act in good faith*

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<sup>11</sup> *Archer – Correction*, para. 58.

<sup>12</sup> ICSID Case No. ARB/08/12 [*Caratube – Provisional Measures*].

<sup>13</sup> The decision does not provide information about the process for nomination of the members of the Arbitral Tribunal.

The case of Caratube International Oil Company LLP (“Caratube”) against the Republic of Kazakhstan concerns the alleged expropriation of Caratube’s investments in the oil and gas industry in the host State. Caratube alleges that the Kazakh authorities unlawfully terminated Caratube’s contract while engaging in a campaign of harassment and unlawful investigations by various Kazakh bodies. Caratube claims that these measures amount to a violation of the 1992 United States/Kazakhstan Bilateral Investment Treaty (“BIT”).

The Claimant’s application for provisional measures was made as a result of the Kazakh authorities’ investigations and seizure of documents related to Caratube’s owners and investment. The decision on provisional measures contains very broad excerpts from the parties’ submissions and even large sections of the parties’ pleadings as taken from the hearing transcripts. The actual decisions taken by the Arbitral Tribunal take up much less space.

In essence, the Arbitral Tribunal rejected all of the Claimant’s requests. The Claimant’s request for a meeting concerning the area subjected to the contract was rejected because the Arbitral Tribunal found enough evidence suggesting that the meeting would indeed take place.<sup>14</sup> The Arbitral Tribunal rejected for the same reason the Claimant’s second request concerning the relinquishment of certain contractual areas. Here, too, the arbitrators took the view that the parties were moving forward on the matter.<sup>15</sup> The third request for provisional measures, aimed at granting the Claimant access to documents seized by the Respondent’s investigators, was also rejected by the Arbitral Tribunal given that Kazakhstan had agreed to grant the Claimant broad access to the documents at stake, with the right to copy.<sup>16</sup>

The Claimant’s penultimate request aimed at obtaining that the Respondent refrain from harassing its employees and from acting in violation of its duties of good faith and equality. While condemning the Respondent’s attitude in the conduct of its criminal proceedings, the Arbitral Tribunal limited its decision to the “*confirmation*” that the Parties have “*an obligation to conduct the procedure in good faith and that this obligation includes a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party*”.<sup>17</sup>

<sup>14</sup>) *Caratube – Provisional Measures*, para. 82 *et seq.*

<sup>15</sup>) *Caratube – Provisional Measures*, para. 90 *et seq.*

<sup>16</sup>) *Caratube – Provisional Measures*, para. 110.

<sup>17</sup>) *Caratube – Provisional Measures*, para. 120.

The Claimant's last request was particularly difficult. The Claimant sought an order effectively ordering Kazakhstan to refrain from pursuing the current criminal complaints or engaging in new ones. The Arbitral Tribunal found that it could in theory render such a decision as it had the power to do so under the ICSID Convention and the BIT. However, it also considered that the threshold that must be met to trigger such a decision is particularly high. The Arbitral Tribunal found that the Claimant failed to establish that its right to pursue the ICSID arbitration had been violated and that, as a result, its request could not be granted.<sup>18</sup>

#### **IV. Decision on the Discontinuance of the Annulment Proceedings, *ATA Construction Industrial and Trading Company v. Hashemite Kingdom of Jordan***<sup>19</sup>

*Composition of the ad hoc Committee: Judge Gilbert Guillaume, President; Prof. Juan Fernández-Armesto and Prof. Dr. Bernard Hanotiau, Members.*

##### *Application for annulment – discontinuance – allocation of the costs of the proceedings*

The *ad hoc* Committee's decision on the discontinuance of the annulment proceedings brought by Jordan is peculiar in the sense that these proceedings took place in parallel with interpretation proceedings also brought by the Respondent State.

Jordan's application for the annulment of the award of 18 May 2010<sup>20</sup> was lodged "provisionally", as it was said to be dependent on the outcome of the pending decision on interpretation. When the Arbitral Tribunal, seized with this latter application, rendered its decision on 7 March 2011,<sup>21</sup> Jordan withdrew its annulment application.

As a result, the main issue that the *ad hoc* Committee had to decide upon was how to split the costs of the annulment proceedings. Taking into consideration that the investor had "*opposed successive measures proposed by*

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<sup>18</sup>) *Caratube – Provisional Measures*, para. 134 *et seq.*

<sup>19</sup>) ICSID Case No. ARB/08/2 [*ATA – Discontinuance*].

<sup>20</sup>) Available at <http://italaw.com/sites/default/files/case-documents/ita0043.pdf>.

<sup>21</sup>) See J. Fouret & Dany Khayat, "ICSID Case Law Review" (2012) 11.1 LP ICT, 137, at 160 *et seq.*

Jordan, and even by the Secretary-General of ICSID, in order to defer the procedural steps in the annulment case until after the decision on interpretation”,<sup>22</sup> the *ad hoc* Committee concluded that it had “increased unnecessarily the costs of the proceeding for the other Party”<sup>23</sup> and must thus be ordered to pay part of Jordan’s costs.

### V. Award, *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*<sup>24</sup>

*Composition of the Arbitral Tribunal: Mr. Rodrigo Oreamuno,*<sup>25</sup> *President; Prof. Dr. Karl-Heinz Böckstiegel*<sup>26</sup> *and Prof. Brigitte Stern.*<sup>27</sup>

*Jurisdiction on the basis of investment law – interpretation of whether consent given by the State in the law – method of interpretation*

The award rendered on 2 August 2011 in the case of Brandes Investment Partners LP (“Brandes”), only defined as a “United States registered investment adviser”, against the Bolivarian Republic of Venezuela (“Venezuela”) concerns the interpretation of the 1999 Law on Promotion and Protection of Investments (“LPPI”) enacted by the recently elected President Chávez. There is no word in the award as to the underlying dispute between the parties. In fact, the only question put to the Arbitral Tribunal and decided upon in this award is whether the LPPI contains Venezuela’s consent to ICSID jurisdiction to resolve disputes with a foreign investor. It is worth quoting in full the relevant section of the LPPI, relied upon by Brandes:

Disputes arising between an international investor, whose country of origin has in effect with Venezuela a treaty or agreement for the promotion and protection of investments, or disputes to which are applicable the provisions of the Multilateral Investment Guarantee Agency (MIGA), or the Convention on the Settlement of Investment Disputes

<sup>22</sup>) *ATA – Discontinuance*, para. 33.

<sup>23</sup>) *Id.*

<sup>24</sup>) ICSID Case No. ARB/08/3 [*Brandes – Award*].

<sup>25</sup>) Appointed by the Chairman of the Administrative Council of ICSID.

<sup>26</sup>) Appointed by the Claimant.

<sup>27</sup>) Appointed by the Respondent.

between States and Nationals of Other States (ICSID), shall be submitted to international arbitration, according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of using, if appropriate, the dispute resolution means provided for under the Venezuelan legislation in effect, when applicable.

The dispute between the parties concerned only those disputes “to which are applicable” the provisions of the ICSID Convention. Brandes considered that the LPPI contained sufficient wording to allow it to bring such a dispute to international arbitration under the ICSID Convention. Its argument was that Venezuela’s consent to ICSID arbitration was, in fact, embodied in this provision.

In rejecting the Claimant’s position and deciding that the LPPI does not contain Venezuela’s consent to ICSID arbitration, the Arbitral Tribunal first came to the conclusion that a grammatical analysis was not conclusive given that “the wording of Article 22 of the LPPI is confusing and imprecise”.<sup>28</sup>

The Arbitral Tribunal then assessed the LPPI’s context, goals and circumstances in which it was enacted, including decisions of the Supreme Court of Venezuela. It also gave weight to the decisions rendered on the same question by ICSID arbitral tribunals, as in the cases of *Mobil Oil v. Venezuela* (ICSID Case No. ARB/07/27) and *Cemex v. Venezuela* (ICSID Case No. ARB/08/15). In both instances, the arbitral tribunals decided that Venezuela had not given its consent to ICSID arbitration in the LPPI.

Without developing its line of reasoning much, and quite abruptly, the Arbitral Tribunal concluded by holding that it is “obvious” that the LPPI does not contain Venezuela’s consent to ICSID arbitration.

## VI. Joint Commentaries

### **Decision on Jurisdiction and Admissibility of 4 August 2011, *Abaclat and Others (Case formerly known as *Giovanna a Beccara and Others*) v. The Argentine Republic***<sup>29</sup>

<sup>28</sup>) Brandes – Award, para. 86.

<sup>29</sup>) ICSID Case No. ARB/07/5 [*Abaclat – Jurisdiction*]. The dissenting opinion of G. Abi-Saab was issued a few months later on 28 October 2010 and will also be addressed in the present analysis.

**Recommendation pursuant to the Request by ICSID dated November 18, 2011 on the Respondent's Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg dated September 15, 2011 of 19 December 2011, *Abaclat (Case formerly known as Giovanna a Beccara and Others) v. The Argentine Republic***<sup>30</sup>

*Composition of the Arbitral Tribunal: Prof. Pierre Tercier,*<sup>31</sup> *President; Prof. G. Abi-Saab*<sup>32</sup> *and Prof. A-J van den Berg,*<sup>33</sup> *Arbitrators.*

*jurisdiction and admissibility – dissenting opinion – notion of investment – sovereign debt – mass claim – class action – disqualification – PCA*

If there is one ICSID decision which should be read and analyzed in 2011, it is that of *Abaclat and Others v. Argentina*, as it raises novel questions, particularly pertaining to the jurisdiction of a tribunal and the admissibility of claims. The numerous and varied articles written on this case and the important dissenting opinion of Arbitrator Abi-Saab are symptomatic of the importance of the said decision of 4 August 2011, and not only due to the amount in dispute of over a billion dollars.

The Arbitral Tribunal had to rule, originally, on the claims brought by about 195,000 claimants, allegedly representing around USD 4.4 billion in bond-holdings on the basis of the provisions contained in the BIT between Italy and Argentina. The claims were brought to arbitration in February 2007, both by institutional and individual investors in response to Argentina's default and a later partial restructuring of its sovereign debt.<sup>34</sup>

However, in 2010, a large number of claimants withdrew from the ICSID claim after accepting a settlement offer by Argentina. In 2011, the case was announced as still ongoing, being brought now by some 60,000 claimants, with holdings of around USD 1.5 billion.<sup>35</sup>

<sup>30</sup> ICSID Case No. ARB/07/5 – PCA Case No. IR 2011/1 – Decision taken by the Secretary General of the PCA [*Abaclat – Disqualification*].

<sup>31</sup> Appointed by agreement of the Parties in replacement of R. Briner.

<sup>32</sup> Appointed by the Respondent.

<sup>33</sup> Appointed by the Claimants.

<sup>34</sup> For the complete factual background: *Abaclat – Jurisdiction*, paras. 8–97.

<sup>35</sup> *The American Lawyer – Focus Europe*, Summer 2011, page 31. It was formerly known as the *Beccara and Others v. Argentina* case, one of the Claimants that withdrew its claims due to the settlement reached with Argentina.

The jurisdictional decision commented upon hereafter provides the first concrete support for accepting that foreign creditors of a defaulting State can rely on ICSID arbitration for resolving their sovereign debt-related disputes. It will thus be interesting to analyze the various jurisdictional issues (A) before analyzing the admissibility issues raised (B). Further, the decisions taken with a majority, accepting jurisdiction, have led to a disqualification procedure launched by Argentina against the two majority arbitrators (C). For the sake of completeness, we will comment on and analyze the issues raised by the dissenting arbitrator whenever necessary.

A. *The Two Main Jurisdictional Issues: razione materiae and razione loci*

Before analyzing the jurisdictional issues, the Arbitral Tribunal decided to give a lesson in international investment law by setting out, in its view, the applicable rules and principles to determining its jurisdiction.<sup>36</sup> It is not absolutely certain whether this reasoning was necessary, but at least it offers a comprehensive summary of the applicable rules and of their content, without, it seems, offering any views on them but for saying that some provisions of the BIT contain nothing “*out of the ordinary*”.<sup>37</sup>

We will focus our analysis on two of the jurisdictional issues raised, namely whether an investment was made (1.), and whether it was made on Argentinean territory (2.). The other jurisdictional issue, which concerned the “umbrella clause” and the contract/treaty claim distinction, will not be analyzed as the Tribunal deemed it unnecessary to fully investigate the issue since the claims at stake were of “*treaty nature*”.<sup>38</sup>

1. *Can a Sovereign Bond Constitute an Investment under the BIT and the ICSID Convention?*

The central question was thus not only whether a sovereign bond could constitute an investment, but also if the Claimants, who did not hold the Argentinean bonds directly, held investments under both the BIT and the Washington Convention.

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<sup>36)</sup> *Abaclat – Jurisdiction*, paras. 251–298.

<sup>37)</sup> *Abaclat – Jurisdiction*, para. 266.

<sup>38)</sup> *Abaclat – Jurisdiction*, para. 332.

For the latter, the Tribunal ascertained that it “*is concerned mainly with dispute resolution rules*” as a preliminary point in order to weaken any substantial rules deriving from the Convention and regarding jurisdiction.<sup>39</sup>

While this appears to be true, the philosophy behind the Convention and the approach of the drafters illustrate that the instrument is more than just a set of procedural rules but has, instead, some substance that can be found in a proper interpretation of its various provisions. We are thus not convinced by this abrupt affirmation whose purpose was, in reality, to reject entirely any test, particularly the *Salini test*, invoked by Argentina. However, we rather agree on the interpretation of the symbiosis between these two instruments, creating what we have called a “double hurdle test”:<sup>40</sup>

350. Thus, within this interpretation, as it arises further from the wording of Article 1(1) and the aim of the BIT, the definition of investment provided in the BIT focuses on what is to be protected, i.e., the fruits and value generated by the investment, whilst the general definitions developed with regard to Article 25 ICSID Convention focus on the contributions, which constitute the investment and create the fruits and value. In summary, a certain value may only be protected if generated by a specific contribution, and – vice versa – contributions may only be protected to the extent they generate a certain value, which the investor may be deprived of.

351. In other words, if it is to be applied, the “double barrelled” test does not mean that one definition, namely the definition provided by two Contracting Parties in a BIT, has to fit into the other definition, namely the one deriving from the spirit of the ICSID Convention. Rather, it is the investment at stake that has to fit into both of these concepts, knowing that each of them focuses on another aspect of the investment.<sup>41</sup>

Although some authors have indicated that the Tribunal rejected the *Salini test*, this is in fact not entirely true; rather, it in fact refused the limitation that such a test could impose on the notion of investment, but indicated that the test provided an example of the characteristics of the

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<sup>39)</sup> *Abaclat – Jurisdiction*, para. 348.

<sup>40)</sup> J. Fouret & D. Khayat, “ICSID Case Law Review” (2012) 11.1 LPICT 137, at 151 *et seq.*

<sup>41)</sup> *Abaclat – Jurisdiction*, paras. 350–351.

“contribution” made by an investment. This liberal approach is not fully convincing given that the *Salini* characteristics are important, even if not compulsory, because a fully subjective definition of investment could lead to simple sales contracts being qualified as investments. Indeed we believe that “*a private party and a state contracting with each other are not at liberty to create their own definition of an investment under the ICSID Convention*”.<sup>42</sup> We fear that the route chosen by this Tribunal is exactly this one, potentially depriving the word ‘investment’ of any specific meaning.

But this question of principle on the notion of investment does not mean that, in the end, the qualification retained by the Tribunal is wrong in our opinion. Indeed, the result is the same because these bonds do fit into the mould of an investment, from whichever angle you look at them.<sup>43</sup>

Indeed, the assets at stake are “security entitlements” to sovereign bonds and the relevant BIT clearly protected assets such as bonds, as well as security entitlements to such bonds “*representing the financial value held by the holder of the security entitlement in the bond issued by Argentina*.”<sup>44</sup>

Since “*Claimants made contributions, which led to the creation of the value that Argentina and Italy intended to protect under the BIT*”,<sup>45</sup> and in fact met the *Salini test*, these bonds are a contribution which qualifies as an investment.

## 2. A Very Flexible, But Sensible Territorial Requirement

Another question of importance was that of *ratione loci* jurisdiction to determine whether the Claimants actually invested in Argentina. The Respondent indicated that there had not, in fact, been any investment in its territory because the price paid for these security entitlements was never made on Argentinean soil, or transferred there, with most of the individuals making their purchases through a bank.

Using a *Salini test* criterion, without naming it as such, the majority of the Tribunal indicated that the important issue was in fact:

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<sup>42</sup> *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Award of 13 March 2009, at para. 235 and our support of this approach in J. Fouret & D. Khayat, “Centre international pour le règlement des différends relatifs aux investissements” (2009) 22.2 RQDI 232, at 249 and J. Fouret & D. Khayat, “ICSID Case Law Review” (2012) 11.1 LPICT 137, at 151 *et seq.*

<sup>43</sup> *Abaclat – Jurisdiction*, paras. 368–372.

<sup>44</sup> *Abaclat – Jurisdiction*, para. 357.

<sup>45</sup> *Abaclat – Jurisdiction*, para. 365.

that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina's economic development. Whether the funds were actually used to repay pre-existing debts of Argentina or whether they were used in government spending is irrelevant. In both cases, it was used by Argentina to manage its finances, and as such must be considered to have contributed to Argentina's economic development and thus to have been made in Argentina.<sup>46</sup>

We fully agree with this approach as it is indeed the end result that matters: the impact in Argentina of a flow of investment coming from the Claimants, even if indirectly, with that very purpose.

It is now clear, as it was for the majority of the Tribunal, that in cases involving purely financial issues, "*the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred.*"<sup>47</sup>

These jurisdictional hurdles passed, Claimants faced an admissibility issue due to the nature of these mass claims.

#### *B. Are Mass Claims Admissible Before an ICSID Arbitral Tribunal?*<sup>48</sup>

The main admissibility argument, and the very novel one, concerns the issue of whether mass claims, such as the present case with 60,000 claimants, are admissible in ICSID arbitrations, since the Washington Convention is silent on "*collective proceedings*".<sup>49</sup>

The first issue raised is therefore the absence of any such reference in the ICSID Convention. We can only agree with the Tribunal that this is a "gap" and that there is nothing, in the text or the drafting history, which envisaged such a possibility. This allows the Arbitral Tribunal to accept such claims,

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<sup>46)</sup> *Abaclat – Jurisdiction*, para. 378.

<sup>47)</sup> *Abaclat – Jurisdiction*, para. 374.

<sup>48)</sup> It is on this issue that most of the criticisms of the dissenting arbitrator are concentrated at paragraphs 120 to 274, qualifying the attitude of the Tribunal as a flagrant violation of the due process rights of Argentina at para. 244. While we do not agree with this approach, we also believe that the dissenting arbitrator fails to grasp the necessary practical concern in this type of situation, which does not in any event impact on the due process rights of Argentina if the principles and conditions laid down for accepting mass claims, as explained here below, are respected.

<sup>49)</sup> *Abaclat – Jurisdiction*, para. 516.

within the limitations granted by Article 44 of the ICSID Convention and 19 of the ICSID Arbitration Rules.<sup>50</sup>

The second issue is therefore the powers of the Tribunal under the aforementioned articles. It is indeed possible to fill the gap, when necessary, without actually changing/amending the rules, but rather permitting a situation to be envisaged which was not foreseen when the Convention was drafted, but which clearly appears to be in the scope of the mandate given to ICSID by its drafters. This is evidently the case in the present dispute.<sup>51</sup>

The third issue regards the necessary adaptation for the procedure, due to its collective nature, without breaching the ICSID Convention and Rules. For the Tribunal, it “*concerns the method of the Tribunal’s examination, as well as the manner of representation of Claimants. However, it does not affect the object of such examination. Further, the Tribunal remains obliged to examine all relevant aspects of the claims relating to Claimants’ rights under the BIT as well as to Respondent’s obligations thereunder subject to the Parties’ submissions. Thus, it is the manner in which the Tribunal will conduct such examination which may diverge from usual ICSID proceedings.*”<sup>52</sup> It is thus the usual practice of conducting proceedings that will change, no more than that, and it is indeed the role of arbitrators to adapt their procedure, within the framework under which they operate, to every particular case. There is nothing different here in essence, and it is a rather interesting and original approach taken by the Tribunal which should be appraised, allowing individuals to bring ICSID claims in a group, where it would have been unfeasible to do so individually.

The fourth and final issue derives from the previous one, namely that in order to accept these types of claims, they must be sufficiently homogeneous to be decided together by a single tribunal.<sup>53</sup> This is the case presently, which does not deprive Argentina of defense rights (rather, it preserves it from 60,000 separate legal actions).<sup>54</sup>

Finally, the Tribunal anticipates some of the criticisms that it may face, such as the one from the dissenting arbitrator, which indicates that it did not draft the instruments but only applied provisions, notably of a BIT, that

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<sup>50)</sup> *Abaclat – Jurisdiction*, paras. 518–520.

<sup>51)</sup> *Abaclat – Jurisdiction*, paras. 521–528.

<sup>52)</sup> *Abaclat – Jurisdiction*, para. 533.

<sup>53)</sup> *Abaclat – Jurisdiction*, paras. 534–544.

<sup>54)</sup> *Abaclat – Jurisdiction*, para. 545.

were agreed between Italy and Argentina. We cannot but agree with the Tribunal's conclusion on this issue:

Policy reasons are for States to take into account when negotiating BITs and consenting to ICSID jurisdiction in general, not for the Tribunal to take into account in order to repair an inappropriately negotiated or drafted BIT. The present BIT is clear, it includes bonds and security entitlements [...]. Whether or not ICSID is the best way to deal with a dispute relating to these bonds and security entitlements in the context of foreign debt restructuring is irrelevant. The Parties chose ICSID arbitration for this kind of dispute. They, as well as the Tribunal, are bound by such choice and cannot evade it based on controversial policy reasons.<sup>55</sup>

We can indeed wonder if ICSID is the best forum for such claims. But the fact is that such an avenue was agreed upon by the States in question and was open to investors. And there is nothing this Tribunal could have done to decide otherwise under such BIT provisions. It is now for the States to reflect on their BIT drafting if they would prefer not to include such types of disputes in their BIT provisions.

### *C. The Disqualification Procedure or Argentina's Attempt to Remove the Two Remaining Arbitrators*

After having issued his strongly worded dissenting opinion, Prof. Abi-Saab resigned from the Tribunal and was replaced by Santiago Torres Bernardez. The two remaining arbitrators were challenged by Argentina for lack of independence and impartiality in their decision making process. Without being overly cynical, it appears that Argentina, being a disgruntled party, just wanted to remove the arbitrators that rendered decisions that were not in its favor.<sup>56</sup>

The Secretary General of the PCA, faced with three different grounds for disqualification, namely refusal to grant provisional measures, limitation of the right of defense and prejudgment, after thoroughly analyzing all the

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<sup>55</sup>) *Abaclat – Jurisdiction*, para. 550.

<sup>56</sup>) The Secretary General of the PCA does not say otherwise: *Abaclat – Disqualification*, paras. 79, 102 and 157.

arguments presented, had no choice but to say that there is no “evidence that the majority of the Tribunal was influenced by anything other than its analysis of the arguments which the parties presented”.<sup>57</sup>

The disqualification request was thus rejected and the Tribunal remains in place with a new third arbitrator.

In conclusion, it is interesting to note that two other cases are pending for Italian creditors against Argentina, namely *Giordano Alpi and Others v. Argentina* and *Giovanni Alemanni and Others v. Argentina*. Neither of them have the same Tribunal, nor have they rendered a decision yet. Thus, considering some of the very difficult issues raised, the cases do throw open the possibility for the three tribunals to take opposing views.

Finally, it is also worth noting, alongside the policy consideration raised by the Arbitral Tribunal, that this decision opens possibilities for creditors, who sometimes have no other options available, in the case of sovereign defaults or imposed restructurings. Whether this is a positive or negative development is another question, but the fact is that the drafting of most BITs, as they stand, do offer such a potential. It is thus up to the States to modify such provisions if they do not want to offer such a possibility, but tribunals are clearly not to blame if indeed this possibility is opened to investors.

## VII. Award, *Libananco Holdings Co. v. Republic of Turkey*<sup>58</sup>

*Composition of the Arbitral Tribunal: Mr. Michael Hwang S.C.,*<sup>59</sup> *President; Mr. Henri C. Alvarez QC*<sup>60</sup> *and Sir Franklin Berman QC,*<sup>61</sup> *Arbitrators.*

*ratione personae jurisdiction – Energy Charter Treaty – ownership of shares – evidence of fraud – forensic investigations – allocation of costs*

The *Libananco* case and the decisions rendered by the Arbitral Tribunal read quite like a detective story. The authors of this section had previously

<sup>57</sup> *Abaclat – Disqualification*, paras. 80, 102 and 157.

<sup>58</sup> ICSID Case No. ARB/06/8 [*Libananco – Award*].

<sup>59</sup> Appointed by the Chairman of the Administrative Council of ICSID.

<sup>60</sup> Appointed by the Claimant.

<sup>61</sup> Appointed by the Respondent.

published a commentary on the Decision on Preliminary Issues, which was rendered on 23 June 2008.

Libananco Holdings Co. Limited (“Libananco”) is a Cypriot company which held stakes in two Turkish utility companies. The concession granted by Turkey to these companies was cancelled in June 2003, in the context of a political dispute between the man allegedly behind these investments, Cem Uzan, and other Turkish political figures.

The main issue at stake in the arbitration was whether Libananco was the actual owner of shares in the Turkish companies subjected to the cancellation of their licenses. The question put to the Arbitral Tribunal was mainly one of evidence, with direct consequences on jurisdiction. Indeed, Libananco grounded the jurisdiction of the Arbitral Tribunal on the Energy Charter Treaty, to which both Cyprus and Turkey are parties. If Libananco established ownership of the shares, then the Arbitral Tribunal could move to an analysis of the alleged breaches of the protection of foreign investors under the Energy Charter Treaty. As put by the Arbitral Tribunal, “*Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent*”.<sup>62</sup> However, the entire case was almost completely overshadowed by the fraud allegations made by Turkey against Libananco, including accusing it of a fraudulent attempt to rely on the ECT, by way of a complex scheme of bearer shares. The Arbitral Tribunal never went as far as even considering Libananco’s claims on the merits or even setting them out. Bifurcation of the proceedings was ordered and, in the present award, the Arbitral Tribunal found, as it had been argued by Turkey, that it did not have jurisdiction to hear Libananco’s claims.

The Award contains long and detailed accounts of the depositions of various witnesses involved in the constitution of the bearer-share company structure that was allegedly owned by Libananco.<sup>63</sup> Those accounts, which deal with matters such as family divorce and the very concrete way in which the bearer shares were apparently physically exchanged, are fascinating. The analysis of the forensic evidence concerning various share transfer documents, floppy disks and audio recordings of telephone conversations (telephone tapping had been one of the issues dealt with in the

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<sup>62</sup>) *Libananco – Award*, para. 128.

<sup>63</sup>) *Libananco – Award*, paras. 160–348.

2008 Decision on Preliminary Issues) is also remarkable and uncommon in ICSID arbitration (as well as in the immense majority of commercial arbitrations). The description of the efforts made by various forensic experts to find traces of backdating or alterations, and the extent of the investment made in these technical services, demonstrate how much this arbitration meant for each side, and leaves no doubt as to the intense political pressure that the *Libananco* case was shrouded in.

The Arbitral Tribunal then undertook a comprehensive review of the other evidence brought by the parties with respect to the key issue in this case, that is whether a valid transfer of bearer shares in the Turkish companies was indeed made to Libananco, under Turkish law. Having decided that a valid transfer under Turkish law required “teslim” (i.e. transfer of possession), which in turn requires physical possession and the intent to transfer, the Arbitral Tribunal undertakes a thorough analysis of the many factual aspects of this dispute. For instance, unfazed by details, the Arbitral Tribunal goes as far as examining the records of passenger planes and their routes to determine whether a certain individual did fly to Cyprus on a given date. This may be one of the most detailed examinations of the factual record that any ICSID Tribunal has ever undertaken.<sup>64</sup>

The Arbitral Tribunal’s conclusion is extremely severe for the Claimant. Not only does it find that there is no evidence that Libananco ever acquired ownership of the Turkish utility companies at stake, but it also shares its doubts as to the motivation behind the whole alleged operation:

One striking feature of this case, underscored by the nature and magnitude of the transaction and investment in question, is the absence (even in the context of a family investment) of any form of orderly procedure designed to produce an adequate written record and compliance with the legal requirements that had to be met in order to achieve the desired factual result. Indeed, the evidence shows that even basic corporate and legal documents (many of which would be likely to exist if the facts alleged by the Claimant are true) were neither created nor retained by the persons responsible for managing or otherwise involved in Libananco’s corporate affairs.<sup>65</sup>

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<sup>64</sup>) *Libananco – Award*, paras. 385 *et seq.*

<sup>65</sup>) *Libananco – Award*, paras. 531 *et seq.*

That conclusion is very telling of the Arbitral Tribunal's views on whether or not the Claimant had come with clean hands to this arbitration. It adds: "*The failure of the Claimant's witnesses to comply with the relevant legal requirements (which could easily have been complied with) is suspect, since no convincing reason for such non-compliance was forthcoming.*"

With no evidence of ownership of the shares, Libananco cannot be considered to be a protected investor under the Energy Charter Treaty: "*Accordingly, the Tribunal finds that the Claimant has not proved that it owned the shares in ÇEAŞ and Kepez, which represent the 'Investment' in this arbitration, by the critical date of 12 June 2003.*"<sup>66</sup>

Although not required given this conclusion, the Arbitral Tribunal then goes on to analyze two specific questions of interpretation of the Energy Charter Treaty<sup>67</sup> before turning to the question of costs.

It is rare that the issue of costs is worthy of specific attention. However, in this case, the sheer magnitude of the costs claimed by the parties does warrant a brief review. On the basis of information publicly available, this case is, by far, the costliest of all ICSID cases. On the Claimant's side, the costs are detailed to be for a total of more than USD 24 million, including some USD 18 million on legal fees and more than USD 6 million on expenses (mostly presumably on forensic experts), in addition to ICSID costs. On the Respondent's side, the amounts are even more considerable. The Respondent claims a total of USD 35.7 million in legal fees and some USD 10 million in experts. The *Libananco* arbitration was therefore one which cost more than USD 50 million for a 5-year proceeding, yet which did not even reach the merits and damages stage. On this matter, the Arbitral Tribunal noted in a very subdued way: "*the amounts claimed are very substantial indeed*"<sup>68</sup> before ordering the Claimants to pay Turkey a hefty proportion of the costs the State incurred, in an amount of USD 15 million.

<sup>66</sup>) *Libananco – Award*, para. 536.

<sup>67</sup>) Namely whether Turkey did consent to arbitration under the Energy Charter Treaty given that it has opted to be listed in Annex ID to the Convention which contains those countries that limited their unconditional consent to arbitration to matters not previously submitted to national courts (at para. 539 *et seq.*) and whether the denial of benefits clause provided for at Art. 17 of the ECT applies to Libananco (at para. 549 *et seq.*).

<sup>68</sup>) *Libananco – Award*, para. 562.

### VIII. Decision on Jurisdiction, *Hochtief AG v. Argentine Republic*<sup>69</sup>

*Composition of the Arbitral Tribunal: Prof. Vaughan Lowe QC,<sup>70</sup> President; Judge Charles N. Brower<sup>71</sup> and Mr. J. Christopher Thomas QC,<sup>72</sup> Arbitrators.*

*Most favored nation clause – reliance on MFN to extend dispute settlement provision – mandatory submission of the dispute to national courts – meaning of “most favorable” – jurisdiction racione personae – minority shareholder*

The decision on jurisdiction rendered on 24 October 2011 is an extremely well-reasoned and convincing one, and covers the thorny issue of the interpretation of the most favored nation (MFN) provisions in the context of bilateral investment treaties, particularly when it comes to applying such clauses to dispute settlement provisions.

The dispute between Hochtief AG, a German company, and the Argentine Republic arose from a 25-year concession awarded to Hochtief and other companies for the construction, maintenance and operation of toll roads and bridges in certain areas in Argentina. The project was operated by way of a locally incorporated company, Puentes del Litoral (hereinafter “PdL”) in which Hochtief owned 26% of the share capital.

Argentina raised several objections to the jurisdiction of the Arbitral Tribunal, the first and main one relating to the requirement, under Article 10 of the 1991 Treaty for the promotion and reciprocal protection of investments between Germany and Argentina (hereinafter the “BIT”), to submit disputes to local Argentinean courts for a period of 18 months before resorting to arbitration. Other issues of jurisdiction were also resolved by the Arbitral Tribunal.

#### *A. The Scope of the MFN Provision and Whether It Could Extend to Dispute Settlement Provisions*

The extent of an investor’s reliance on the MFN provisions in bilateral investment treaties is one of the most fiercely debated questions in

<sup>69</sup>) ICSID Case No. ARB/06/1 [*Hochtief – Decision*].

<sup>70</sup>) Appointed by the Co-Arbitrators.

<sup>71</sup>) Appointed by the Claimant.

<sup>72</sup>) Appointed by the Respondent.

investment arbitration. Several arbitral tribunals have had to deal with this question and have often reached contradictory decisions.<sup>73</sup>

Among the most hotly contested issues is that of whether an investor can validly rely on the MFN provision to rely on the most favorable dispute settlement provisions of another treaty signed by the host State of the investment.

In the case at hand, Article 10 of the BIT provided that a dispute between an investor and a contracting State may be submitted to ICSID arbitration “*at the request of one of the parties to the dispute where, after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision has been made but the Parties are still in dispute*”.

The investor had not brought the dispute before local Argentinean courts but sought to rely on the MFN provision of the BIT to “import” the most favorable dispute settlement provision of the Chilean-Argentinean bilateral investment treaty. That provision did not require the investor to bring its claim before national courts at all before initiating arbitration. On the contrary, Argentina argued that the MFN provision was only applicable to what it called “substantive protections” under the BIT, which it alleged did not include the dispute resolution provisions.

The Arbitral Tribunal found that the foreign investor could rely on the MFN provision to, in turn, rely on the more favorable Chile-Argentina dispute settlement provision. It reached this conclusion in the following steps:

First, the Arbitral Tribunal analyzed whether MFN provisions could apply to dispute settlement. Given that the wording of the BIT’s MFN provision required that most favored nation entitlement applies to investors “as regards their activity in connection with investments in its territory”, the Arbitral Tribunal had to consider whether dispute resolution can be considered to be “an activity in connection with an investment”. The

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<sup>73</sup> For our analysis of the MFN clause in past cases, see J. Fouret & D. Khayat, “ICSID Case Law Review” (2012) 11.1 LPICT 137, at 147 *et seq.* and J. Fouret & D. Khayat, *Recueil des commentaires des décisions du CIRDI (2002–2007)*, Bruylant (2009), at 261–270, 285–287, 313–315 and 445–447 and for an analysis of the MFN clause and its possible limits, see A. Cohen-Smutny & Lee A. Steven, “The MFN Clause: What are its Limits” in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements – A Guide to the Key Issues*, Oxford University Press (2010), 351.

Arbitral Tribunal had no difficulty in deciding that it was indeed the case considering that a different conclusion would be “*nonsensical because the right to enforcement is an essential component of the property rights themselves, and not a wholly distinct right*”.<sup>74</sup> The Arbitral Tribunal’s conclusion did not leave any doubt as to the importance of the dispute resolution provision being covered by the protection offered by the BIT as “*a protective right that sits alongside the guarantees against arbitrary and discriminatory measures, expropriation and so on*”.<sup>75</sup>

Second, the Arbitral Tribunal considered whether applying the MFN provision would give investors “new rights”, which may be a step too far given that it could, accordingly, be argued that the MFN provision could not create a right to go to arbitration where this right did not exist before. Here, too, the Arbitral Tribunal easily found that the “*18-month pre-arbitration litigation requirement*” of the BIT did not preclude arbitration but simply framed it in conditions of time that could easily be met. As the Arbitral Tribunal found, the MFN provision did not grant Hochtief a new right to arbitrate but rather allowed it to reach the same position, i.e. initiating an arbitration, by “*doing so more quickly and more cheaply, without first pursuing litigation*”.<sup>76</sup>

Third, the Arbitral Tribunal examined whether resorting to arbitration under the Chilean-Argentinean bilateral investment treaty would indeed be “more favorable” than under the provisions of the BIT. The Arbitral Tribunal’s decision is piercingly clear in deciding that “*whatever the substantive merits of litigation and arbitration, it is always more favorable to have the choice as to which to employ than it is not to have that choice*”.<sup>77</sup>

Finally, the Arbitral Tribunal rejected a final objection by Argentina, according to which Argentina argued that the MFN “advantage” can only be given in the territory of Argentina itself, whereas ICSID arbitrations are fully international. The Arbitral Tribunal was unfazed by the argument and considered that the relevant territorial treatment at stake, for the application of the MFN provision, was Argentina’s refusal to allow the Claimant to

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<sup>74</sup>) *Hochtief – Decision*, para. 67.

<sup>75</sup>) *Hochtief – Decision*, para. 68.

<sup>76</sup>) *Hochtief – Decision*, para. 85.

<sup>77</sup>) *Hochtief – Decision*, para. 100.

pursue arbitration and “*that conduct cannot be said to be conducted outside the territory of the Respondent for the purpose of*” the MFN provision.<sup>78</sup>

Reference should be made here to the very detailed dissenting opinion of Mr. J. Christopher Thomas, who took the opposite position regarding the MFN provision. The premise of his opinion is that there was no agreement to arbitrate in the BIT, as it stood, i.e. before the expiry of the 18-month mandatory pre-arbitration litigation period. He also goes on to add that, in his view, the Arbitral Tribunal can only consider whether the MFN provision extends to dispute settlement if it had jurisdiction to make such a determination. However, as discussed, there was no mutual consent to arbitrate, as things stood. Finally, Mr. Thomas elaborated on the wording of the MFN provision, which he did not think applied to the dispute settlement provision of the BIT, and on the structure of the treaty in order to further bolster his conclusions.

#### B. *The Investor’s Standing to Claim under the BIT*

The Arbitral Tribunal also had to decide upon the Respondent’s objection that Hochtief lacked standing to present its claim, because it only owned 26% of the shares of the Argentinean company that allegedly suffered the loss. Referring to the definition of “investment” under the BIT which includes “shares, stocks in companies and other forms of participation”, without limitation, the Arbitral Tribunal rejected the argument and concluded that it had no doubts that “*Hochtief made an investment in Argentina [...] and that it is an investor under the BIT*”.<sup>79</sup>

### IX. Award, *El Paso Energy International Company v. The Argentine Republic*<sup>80</sup>

*Composition of the Arbitral Tribunal: Prof. Lucius Caflisch,<sup>81</sup> President; Prof. Piero Bernardini<sup>82</sup> and Prof. Brigitte Stern.<sup>83</sup>*

<sup>78)</sup> *Hochtief – Decision*, para. 110.

<sup>79)</sup> *Hochtief – Decision*, para. 119.

<sup>80)</sup> ICSID Case No. ARB/03/15 [*El Paso – Award*].

<sup>81)</sup> Appointed by the Chairman of the Administrative Council of ICSID.

<sup>82)</sup> Appointed by the Claimant.

<sup>83)</sup> Appointed by the Respondent.

*Definition of investment – notion of indirect expropriation – fair and equitable treatment – legitimate expectations – full protection and security – discriminatory and arbitrary treatment – state of necessity*

The proceedings initiated by El Paso Energy International Company (“El Paso”), a Delaware company, against Argentina could have been brought to an end with the final award rendered on 31 October 2011, which ordered Argentina to pay in the region of USD 43 million plus substantial interest. However, the readers of this case law review section will see that this case still goes on, given that an application for the annulment of the award was lodged by Argentina and registered with ICSID.

A previous decision on jurisdiction had been rendered in this matter on 27 April 2006. The Arbitral Tribunal then found in favor of jurisdiction on the basis of the 1991 Bilateral Investment Treaty between the United States and Argentina (the “BIT”).

El Paso’s claims stemmed from the financial crisis that hit Argentina in 2001/2002. The Arbitral Tribunal’s description of the measures is so clear that it deserves to be quoted in full:

Beginning in Spring of 2001, the GOA took a series of measures: elaboration of a plan to switch the convertibility regime from the dollar to a basket of US dollars and euros; tax-exemption measures to assist the economic sectors most affected by the recession; and a “mega-swap” of outstanding government bonds for instruments with longer periods of maturation. These measures had little effect: capital flight and deposit runs generated a partial deposit freeze. When Argentina failed to comply with the fiscal targets set, the IMF declined to make a payment for December 2001.

At the end of 2001, savings were massively withdrawn from the banks. In order to control the situation, the Government issued Decree No. 1570/01, known as “Corralito,” on 1 December 2001, restricting bank withdrawals and prohibiting any transfer of currency abroad. The situation led to demonstrations and tens of deaths in December 2001, and these, in turn, brought about the resignation of President de la Rúa on 20 December 2001. It can be noted that within a period of less than ten days, Argentina had a succession of five Presidents, who resigned one after the other. According to the GOA, “Argentina seemed to be on

the brink of anarchy and the abyss.” The situation was indeed critical, and at the end of that month Argentina partly defaulted on its international obligations and abandoned the convertibility regime, replacing it by a dual exchange-rate system.<sup>84</sup>

El Paso’s claims derived mainly from the demise of the convertibility regime and the “pesification” of the economy. According to the investor, “*These measures, according to the Claimant, turned the electric power sector into a strictly regulated industry operating with price caps and other requirements which made it difficult to earn a profit and even to retrieve investments.*”<sup>85</sup> The details of such measures are provided by the Arbitral Tribunal with respect to the electricity sector<sup>86</sup> and the hydrocarbon sector<sup>87</sup> in which the Claimant had made its investments.

According to the investor, Argentina’s actions breached various provisions of the BIT, including those on expropriation, discriminatory treatment, fair and equitable treatment and full protection and security. Argentina denied these allegations and argued that, even if they were true, they do not constitute a breach of its treaty obligations towards United States investors as they were justified under the state of necessity exception in Article XI.

The 281-page award is so comprehensive and dense that only a very brief overview can be provided, focusing on the striking points.

#### A. *The Extent of El Paso’s Investment in Argentina*

El Paso’s position on what constitutes its investment in Argentina raised interesting questions regarding the definition of the notion of investment under the BIT. El Paso claimed that its investment in Argentina was constituted of both the shares of local Argentinean companies that it owned as well as the contracts and licenses of such local companies. The Arbitral Tribunal disagreed. In clear terms, it distinguished what “is” El Paso’s investment (i.e. the shares it held in the local companies) from what “is not” El Paso’s investment (the rights held by the local companies).

<sup>84</sup>) *El Paso – Award*, at para. 90 *et seq.*

<sup>85</sup>) *El Paso – Award*, at para. 96.

<sup>86</sup>) *El Paso – Award*, at para. 98 *et seq.*

<sup>87</sup>) *El Paso – Award*, at para. 105 *et seq.*

The Arbitral Tribunal's analysis on this point is largely based on its refusal to compensate El Paso twice, once for the loss of value of its shares and a second time for the violations of the contractual rights of the companies in which it had a stake.<sup>88</sup> It remains to be seen if the Arbitral Tribunal's decision would have been the same if the investor had clearly limited its claims to the value of the contractual rights of the local companies, to the exclusion of the value of its shareholding in such companies.

### B. *The Scope of the Notion of Indirect Expropriation*

The investor's position was that the Respondent's actions amounted to the indirect expropriation of its investment in Argentina. The Arbitral Tribunal's definition of the notion of indirect expropriation emphasized the following positions: (1) general regulations cannot be considered to amount to indirect expropriation unless they are unreasonable<sup>89</sup> and (2) for an indirect expropriation to exist, at least one aspect of the property rights must have disappeared,<sup>90</sup> while a mere loss of value cannot be considered as an indirect expropriation.<sup>91</sup> The Arbitral Tribunal's developments on these questions are comprehensive and detail the case law of ICSID Tribunals which have previously decided similar issues.

The Arbitral Tribunal rejected El Paso's claims of indirect expropriation by deciding that the Argentinean measures did not deprive the investor of control over its investment<sup>92</sup> and that no forced sale of any of El Paso's shares or assets occurred.<sup>93</sup>

The Arbitral Tribunal also examined El Paso's claim that certain tax measures, decided by Argentina, were also to be considered as an indirect expropriation. On this point, the Arbitral Tribunal stresses that "*the Claimant does not complain about a change of the law; it complains about 'no change in the law.' The only claim here is that the State has not modified its laws in order to alleviate the economic problems resulting for the economic actors from the new economic situation*".<sup>94</sup> For this reason, and also because

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<sup>88</sup>) *El Paso – Award*, at para. 142 *et seq.*

<sup>89</sup>) *El Paso – Award*, at para. 234 *et seq.*

<sup>90</sup>) *El Paso – Award*, at para. 245 *et seq.*

<sup>91</sup>) *El Paso – Award*, at para. 249 *et seq.*

<sup>92</sup>) *El Paso – Award*, at para. 248.

<sup>93</sup>) *El Paso – Award*, at para. 270 *et seq.*

<sup>94</sup>) *El Paso – Award*, at para. 295.

it considered the tax measures to be reasonable, the Arbitral Tribunal rejected El Paso's claims on this ground as well.

### C. *Alleged Discriminatory and Arbitrary Treatment*

The investor's claim that its investment was the subject of discriminatory and arbitrary treatment was based on Article II(2)(b) of the BIT. El Paso argued that Argentina took measures that "*have been designed to benefit other sectors of the economy at the expense of energy companies, thus constituting a politically-motivated and discriminatory transfer of wealth from energy companies to other sectors of the economy*".<sup>95</sup> On both discrimination and arbitrariness, the Arbitral Tribunal found little difficulty in rejecting El Paso's claims because the latter was not able to provide convincing evidence to support its claims.

### D. *Alleged Violation of the Fair and Equitable Treatment Protection Afforded by the BIT*

As is often the case, the allegation of a violation of the fair and equitable treatment provision is the opportunity to attempt to define what is meant by this standard. Indeed, there is no definition of this treatment in the BIT or in any other legal instrument. International law cases have often provided their definition of the standard and so did the Arbitral Tribunal in this case, which took into consideration the fact that the application of this standard should not lead to the "*negation*" of the "*sovereign power of the State to regulate its economy*".<sup>96</sup>

The most important point developed by the Arbitral Tribunal is its understanding of the scope of the legitimate expectations of the investors. Although the Arbitral Tribunal accepts that respecting the legitimate expectations of a foreign investor covered by a bilateral investment treaty is certainly a part of the definition of the standard of fair and equitable treatment, it carefully sets the following limit: "*The Tribunal considers that the notion of 'legitimate expectations' is an objective concept, that it is the result of a balancing of interests and rights, and that it varies according to the context.*"<sup>97</sup>

<sup>95</sup> *El Paso – Award*, at para. 301.

<sup>96</sup> *El Paso – Award*, at para. 340.

<sup>97</sup> *El Paso – Award*, at para. 356.

The Arbitral Tribunal then goes on to provide its reading of the scope of an investor's reasonable expectations and concludes in a statement setting out its definition of this concept, no doubt meant to be as general as possible, to serve as a future reference in this field: "*the legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so*".<sup>98</sup> As detailed by the Arbitral Tribunal, the most important aspect of this definition is that a modification of the legal framework must be either unreasonable or contradict the specific commitments given by the State to a foreign investor.

For reasons that would be too long to detail in this commentary, the Arbitral Tribunal eventually found that, applying the above-mentioned principles, Argentina's actions in the electricity sector or in the oil and gas sector were not undertaken in violation of El Paso's treaty rights under the fair and equitable treatment standard. The Arbitral Tribunal also found that the "pesification" of the Argentinean economy did not violate El Paso's treaty rights either.

In contrast, the Arbitral Tribunal takes a very interesting position on the cumulative effect of those measures. El Paso argued that, taken together, these measures forced it to sell its Argentinean investment at a loss. The Arbitral Tribunal, referring to the *LG&E* case, agrees with this assessment and considers that "*the cumulative effect of the measures was a total alteration of the entire legal setup for foreign investments, and that all the different elements and guarantees just mentioned can be analysed as a special commitment of Argentina that such a total alteration would not take place*".<sup>99</sup> What is more, the Arbitral Tribunal derives from this finding the existence of a notion of a "*creeping violation of the FET standard*" described as a "*a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result*".<sup>100</sup>

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<sup>98</sup>) *El Paso – Award*, at para. 364.

<sup>99</sup>) *El Paso – Award*, at para. 517.

<sup>100</sup>) *El Paso – Award*, at para. 518.

### E. *Other Issues and Damages*

The *El Paso* decision also deals with the interpretation of the umbrella clause provision of the BIT on which the Arbitral Tribunal takes a restrictive decision. Only those breaches of an investment agreement between a party to the BIT and the national of another party are capable of being considered to be elevated to the rank of a treaty violation.<sup>101</sup>

On the thorny question of whether a state of necessity may excuse Argentina's violations of *El Paso's* rights,<sup>102</sup> the Arbitral Tribunal takes a balanced view, in favor of *El Paso*, in line with the decisions rendered by other ICSID tribunals but in contrast with other awards.<sup>103</sup> The Arbitral Tribunal starts by deciding that the BIT provisions on this issue are not self-judging,<sup>104</sup> before finding that Argentina did contribute to the economic crisis of 2001.<sup>105</sup> According to a majority of the Arbitral Tribunal (Arbitrator Stern did not agree with the majority but instead of appending a dissenting opinion, her views are exposed in the award itself):<sup>106</sup> “*Argentina’s failure to control several internal factors, in particular the fiscal deficit debt accumulation and labour market rigidity, substantially contributed to the crisis. The progressive worsening of internal factors diminished Argentina’s ability to respond adequately to external shocks, unlike what happened in other South American countries*”. As a result, the Arbitral Tribunal found that Argentina may invoke the state of necessity to excuse its violations of the BIT.

The Arbitral Tribunal eventually decided on the damages to be awarded to *El Paso* and took the uncommon step of appointing its own expert to assess them. Although *El Paso* has claimed, under different methods, compensation varying between USD 228 million (DCF method) and USD 210

<sup>101</sup> *El Paso – Award*, at para. 531 *et seq.*

<sup>102</sup> *El Paso – Award*, at para. 552 *et seq.*

<sup>103</sup> For the first cases and the discrepancies therein, see, e.g., J. Fouret, “‘CMS c. LG&E’ ou l’état de nécessité en question” (2007) 2 *Rev. arb.* 249 or Jorge E. Vinales, “State of Necessity and Peremptory Norms in International Investment Law” (2008) 14.1 *Law and Business Review of the Americas* 79. See also our commentary on these differences: J. Fouret & D. Khayat, *Recueil des commentaires des décisions du CIRDI (2002–2007)*, Bruylant (2009), at 500 *et seq.* and J. Fouret & D. Khayat, “Centre international pour le règlement des différends relatifs aux investissements” (2008) 21.2 *RQDI* 291, at 366 and 378 *et seq.* as well as the most recent comments on *Impregilo v. Argentina* in our last review J. Fouret & D. Khayat, “ICSID Case Law Review” (2012) 11.1 *LPIC T* 137, at 194 *et seq.*

<sup>104</sup> *El Paso – Award*, at para. 563.

<sup>105</sup> *El Paso – Award*, at para. 649 *et seq.*

<sup>106</sup> *El Paso – Award*, at para. 666 *et seq.*

million (transactions method), the Arbitral Tribunal decided to award only a fraction of this amount, under the DCF method, with revised assumptions, at USD 43.01 million plus interest.

## X. Decision on the Applications for Partial Annulment, *Continental Casualty Company v. The Argentine Republic*<sup>107</sup>

*Composition of the ad hoc Committee: Dr. Gavan Griffith, President; Messrs. Christer Söderlund and Bola A. Ajibola, Members.*

*Annulment – Articles 52(1)(b), (d) and (e) of the ICSID Convention – double application for annulment – failure to state reasons – manifest excess of power – serious departure from a fundamental rule of procedure*

This decision relates to the applications, both from Claimant and Respondent, for partial annulment of the Award of 5 September 2008.<sup>108</sup> The annulment procedure resulted first in a decision on the stay of enforcement of the Award, which granted the continuation of the stay (without providing any guarantee in exchange for such a stay, in large part due to the fact that the amount awarded was so low that the State would not jeopardize its credibility by not paying the Award if it was not annulled).<sup>109</sup>

We will not dwell on the underlying dispute, having previously commented on it<sup>110</sup> and as it is described at length in the decision, but will say that Claimant is a US insurance company that managed a workers' compensation program which suffered a devastating blow due to the measures taken by Argentina during the 2001 financial crisis.<sup>111</sup> Most of the claims

<sup>107</sup> ICSID Case No. ARB/03/9 [*Continental – Annulment*].

<sup>108</sup> Commented on in J. Fouret & D. Khayat, "Centre international pour le règlement des différends relatifs aux investissements" (2008) 21.2 RQDI 291, at 378 *et seq.*

<sup>109</sup> *Continental – Annulment*, para. 20. Commented on in J. Fouret & D. Khayat, "Centre international pour le règlement des différends relatifs aux investissements" (2009) 22.2 RQDI 231, at 262 *et seq.* For the criticism of the absence of guarantee, see J. Fouret, "Stay(ing) on Track or Falling off the Edge: The Absence of Legal Security in the Ad Hoc Committees' Decisions under Article 52(5) of the ICSID Convention" (2012) 27.2 ICSID Rev. – FILJ 1.

<sup>110</sup> J. Fouret & D. Khayat, "Centre international pour le règlement des différends relatifs aux investissements" (2008) 21.2 RQDI 291, at 378 *et seq.*

<sup>111</sup> *Continental – Annulment*, para. 42 *et seq.*

were dismissed and the Tribunal only awarded an amount of around USD 2.8 million.

In unusual fashion, both Claimant and Respondent applied for annulment; the former essentially to annul the finding based on Article XI of the BIT<sup>112</sup> as well as the failure to compensate breaches outside the crisis period, whereas the latter, Argentina, attempted to annul only the recognition by the Tribunal of the violation of fair and equitable treatment.

The analysis of the Committee is quite long but of limited interest for ICSID case law. Our concise analysis will follow that of the Committee and is threefold: first dealing generally, as always, with the principle underlying the ICSID's annulment process, establishing the Committee's understanding of the procedure (A.); then analyzing Continental's grounds for annulment (B.); before turning briefly to those of Argentina (C.)

#### A. *An Ad Hoc Committee with a Mission*

The Committee, at the outset, reaffirmed its limited mandate and its duty not to deviate from such mandate by reviewing the merits and acting as an appellate court.<sup>113</sup>

However, contrary to some of its predecessors,<sup>114</sup> the Committee does adopt the famous *Saipem Dictum*, applicable to arbitral tribunals<sup>115</sup> for annulment procedures, in stating:

Notwithstanding this, in relation to matters which fall within the competence of an ad hoc committee to decide, it is in the Committee's view to be expected that the ad hoc committee will have regard to relevant previous ICSID awards and decisions, including other annulment

<sup>112</sup> The application of that Article by the Tribunal enabled the State to protect its public order and essential security interests.

<sup>113</sup> *Continental – Annulment*, paras. 81–83.

<sup>114</sup> See, for example, the annulment decision in *Duke v. Peru* (ICSID Case No. ARB/03/28) of 1 March 2011, at para. 88 commented on in J. Fouret & D. Khayat, "ICSID Case Law Review" (2012) 11.1 LPICT 137, at 154 *et seq.*

<sup>115</sup> *Saipem v. Bangladesh*, Decision on Jurisdiction (21 March 2007), ICSID Case No. ARB/05/7, para. 67 and the commentary in J. Fouret & D. Khayat, *Recueil des Commentaires des Décisions du CIRDI (2002–2007)*, Bruylant (2009), at 522–523. This *dictum* has since been relied upon notably in *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, Award (8 May 2008), ICSID Case No. ARB/98/2 and *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*, Award (18 August 2008), ICSID Case No. ARB/04/19, para. 117.

decisions, as well as to other relevant persuasive authorities. Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term the emergence of a jurisprudence *constante* in relation to annulment proceedings may be a desirable goal.<sup>116</sup>

As we have already advocated previously, we do believe that this should be the way forward for any of the decision-making bodies under the auspices of ICSID, be it a tribunal or a committee. The fact that a Committee has also now affirmed this viewpoint is thus a significant move forward.

The *ad hoc* Committee then turns to the different grounds put forward by the parties, namely Articles 52(1)(b), (d) and (e) of the ICSID Convention: manifest excess of power, serious departure from a fundamental rule of procedure and failure to state reasons. It recites previous case law and follows more or less the classical approach regarding each of these grounds.<sup>117</sup>

### B. *Continental's Application for Annulment: Many Arguments but None Successful*

Continental based its arguments on three issues, namely: failure to rule on the post-crisis breaches, and thus on the losses suffered (1.); failure to recognize expropriation (2.); and issues regarding Article V of the BIT concerning the free transfer clause (3.).

#### 1. *Post-Crisis/Post-State of Necessity Breaches*

This argument was advanced before the Arbitral Tribunal as Continental considered that the Tribunal had failed to address it.<sup>118</sup> Since Argentina could not rely on Article XI of the BIT, Continental argued that it should have obtained compensation for post-2002 breaches, as well as for the continuation of some of the breaches that were initiated during the state of necessity.

For the *ad hoc* Committee, “the Tribunal’s position on this issue is sufficiently implicit from a reading of the Award as a whole”<sup>119</sup> to rule out any

<sup>116</sup>) *Continental – Annulment*, para. 84.

<sup>117</sup>) *Continental – Annulment*, paras. 86–103.

<sup>118</sup>) *Continental – Annulment*, para. 108.

<sup>119</sup>) *Continental – Annulment*, para. 126.

compensation even though “*it may have been preferable for the Tribunal to deal with this argument expressly*”.<sup>120</sup>

Even though it uses the word ‘preferable’, thereby not acknowledging the fact that an express argument must in fact be specifically addressed, the Committee signals that it can be dangerous to behave in such a manner. Although it was a minor argument, only raised briefly, the Tribunal did not deal with a key issue.<sup>121</sup> The reasoning of the Committee is logical and preserves the restricted nature of annulment:

as the Tribunal found, that the BIT was simply inapplicable to the 2001-2002 measures by virtue of Article XI, due to the crisis then prevailing, then it would follow that those measures cannot be a violation of the BIT, even if their consequences continue to be felt after the crisis is over.<sup>122</sup>

Even though the fact that it was only dealt with implicitly was not problematic, it is necessary for the preservation of the finality of the Award to read the entire Award, to determine if it is so logical, obvious or self-evident that the decision could easily be understood by any reader. The approach of the Committee appears convincing in the context of annulment by the ICSID mechanism.

Finally, the Committee, also on this particular issue, rejected the argument based on the wrongful analysis of WTO and ICSID case law. As repeated by the Committee, following the classical and correct trend of its predecessors, an “*error of law is not a ground of annulment, and it is therefore not for the Committee to determine whether the Tribunal applied the law correctly*”.<sup>123</sup>

## *2. More Damages for Expropriation than Violation of Fair and Equitable Treatment*

Even though the Tribunal recognized a violation of the standard of fair and equitable treatment, it refused to recognize an expropriation of Claimant’s

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<sup>120)</sup> *Continental – Annulment*, para. 128.

<sup>121)</sup> *Id.*

<sup>122)</sup> *Continental – Annulment*, para. 126.

<sup>123)</sup> *Continental – Annulment*, para. 141.

investment.<sup>124</sup> In fact, the Tribunal's reasoning is almost the same as that it previously used: since the alleged expropriation occurred during the period when Article XI was applied, it could not have occurred again in 2004 and give rise to compensation.<sup>125</sup>

It should be noted that the Committee attempted, equally, to reassure Claimant, despite not properly respecting its mandate in doing so, by indicating that even if the Tribunal had accepted the expropriation "*it would not have awarded higher damages for the breach of the expropriation clause than it did for the breach of the fair and equitable treatment clause*".<sup>126</sup> Consequently, the Tribunal applied the proper applicable law and there was no ground for annulment.

### 3. *Breach of Article V of the BIT, the "Free Transfers" Provision*

The last argument raised by Claimant concerned the request to annul the Tribunal's decision that there had been no breach of the "free transfers" provision of the BIT.<sup>127</sup> Continental complained that the Tribunal erred in holding that certain transactions fell outside the scope of those covered in the "*free transfers*" clause of the treaty.

The Committee restrained itself, again, in order not to deviate from its mandate, and clearly expressed the limit of its mandate and the absence of an annulable error on the part of the Tribunal

Hence, on first impression, the Committee considers it apparent that the Tribunal applied the applicable law, and gave reasons for its decision. It determined what it considered to be the scope of protection afforded by Article V and it found that even if the facts as claimed by Continental were correct, the transactions that it claimed to have been prevented from making would not have fallen within any of the categories of transactions protected by Article V as correctly interpreted. It therefore gave a reasoned rejection of the Article V claim, without the need to consider whether or not the facts claimed by Continental were established.

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<sup>124</sup>) *Continental – Annulment*, paras. 144–148.

<sup>125</sup>) *Continental – Annulment*, paras. 151–169.

<sup>126</sup>) *Continental – Annulment*, para. 174 and, for the complete analysis, paras. 175–181.

<sup>127</sup>) *Continental – Annulment*, paras. 182–187.

[...]

The Committee recalls that alleged error of fact or alleged error of law are not grounds of annulment under Article 52 of the Convention. The applicable law was the BIT, the ICSID Convention, and international law generally. The Tribunal applied Article V of the BIT to determine Continental's claim under that provision, and gave reasons for its decision. Whether or not the Tribunal decided the claim correctly is not a matter to be determined by an annulment committee.<sup>128</sup>

The answer is clear and self-explanatory and follows the classical, and correct, application of the provision of the Washington Convention on this issue.

### *C. Argentina's Failed Attempt to Obtain the Annulment of the Debt Restructuring Analysis*

Argentina tried to annul the only portion of the award unfavorable to it, which held that its debt restructuring in 2004 was a breach of fair and equitable treatment under the US-Argentina BIT.<sup>129</sup> Argentina had highlighted the fact that the Tribunal gave only a very short answer to such a major issue, which, it argued, therefore constituted a failure to state reasons and a manifest excess of power.

The Committee first clarifies that "*the fact that reasons may have been short is not in the Committee's view a meaningful criterion for determining whether the discussion offered by a tribunal falls short of its duty to state reasons.*"<sup>130</sup> This is indeed the correct approach, as there is no need to dwell on some issues, even though sometimes they may have been studied at length by the parties, if the decision for the Arbitral Tribunal to take is simple. It is not a question of length but of clarity and exhaustiveness.

Argentina's request for annulment, based also on a manifest excess of power,<sup>131</sup> was thus entirely dismissed by the Committee.

<sup>128</sup>) *Continental – Annulment*, paras. 208 and 231.

<sup>129</sup>) *Continental – Annulment*, paras. 233–236.

<sup>130</sup>) *Continental – Annulment*, para. 261. The Committee went on to add: "*Furthermore, in determining whether the reasons given for a conclusion on a particular question are sufficient, is it necessary not to look in isolation at the particular paragraphs of the award dealing specifically with that question.*"

<sup>131</sup>) *Continental – Annulment*, paras. 266–279.

Hence, logically, the costs are equally shared between the parties, and each is ordered to bear its own costs.

**XI. Procedural Order No. 3, *International Quantum Resources Limited, Frontier SPRL et Compagnie Minière de Sakania SPRL v. Democratic Republic of Congo***<sup>132</sup>

*Composition of the Arbitral Tribunal: Prof. Pierre Tercier, President; Prof. Horacio Grigera Naón and Prof. Brigitte Stern, Arbitrators.*<sup>133</sup>

*Application for provisional measures – burden and threshold of proof – recommendations to third parties*

The Arbitral Tribunal's Procedural Order No. 3 deals with the Claimants' request for provisional measures and was rendered in French. While International Quantum Resources Limited is a British Virgin Islands company, the two other companies were constituted in the Democratic Republic of Congo ("DRC"), where their investment in the mining industry was made. All three Claimants are part of the Canadian mining group, First Quantum Minerals Limited. The mine at stake in this arbitration is considered to be one of the biggest nickel sources in the world.

The dispute was brought to ICSID on the basis of the provisions of the Mining Code of the Democratic Republic of the Congo and stems from the cancellation of mining authorizations by the government. The Claimants' request for provisional measures mainly aimed at ensuring that the DRC did not cancel or transfer the mining rights to third parties and that the status quo on the ground was maintained.

Having determined that it had prima facie jurisdiction over the dispute, the Arbitral Tribunal examined each request for provisional measures. It started by rejecting the request that the mining rights be preserved given that the Respondent indicated that they already no longer existed, rendering the Claimants' request moot.

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<sup>132</sup>) ICSID Case No. ARB/10/21 [*International Quantum – Procedural Order No. 3*].

<sup>133</sup>) The Order does not provide information as to the nomination process of the members of the Arbitral Tribunal.

In deciding on the request that the RDC should not transfer mining rights to third parties, the Arbitral Tribunal carefully refrained from making recommendations to legal entities that were not parties to the proceedings. The Arbitral Tribunal nonetheless accepted to order the RDC to inform certain third parties of the existence of the dispute and claims by the parties so that the Claimants be informed of such transfer if it were to take place.

Finally, although the Arbitral Tribunal ordered the parties to carry out inventories of disputed assets on the ground in the DRC, it rejected the Claimants' requests that certain proceedings in the DRC be suspended, on the basis that they were either subject to appeal and non-enforceable in the meantime, or non sufficiently motivated at this stage of the dispute.

All in all, the Arbitral Tribunal's decision on provisional measures was rather strict against the Claimants and established a high burden of proof upon it. This case ultimately settled on 12 April 2012.

## XII. Award, *Spyridon Roussalis v. Romania*<sup>134</sup>

*Composition of the Arbitral Tribunal: Prof. Bernard Hanotiau,<sup>135</sup> President; Prof. Andrea Giardina<sup>136</sup> and Prof. W. Michael Reisman,<sup>137</sup> Arbitrators.*

*Fulfilment of contractual and investment obligations – justification for measures taken – parallel criminal investigation – counterclaims by the State*

The award rendered in the case of Mr. Spyridon Roussalis, a Greek national, against Romania, relates to a post-privatization dispute, of frequent occurrence in Eastern European countries, and particularly in Romania.

Mr. Roussalis' investment in Romania consisted of his acquisition in 1998 of SC Continent Marine Enterprises S.A. (hereinafter "Continent SA"), through a wholly-owned Romanian entity called SC Continent Marine Enterprise Import Export S.R.L. (hereinafter "Continent SRL"). As is generally the case in Romania, the privatization of Continent SA was

<sup>134</sup> ICSID Case No. ARB/06/1 [*Roussalis –Award*].

<sup>135</sup> Appointed by the Chairman of the Administrative Council of ICSID.

<sup>136</sup> Appointed by the Chairman of the Administrative Council of ICSID.

<sup>137</sup> Appointed by the Respondent.

negotiated, conducted and thereafter controlled by AVAS, the Authority for State Assets Recovery.

The privatization contract signed between Continent SRL and AVAS required, *inter alia*, the buyer to pay a certain amount for the price of the shares of the privatized company and to invest in the latter company an amount of USD 1.4 million as a post-purchase investment.

The bitter dispute between the parties mainly concerned the post-purchase investment. The Claimant alleged that, despite having performed all of his obligations under the privatization agreement, Romania engaged in a series of actions leading to the destruction of his investment. Mr. Roussalis alleged that Romania's actions breached various provisions of the Agreement between the Government of Romania and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, which entered into force on 23 May 1997 (the "BIT") including the fair and equitable and full protection and security provisions, leading to the expropriation of his investment in Romania.

There were no challenges to the jurisdiction of the Arbitral Tribunal. Indeed, Romania's position that the investor did not fulfil its investment obligations and engaged in fraudulent activities was not brought as a challenge to the jurisdiction of the Arbitral Tribunal because this related to post-investment issues and not to the constitution of the investment.

On the merits, Mr. Roussalis complained that AVAS had enforced a share pledge agreement to secure ownership over shares in Continent SA and had resorted to abusive proceedings before its own courts, to obtain both the confirmation of the enforcement of the pledge and the cancellation of a decision by shareholders of the company to increase the capital. Other claims raised concerned tax investigations, criminal sanctions and procedure as well as unfair sanctions over food safety standards.

In agreeing with Romania's defenses to reject all of the Claimant's arguments, the Arbitral Tribunal resorted to an analysis of the facts at hand. The Arbitral Tribunal found little difficulty in deciding that Romania "*acted in accordance with its contractual and legal rights and statutory duties*"<sup>138</sup> in starting proceedings against the Claimant. It also found that the various proceedings initiated in Romania "*did not breach the principle of legal*

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<sup>138</sup>) *Roussalis – Award*, para. 340.

*certainty*” as alleged by the Claimant<sup>139</sup> and were not “a pretense trial”.<sup>140</sup> Consequently, the Arbitral Tribunal easily held that Romania had not breached any provision of the treaty, under any of the various claims brought by the foreign investor.

The Arbitral Tribunal’s findings on these claims do not raise important issues in the field of investor/State disputes. The last section of the award, however, which deals with Romania’s counterclaim, warrants a few comments.

Romania filed a counterclaim arising out of the investor’s alleged failure to fulfil its undertaking to make post-privatization investments, which sought an order that the investor take steps to abide by the decision on the enforcement of the pledge and an order for damages for non-fulfilment of this decision.

The Arbitral Tribunal found that it did not have jurisdiction to decide Romania’s counterclaim after a convincing analysis of the parties’ consent under the BIT.

While the ICSID Convention did allow for possible counterclaims to be entertained by the Arbitral Tribunal, it did so subject to ascertaining that they are “*within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre*” (Article 46 of the ICSID Convention – see also ICSID Rule 40).

The Arbitral Tribunal thus examined whether Article 9 of the BIT, which provides consent to arbitration of investor/State disputes, could be interpreted to encompass the counterclaims made by the State: “Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way”. In interpreting this provision, there was no question for the Arbitral Tribunal that consent to arbitration was limited to obligations of the State, nor those of the investor.

The BIT’s umbrella clause (Article 2(6)), relied upon by Romania to bolster its argument was also deemed unhelpful by the Arbitral Tribunal. Indeed, the wording of this provision also confirms that the obligations referred to are those of the State party to the BIT, not of the investor:

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<sup>139)</sup> *Roussalis – Award*, para. 359.

<sup>140)</sup> *Roussalis – Award*, para. 605.

“Each Contracting Party shall observe any other obligation it may have entered into with regard to investments of investors of the Contracting Party”.

Prof. Michael Reisman was not convinced by the majority’s decision on the scope of consent to counterclaims under the dispute resolution provision of the BIT. He appended a declaration to the award in which he considered that, by having ratified the ICSID Convention, States have “*ipso facto*” imported consent to counterclaims in arbitrations that investors seek to pursue.

### XIII. Decision on Jurisdiction and Award, *SGS Société Générale de Surveillance SA v. Republic of Paraguay*<sup>141</sup>

*Composition of the Arbitral Tribunal: Dr. Stanimir Alexandrov,<sup>142</sup> President; Mr. Donald F. Donovan<sup>143</sup> and Dr. Pablo García Mexía,<sup>144</sup> Arbitrators.*

*Jurisdiction under contract claim – interpretation of the scope of the umbrella clause – finding of liability for breach of contractual undertakings*

The case of *SGS Société Générale de Surveillance SA* (hereinafter “SGS”), a Swiss company, and Paraguay, involves a claimant which has solid experience in ICSID arbitration. Indeed, this is SGS’ third ICSID matter, after its arbitrations with Pakistan and The Philippines, making SGS the ICSID claimant with the most cases.

The facts of this matter are relatively simple, and are even probably among the simplest sets of facts in ICSID arbitration. SGS obtained a three-year renewable contract to provide customs services and tax improvement mechanisms in relation to imports in Paraguay, pursuant to a contract signed in 1996 with the Ministry of Finance of Paraguay. SGS’ services were to be invoiced on a monthly basis. The first invoices were settled but, after a few months, Paraguay stopped paying for SGS’ work. In June 1999, the

<sup>141</sup> ICSID Case No. ARB/06/1 [*SGS – Award*].

<sup>142</sup> Appointed by the Chairman of the Administrative Council of ICSID.

<sup>143</sup> Appointed by the Claimant.

<sup>144</sup> Appointed by the Respondent.

contract was terminated by mutual consent. The parties thereafter engaged in negotiations to attempt to resolve their dispute. These discussions lasted several years but did not result in any agreement. The outstanding invoices claimed by SGS amounted, in principal, to more than USD 39 million.

SGS eventually initiated arbitration proceedings on the basis of the Bilateral Investment Treaty between Switzerland and Paraguay (“BIT”), claiming the payment of the invoices plus interest. SGS argued that Paraguay’s failure to settle the invoices amounted to breaches of the protection granted by the treaty, including fair and equitable treatment (Article 4(1)), non-impairment of the investment by undue and discriminatory measures (Article 4(2)) and observance of undertakings, also known as the “umbrella clause” (Article 11).

The Arbitral Tribunal first rendered a decision on jurisdiction on 12 February 2010. This decision was not published at the time but was appended to the award rendered on 10 February 2012. As further elaborated below, the Arbitral Tribunal found that it had jurisdiction to hear the Claimant’s case and decided in its favor on the merits, awarding the full amount of the outstanding invoices plus substantial interest.

#### A. *Broad Jurisdiction, Including under the Umbrella Clause*

The Arbitral Tribunal’s decision on jurisdiction does not break any new ground with regard to most of the questions that were debated between the parties. This is certainly true of the lengthy developments on the burden of proof of establishing the facts pertaining to jurisdiction, as well as the very clear decision on the validity of Paraguay’s consent to arbitration<sup>145</sup> and the characterization of SGS’ investment under the treaty and the ICSID Convention.<sup>146</sup> On the latter point, the Arbitral Tribunal very classically followed the *Salini test* method, finding that SGS’ investment had the required commitment of resources or assets, duration, risk and contribution to the economic development of the host State.<sup>147</sup> The Arbitral Tribunal also rejected Paraguay’s argument that the investment was not made in accordance with its laws, nor did it agree to apply the contract’s dispute

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<sup>145</sup> *SGS Award*, paras. 60 *et seq.*

<sup>146</sup> *SGS Award*, paras. 77 *et seq.*

<sup>147</sup> *SGS Award*, paras. 100 *et seq.*

resolution clause (pointing to local courts in Asunción), due to the fact that its scope cannot be confused with the dispute resolution provision of the treaty, each having a different ambit.<sup>148</sup>

Also, the Arbitral Tribunal readily accepted that, if proven by the Claimant, the facts alleged could be found to breach the BIT's fair and equitable treatment standard as well as the prohibition of undue and discriminatory measures.

The last section of the decision deals with the controversial "observance of undertakings" provision, also known as the "umbrella clause", at Article 11, which has been discussed in several previous ICSID decisions and awards.

The Arbitral Tribunal's analysis<sup>149</sup> is largely favorable to the investor in that it gives full force and meaning to the umbrella clause by agreeing non-equivocally to transform the contractual undertaking of the State into a treaty obligation subject to arbitration. In doing so, the Arbitral Tribunal looked at the "unqualified text" of Article 11, which permits "the umbrella clause to encompass host State commitments of all kinds".<sup>150</sup> The decision does go further in denying any relevance between the contract at stake (which pointed to the local courts of Asunción) and the dispute resolution provision. In particular, the Arbitral Tribunal refused to follow the path of the decision rendered in another case involving the same Claimant, which gave effect to the umbrella clause, but only to stay its decision until the Claimant had exhausted the avenue of the contractual dispute resolution provision (*SGS v. Philippines*). Relying on the positions of scholars, such as Emmanuel Gaillard, dissenting arbitrators (Prof. Crivellaro) and ICSID case law (*Aguas del Tunari v. Bolivia*), the Arbitral Tribunal unanimously refused to allow the contractual dispute settlement provision to override the BIT arbitration agreement and, therefore, to allow all contractual claims to be decided on the merits.

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<sup>148</sup>) *SGS Award*, paras. 125 *et seq.*

<sup>149</sup>) *SGS Award*, paras. 162 *et seq.*

<sup>150</sup>) *SGS Award*, para. 170.

### B. *Straightforward Condemnation of Paraguay's Failure to Observe its Contractual Payment Obligations*

The award rendered on 10 February 2012 by the Arbitral Tribunal in this matter is a relatively straightforward application of the decision on jurisdiction to the detailed set of facts that had been detailed by the parties in the merits phase of the arbitration.

Although SGS had based its claim on several breaches of the BIT, the Arbitral Tribunal considered that, given that it had found that Paraguay breached the “umbrella clause”, it did not need to undertake any examination of the merits of the claims on the other grounds. With facts arising from exactly the same set of facts, there was no point undertaking an additional inquiry as this “*would not, even if the Tribunal were to find a violation, result in increasing the damages owed to Claimant*”.<sup>151</sup> This may seem to a certain extent disappointing after the decision on jurisdiction’s finding that, “*if proven*”, the facts may give rise to violations of such BIT provisions. The award does not address any violation other than that of the umbrella clause, and did not legally have to.

The Arbitral Tribunal’s analysis of Paraguay’s violations of its undertakings is made particularly easy given that the main facts at stake were not disputed, particularly the failure to pay the outstanding invoices. Paraguay’s attempts to reopen the discussion on the scope and meaning of the “umbrella clause” are disposed of by the Arbitral Tribunal on more than one occasion. Also, the various defenses against the alleged contractual breaches of SGS are systematically rejected as meritless or unproven, with relative ease by the Arbitral Tribunal, which relied among other things on what it considered to be credible witness testimony for SGS.

In analyzing the umbrella clause provision, the Arbitral Tribunal focused mainly on the fact that Paraguay was precluded from attempting to re-argue the decision already taken on jurisdiction.

More importantly, from a legal perspective, the award also rejects Paraguay’s attempts to escape liability for non-payment of its debts by relying on the dispute resolution provision of the underlying contract. In essence, Paraguay’s main argument is that there can be no breach of contract until a local Paraguayan court decides in favor of SGS, pursuant to the contract. In other words, Paraguay gives precedence to the contract over the BIT. The

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<sup>151</sup> *SGS Award*, paras. 67 *et seq.*

Arbitral Tribunal flatly rejects the argument. It considers that Paraguay's commitment was to honor the contract and that, by virtue of the umbrella clause, that commitment became a treaty obligation subject to the jurisdiction of the Arbitral Tribunal.

Given the undisputed fact that SGS' invoices were never paid, and with the finding that Paraguay had no valid excuse not to fulfil its undertaking, the Arbitral Tribunal's conclusion is predictable: "*the Respondent has failed to observe its contractual commitments in breach of Article 11 of the BIT*" and is ordered to pay the amounts due plus interest and costs.

#### **XIV. Decision on the Proposal to Disqualify L. Yves Fortier, *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela***<sup>152</sup>

*Composition of the Tribunal: Judge Kenneth Keith*<sup>153</sup> *and Prof. G. Abi-Saab*,<sup>154</sup> *Members.*

##### *Disqualification – Independence – Impartiality – Conflict of interests – Article 57 ICSID Convention*

This decision relates to the application by Respondent to disqualify L. Yves Fortier due to a conflict of interest with his previous firm.

The issue being that Mr. Fortier immediately made a disclosure when informed of the potential conflict arising from the merger of his firm with another firm, which had cases and arbitrations against Venezuela, even though a "Chinese wall" had automatically been put in place.<sup>155</sup> Furthermore, he informed the parties two weeks later that he had resigned from this firm to establish practice as a sole practitioner.<sup>156</sup> The Claimant thus requested Respondent to withdraw its request in view of this new fact, but Respondent refused to do so.<sup>157</sup>

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<sup>152</sup>) ICSID Case No. ARB/07/30 [*Conoco – Disqualification*].

<sup>153</sup>) Appointed by the Claimant.

<sup>154</sup>) Appointed by the Respondent.

<sup>155</sup>) *Conoco – Disqualification*, paras. 1–5.

<sup>156</sup>) *Conoco – Disqualification*, para. 11.

<sup>157</sup>) *Conoco – Disqualification*, paras. 12–15.

The Tribunal first reiterates the general and traditional standards applicable in such a situation with some innovation (A) before turning to their application to the facts of the case (B).<sup>158</sup>

*A. The Traditional Principles with an Innovative Spin*

The two remaining members of the Arbitral Tribunal are thus called upon to decide the challenge within the traditional, though questionable, ICSID framework. They start by setting out the foundations and the principles underlying their analysis, with what seems at first to be a classical reading of the ICSID Convention and arbitral case law.<sup>159</sup>

Two points are in fact worth noting.

First, the arbitrators indicate that the threshold for the disqualification of an arbitrator in ICSID arbitration is a very high one compared to other institutions, and thus difficult to meet in most cases. In the arbitrators' words:

it imposes a relatively heavy burden on the party proposing disqualification. Further, the manifest lack of the required qualities, here independence and impartiality of judgment, must appear from objective evidence.<sup>160</sup>

It is indeed true that the threshold is high in ICSID case law, as previously seen in 2011 where there could have been legitimate questions, at least in the eyes of the parties, about the independence of an arbitrator.<sup>161</sup>

The second point is interesting as it highlights the casuistic approach necessary for arbitral tribunals to be able to decide upon a disqualification. Indeed, the arbitrators indicate that

we do not consider that a non disclosure does in itself result in disqualification. The IBA Guidelines, endorsed by an ICSID decision on this point, say that non disclosure cannot make an arbitrator partial or lacking in independence; it is only the facts and circumstances that he

<sup>158</sup>) *Conoco – Disqualification*, paras. 12–15.

<sup>159</sup>) *Conoco – Disqualification*, paras. 51–60.

<sup>160</sup>) *Conoco – Disqualification*, para. 56

<sup>161</sup>) For the most recent disqualification decisions in 2011, see the Joint Commentary in J. Fouret & D. Khayat, "ICSID Case Law Review" (2012) 11.1 LPICT 137, at 183 *et seq.*

did not disclose that can do so. That proposition is, however, subject to this qualification – depending on the particular facts and circumstances, the non disclosure may itself give rise to a reasonable suspicion of bias, whether conscious or unconscious.<sup>162</sup>

There is, therefore, no general rule, not even concerning non-disclosure. A case-by-case analysis will be needed to determine, in the particular circumstances of a case, whether such non-disclosure could be suspicious and necessitate disqualification. This interesting and non-dogmatic approach should be praised.

### B. *No Risk of Partiality and No Disqualification*

Taking into account the arbitrators' quote above, it is clear that the facts of the case at hand are thus the central issue in determining the acceptance or rejection of a disqualification request.

Analyzing with care and precision the statements made by Mr. Fortier,<sup>163</sup> Judge Keith and Professor Abi-Saab had no doubt about the truthfulness of the various declarations,<sup>164</sup> and did not believe that he was in breach of Rule 6(b) concerning the duty to disclose:

We cannot see that, in the circumstances of this case, there is a sufficient basis for saying that, at some point well before 4 October, Mr. Fortier knew or should have known the information in question and hence was under an obligation to disclose. There is no evidence before us on which such a finding could be based.<sup>165</sup>

As the criteria in ICSID arbitration are objective, and as the case at hand did not indicate any risk of partiality or lack of independence, it appeared a logical consequence that the arbitrators rejected the request for disqualification.

We have sometimes been critical of this procedure of disqualification, entrusting the two remaining arbitrators with that role. It appears, though, that there is not much to criticize in the present decision.

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<sup>162)</sup> *Conoco – Disqualification*, para. 60.

<sup>163)</sup> *Conoco – Disqualification*, paras. 61–64.

<sup>164)</sup> *Conoco – Disqualification*, para. 65.

<sup>165)</sup> *Conoco – Disqualification*, para. 67.