International Courts

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This report summarizes significant developments in 2010 concerning international courts and tribunals, particularly the International Court of Justice, the International Tribunal for the Law of the Sea, international tribunals operating under the auspices of the Permanent Court of Arbitration, and arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. This report covers the period of activity from December 1, 2009, to November 30, 2010.

I. International Court of Justice[1]

The International Court of Justice ("ICJ" or the "Court") is the principal judicial organ of the United Nations ("U.N."). The ICJ's jurisdiction is two-fold: to deliver judgments in contentious cases submitted to it by sovereign states, and to issue advisory opinions at the request of certain U.N. organs and agencies.[2]

A. CONTENTIOUS CASES

During the period under review, the Court delivered two substantive judgments and one order regarding the admissibility of a counter-claim. These are summarized below.

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1. INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org (last visited Jan. 20, 2011). ICJ decisions, pleadings, and other related materials are available within the website.

2. U.N. Charter arts. 92, 96, *available at* http://www.un.org/en/documents/charter/chapter14.shtml; Statute of the International Court of Justice, art. 36, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

In addition, two matters were removed from the list pursuant to the applicants' requests. First, on May 12, 2010, the Court issued an order in the matter of *Certain Questions Concerning Diplomatic Relations (Honduras v. Brazil)*, recording the request by Honduras to discontinue the proceedings. Noting that the Brazilian Government had not taken any steps in the said proceedings, the Court removed the case from the list. Second, on November 17, 2010, pursuant to the request of the applicant, to which the respondent did not object, the Court issued a similar order in the matter of *Certain Criminal Proceedings in France (Democratic Republic of the Congo v. France)*.

1. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*

On April 20, 2010, the ICJ delivered a judgment in the *Pulp Mills* case.[3] The case arose from a dispute between Argentina and Uruguay concerning the construction by Uruguay of the CMB (ENCE) and Orion (Botnia) pulp mills on the River Uruguay, which forms a shared border between the two countries. Argentina commenced the ICJ proceedings against Uruguay in 2006 pursuant to the 1975 bilateral treaty known as the Statute of the River Uruguay, claiming, *inter alia*, that the construction threatened the river and its environs with likely damage to water quality.

In its judgment, the Court first found that Uruguay had breached the Statute's "procedural obligations of informing, notifying and negotiating" with Argentina and the Administrative Commission of the River Uruguay during the development of plans for the pulp mills.[4] But, it rejected Argentina's contention that Uruguay had a "no construction" obligation after the negotiation period provided for by the Statute had expired.[5] The Court further held that Uruguay had not breached its substantive obligations for the protection of the environment under the Statute by authorizing the construction of the paper mills.[6]

Turning to remedies, the Court ruled "that its finding of wrongful conduct by Uruguay in respect of its procedural obligations *per se* constitutes a measure of satisfaction for Argentina."[7] In light of this finding, it rejected Argentina's plea to order Uruguay to dismantle the Orion (Botnia) mill, pay compensation, and provide guarantees that in the future Uruguay would not prevent the Statute from being applied.[8] It also rejected Uruguay's request to confirm its right to continue the construction.[9] Finally, the Court emphasized that the Statute places the parties under a continuous duty to cooperate, which encompasses ongoing monitoring of an industrial facility such as the paper mill.[10]

2. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*

On November 30, 2010, the Court delivered a judgment in the *Case Concerning Ahmadou Sadio Diallo*. Guinea instituted the ICJ proceedings against the Democratic Re-

3. *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, ¶ 282 (Apr. 20, 2010), *available at* http://www.icj-cij.org/docket/files/135/15877.pdf.
4. *See id.* ¶¶ 81, 104-07, 111, 119-21, 143-49.
5. *See id.* ¶ 157.
6. *See id.* ¶¶ 173-75, 180, 187-89, 195-200, 204-19, 225, 265.
7. *See id.* ¶ 269.
8. *See id.* ¶¶ 275, 277-78.
9. *See id.* ¶ 280.
10. *See id.* ¶ 281.

public of the Congo ("DRC") in 1998, in the exercise of diplomatic protection of its national, Ahmadou Sadio Diallo. It initially contended that Mr. Diallo, a founder of two private companies in the DRC, had been the victim of arrest, detention, and expulsion measures taken by the DRC authorities in 1995-1996 in violation of international law.[11] In 2003, in reply to the DRC's preliminary objections concerning admissibility, Guinea submitted for the first time that Mr. Diallo had also been subjected to unlawful arrest and detention in 1988-1989.[12] It was not until 2008, however, that Guinea introduced a detailed claim, alleging that the DRC's conduct arising from those earlier events amounted to a violation of international law.[13]

In its previous judgment of May 24, 2007, the Court declared that Guinea's application was admissible insofar as it concerned protection of Mr. Diallo's rights as an individual and protection of his direct rights as *associé* in his two companies.[14]

In its 2010 judgment, the Court first found that Guinea's belatedly filed additional claim concerning the arrest and detention of Mr. Diallo from 1988-1989 was inadmissible on the ground that it was neither "implicit" in Guinea's 1998 application, nor did it "arise directly out of the question which was the subject-matter of" that application.[15]

Turning to the DRC's conduct in 1995-1996, the Court first held the DRC responsible for breaching several obligations under the International Covenant on Civil and Political Rights (Covenant) and the African Charter on Human and Peoples' Rights (African Charter). In particular, the Court ruled that Mr. Diallo's expulsion was not in accordance with Congolese law, as required by the Covenant and the African Charter, and was effected in the absence of any "compelling reasons of national security," as required by the Covenant.[16] Further, according to the Court, Mr. Diallo's arrests and detentions were arbitrary.[17] The Court observed in that respect that Mr. Diallo was imprisoned for a particularly long time, and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.[18] Mr. Diallo was also never informed of the reasons for his detentions, as the Covenant and the African Charter require.[19] On the other hand, the Court found that Mr. Diallo was not subject to mistreatment during his detentions, and hence the DRC did not violate the Covenant and the African Charter in that respect.[20]

The Court further held that, by not informing Mr. Diallo without delay of his right to consular assistance under the Vienna Convention on Consular Relations, the DRC violated its obligations under Article 36(1)(b) of that Convention.[21]

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11. *See* Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. Congo), Judgment, ¶¶ 16-19 (Nov. 30, 2010), *available at* http://www.icj-cij.org/docket/files/103/16244.pdf.

12. *See id.* ¶ 30.

13. *See id.* ¶ 32.

14. *See* Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. Congo), Judgment on Preliminary Objections, ¶ 98 (May 24, 2007), *available at* http://www.icj-cij.org/docket/files/103/13856.pdf.

15. Diallo, Judgment, ¶¶ 36-48.

16. *See id.* ¶¶ 64-74.

17. *See id.* ¶¶ 75-82.

18. *See id.* ¶ 82.

19. *See id.* ¶¶ 83-85.

20. *See id.* ¶¶ 88-89.

21. *See id.* ¶¶ 90-97.

Finally, the Court found that the DRC did not violate Mr. Diallo's direct rights as an *associé* in his companies, including the right to participate and vote in general meetings of the companies, to appoint a *gérant*, to oversee and monitor the management of the companies, as well as the right to property over the companies' *parts sociales*.[22]

With respect to remedies, considering "in particular the fundamental character of the human rights obligations breached" by the DRC, the Court ruled that, "in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation."[23] The Court further decided that, failing agreement between the parties on the matter of compensation within six months from the date of the judgment, the question of compensation due to Guinea will be settled by the Court in a subsequent phase of the proceedings.[24]

3. *Jurisdictional Immunities of the State (Germany v. Italy)*

On July 6, 2010, the ICJ issued an order finding that Italy's counter-claim against Germany in the matter under the European Convention for the Peaceful Settlement of Disputes (European Convention) was inadmissible since it did not fall within the jurisdiction of the Court, as required by Article 80 of the Rules of Court.[25]

Germany instituted proceedings against Italy in late 2008. In its application, it contended that Italian judicial authorities had repeatedly violated Germany's jurisdictional immunity by admitting civil claims against Germany based on violations of international humanitarian law committed during the Second World War.[26] In its counter-memorial, Italy requested the Court to find that Germany was in violation of its obligation under the European Convention by denying effective reparation to Italian victims of crimes against humanity committed by the Nazi regime during the Second World War.[27]

In its order, the Court found that the real cause of Italy's counter-claim relates to facts or situations that occurred prior to the entry into force of the European Convention in 1961 as between the parties, namely, the legal regime established in the aftermath of the Second World War.[28] Hence, according to Article 27(a) of the European Convention, Italy's counter-claim does not fall within the temporal scope of the Court's jurisdiction.[29] In light of this finding, the Court refrained from determining whether the counter-claim directly relates to the subject matter of Germany's claim.[30]

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22. *See id.* ¶¶ 99-159.

23. *See id.* ¶ 161.

24. *See id.* ¶ 164.

25. *See* Jurisdictional Immunities of the State (Ger. v. It.), Order, ¶ 35 (July 6, 2010), *available at* http://www.icj-cij.org/docket/files/143/16027.pdf; *see also* Rules of Court, art. 80, *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0.

26. Jurisdictional Immunities at ¶ 1.

27. *See id.* ¶ 3.

28. *See id.* ¶¶ 27-30.

29. *See id.* ¶¶ 31, 33.

30. *See id.* ¶ 32.

B. Advisory Proceedings

During the period under review, the Court delivered one advisory opinion and one order regarding a request for an advisory opinion. These are summarized below.

1. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*

On July 22, 2010, in response to a request by the U.N. General Assembly, the Court delivered an advisory opinion, declaring that Kosovo's unilateral declaration of independence, adopted on February 17, 2008, did not violate international law.[31] At the outset of its opinion, the Court unanimously found that it had jurisdiction in the matter[32] and, by nine votes to five, decided to exercise its discretion and comply with the General Assembly's request.[33] It therefore rejected an argument made by some participants in the proceedings that the Court should refuse to provide an advisory opinion because the Security Council, not the General Assembly, was principally seized of the matter of Kosovo's independence.[34] Turning to the scope and meaning of the question put before it by the General Assembly, the Court emphasized that it had not been asked to rule on the legal consequences of the declaration and, in particular, on whether Kosovo had achieved statehood.[35] Rather, the Court's task was limited to advising on whether a unilateral declaration of independence constitutes a violation of international law.[36]

With regard to the substance of the request, the Court first examined the lawfulness of Kosovo's declaration of independence under general international law.[37] Having reviewed the development of the right to self-determination and the principle of territorial integrity, as well as the practice of the U.N. Security Council, the Court concluded that "general international law contains no applicable prohibition of declarations of independence."[38]

The Court then turned to the *lex specialis* created by the Security Council Resolution 1244 (1999) (Resolution), which set forth a "temporary, exceptional legal regime" for the administration of Kosovo,[39] and to the Constitutional Framework for Provisional Self-Government (Constitutional Framework) promulgated thereunder by the U.N. Mission in Kosovo ("UNMIK"). It determined that those instruments contained no specific pro-

31. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ¶ 122 (July 22, 2010), *available at* http://www.icj-cij.org/homepage/pdf/20100722_KOS.pdf.

32. *See id.* ¶¶ 18-28.

33. *See id.* ¶¶ 29-48, 123.

34. *See id.* ¶¶ 36-47.

35. *Id.* ¶¶ 51, 56 (noting that the Court had not "been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.").

36. *See id.* ¶ 56.

37. *Id.* ¶ 78.

38. *See id.* ¶¶ 79-84.

39. *Id.* ¶ 100.

hibition on declaring independence that was applicable to the authors of the declaration in question.[40]

In reaching that conclusion, the Court first held that the authors of the declaration "did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as . . . representatives of the people of Kosovo outside the framework of the interim administration."[41] The Court further rejected a contention that the authors of the declaration had violated the Resolution, holding that the latter did not concern the "final status of Kosovo or [the] conditions for its achievement."[42] Noting that the Security Council has the power "to make demands on actors other than United Nations Member States and intergovernmental organizations," the Court held that no such demands were made in the Resolution.[43] In any event, in the Court's opinion, nothing in the text (including the phrase "pending a political settlement"), or in the object and purpose of the Resolution, could be construed as "a prohibition, binding on the authors of the declaration . . . against declaring independence."[44] Finally, the Court held that the declaration did not violate the Constitutional Framework because its authors were not bound by it.[45] For these reasons, by ten votes to four, the Court found that the declaration of independence of Kosovo did not violate international law.[46]

2. *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*

On April 26, 2010, the ICJ received a request for an advisory opinion from the International Fund for Agricultural Development ("IFAD" or "Fund").[47] The request concerned the validity of a judgment rendered by the Administrative Tribunal of the International Labour Organization ("ILOAT") on February 3, 2010, in favor of a U.N. staff member who had a fixed-term contract with the Global Mechanism of the U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Global Mechanism). In its request, IFAD asked the Court to advise on nine separate issues, including whether the ILOAT had jurisdiction to entertain a claim by a staff member of the Global Mechanism, which is a separate legal entity and for which the Fund merely acts as a "housing organization."[48] IFAD also questioned the ILOAT's jurisdiction to review decisions of the Managing Director of the

40. *Id.* ¶ 118.
41. *Id.* ¶ 109.
42. *Id.* ¶ 114.
43. *Id.* ¶¶ 116-17 (adding that the term "all concerned" in the text of the Resolution was not specific enough to apply to the Kosovo Albanian leadership).
44. *Id.* ¶ 118.
45. *Id.* ¶ 121.
46. *Id.* ¶ 123.
47. Press Release, Int'l Court of Justice, The Int'l Fund for Agric. Dev. Requests an Advisory Opinion from the Court on a Judgment Rendered by the Admin. Tribunal of the Int'l Labour Org. (May 11, 2010), http://www.icj-cij.org/docket/files/146/15933.pdf.
48. Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development (Request for Advisory Opinion) Order, 2-3 (Apr. 29, 2010), *available at* http://www.icj-cij.org/docket/files/146/15931.pdf.

Global Mechanism and in particular the Tribunal's power to substitute those decisions for its own.[49]

By an order of April 29, 2010, the Court decided that IFAD and its Member States were entitled to appear before it.[50] It further drew up a list of states and specialized agencies that may be able to furnish relevant information in the advisory proceedings. Pursuant to article 66 of its Statute and 104 of its Rules, the Court then organized the written proceedings and fixed the time limits.[51]

IFAD's request for an advisory opinion falls within the framework of the rarely used procedure for the review of judgments of administrative tribunals, which has resulted in only four advisory opinions since 1946.

C. General List

As of November 30, 2010, the list of pending contentious proceedings before the Court included the following fourteen cases, listed by date of introduction: *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*; *Maritime Dispute (Peru v. Chile)*; *Aerial Herbicide Spraying (Ecuador v. Colombia)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*; *Jurisdictional Immunities of the State (Germany v. Italy)*; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*; *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*; *Whaling in the Antarctic (Australia v. Japan)*; *Frontier Dispute (Burkina Faso/Niger)*; and proceedings instituted on November 18, 2010 by Costa Rica against Nicaragua, including a request for provisional measures, "with regard to an alleged 'incursion into, occupation of and use by Nicaragua's Army of Costa Rican territory as well as breaches of Nicaragua's obligations to Costa Rica.'"[52] In addition, as noted above, on April 23, 2010, IFAD requested an advisory opinion from the Court on a judgment rendered by the ILO Administrative Tribunal. The request is currently pending.

D. Composition of the Court

As of November 30, 2010, the Court was composed of the following judges: Hisashi Owada (Japan), President; Peter Tomka (Slovakia), Vice-President; Abdul G. Koroma (Sierra Leone); Awn Shawkat Al-Khasawneh (Jordan); Bruno Simma (Germany); Ronny Abraham (France); Kenneth Keith (New Zealand); Bernardo Sepúlveda-Amor (Mexico); Mohamed Bennouna (Morocco); Leonid Skotnikov (Russian Federation); Antônio A. Cançado Trindade (Brazil); Abdulqawi Ahmed Yusuf (Somalia); Christopher Greenwood

49. *Id.* at 3.

50. *Id.* at 3-4.

51. *Id.* at 4.

52. Press Release, Int'l Court of Justice, Costa Rice Institutes Proceedings Against Nicaragua & Requests the Court to Indicate Provisional Measures (Nov. 19, 2010), http://www.icj-cij.org/docket/files/150/16239.pdf.

(United Kingdom of Great Britain and Northern Ireland); Xue Hanqin (China); and Joan E. Donoghue (United States of America).

II. The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea ("ITLOS" or "Tribunal") is one of the institutional mechanisms designed to settle disputes concerning the interpretation or application of the United Nations Convention on the Law of the Sea of 1982 ("Convention" or "UNCLOS").[53] The Tribunal is composed of a body of 21 independent members[54] elected for nine years by the States Parties to the Convention.[55] The Tribunal's seat is in Hamburg, Germany.[56]

ITLOS is open to States Parties to the Convention.[57] In circumstances specifically provided for in the Convention, the Tribunal can also be open to entities other than States Parties.[58] The jurisdiction of ITLOS comprises all disputes submitted to it in accordance with the Convention and all matters specifically provided for in any other agreement conferring jurisdiction on the Tribunal.[59] It also has authority to give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for this.[60] The Tribunal's Seabed Disputes Chamber has jurisdiction to hear disputes relating to activities in the International Seabed Area[61] and to give advi-

53. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, *available at* http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm. According to Article 287(1) of UNCLOS, a State, when signing, ratifying or acceding to the Convention or at any time thereafter, can choose one or more of the following dispute settlement mechanisms: ITLOS, the ICJ, an arbitral tribunal constituted in accordance with Annex VII of UNCLOS, and a special arbitral tribunal constituted in accordance with Annex VIII of UNCLOS for the categories of disputes specified therein.

54. UNCLOS Annex VI art. 2(1).

55. UNCLOS Annex VI art. 5(1). As of November 30, 2010, the Tribunal was composed of the following judges: José Luis Jesus (Cape Verde), President; Helmut Tuerk (Austria), Vice-President; Hugo Caminos (Argentina); Vicente Marotta Rangel (Brazil); Alexander Yankov (Bulgaria); L. Dolliver M. Nelson (Grenada); P. Chandrasekhara Rao (India); Joseph Akl (Lebanon); Rüdiger Wolfrum (Germany); Tullio Treves (Italy); Tafsir Malick Ndiaye (Senegal); Jean-Pierre Cot (France); Anthony Amos Lucky (Trinidad and Tobago); Stanislaw Pawlak (Poland); Shunji Yanai (Japan); James Kateka (United Republic of Tanzania); Albert Hoffmann (South Africa); Zhiguo Gao (China); Boualem Bouguetaia (Algeria); Vladimir Vladimirovich Golitsyn (Russian Federation); and Jin-Hyun Paik (Republic of Korea). International Tribunal for the Law of the Sea, General Information - Judges, http://www.itlos.org/general_information/judges/text_en.shtml (last visited Feb. 12, 2011).

56. UNCLOS Annex VI art 1(2).

57. UNCLOS Annex VI art 20(1). There are currently 161 States and other entities that are parties to the Convention. *See* the status of the Convention and the Agreement relating to the implementation of Part XI of the Convention, http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm (last visited Feb. 12, 2011).

58. UNCLOS art. 291(2); UNCLOS Annex VI art 20(2).

59. UNCLOS Annex VI art 21. The Tribunal also has jurisdiction over any dispute concerning the interpretation or application of an international agreement *related to the purposes of the Convention* which is submitted to it in accordance with the agreement (UNCLOS art. 288(2)) and jurisdiction to entertain an application for the prompt release of a detained vessel or its crew (UNCLOS art. 292).

60. Rules of the International Tribunal for the Law of the Sea art. 138(1), ITLOS/8, Mar. 17, 2009, *available at* http://www.itlos.org/documents_publications/documents/Itlos%208%20E%2017%2003%2009.pdf (last visited Feb. 12, 2011).

61. UNCLOS arts. 187, 188.

sory opinions on legal questions arising within the scope of the activities of the International Seabed Authority.[62]

To settle disputes, ITLOS pursuant to Article 15 of its Statute formed the following special chambers: the Chamber of Summary Procedure, the Chamber for Fisheries Disputes, the Chamber for Marine Environment Disputes, the Chamber for Maritime Delimitation Disputes, and the Chamber to deal with the *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*.[63]

A. ITLOS IN 2010

During the period under review, no judgment was delivered by ITLOS. Some notable developments took place, however, highlighting the Tribunal's growing importance in settling "disputes arising out of [the] interpretation [and] application of . . . the Convention."[64]

One of the important developments concerns the request from the Council of the International Seabed Authority submitted to the Seabed Disputes Chamber to give an advisory opinion on: (1) the scope of legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area[65]; (2) the extent of liability of a State Party for any failure to comply with the provisions of the Convention by an entity it has sponsored under Article 153, paragraph 2 (b), of the Convention; and (3) the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention (particularly Article 139 and Annex III of UNCLOS, and the 1994 Agreement).[66] This is the "first advisory opinion that the Seabed Disputes Chamber has been called upon to render."[67]

The President of ITLOS also appointed three arbitrators to serve as members of an arbitral tribunal instituted under Annex VII of the Convention to settle the maritime delimitation dispute between Bangladesh and India in the Bay of Bengal.[68] The three ap-

62. UNCLOS arts. 159(10), 191.

63. UNCLOS Annex VI art. 15. More details regarding the special chambers of ITLOS can be found at http://www.itlos.org/general_information/judges/chambers_en.shtml (last visited Feb. 12, 2011).

64. Jose Luis Jesus, Int'l Tribunal for the Law of the Sea, The Role of ITLOS in the Settlement of Law of the Sea Disputes (Dec. 2, 2010), *available at* http://www.itlos.org/news/statements/Jesus/jesus_washington_02 1210.pdf.

65. UNCLOS art. 1(1)(1) defines "Area" to mean the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

66. Press Release, Int'l Tribunal of the Law of the Sea, The Seabed Disputes Chamber of the International Tribunal of the Law of the Sea Receives a Request for an Advisory Opinion (May 14, 2010), http://www.itlos.org/news/press_release/2010/press_release_147_en.pdf.

67. *Id.*

68. Pursuant to UNCLOS Annex VII art. 3(e), if the parties to a dispute cannot agree on the appointment of one or more of the members of the arbitral tribunal, or on the appointment of the president of the arbitral tribunal, these appointments have to be made by the President of ITLOS at the request of a party to the dispute and in consultation with the parties. *See also* Press Release, Int'l Tribunal for the Law of the Sea, The President of the Tribunal Appoints Three Arbitrators in the Arbitral Proceedings Instituted to Settle the Maritime Boundary Dispute Between Bangladesh and India in the Bay of Bengal (Mar. 8, 2010), http://www.itlos.org/news/press_release/2010/press_release_143_en.pdf.

pointed arbitrators are Rüdiger Wolfrum (as the president of the arbitral tribunal), Tullio Treves, and Ivan Shearer.[69]

The Tribunal continues to be seized with the dispute relating to the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. The proceedings were instituted by Bangladesh in 2009. This is the first case in the history of ITLOS in which it has been asked to conduct a maritime delimitation.

III. Permanent Court of Arbitration

The Permanent Court of Arbitration ("PCA") was established by the 1899 Hague Convention for the Pacific Settlement of International Disputes[70] as a permanent institution available to facilitate access to arbitration and other forms of dispute resolution. To date, "111 states have acceded to one or both of the PCA's founding conventions."[71]

The PCA is an institutional framework that provides registry and general administrative support to arbitral tribunals, commissions, and parties to arbitration or other forms of dispute resolution involving various combinations of states, state entities, international organizations, and private parties.

The PCA administers arbitration, conciliation, and fact-finding proceedings under its own rules of procedure, which are based upon the UNCITRAL Arbitration Rules, or under any other procedural rules agreed upon by the parties.

A. Cases

Two arbitrations were added to the list of active cases this year:[72] *European American Investment Bank, AG v. Slovak Republic* and *Bilcon of Delaware v. Canada*.[73] Final awards were rendered in *Chemtura Corporation (formerly Crompton Corporation) v. Canada* and *Romak S.A. (Switzerland) v. Uzbekistan*.[74]

1. *New Cases*

a. *European American Investment Bank A.G. (Austria) v. Slovak Republic*

The dispute arises from a 2007 change in Slovak law requiring all private health insurance companies to refrain from paying dividends to their shareholders and instead to reinvest any profits back into the health care system.[75] European American Investment Bank

69. *Id.*

70. *See* Hague Convention for the Pacific Settlement of International Disputes, July 29, 1899, 1 T.I.A.S. 230-46 ("Convention"). The Convention was revised in 1907. *See* Hague Convention for the Pacific Settlement of International Disputes, Oct. 17, 1907, 1 T.I.A.S. 577-606.

71. *Member States*, Permanent Court of Arbitration, http://www0.pca-cpa.org/showpage.asp?pag_id=1038 (last visited Jan. 20, 2011).

72. The PCA identifies the parties and publishes awards or other information in proceedings under PCA auspices only where the parties have so agreed. *Cases*, Permanent Court of Arbitration, http://www.pca-cpa.org/showpage.asp?pag_id=1029 (last visited Jan. 20, 2011).

73. *Id.*

74. *Id.*

75. Zuzana Vilikovská, *Austrian Firm Seeks Arbitration Over Profit Ban for Health Insurers*, The Slovak Spectator, Sept. 2, 2010, *available at* http://spectator.sme.sk/articles/view/39972/10/austrian_firm_seeks_arbitration_over_profit_ban_for_health_insurers.html.

("Euram") claims damages allegedly arising from the 2007 changes in Slovak law.[76] Proceedings are conducted under the UNCITRAL Arbitration Rules and in accordance with the Agreement between the Republic of Austria and the Czech and Slovak Federal Republic Concerning the Promotion and Protection of Investments. The Arbitral Tribunal is composed of Dr. Alexander Petsche, Professor Brigitte Stern, and Sir Christopher Greenwood (Presiding Arbitrator).

b. *Bilcon of Delaware v. Canada*

Bilcon of Delaware, a U.S. company, operates a basalt quarry in Canada. Bilcon's plans to expand its quarry were rejected by a panel of environmental experts. Bilcon claims that the process of review of its plans and the accompanying delays were in violation of three provisions of the North American Free Trade Agreement (NAFTA): Articles 1102 (National Treatment), 1105 (International Law Standards of Treatment), and 1103 (Most-Favored-Nation Treatment). Bilcon claims US$101 million in damages, plus costs and fees. The Arbitral Tribunal is composed of Professor Donald McRae, Professor Bryan Schwartz, and Judge Bruno Simma (Presiding Arbitrator). The arbitration is being conducted under the UNCITRAL Arbitration Rules and Chapter 11 of NAFTA.

2. *Concluded Proceedings*

a. *Romak S.A. (Switzerland) v. Uzbekistan*

The three-member arbitral tribunal rendered a final award on November 26, 2009, in the dispute between the Swiss company Romak S.A. and the Republic of Uzbekistan. Romak is a Swiss grain-trading *société anonyme*.[77] Uzkhleboproduct is the fifty-one percent state-owned body responsible for grain production and distribution in Uzbekistan. Uzdon is one of Uzkhleboproduct's corporate members responsible for foreign trade.[78] Uzkhleboproduct entered into a contract with Romak for the delivery of 50,000 tons of wheat to occur on or before December 31, 1996, with itself as principal and Uzdon as commission agent.[79] Romak delivered nearly 40,600 tons between July 1996 and January 1997, but it was never paid. Romak initiated arbitration against Uzdon under the aegis of the Grain and Feed Trade Association ("GAFTA"). The GAFTA arbitral tribunal found for Romak, ordering Uzdon to pay US$10,510,629.12.[80] Romak attempted, but failed, to enforce the GAFTA award in both Uzbekistan and France.[81] Eventually, Romak initiated arbitral proceedings against the Republic of Uzbekistan, asserting that the acts of Uzdon and Uzkhleboproduct, in addition to the failure of Uzbek courts to enforce the GAFTA award, violated the Bilateral Investment Treaty ("BIT") between Switzerland and Uzbekistan.[82]

76. *Id.*
77. Romak S.A. (Switz.) v. Republic of Uzbekistan, Award, ¶¶ 2-3 (Perm. Ct. Arb. 2009), *available at* http://www.pca-cpa.org/upload/files/ROMAK-UZBEKISTAN%20Award%2026%20November2009.pdf.
78. *Id.* ¶¶ 15-22.
79. *Id.* ¶ 28.
80. *Id.* ¶ 58.
81. *Id.* ¶ 63.
82. *See id.* ¶ 71.

Uzbekistan contested the arbitral tribunal's jurisdiction, arguing that neither the GAFTA arbitration award nor the sale of goods by Romak constituted an investment that would make the claims fall under the BIT.[83]

An Arbitral Tribunal, consisting of Mr. Noah Rubins, Professor Nicolas Molfessis, and Mr. Fernando Mantilla-Serrano (Chairman), agreed with Uzbekistan.[84] The Tribunal determined that the term "investment" in the BIT necessarily involved "a contribution that extended over a certain period of time and entailed some risk."[85] Referring to the *Joy Mining Machinery* decision, the Tribunal held that considering the contract at issue an "investment would render meaningless the distinction between investments, on the one hand, and purely commercial transactions, on the other."[86]

b. *Chemtura Corporation (Formerly Crompton Corporation) v. Canada*

The Arbitral Tribunal for the matter of *Chemtura Corp. v. Canada* issued its award on August 2, 2010. The case, brought under Chapter 11 of NAFTA, pertained to the actions of the Canadian Pest Management Regulatory Agency ("PMRA") in ending the registration of certain pest-control products manufactured by Chemtura.

Chemtura is a U.S. chemical corporation. Chemtura owned a registration for a pest-control product that was based on lindane, a chemical that is used in agriculture as pesticide and in pharmacy to fight lice and scabies.[87] In 1999, the PMRA began a special review of lindane, determined that the health risks associated with lindane warranted suspending or terminating all lindane registrations, and terminated Chemtura's remaining lindane registrations.[88]

In 2005, Chemtura began arbitration under Chapter 11 of NAFTA, seeking reinstatement of its lindane registrations and damages and costs resulting from Canada's acts or, alternatively, US$100 million in damages.[89] In particular, Chemtura claimed that Canada had breached NAFTA Articles 1105 (Minimum Standard of Treatment) and 1103 (Most-Favored Nation clause). Chemtura also claimed that the lindane registration cancellations were an expropriation under NAFTA Article 1110. Canada responded by asserting that it had not subjected Chemtura to a substantial deprivation, and that, in any case, the cancellation of the lindane registrations was a valid exercise of Canada's police power.[90]

An Arbitral Tribunal, composed of the Honorable Charles N. Brower, Professor James Crawford, and Professor Gabrielle Kaufmann-Kohler (Presiding), concluded that Canada could not be held liable for any violations under NAFTA.[91] The Tribunal considered the essence of Chemtura's complaints on the PMRA's review process to be that lindane products could have remained usable for slightly longer than determined by the PMRA.[92] The

83. *Id.* ¶¶ 93-94.
84. *Id.* ¶ 211.
85. *Id.* ¶ 212.
86. *Id.* ¶ 185.
87. Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada, Award, ¶¶ 1, 6, 14 (Perm. Ct. Arb. 2010), *available at* http://www.pca-cpa.org/upload/files/Chemtura%20Award%202%20Aug%202010%20scanned.pdf.
88. *See id.* ¶¶ 21, 34.
89. *Id.* ¶¶ 50, 52.
90. *Id.* ¶ 97.
91. *Id.* at pt. V, ¶¶ b-d.
92. *See id.* ¶ 133.

Tribunal determined that the PMRA acted without bad faith and afforded adequate fairness to Chemtura in its review processes and was acting with regard for its treaty obligations and regulatory responsibilities when reexamining the use of lindane.[93]

The Tribunal concluded that Chemtura was given repeated opportunity to voluntarily suspend its lindane registrations and did not sufficiently participate in the process in order to prevent termination by the PMRA.[94] The Tribunal went on to hold that the PMRA's process of reviewing and registering Chemtura-developed lindane replacement pesticides had not been unduly delayed or neglected. The Tribunal stated that Chemtura would have had to prove that the PMRA caused the new product registration to be unfairly delayed, and not merely that the registration was not expedited, in order to find a NAFTA violation.[95]

Finally, the Tribunal examined Chemtura's expropriation claim under NAFTA Article 1110 and determined that there had not been substantial deprivation.[96] The Tribunal found that, while elements such as goodwill, market share, and a customer base could be considered part of Chemtura's investment in the Canadian market, Chemtura had not experienced a great enough deprivation to its business to qualify as having experienced an expropriation.[97] The Tribunal determined that lindane product sales amounted to ten percent of Chemtura's sales in Canada, which was not significant enough to be considered substantial.[98] Additionally, regulating pesticide products in this manner was determined to be squarely within the police powers available to the PMRA and as such could not constitute an expropriation.[99] The Tribunal concluded that Chemtura would have to pay the costs of the arbitration.

IV. ICSID

The International Centre for Settlement of Investment Disputes ("ICSID") was established by the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention").[100] With the denunciation by Ecuador, effective January 7, 2010, and the signature by Qatar on September 30, 2010,[101] 156 States were signatories to the Convention at the time of this writing.[102] This section reports

93. *Id.* ¶ 138.

94. *See id.* ¶ 192.

95. *Id.* ¶ 211.

96. *Id.* ¶ 265.

97. *Id.* ¶ 263.

98. *Id.* ¶ 262.

99. *Id.* ¶ 266.

100. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 17 U.S.T. 1270.

101. Press Release, ICSID, State of Qatar Signs the ICSID Convention (Sept. 30, 2010), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=Announcements Frame&FromPage=Announcements&pageName=Announcement65.

102. *List of Contracting States and Other Signatories of the Convention*, ICSID, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (last updated Dec. 27, 2010).

briefly on the awards and decisions delivered by ICSID tribunals and ad hoc committees from January 1, 2010, to November 30, 2010.[103]

A. AWARDS

During the period under review, fifteen awards were rendered by ICSID tribunals.

In *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, the Claimants initiated proceedings against Georgia in relation to an oil and gas distribution enterprise. On March 3, 2010, a tribunal ordered Georgia to pay each of the Claimants US$45,124,736.83. On July 16, 2010, Georgia filed an application for annulment with the Centre.

In *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh*, the Claimants brought an action against Bangladesh in relation to operations of exploration, development, and production of natural gas. In an award on May 17, 2010, which has not been published, Chevron's claims were denied.

In *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, the Claimants filed claims against Mexico in connection with a concession to operate the national registry of motor vehicles. On June 18, 2010, a tribunal issued an award, which has not been published.

In *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ATA initiated a case against Jordan in relation to a waterway construction project. On July 16, 2010, a tribunal found that the Claimant was entitled to proceed to arbitration with respect to a dispute arising out of a contract between the Claimant and a Jordanian company in accordance with the arbitration clause of that contract, and ordered that ongoing Jordanian court proceedings relating to the same dispute be terminated.

In *Alasdair Ross Anderson and Others v. Republic of Costa Rica*, the Claimants sought compensation from Costa Rica for the loss of their deposits in a currency exchange operation. On May 19, 2010, a tribunal found that it lacked jurisdiction on the ground that the deposits did not constitute an investment.

In *Talsud, S.A. v. United Mexican States*, the Claimant initiated a case against Mexico in relation to a concession to operate the national motor vehicles registry. The award, which was rendered by the tribunal on June 18, 2010, has not been published.

In *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, the Claimants brought claims against Ghana in connection with a cocoa production enterprise. On June 18, 2010, a tribunal dismissed the case on the merits.

In *Liman Caspian Oil BV and NCL Dutch Inv. BV v. Republic of Kazakhstan*, the Claimants initiated proceedings against Kazakhstan under the Energy Charter Treaty in relation to hydrocarbon exploration and extraction activities. On June 22, 2010, a tribunal rendered an award, which has not been published.

In *Saba Fakes v. Republic of Turkey*, the Claimant brought an action against Turkey in relation to a telecommunications company. On July 14, 2010, a tribunal found that it

103. *List of ICSID Cases*, ICSID, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases (last visited Jan. 20, 2011); *Newly Released Awards and Decisions*, INVESTMENT TREATY ARBITRATION, http://ita.law.uvic.ca/ (last visited Jan. 20, 2011). Unless otherwise indicated, all awards and decisions referred to in this section can be found at the above websites.

lacked jurisdiction on the ground that the Claimant's arrangements in the company did not constitute an investment.

In *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, the Claimants filed claims against South Africa in connection with minerals companies. On August 4, 2010, a tribunal dismissed the claims on the merits.

In *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, the Claimants brought a case against Togo in relation to an electricity concession. The tribunal rendered an award on August 10, 2010, which has not been published. An application for annulment was registered by the Centre on November 4, 2010.

In *Astaldi S.p.A. v. Republic of Honduras*, Astaldi initiated an action against Honduras in connection with a highway rehabilitation contract. On September 17, 2010, a tribunal ordered Honduras to pay Astaldi a total of US$6,219,514.51.

In *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Republic of Hungary*, the Claimants filed claims against Hungary under the Energy Charter Treaty in relation to electricity power stations. On September 23, 2010, a tribunal found that it lacked jurisdiction over the contractual claims and denied the treaty claims on the merits.

In *Alpha Projektholding GmbH v. Ukraine*, the Claimant initiated a case against Ukraine in connection with a hotel development project. On November 8, 2010, a tribunal ordered Ukraine to pay the Claimant US$2,979,232.

In *Nations Energy, Inc. and others v. Republic of Panama*, the Claimants brought claims against Panama in relation to an electricity power generation project. On November 24, 2010, a tribunal rendered an award, with a dissenting opinion, which was not publicly available at the time of this writing.

B. Annulment Decisions

During the period under study, five annulment decisions were delivered by ICSID ad hoc committees.

In *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, Kazakhstan applied for annulment of an award ordering it to pay the Claimants US$125,000,000. On March 25, 2010, an ad hoc committee dismissed the application in its entirety.

In *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, Gabon requested annulment of an award ordering it to pay the Claimant US$230,000,000. On May 11, 2010, an ad hoc committee rendered a decision, which has not been published.

In *Helnan International Hotels A/S v. Arab Republic of Egypt*, the Claimant applied for annulment of an award dismissing its claims. On June 14, 2010, an ad hoc committee annulled a holding of the tribunal but otherwise denied the application.

In *Sempra Energy Int'l v. Argentine Republic*, Argentina requested annulment of an award ordering it to pay Sempra US$128,250,462. On June 29, 2010, an ad hoc committee annulled the award on the ground of manifest excess of powers. Sempra resubmitted the dispute to the Centre on November 12, 2010.

In *Enron Creditors Recovery Corp. (formerly Enron Corp.) and Ponderosa Assets, L.P. v. Argentine Republic*, Argentina applied for annulment of an award ordering it to pay Enron US$106,200,000. On July 30, 2010, an ad hoc committee annulled the holdings of the

tribunal that Argentina was precluded from relying on Article XI of the U.S.-Argentina BIT and the principle of necessity under customary international law, as well as the disposition regarding compensation. Enron resubmitted the dispute to the Centre on October 18, 2010.